



GRAND RIVER | SOLUTIONS

# Decision-Makers: A Deep Dive into Serving in this Critical Role

Massachusetts Association of  
Community Colleges, Day 1

Martha Compton

October 2021

## Your Facilitator



### Martha Compton

Director of Strategic Partnerships & Client Relations

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.



## Vision

We exist to help create safe and equitable work and educational environments.



## Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.



## Core Values

- ❖ Responsive Partnership
- ❖ Innovation
- ❖ Accountability
- ❖ Transformation
- ❖ Integrity

# Agenda

01

Title IX Requirements for Hearings

05

The Hearing

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02

Process Participants

06

After the Hearing

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03

The Advisor's Role

07

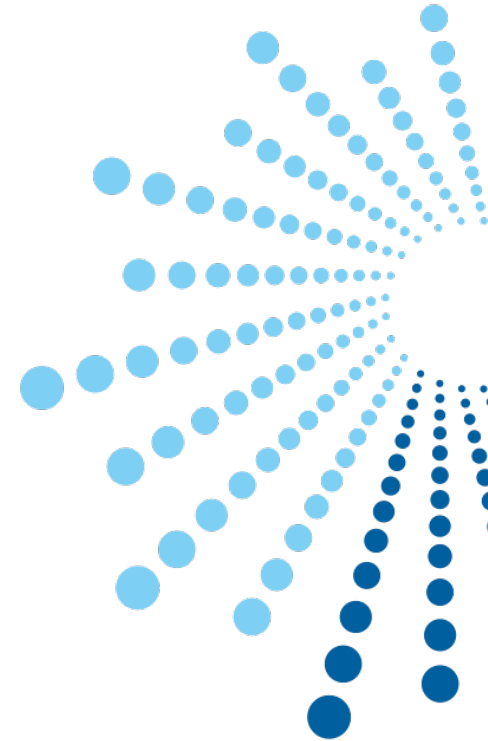
Practical Application

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04

Pre-Hearing Tasks

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# Title IX Requirements For Hearings

01

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# Procedural Requirements for Investigations



Notice TO BOTH PARTIES



Equal opportunity to present evidence



An advisor of choice



Written notification of meetings, etc., and sufficient time to prepare



Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report



Report summarizing relevant evidence and 10-day review of report prior to hearing



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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision-Maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

# VRLC v. Cardona

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

VICTIM RIGHTS LAW CENTER,  
EQUAL RIGHTS ADVOCATES,  
LEGAL VOICE,  
CHICAGO ALLIANCE AGAINST  
SEXUAL EXPLOITATION,  
JANE DOE,  
an individual by and through  
her mother and next friend  
Melissa White,  
NANCY DOE,  
MARY DOE,

Plaintiffs,

v.

MIGUEL CARDONA,  
in his official capacity as  
Secretary of Education,  
SUZANNE GOLDBERG,  
in her official capacity as  
Acting Assistant Secretary for  
Civil Rights,  
UNITED STATES DEPARTMENT  
OF EDUCATION,

Defendants.

CIVIL ACTION  
NO. 20-11104-WGY

YOUNG, D.J.

August 10, 2021

ORDER

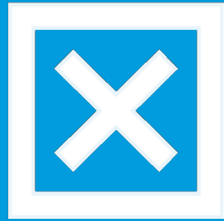
Administrative Procedure Act ("APA"). Accordingly, section 106.45(b)(6)(i)'s prohibition was vacated as well as remanded on July 28, as is the usual course in successful APA challenges.

Victim Rights Law Center v. Cardona, 120-cv-11104-WGY, at \*1 (D. Mass. Aug. 10, 2021).





# Impact of Not Submitting to Cross Examination Under the Exclusionary Rule



Exclusion of all statements of that party or witness



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# Cross Examination

## Exceptions to the Exclusionary Rule



Statements that consist of or are made in the course of the prohibited conduct



When cross examination is waived or not conducted

# When Has a Party Submitted to Cross Examination Under the Exclusionary Rule?



The party or witness has answered all questions deemed relevant on cross



A party or witness appears for cross, but the advisor does not ask any relevant questions



A party or witness refuses to answer one relevant question posed by advisor



A party or witness only answers the Decision-Maker's questions and refuses to answer questions on cross

# Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.

Audio only

Audio and video



Participants must be able to communicate during the hearing

The parties with the decision-maker(s)

The parties with their advisors

# Purpose of the Hearing



# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Trauma-informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Hearing



Format of Questions



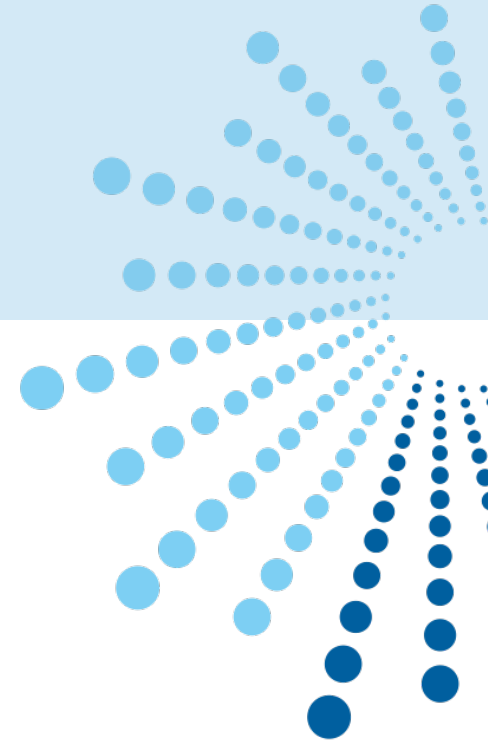
Approach to Clarification



# Process Participants

02

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# The Participants

## The Parties

Complainant	Respondent
<p>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</p>	<p>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

# The Participants

## The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- May be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings
- Any Advisor who oversteps their role as defined by this policy will be warned only once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting will be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator will determine how to address the Advisor's non-compliance and future role.

# The Participants

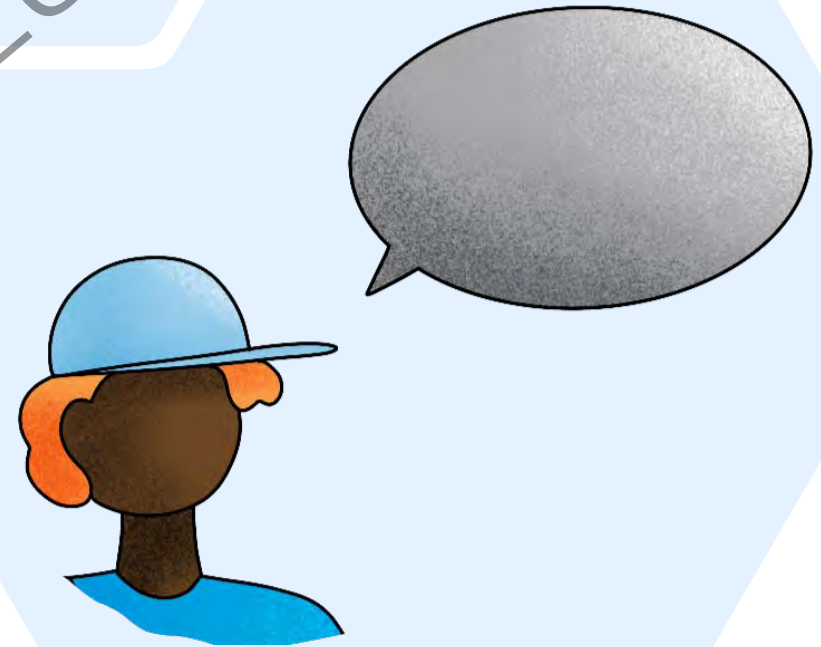
## Advisors



# The Participants

## Advisors: Prohibited Behavior

Any Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting should be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



# The Participants

## The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting



# The Participants

## The Decision-Maker(s)

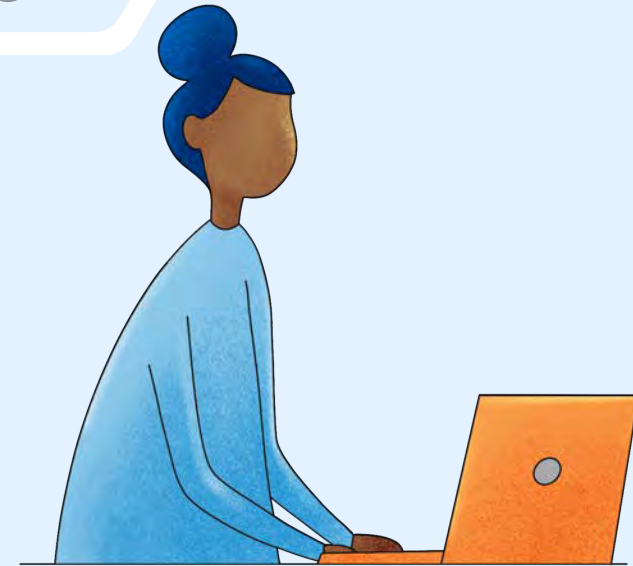
- One person or a panel
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



# The Participants

## The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- May assist in preparing the Notice of Outcome





# The Advisor's Role

First Steps

03

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After you are assigned a case...



Review the policy



Review the materials provided, if any



Reach out to your advisee



Schedule a meeting



# Make the Party Aware that ...

You are under no obligation to keep what the party tells you confidential

There is no attorney client relationship nor any other recognized privilege between you and the party

Were this matter go to a court of law, and you were asked to testify, you would have to do so, truthfully

Do this at the outset

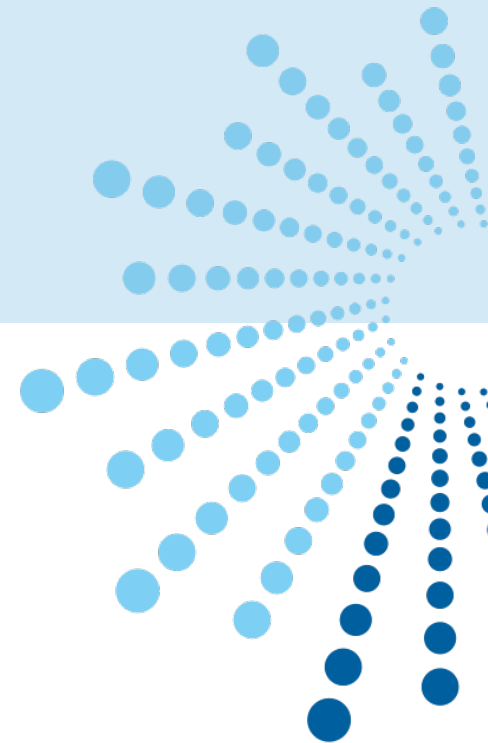


# Pre-Hearing Tasks

What should be done in advance of the hearing

04

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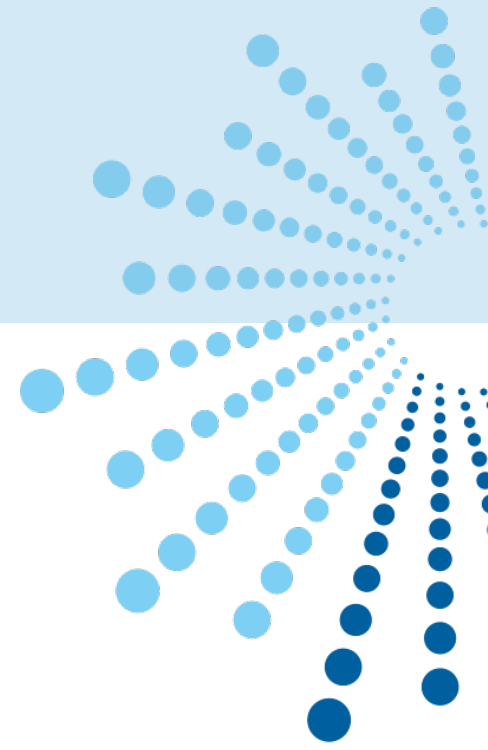




# Pre-Hearing Tasks for the Decision-Maker(s) and Chair

4(a)

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# Prior to the Hearing

The Chair will provide the names of persons who will be participating in the hearing, all pertinent documentary evidence, and the final investigation report to the parties at least ten (10) days prior to the hearing.

The Title IX Coordinator will give the Decision-Maker(s) a list of the names of all parties, witnesses, and Advisors at least five (5) days in advance of the hearing. Any Decision-Maker who cannot make an objective determination must recuse themselves from the proceedings when notified of the identity of the parties, witnesses, and Advisors in advance of the hearing. If a Decision-Maker is unsure of whether a bias or conflict of interest exists, they must raise the concern to the Title IX Coordinator as soon as possible.

During the ten (10) day period prior to the hearing, the parties have the opportunity for continued review and comment on the final investigation report and available evidence. That review and comment can be shared with the Chair at the pre-hearing meeting or at the hearing and will be exchanged between each party by the Chair.

The Chair MAY convene a pre-hearing meeting.

# Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Advance Submission of Questions

Relevancy Arguments and Advance Rulings

# The Decision-Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues



Prepare the script

# Common Areas of Exploration



Credibility?



Clarification on timeline?



The thought process?



Inconsistencies?





# Pre-Hearing Tasks for the Advisor

4(b)

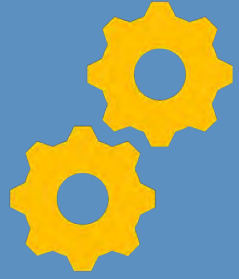
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# Do Your Homework

- Review applicable policy language/provisions
- Familiarize yourself with investigative report
- Understand the ins and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses
- Consult with your advisee
- Anticipate questions of others
- Consider impact of your decisions and develop a strategy



# The Hearing

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# Order of the Proceedings

01

Opening introductions and instructions by the Chair

02

Opening statements

03

Testimony and questioning of the parties and witnesses

04

Closing Statements

05

Deliberations

# Opening Instructions by the Chair

- The institution should have a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Be prepared to answer questions.
- Parties are provided one last opportunity to challenge the composition of the Panel for bias or conflict of interest.
  - Chair or TIXC will make ruling.





# Testimony

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A photograph of a man in a tan jacket shouting into a white megaphone. The image is semi-transparent and serves as a background for the text.

# Testimony and Questioning of the Parties

01

Opening remarks by the parties

02

Decision-Maker(s) will question Complainant first

03

Advisor questions Complainant next

04

Follow up by the Decision-Maker(s)

05

Decision-Maker(s) will question Respondent second

06

Advisor questions Respondent next

07

Follow up by Decision-Maker(s)

# Questioning of the Witnesses

01

The Chair will determine the order of questioning of witnesses

02

Decision-Maker(s) will question first

03

Advisor cross-examination will occur next

04

Follow up by the Decision-Maker(s)



# General Questioning Guidelines

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# Format of Questioning



The Decision-Maker(s) or the Advisor will remain seated during questioning;



Questions will be posed orally,

Advisors can request permission to ask questions electronically, or in writing



Questions must be relevant

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# What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

*See, e.g.,* Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

# When is evidence relevant?

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



# Irrelevant and Impermissible Questions

Questions that seek to illicit irrelevant information

- Complainant's prior sexual history
- Information protected by an un-waived legal privilege
- Medical treatment and care

Duplicative questions

Information that is otherwise irrelevant

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# When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



Be prepared to go down a road that you hadn't considered or anticipated exploring.



Take your time. Be thoughtful. Take breaks if you need it.

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# Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

# Common Areas of Where Clarity or Additional Information is Needed

Details about the alleged misconduct

Facts related to the elements of the alleged policy violation

Relevancy of certain items of evidence

Factual basis for opinions

Credibility

Reliability

Timelines

Inconsistencies



# Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

# Questioning to Assess Credibility

**No formula exists, but consider asking questions about the following:**

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching



# Opinion Evidence

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When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

# Asking Questions to Assess Authenticity

## Investigating the Products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Request further investigation of the authenticity if necessary.

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# What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

# How to Ask the Hard Questions

## Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

## Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

# Special Considerations for Questioning the Investigator

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-Maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

# Special Considerations for Questioning the Investigator



Ask questions about how they conducted their investigation



Explore the investigators decision making



Seek clarity about evidence collected

Where it came from  
Authenticity of the evidence



Ask factual questions that will assist in evaluation of the evidence



If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias



# Special Considerations for Panels

If a panel, decide in advance who will take the lead on questioning

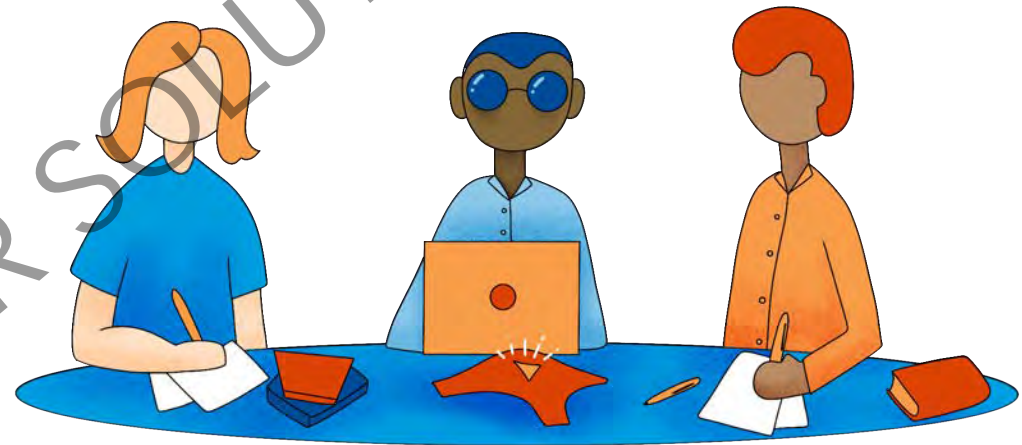
Go topic by topic

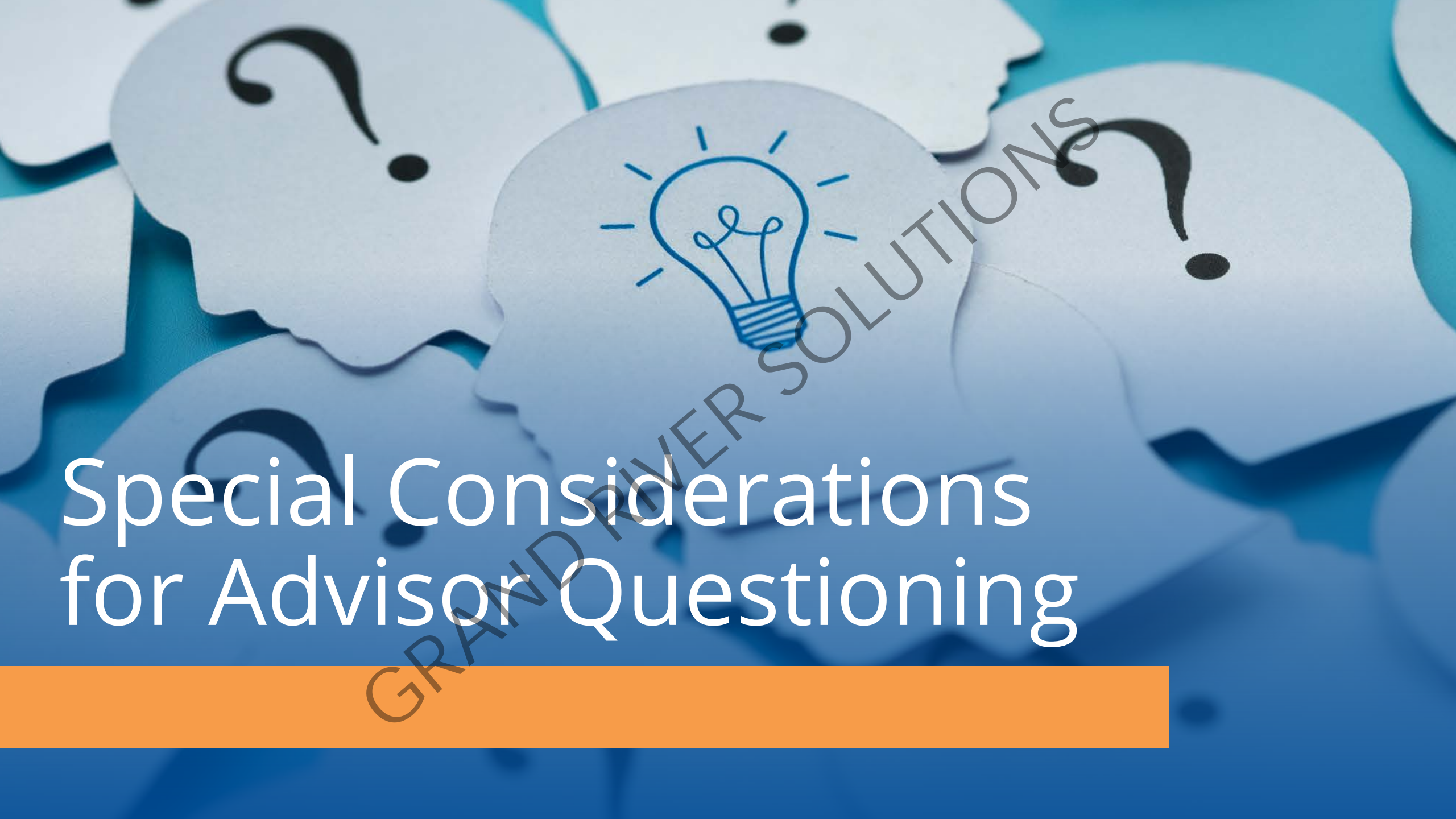
Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel





Special Considerations  
for Advisor Questioning

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# First Decide: To Cross or Not to Cross

## Special Considerations

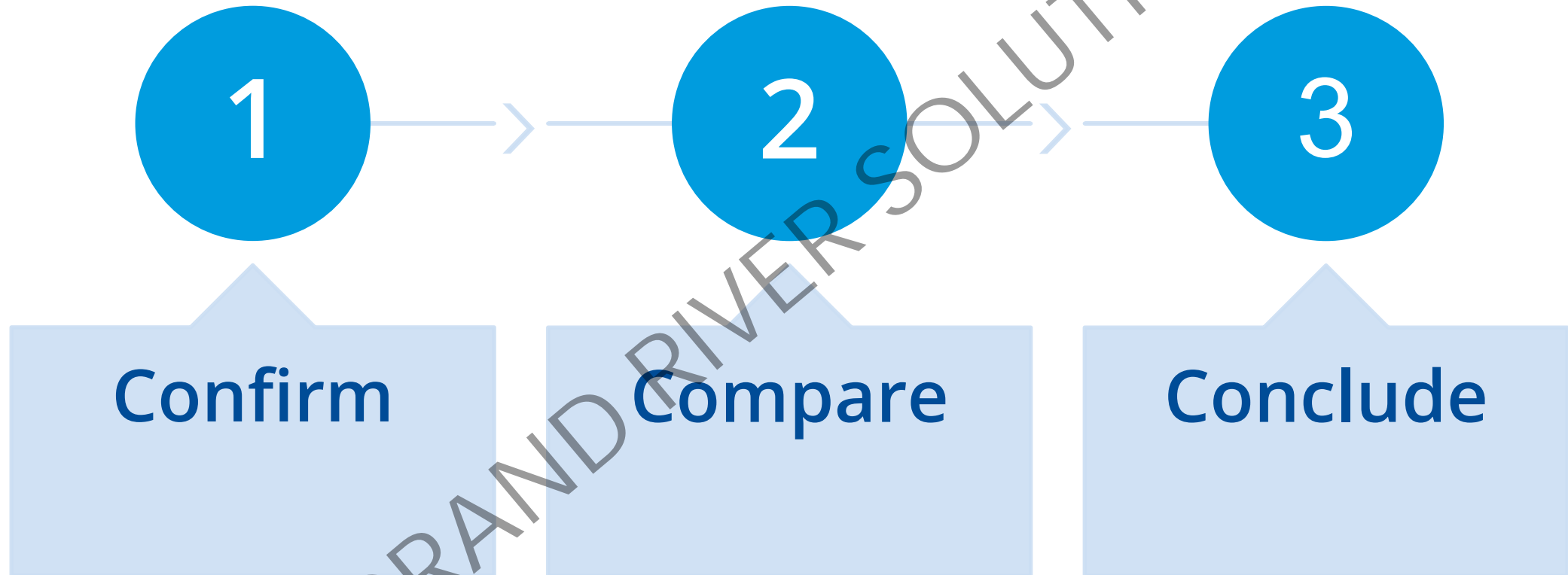


WILL SUBMITTING TO CROSS  
EXAMINATION SERVE THE PARTY'S  
INTERESTS?



WILL CONDUCTING CROSS  
EXAMINATION SERVE THE  
PARTY'S INTERESTS?

# Questioning



# Confirm

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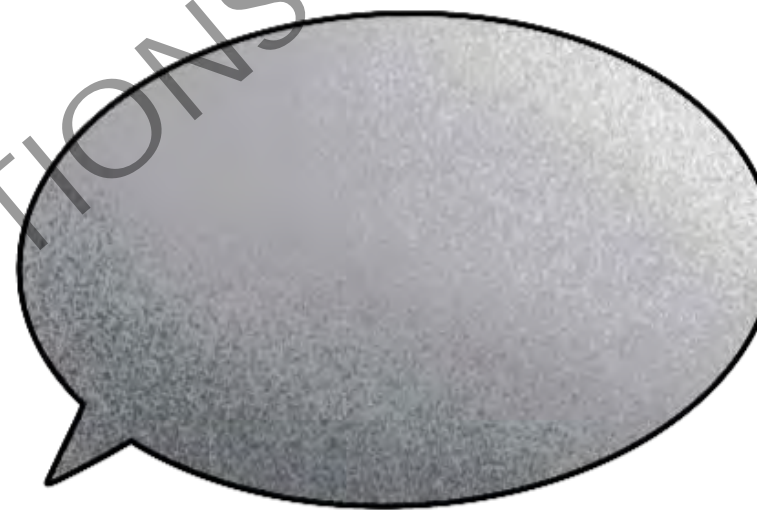
- Witness Y, earlier today you were asked about what you heard and saw on the night in question...
- And you indicated that you heard loud voices, but that you are not sure if it was fighting, is that correct?
- You also said that the parties came out together and then went back into the room, is that what you saw?
- And you are sure of this?





# Compare

- Witness Y, this isn't the first time you shared your observations of Complainant and Respondent that night, is it?
- Did you talk to the investigator about this?
- And that statement was provided just two days after the incident, correct?
- Do you recall what you said to the the investigator?
- Did you tell the investigator the truth when you were interviewed?

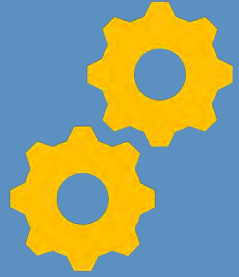




# Conclude

- Witness Y, when you spoke to the investigator, you indicated that you heard fighting, correct?
- And that Complainant came out of the room crying, isn't that right?
- And that Respondent came out looking angry, correct?
- You also stated that you saw Respondent grab Complainant and drag them back into the room, isn't that true?
- Since speaking with the investigator, you and Complainant have had a falling out, haven't you?





# The Decision-Maker's Role in Advisor Questioning

05(a)

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# The Role of the Decision-Maker During Questioning by the Advisors

After the advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

# When Assessing Relevance, the Decision-Maker Can:

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Ask the advisor why their question is relevant

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Take a break

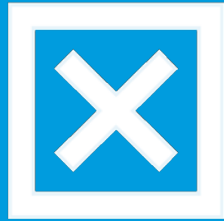
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Ask their own questions of the party/witness

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Review the hearing record

# Impact of Not Submitting to Cross Examination Under the Exclusionary Rule



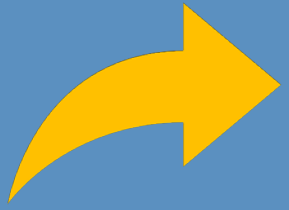
Exclusion of all statements of that party or witness



**When the  
Exclusionary  
Rule is in Effect  
and a Party or  
Witness Declines  
to Answer a  
Relevant  
Questions Posed  
by an Advisor**

## **The Chair should:**

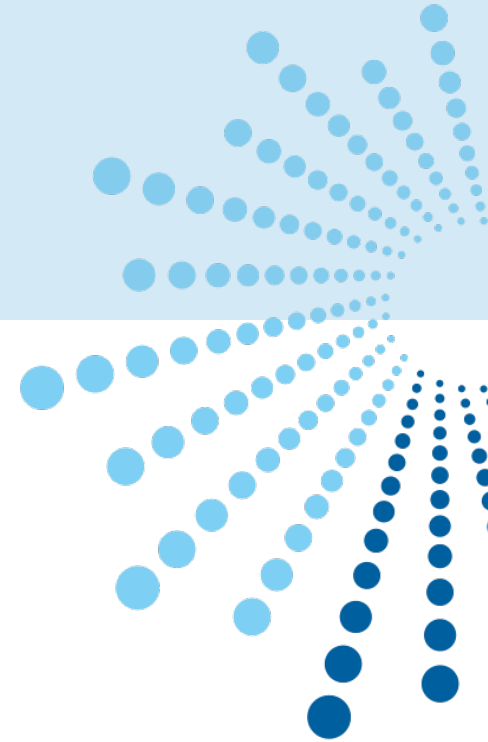
- Remind the party of the impact of not submitting to cross examination;
- Pause the proceedings to allow the party or witness to reconsider.



# After the Hearing

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# Deliberations

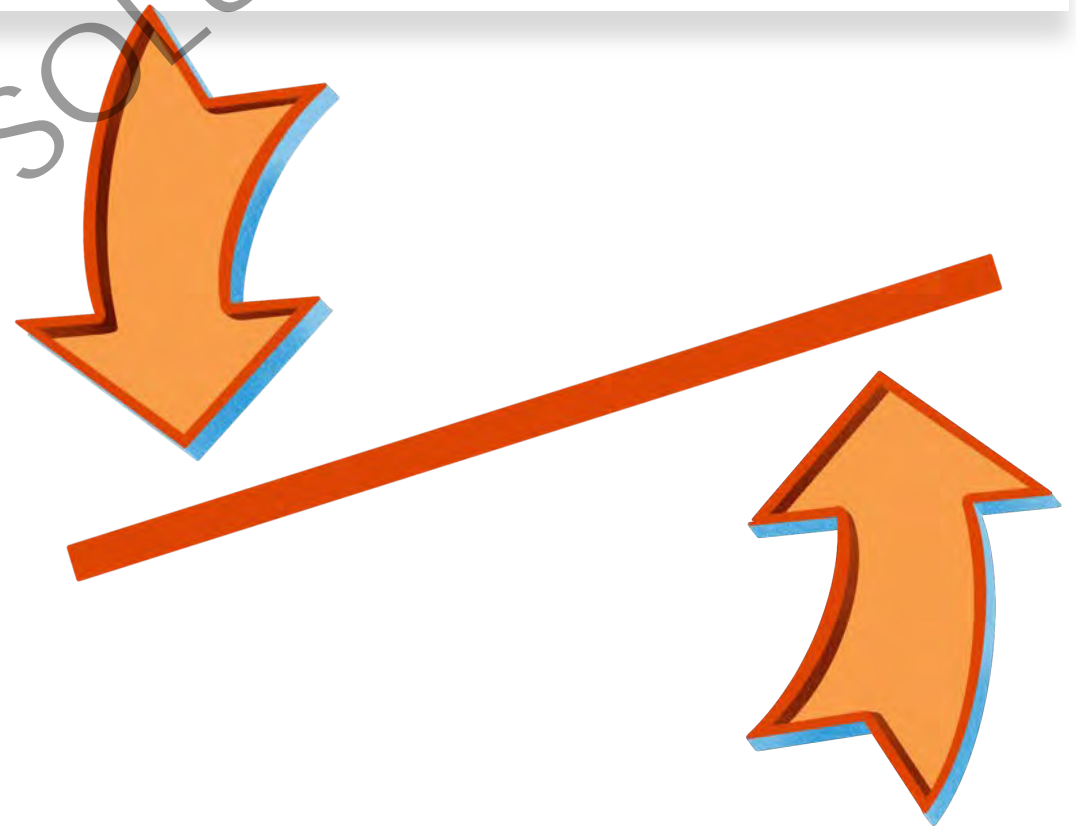
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# Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



# Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated







# Findings of Fact

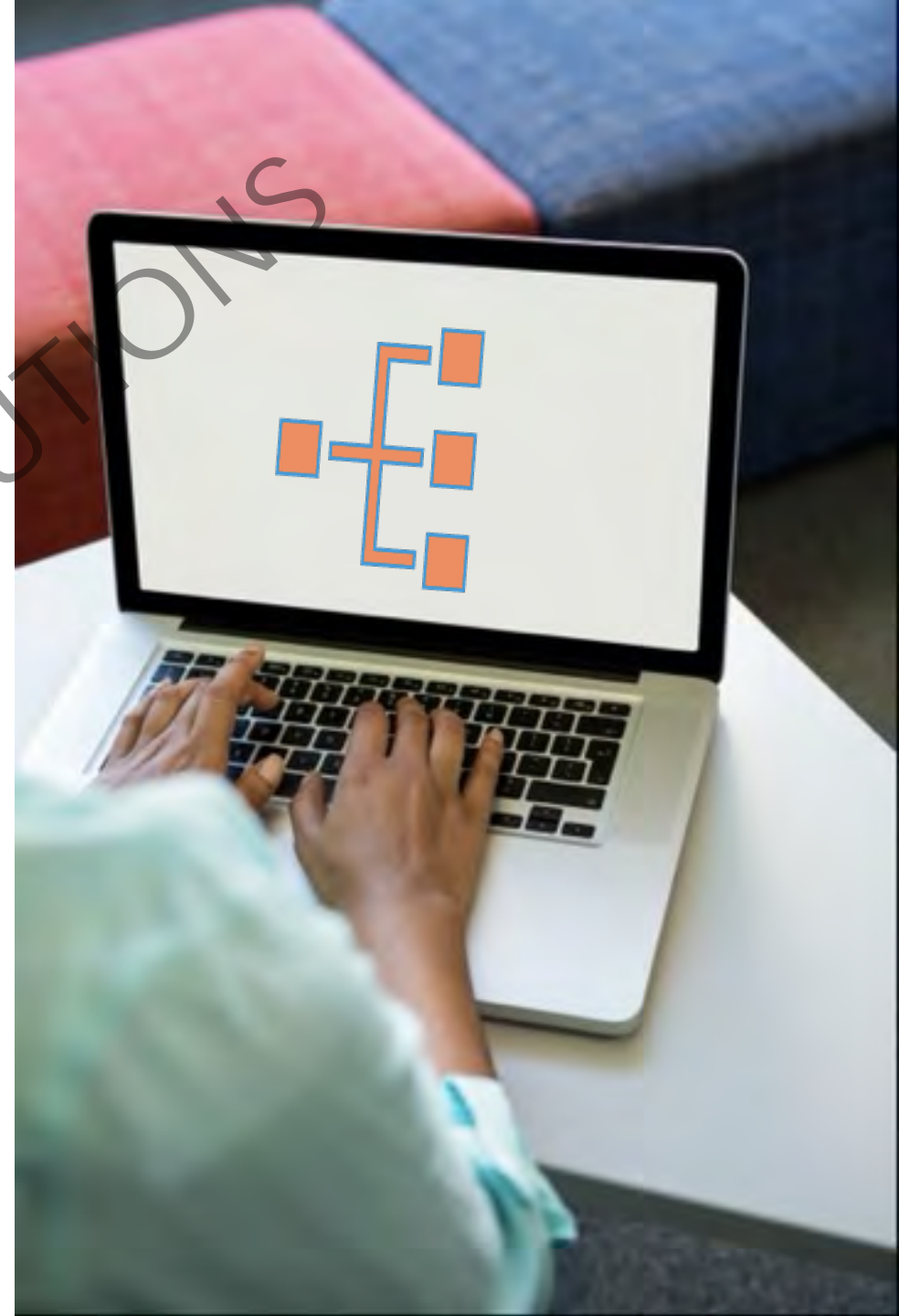
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- **A "finding of fact"**
  - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
  - Based on available evidence and information
  - Determined by a preponderance of evidence standard
  - Determined by the fact finder(s)
- **For example...**
  - Complainant reports that they and Respondent ate ice cream prior to the incident
  - Respondent says that they did not eat ice cream
  - Witness 1 produces a photo of Respondent eating ice cream
- **Next steps?**

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

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# Allegation: Fondling




## Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ without the consent of the victim,
  - ❑ including instances where the victim is incapable of giving consent because of their age or **because of their temporary or permanent mental incapacity.**

# Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p>

# Apply Preponderance Standard to Each Element

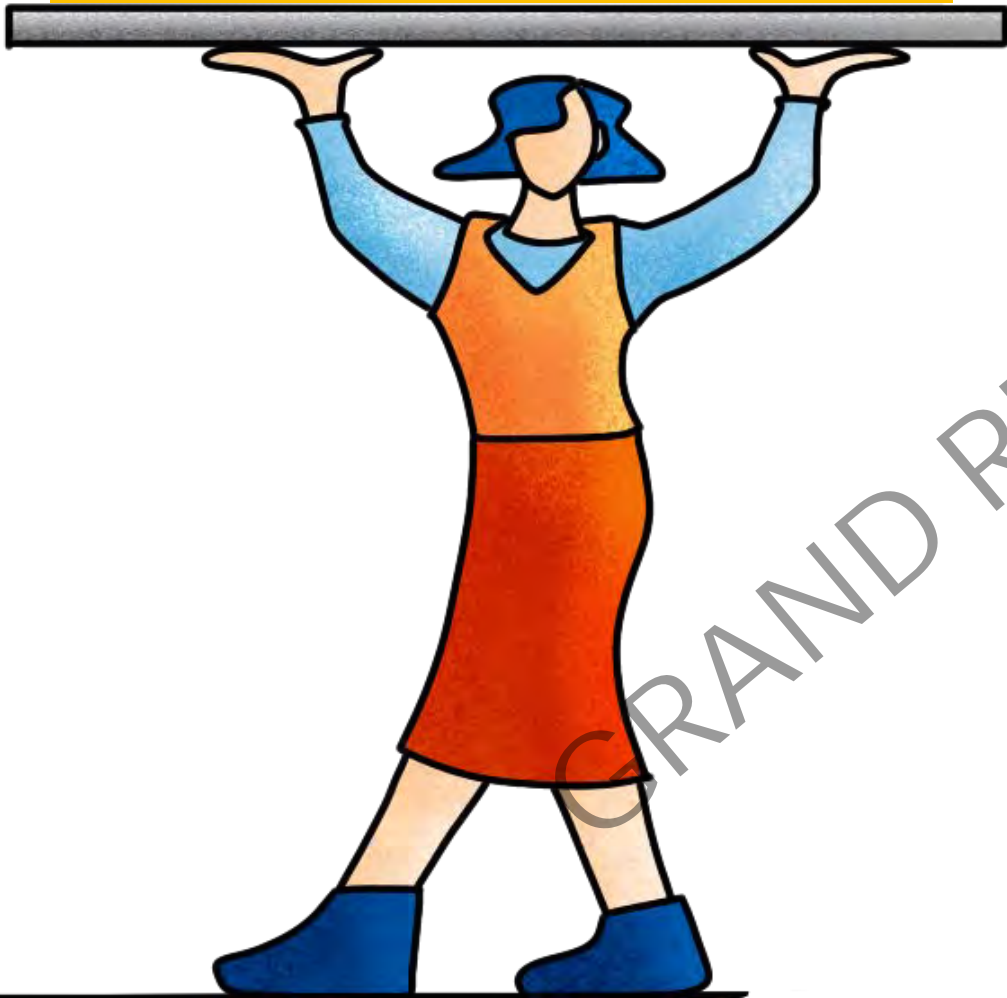
Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were looking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p> 	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating</p> <p>Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p> 

# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



# The Final Determination Should **STAND** On Its Own



**S** Simple and Easy to Comprehend

**T** Transparent/Clear

**A** Accurate

**N** Neutral/Unbiased

**D** Draw Attention to Significant Evidence and Issues

# Choosing Simple Language

Complex Language	Simple Language
"Adjudicated"	"Decided/Determined"
"Preponderance of the Evidence"	"More likely than not"
"Respondent articulated"	"Respondent stated"
"Prima Facie Assessment"	"Plain assessment/On its face assessment"
"The allegation was substantiated"	"The allegation was proven/supported by"
"Pursuant to the policy"	"As stated in the policy"
"Digital Penetration"	"Inserted their finger into (include body part penetrated)"



# Transparent and Clear

- Outline the written determination to enhance transparency and clarity.
- Summarize information chronologically.
- Clearly define language used in the determination.
  - Opinions
  - Quantitative language
  - Slang/acronyms
- Provide clear descriptions of reported acts.
- Use consistent language.



Evidence that the decision maker has afforded significant weight.



Evidence related to assessment of credibility, reliability, and authenticity.

Consistencies  
Inconsistencies  
Corroborative evidence  
Omissions  
Statements that include or that are lacking in significant details



Explanations that provide a better understanding of certain items of evidence or lack of evidence.



**If it was important, emphasize it.**

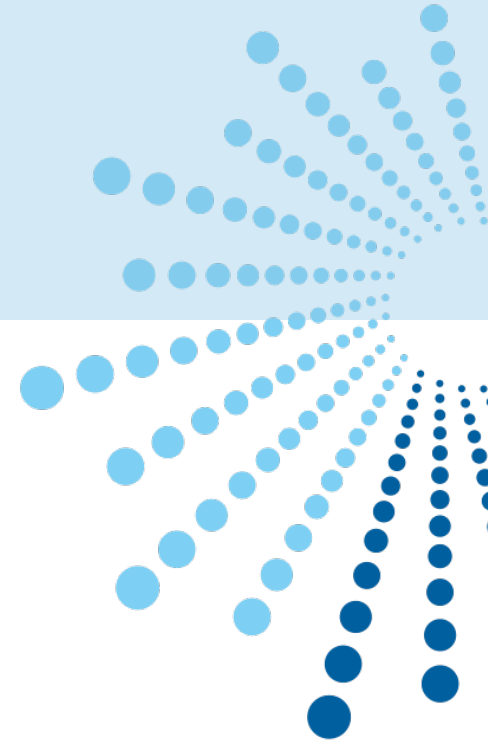
**Draw Attention  
to Specific  
Evidence  
Through  
Intentional  
Presentation of  
Information in  
the Written  
Determination**



# Practical Application

07

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## Scenario 1A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the Decision-Maker?**



## Scenario 1B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- **Must the Decision-Maker find Respondent not responsible because of the findings in the report?**



## Scenario 2

Complainant provides records of a sexual assault forensic exam. In the record, the nurse notes that Complainant had bruising on her inner thighs and abrasions on her cervix. The nurse does not appear at the hearing. Complainant testifies and fully submits to cross. In her testimony she states that she saw bruises on her inner thighs and that the nurse told her about the injuries to her cervix.

- **Can the DM consider evidence of the inner thigh injuries?**
- **Can the DM consider evidence of the injuries to C's cervix?**

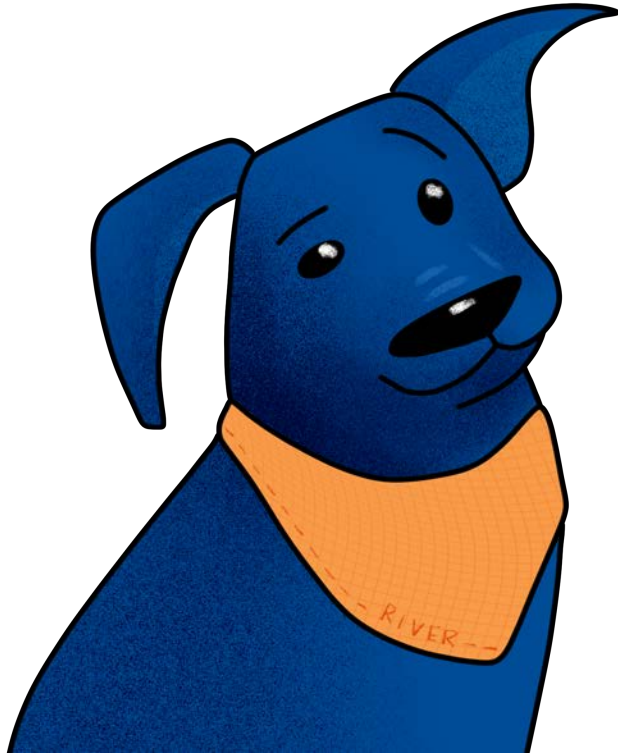


## Scenario 3

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the DM hear from Witness 7 at the hearing?**

# Questions?



Leave Us Feedback:



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# Save the Date!

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## Title IX & Bias Series

*Register for free!*

**November 10, 2021**

*Mitigating Bias in Hearings* with Kelly Gallagher & Tibusay Hernandez

**December 8, 2021**

*Reducing Bias in Sanctioning* with Jody Shipper & Tibusay Hernandez

## Upcoming Trainings

**November 5, 2021**

*Being an Effective Title IX Advisor: From Investigation to Hearing*

**November 14, 2021**

*Inclusive Search Practices: Culture Add vs. Culture Fit Recruitment*

**January 28, 2022**

*Diversity Foundations: Bias Awareness and Mitigation*

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