

Special Considerations for Panels

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

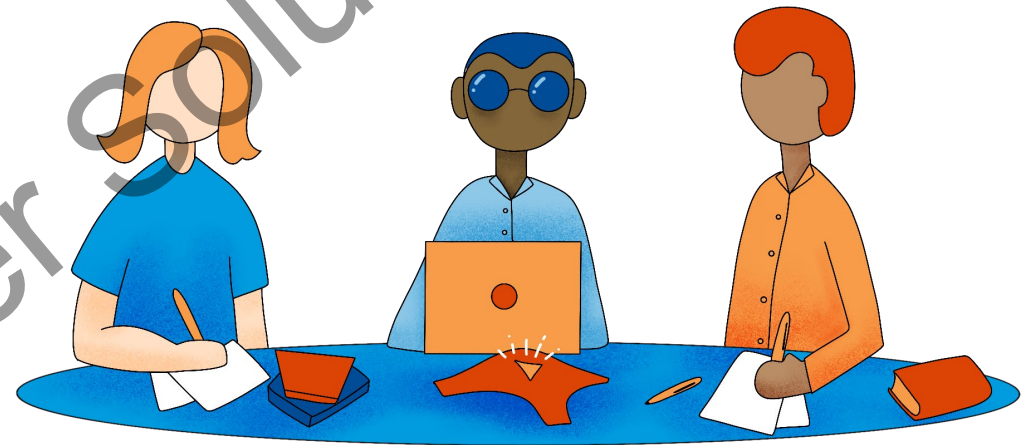
Go topic by topic

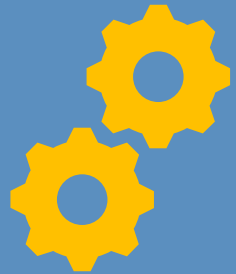
Ask other panelists if they have questions before moving on

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





The Decision Maker's Role in Advisor Questioning

4b

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Cross Examination

Who does it?

Must be conducted
by the advisor

If party does not
appear or does not
participate, advisor
can appear and
cross

If party does not
have an advisor,
institution must
provide one

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:

Ask the person who posed the question why their question is relevant

Take a break

Ask their own questions of the party/witness

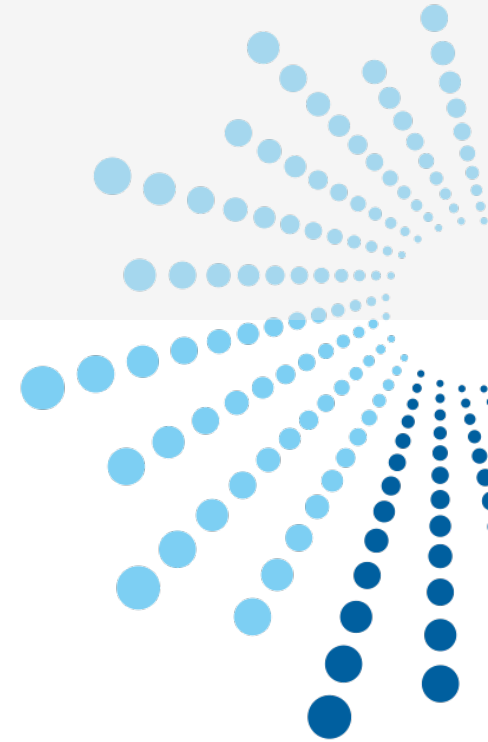
Review the hearing record



After the Hearing

05

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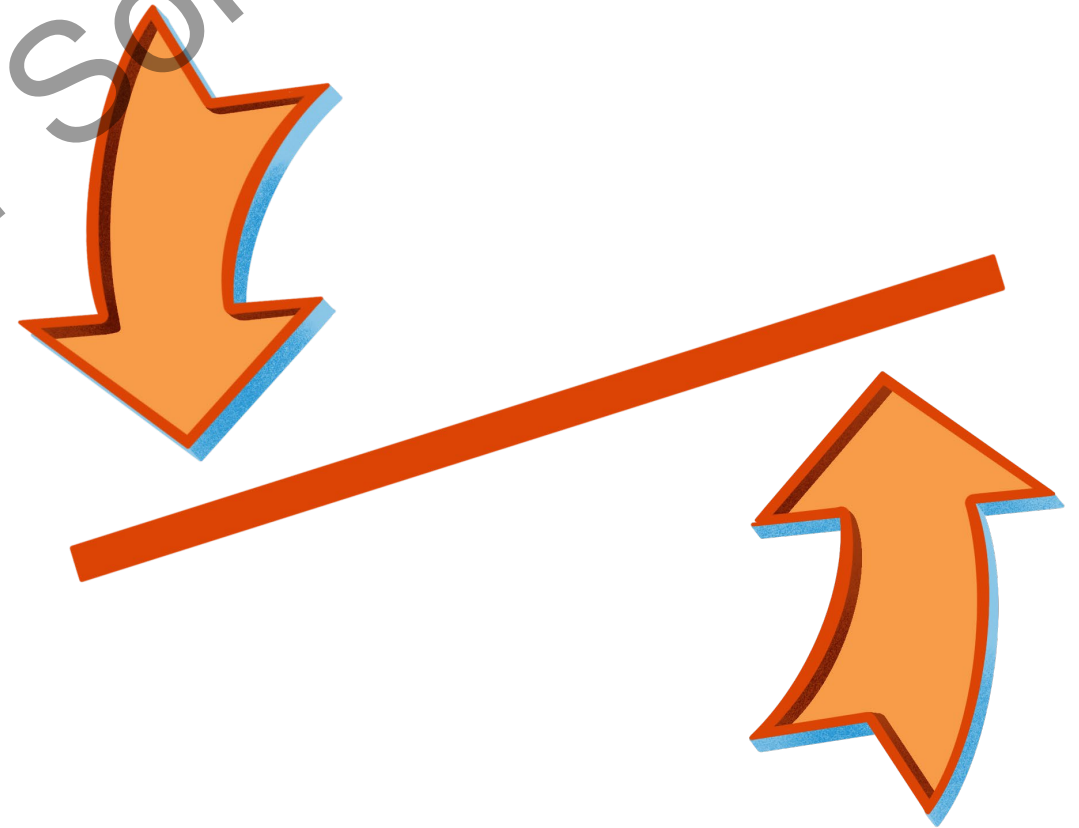
Deliberations

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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.



Help us define "preponderance of the evidence".

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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





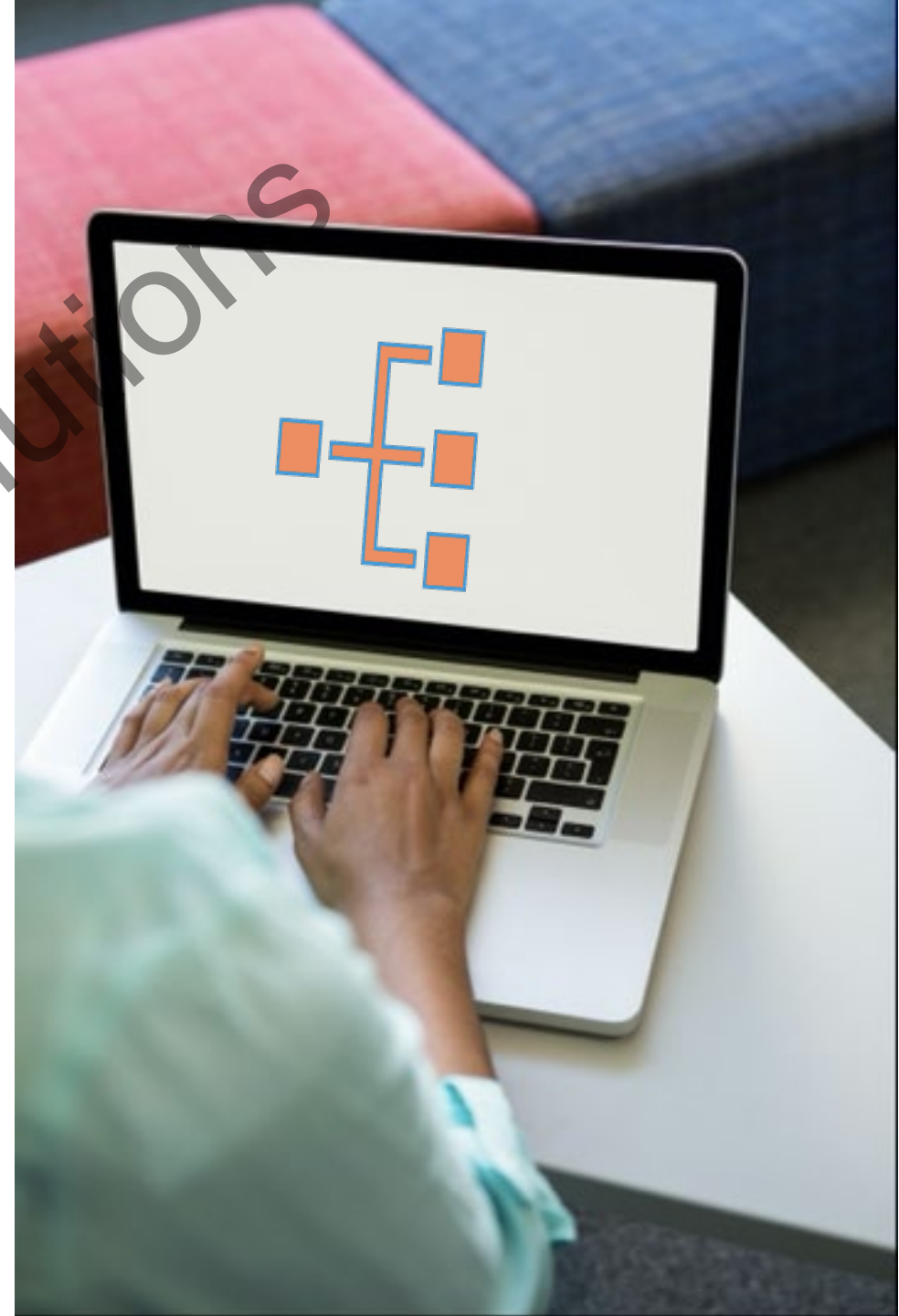
Findings of Fact

- **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 timestamped 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 Complainant,
 - ❑ including instances where the Complainant is incapable of giving consent because of their age or **because of their age or because of temporary or permanent mental or physical 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 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</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> 

Did You Also Analyze...?

(if required by policy)

- On campus?
- Program or Activity?
- In a building owned/controlled by a recognized student organization?
- Substantial control over respondent and context?
- Complainant was attempting to access program/activity?

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What is in your final report/hearing determination?

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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

Goals of Sanctions/Discipline

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?



Prevention

Sanctioning



State law



System policy



Learning environment



Measures available

The Sanction Does Not Undo the Finding



No lesser sanction if
you disagree with
findings



Sanctioning officer
must assume findings
are correct

Determining the Proper Sanction

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?

Aggravating Circumstances

Premeditation

Predation

Physical violence

Repeated violation

Multiple policy violations in one incident

Harm to others, impact on complainant and/or community

Did the behavior continue after intervention?

Effort to conceal or hide the incident?

Refusal to attend past trainings

Past failures to comply with directives



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Title IX Hearings in a Post Regulatory World

Day 2

Jessica Brown & Emma Hempel
March 2023

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Meet Your Facilitators



Jessica Brown

She/Her/Hers

Senior Solutions Specialist



Emma Hempel


She/Her/Hers

Senior Solutions Specialist

Overview of Day Two

Let's Practice!

- Pre-Hearing Preparation
- Questioning During the Hearing
- Cross Examination & Relevance Determination



Outstanding Questions from Day One

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Let's Practice!

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The investigation is complete!

Rapid Fire #1

It is time to schedule the hearing...

Using the chat box:

share your "To Do" List for coordinating the hearing.



Rapid Fire Recap

Arranging for space

Arranging technology

Scheduling pre-hearing meetings with parties & advisors

Scheduling prehearing meetings of the panel

Providing report and record to panel and parties

Scheduling the hearing

Accommodations

Call for written submissions

Conflict checks

Other considerations?

You and your team did a great job scheduling the hearing and arranging all the logistics!

Rapid Fire #2

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.



Rapid Fire Recap

Development of introductory comments

Initial discussion of the evidence

Areas for further exploration

List of questions for the parties and the witnesses

Anticipation of potential issues

Logistics

Review of any written submissions by the parties

Other considerations?

Let's practice!

Developing Questions

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Break Out!

#1

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for witnesses Charlie and Emma
- Group 4: Questions for witnesses Tom and Professor

Report Out

- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for witnesses Tom and Emma
- Group 4: Questions for witnesses Charlie and Professor

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Let's practice!

Relevance Determinations

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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



Break Out!

#2

Say hi!

Pick a scribe

Discuss

- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for Witnesses Emma and Charlie
- Group 4: Questions for Tom and Professor McPhee



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Report Out



Questions Submitted by Complainant's Advisor

Questions for Respondent

- How often do you stalk girls?
- Isn't it true that you do this all the time
- Do you keep stalking me because you're OCD?
- Have you ever been removed from another group project because you could not get along with others?
- Do you enjoy scaring women?
- How often do you imagine that women like you?
- When you first talked to me about your girlfriend breaking up with you, who was your girlfriend or did you make that up just so you could talk to me?
- Why did you keep offering to work with Emma in person instead of by Zoom?
- Did you have a thing for Emma?
- Did you and Emma ever end up hooking up?

Questions Submitted by Complainant's Advisor

Questions for Tom

- Can you think of any reason for Oliver to be hanging out in the garage with flowers, other than to frighten Samantha?
- Oliver was pretty creepy, wasn't he?
- Did you see him throw an object at Samantha?
- Do you believe he was acting in self defense when he threw the object?
- Do you think there was any good reason for him to throw anything at her?
- You said Samantha is really pretty and guys hit on her a lot. Don't you think someone who has had a lot of male attention would be in the best position to know which kind of male attention is acceptable, and when it is stalking?

Questions Submitted by Complainant's Advisor

Questions for Emma

- Did Oliver seem fixated on Samantha when you were all part of the class project?
- Did Oliver insist that the two of you work together in person instead of online?
- How often did he force you to work in person with him after classes?
- Were you afraid of him?
- Why did you lie to Emma and tell her that Samantha was “really troubled” and “having personal issues”?
- What did you mean by that?
- Do you often tell lies?

Questions Submitted by Complainant's Advisor

Questions for Charlie

- So are you the one you suggested he stalk her social media to find a food or drink she liked?
- Is that your M.O. with girls?
- Why do you think Samantha and Oliver had a plan to get together one night and talk?
- Do you know for sure there was a confirmed plan?
- What proof did Oliver give you to prove there was a *real* plan, and not an imaginary one?
- You said Samantha was “rude” because you could not do a lot of work on the group project. What did you mean by that?
- How long have you known Oliver?
- Isn't it true you just don't like Samantha?
- Have you ever been accused of sexual harassment or stalking?
- Isn't it true that you would say anything to support a guy who has been accused?

Questions Submitted by Complainant's Advisor

Questions for Professor McPhee

- Why didn't you tell him to stop stalking me?
- Weren't you supposed to forward my Title IX Complaint to the Coordinator and don't you think that if you had done so, I would have been spared his stalking?

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Questions submitted by Respondent's Advisor

Questions for Complainant

- Isn't it true you found me attractive after we first met?
- You wanted to hook up with me, didn't you?
- You made this complaint only because you wanted your boyfriend's attention, isn't that true?
- You couldn't complete your end of the project without me, right?
- You kept calling me and asking me for help, isn't that true?
- You told the investigator you imagined seeing me everywhere. Where do you think you saw me?
- Why were you always thinking of me?
- And how often do you hallucinate?
- Do you have any imaginary friends?
- How often do you imagine seeing people who are not there?
- How often has this happened in the past?
- Why did you ask your boyfriend to walk you to your car when you knew you were supposed to meet me there?
- You said you were frightened by seeing Oliver in the parking garage. Did he have a weapon? Did he try to touch you? Did he try to hit you? Describe each and every way he tried to attack you that night.

Questions submitted by Respondent's Advisor

Questions for Emma

- Were you frustrated when working on the group project?
- Why?
- Why did you think Oliver was more frustrated than others?
- Why did you think he was “taking it out” on Samantha if he was frustrated with the whole group?
- Are you and Samantha friends?
- Did Samantha tell you what to say in the investigation?
- Are you one of those “Believe all victims” people?

Questions submitted by Respondent's Advisor

Questions for Tom

- When you saw Oliver in the parking garage, were you frightened?
- What, specifically, did Oliver do that was frightening?
- Does Samantha always over-react?
- Does Samantha over-react when she is trying to get attention from you?
- What, specifically, did Oliver throw at her?

Questions submitted by Respondent's Advisor

Questions for Professor McPhee

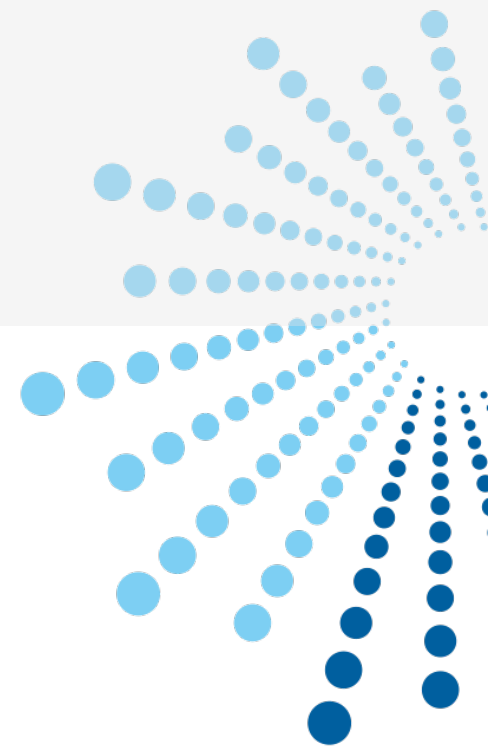
- Isn't it true that Samantha was doing poorly in class?
- What grade did she have up to the project and what grade did she get on the project?
- After she made this complaint, did she get some special treatment or accommodation in your class?
- Isn't it true that, once you told her she would have to do the work, she suddenly made up a story about Oliver to paint him in a bad light?
- Isn't it true that, before she told you this lie, you had no reason to think poorly of Oliver?



Practical Application

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Scenario 1

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 HP hear from Witness 7 at the hearing?**



Scenario 2

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 Hearing Panel find Respondent not responsible because of the findings in the report?**



Scenario 3

During the hearing, the Complainant becomes upset, shuts down, and stops answering question.

**If you are the Hearing Chair,
how do you respond?**



Scenario 1

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 HP hear from Witness 7 at the hearing?**



Scenario 2A

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 2B

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 Hearing Panel find Respondent not responsible because of the findings in the report?**

Case Study

“

The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that she was at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that Respondent was the one who filled their cups. Complainant stated that she “got drunk fast” and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.

”

Witness 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed." She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.

Witness 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.

Witness 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.

Questions?

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Decision Maker Post-Training
Satisfaction Survey



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