



February 28, 2022

**Title IX Team Training
(Day 2)**



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimer #1



- Change is constant in this field.
- Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations in light of the dynamic nature of requirements.

Disclaimer #2



- As you recall from last time, the scenario we're using is entirely fiction.
- Your parties and witnesses have been instructed to play the parts in certain ways, and under no circumstances are they to make it easy for you.
- You are not allowed to retaliate against your colleagues for participating in this mock hearing.
😊

Posting These Materials



- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

Aspirational Agenda



- 1:00-1:30 – Asking Good Hearing Questions
- 1:30-2:00 – Hearing prep in small groups
- 2:00-2:30 – Questioning of Complainant
- 2:30-3:00 – Questioning of Respondent
- 3:00-3:30 – Questioning of Sarah
- 3:30-4:00 – Making Good Decisions and Deciding Our Case

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Tools: What are the goals of cross-examination?



- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment of witness*** being questioned.
- Minimize the other party's case by ***impeachment of other witnesses*** through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5



- What bias might a witness have?
- Do you understand the relationship between the witness and the parties?
- Experts: getting paid for testimony
 - You charge fees based on an hourly rate?
 - You were paid to produce a written report?
 - Based on this report, you're testifying today?
 - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5



- Perception and Recall
 - What is the witness's perception of the facts?
 - Has time impacted recall or ability to remember clearly?
 - How many times has the witness talked to a party about this case?
 - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
 - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5



- Example: Intoxication level information from witness.
 - You did not see the consumption, or keep track of how long the party was consuming alcohol?
 - You did not measure the alcohol poured by ____ at the party?
 - Your statements are based on information provided by others? the other party?
 - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: Determine whether the person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5



- Inconsistency in statements
 - If a fact was very important, why is the hearing the first time it has come up?
 - What possible reasons might the witness have for changing their testimony?
 - Did a witness receive coaching from the party or others between making one statement and another?
 - Has the witness's perspective or motive changed between statements?
 - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
 - Example: Card swipes
 - You said that you entered the building by yourself at 1:00 a.m.
 - Security footage doesn't show you entering.
 - Your card swipe record doesn't show you entering.
 - Can you help me understand why there is a discrepancy?

Advisors: Thought Process

Advocating for your party in the Hearing 1 of 7



Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Advocating for your party in the Hearing 2 of 7



Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Advocating for your party in the Hearing 3 of 7



Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Advocating for your party in the Hearing 4 of 7



Preparation

- Consider a script
 - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
 - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Advocating for your party in the Hearing 5 of 7



The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Advocating for your party in the Hearing 6 of 7



The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

Advocating for your party in the Hearing 7 of 7



Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

How Do You Choose Questions?

What Don't You Know?



Decision-makers: If you need to know it to make a determination, you have the obligation to ask the question.

Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

What Do You Know?



Decision-makers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.

Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the decision-maker's mind.

Disputed Facts?



Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker where the other party's story doesn't make sense, by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

Make Your Plans



- Decision-makers:
 - What themes do you wish to draw out?
 - What disputed points do you need information on?
 - Who will cover which topics?
 - Which questions will be asked?
- Advisors:
 - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
 - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
 - Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
 - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
 - Etc.



Mock Hearing



Reaching a Decision

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

Reminders (2 of 3)



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly “50-50,” the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

Making OUR Decision



- Three questions:
 - Did sexual intercourse occur?
 - Did Tessa give consent?
 - Was Tessa's consent valid?
- For each question:
 - List the evidence for and against
 - Which evidence do you weigh more heavily?
 - Which way do you rule, and why?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
 - Example: Michael brought Tessa a glass of punch and saw her drink it.
- Make a list of what facts are disputed.
 - Example: Michael says he did not see Tessa drink wine before the parties; Tessa said she was sipping it.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.



Debrief!