Sexual Misconduct Advisor Training

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August/September 2020



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Agenda

I. Background
II. Basics: Role of the Advisor
III. Pre-hearing
IV. At the hearing
V. Hypotheticals



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"Sexual Harassment": A key distinction in our model policy

- "Sexual Harassment" v. other sexual misconduct that is not "Sexual Harassment"
- Importance of distinction for our purposes today: If the conduct alleged is "sexual harassment," then the advisors will ask questions at the hearing.

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Sexual Harassment Definition

Conduct on the basis of sex that satisfies one or more of the following:

- Quid pro quo: An employee of the institution conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined in this Policy.



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What is not "Sexual Harassment" but may be an issue at a hearing?

Example:

- "Other Inappropriate Sexual Conduct" may include:
  - Requests for sexual favors/sexual advances
  - Unwelcome intentional touching of a sexual nature
  - Jokes/Comments of a sexual nature
  - Recording of sexual activity without consent



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Outline of Title IX Case (if Sexual Harassment)

- Notice
- Investigation (**no determination**)
- All evidence related to allegation to both CP and RP
- Ability to comment on evidence
- **No Administrative Disposition**
- Hearing
- Appeal



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Outline of Title IX Case (if not Sexual Harassment)

- Notice
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- **Administrative Disposition (can admit conduct)**
- Hearing
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Role of the Advisor

- "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally."



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Role of the Advisor

- "If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the [institution's] choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."



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Role of the Advisor—Our Model Policy (if "Sexual Harassment")

Each party may have an advisor of their choice at the hearing. If a party does not have an advisor, the University will provide one. Advisors are not permitted to actively participate in the hearing, except for asking questions of the other party and any other witnesses.



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Role of the Advisor—Our Model Policy (if not "Sexual Harassment")

Each party may have an advisor of their choice at the hearing. Upon request from either party, the University will provide an advisor to that party. Advisors are not permitted to actively participate in the hearing.



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Bottom line: Advisor Role at Hearing

- Advisors in "Sexual Harassment" cases will ask questions. Parties must have advisor.
- Advisors in non-Sexual Harassment cases will not ask questions. Parties may have advisor.
- In either case, advisors are not to do opening statements, closing statements, lodge objections, or talk at the hearing.



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The rest of this training will mainly focus on "Sexual Harassment" cases

Because these are the cases where advisors will be asking questions.



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Role of the Advisor—Our Model Policy

The hearing officer may, at the hearing officer's discretion, ask questions during the hearing of any party or witness and may be the first person to ask questions of any party or witness. Each party's advisor will have an opportunity to ask relevant questions and follow-up questions of the other party and of any witnesses that participate in the hearing, including questions that challenge credibility. Each advisor has the ability to ask questions directly, orally, and in real time at the hearing. The parties will not be permitted to personally ask questions of the other party or any witnesses that participate in the hearing. The advisors may ask questions under the following procedure:

The advisor will ask a question of the applicable participant.

Before the participant answers a question, the hearing officer will rule as to whether the advisor's question is relevant to the alleged conduct charges.

If the hearing officer rules the advisor's question as not relevant, then the hearing officer must explain any decision to exclude a question as not relevant. If the hearing officer allows the question as relevant, the participant will answer it.

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Before the Hearing…

- Review materials
- Review policy (institutional policies are often different from the model policy)

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Look at the Policy Provision(s) at issue

Engaging in **a course of conduct directed at a specific person** that would **cause a reasonable person to fear for his or her safety or the safety of others**, **or suffer substantial emotional distress**. For the purposes of this definition—

- *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



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Look at the Policy Provision(s) at issue

Engaging in (1) **a course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others**, **or suffer substantial emotional distress**. For the purposes of this definition—

- *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
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Before the hearing…Try to meet

- Explain you do not "represent." Explain your role.
- Discuss a strategy
  - Accept responsibility? No administrative disposition. RP may agree to conduct. Do you want to focus on mitigating factors?
  - What is the story? What evidence exists to support that story?
  - Read the documents and outline what is important. What you need from each witness to tell the story.

Note: use of the word "story" does not mean false. Different people often have different perceptions of same events.

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Before the hearing…Tips for Examining Witnesses

- If it is a witness you call, before the hearing (if possible),
  - Ask the person you are advising for questions they want asked.
  - Meet/telephone with the person you are advising and the witness
  - Talk through what you will ask that person.
  - In drafting questions, focus on what is relevant to a potential policy violation.
  - Note: Prior meeting is sometimes not possible/practicable.

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Questioning at the Hearing—Our Model Policy

The hearing officer may, at the hearing officer's discretion, ask questions during the hearing of any party or witness and may be the first person to ask questions of any party or witness. Each party's advisor will have an opportunity to ask relevant questions and follow-up questions of the other party and of any witnesses that participate in the hearing, including questions that challenge credibility. Each advisor has the ability to ask questions directly, orally, and in real time at the hearing. The parties will not be permitted to personally ask questions of the other party or any witnesses that participate in the hearing. The advisors may ask questions under the following procedure:

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Relevance

Has a tendency to make a fact more or less probable than it would be otherwise without the evidence

and

the fact is of consequence in determining a material issue.



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Presentation of Witnesses and Exhibits



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Relevance—CP's Prior Sexual History

- Prior Sexual History: A Complainant's sexual predisposition or prior sexual behavior are not relevant except where questions and evidence about a Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the alleged conduct charged by the Complainant or if the questions or evidence concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent of the alleged conduct.

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At the hearing…Tips

- Ensure your advisee is “heard” by giving the advisee an opportunity to tell their story.
- Feel free to take breaks to talk with your advisee.
- Right before you say you are finished with each witness, ask the advisee if he/she has more questions.
- We want the advisee to be heard and felt heard. This may be a major life event.



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At the hearing…Tips for Examining Witnesses

- If it is a witness you call, tell the story. What happened? Use open ended questions.
  - What
  - Who
  - Why
  - When
  - What did you do next?
  - What happened after that?
  - Describe…
  - Tell us…
  - Explain to the hearing officer why…



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At the hearing…Tips for Examining Witnesses

- Focus on what is important.
  - Policy violation.
  - Example:
    (1) Course of conduct
    (2) directed at a person
    (3) that would cause a reasonable person to fear for their safety or cause substantial emotional distress



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At the hearing…Tips for Examining Witnesses

If it is a witness the opposing party calls, the approach is different.

- Get in. Get out. Could be very short.
- Brief questions.
- Leading questions.
  - Isn't it true that…
  - XYZ, right?
  - XYZ, correct?
  - Its also true that…
- Calm demeanor. Normal volume. Not TV.
- Listen.
- Don't quarrel/fight. If the answer is contrary to the evidence it shows the witness is not credible. If the witness's explanation doesn't make sense, you just made your point. Don't ask them to explain. Move on.
- Questions may focus on credibility.



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At the hearing…Tips for Examining Witnesses

- Credibility.
  - Are there inconsistencies? Is an explanation plausible?
  - What did the witness do? What did they *not* do?
  - Are there motives for the witness to be less than truthful?
  - Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
  - Is there an opportunity for a good faith mistake?



At the hearing…Tips for Examining Witnesses

- Test for implicit bias.
  - What is the essence (elements)?
  - Create hypo that includes elements. Switch gender.



Hypothetical #1

You have been assigned to advise a student at an upcoming hearing. Two weeks before the hearing, you contact the student but the student doesn't respond. You email again two more times and call the student. The student does not respond. What do you do?



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Hypothetical #1 continued…

- "Where one party appears at the hearing and the other party does not, [the regulations] still state [that the institution must provide an advisor]. Thus, a party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear. Similarly, where one party does not appear and that party's advisor of choice does not appear, [an advisor provided by the institution] must still cross-examine the other, appearing party…" (p.1171, *Preamble*)



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Hypothetical #2

You have been assigned an advisee. Your advisee states he/she did not commit the policy violation. Among the evidence is a video showing the person committing the policy violation. The advisee wants you to ask cross-examination questions of the witnesses and to ask questions that you think are ridiculous. What do you do?



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Hypothetical #3

You are advising a student in a case where the student is accused of sending three inappropriate text messages expressing a romantic interest in the CP. You ask the RP for any questions RP has. Together with any questions you can think of, you think the cross-examination will only last 5 minutes. You wonder if this is adequate. What do you do?



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Hypothetical #3 (continued)

At the hearing, right before you question a witness adverse to the student you are advising, the witness makes statements that are inconsistent with statements made previously. What do you do?



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Hypothetical #4

Your advisee slowly grows more and more frustrated at the hearing during questioning and states that he/she refuses to answer certain questions because they are harassing and unfair. What do you do?



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Hypothetical #4

- "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…"



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Hypothetical #5

- You advise a party. After the hearing, the advisee thanks you for your help.



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Questions & Comments?

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Contact Information

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