

University Representative Role in Sexual Misconduct Hearings

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Agenda

1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Pre-Hearing
4. At the Hearing
5. Special Issues
6. Hypotheticals



Background and Context



Distinctions...

Sexual Harassment

vs.

Non-Sexual Harassment

(Ex. Other Inappropriate Sexual Conduct, Retaliation, etc.)



Definition of “Sexual Harassment” Under Title IX

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

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity (Hostile Environment); or
3. “**Sexual assault,**” “**dating violence,**” “**domestic violence,**” or “**stalking**” as defined under Clery/VAWA.

*Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct*

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

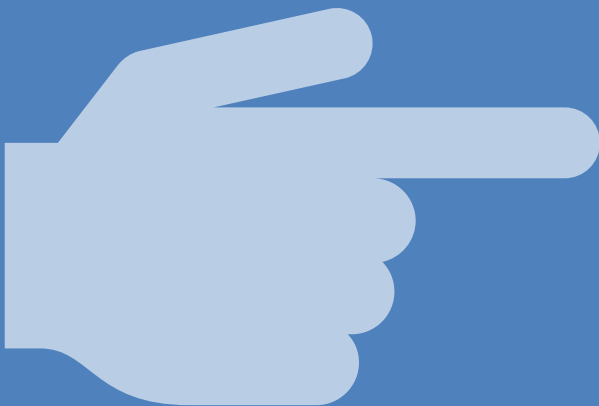


Example: Other Inappropriate Sexual Conduct

Important Distinction for Sexual Harassment Cases



If the conduct alleged is
“**sexual harassment**,” then
the advisors will **ask questions**
at the hearing.



Remainder of
this training...

Applies to Sexual Harassment Cases &
advisors **asking questions** during the hearing.



Purpose of Hearing

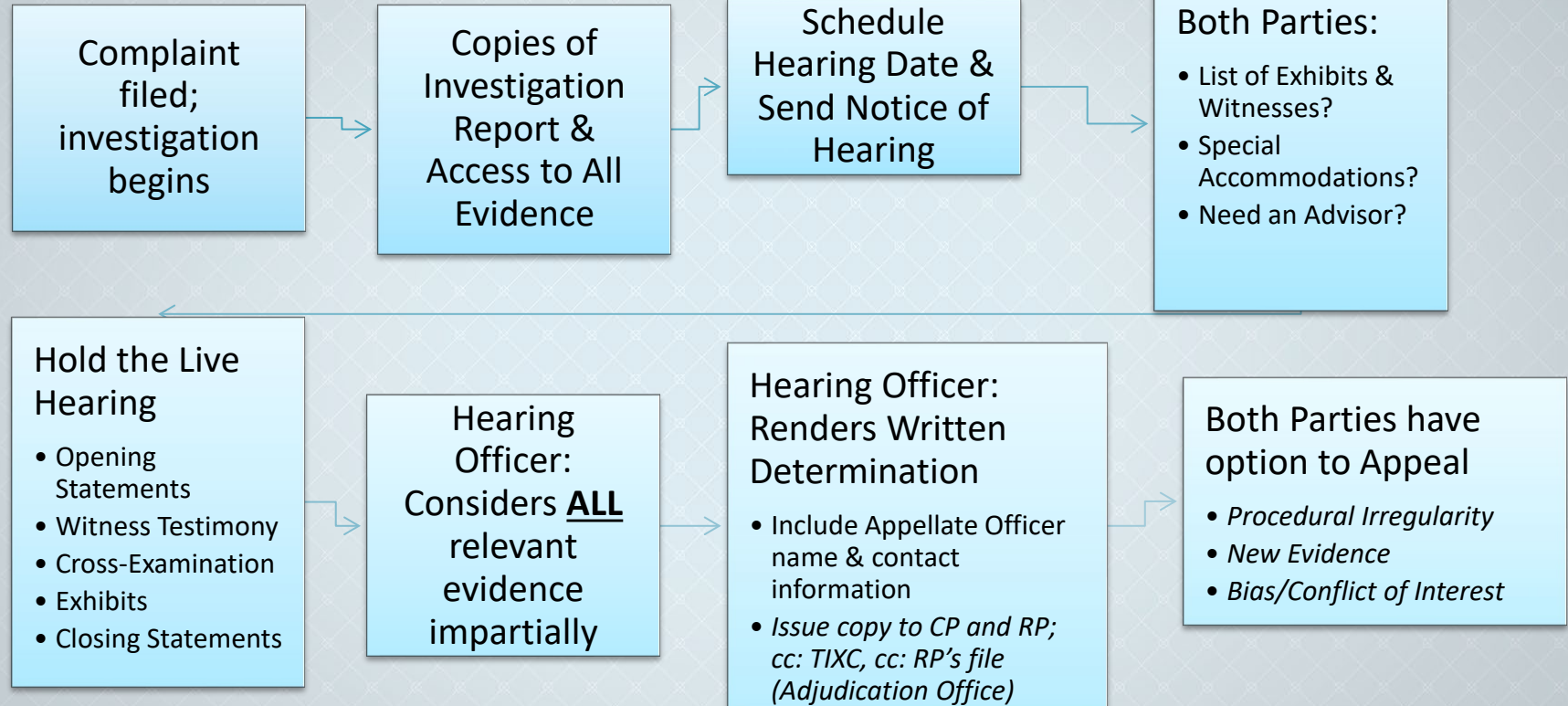
- It may be required by law
- Due Process
 - Notice
 - Opportunity to be heard
- Determined by Impartial Hearing Officer
- Whether the RP committed a university policy violation.





University Representative Role

Live Hearing: Logistics Flowchart



1. Facilitate the presentation of relevant facts and witnesses.
2. An option to present example sanctions, of similar circumstances, if a determination of responsibility is rendered.

University Representative Role at Hearings



Pre-Hearing

Mindset

Mindset:

- **Fairness** and **appearance of fair.**
- Parties to **be heard** and **feel heard.**

Remember: This is likely a **major life event** for both the Complainant & Respondent.



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The background of the slide is split. The left side features a close-up, slightly blurred image of a document with several checkmarks circled in pencil. The right side is a solid light blue color with a subtle, repeating pattern of small 'x' marks.

Before the Hearing: University Representative Role

- Review materials.
- Review your institution's policy.
- Get a **(free)** advisor from UT System's Office of General Counsel.

Look at the 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.



Look at the Provision(s) at Issue:

Engaging in a (1) **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.**

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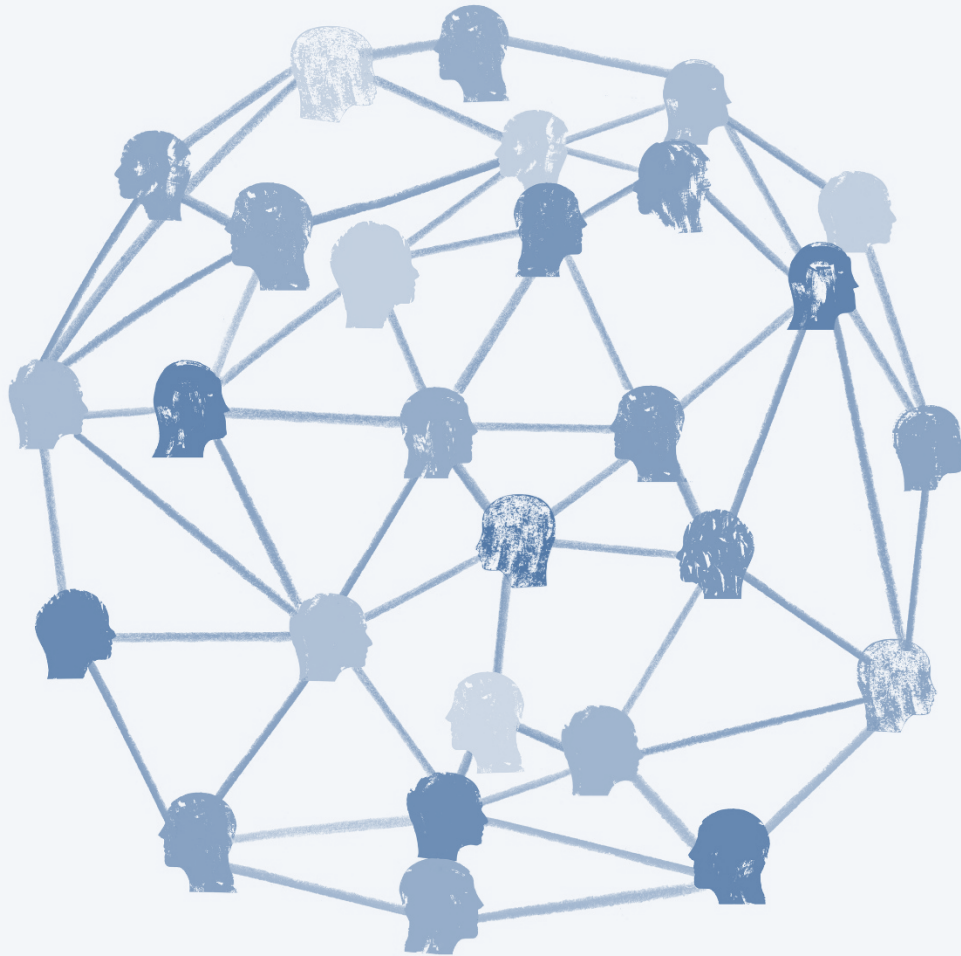




Witnesses to call:

- CP
- RP
- Witnesses
- Investigator?

Remember: Burden of proof is on the institution, not the Complainant.



At the Hearing

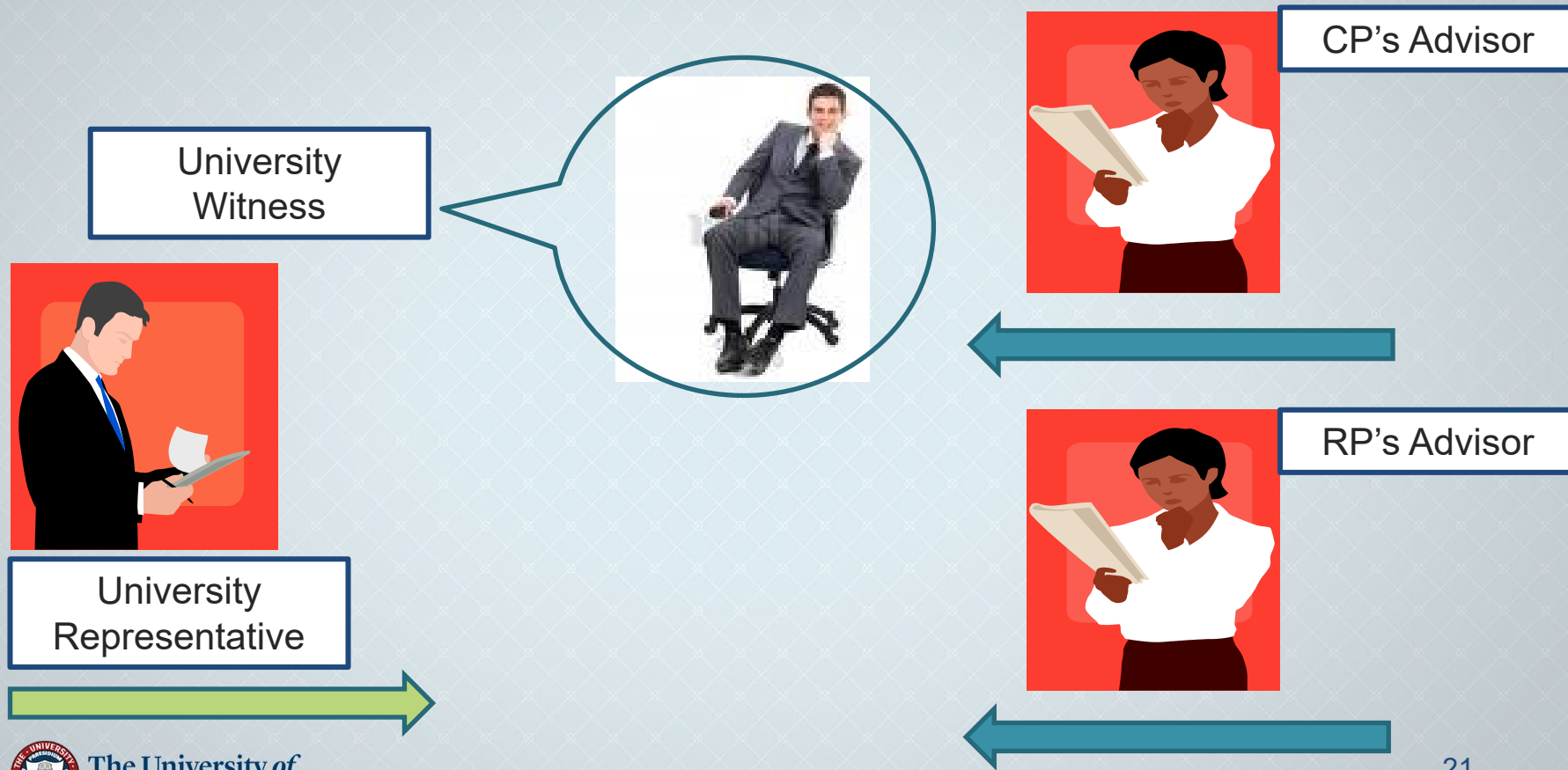
Overview of Hearing



General outline:

- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements

Presentation of Witnesses & Exhibits



Procedure for Questioning Participants

Hearing Officer may ask relevant questions during the hearing of any party or witness, and may be the **first** to ask relevant questions.

The parties' advisors and the University Representative may ask relevant questions and follow-up questions of the parties and witnesses that participate in the hearing, including questions that challenge credibility. Questions can be asked directly, orally, and in real time at the hearing.

1. Question is posed for a participant at the hearing.
2. The **Hearing Officer** must deem the question relevant **BEFORE** the participant answers.

Preponderance of the Evidence Standard:

Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.

Note: The Respondent is presumed **not responsible**.

Burden of Proof on the Institution



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Evidence is **relevant** if:

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



Relevant Evidence Examples

Statements consistent or inconsistent?

- “RP is so annoying. I would never hook up with RP;” or
- “RP is so hot. I am going to hook up tonight.”



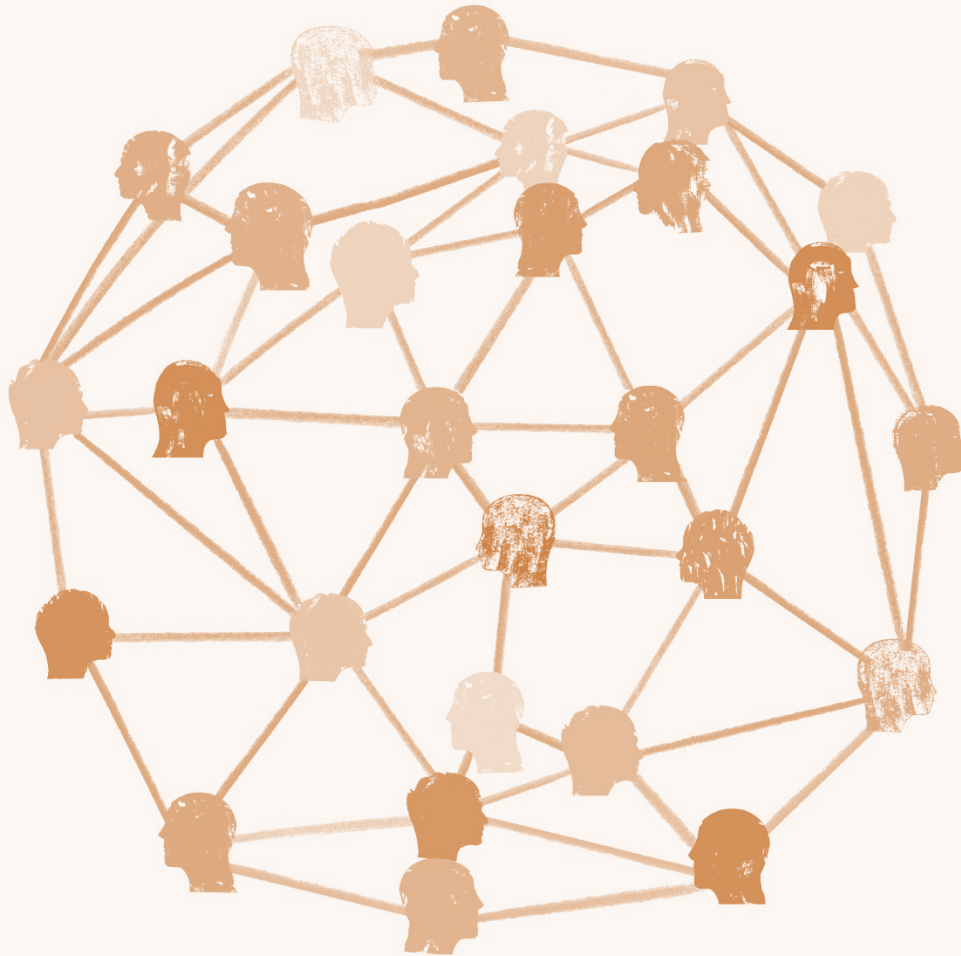
Relevance: Prior Sexual History

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.

Tips for the University Representative Role

- Passionate v. Dispassionate:
 - Tone, Volume, Facial Expressions
- Respectful demeanor
- Objections?

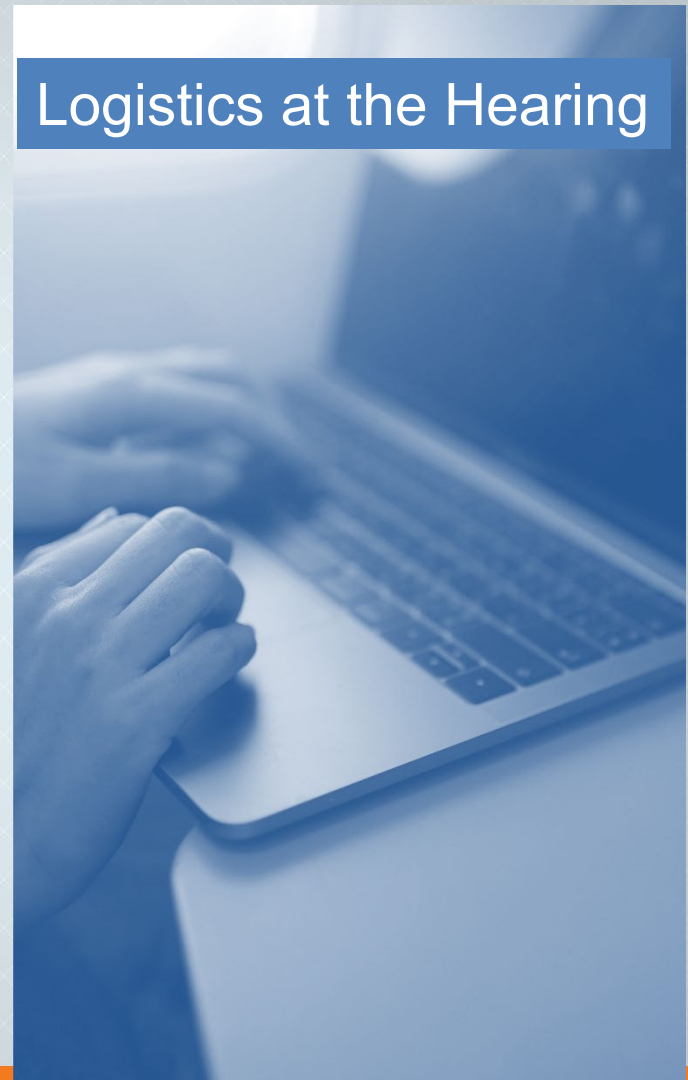
Remember: This is likely a **major life event** for both the Complainant & Respondent.



Special Issues at the Hearing

Logistics at the Hearing

“At the request of either party, the [institution] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously **see & hear** the party or the witness answering questions.”



Exchange of Witness Lists & Documents





Exclusion of Privileged Information Unless Waived

No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.

Consent Definition

A **voluntary, mutually understandable agreement** that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

Incapacitation Definition

Incapacitation is the **inability, temporarily or permanently, to give consent** because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.

If it is a witness that **you** call, help tell the story.

- What happened...
- Ask open-ended questions.
- Seek clarity with ***“Tell me more about that...”*** or ***“Help me understand...”***
 - Attempt to clarify inconsistencies from **all** parties.
- ***“What was your thought process for ...[insert the clarifying part]?”***
 - ***“What, if anything, do you remember once you...[insert part part]...?”***
 - ***What did you mean by [blank]?”***
- ***“There are **differences** in your account vs. [blank]...[insert specifics] ...help me understand the reason(s) or rationale for this different account...?”***



Questioning Witnesses at the Hearing



Focus on what is important.

- Policy violation
- Example: *Stalking*
 - (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



Questioning Witnesses at the Hearing (Cont.)

- Calm demeanor. Normal volume. Not TV.
- Listen.
- Don't quarrel or fight.
- If the answer is contrary to the evidence, it shows the witness is not credible.
- Questions may focus on credibility.

Disputed Facts and Credibility

- Are there inconsistencies? Is it corroborated in any way?
- 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?
- What about demeanor? (How much to weigh/cultural stereotypes?)



Tips at the Hearing

- Mindset:
 - **Fairness** and **appearance of fair.**
 - Parties to **be heard** and **feel heard.**
- Feel free to take **breaks.**
- **Closing** statement:
 - What are the main points?
 - Emphasize elements & evidence.



- How do you introduce this topic?
- When do you do so?
- What sanctions are appropriate?

Hypothetical 1



One of the parties does not appear.

What do you do?

Hypothetical 2

On the day of the hearing, the Complainant (CP) expresses that the CP has additional exhibits for the Hearing Officer to consider. You've never seen these documents before and neither has the Respondent.

Do you object?

Hypothetical 3

You are preparing for a hearing. As you do so, you begin to think that the RP is not responsible for the alleged conduct or that the conduct does not meet the definition of what is prohibited.

What do you do?

Hypothetical 4

You presented a witness at the hearing. On cross-examination, a party's advisor (either the CP's or RP's advisor) elicits testimony that makes the witness appear not credible.

What do you do?

Hypothetical 5

There are 5 witnesses who will say the same thing. Do you call all of them?

What do you do?

Hypothetical 6

You are preparing for a hearing in which the Respondent (RP) is accused of stalking a fellow student.

During the course of preparations, you find out that there has been a prior report against this same Respondent the year before, but the case never proceeded to a Formal Complaint. Apparently, a different Complainant had said that the RP was “creepy” and “was always around.”

Do you include this in your presentation?

Q & A



Contact Information

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