

Sexual Misconduct Advisor Training

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Spring 2021

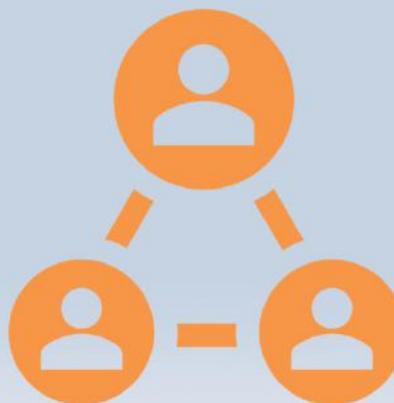


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Agenda

1. Background
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Basics: Advisor Role
4. Pre-Hearing
5. At the Hearing
6. Hypotheticals



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Distinctions...

1. Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

2. Non-Sexual Harassment

Ex.: Other Inappropriate Sexual Conduct



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Definition of “Sexual Harassment”

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; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



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

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Important Distinction for Sexual Harassment Cases



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



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



Example: Other Inappropriate Sexual Conduct



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Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that they created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct.



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Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential Examples (depending on facts):

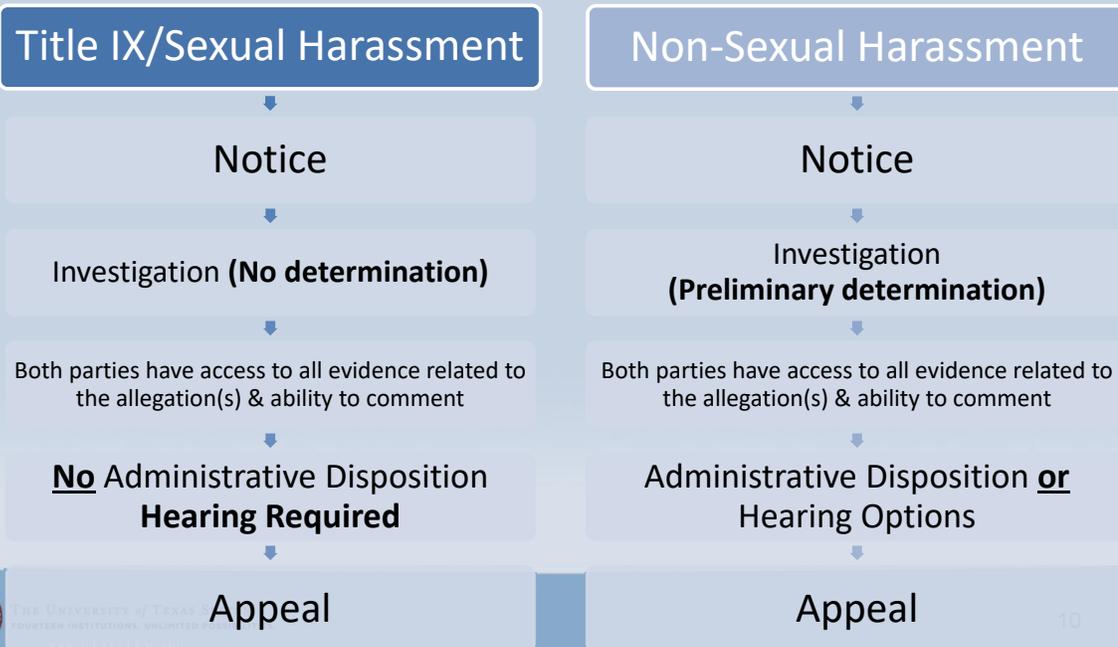
- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



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Source: UT System Model Policy for Sexual Misconduct (2020)

Outline Comparisons...



Advisor Role at Hearing

“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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Source: Title IX Regulations (2020)

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Advisor Role at Hearing



“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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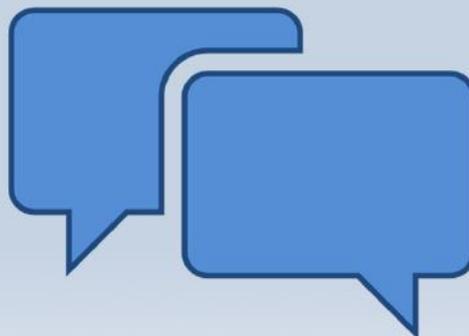
Source: Title IX Regulations (2020)

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Role of the Advisor (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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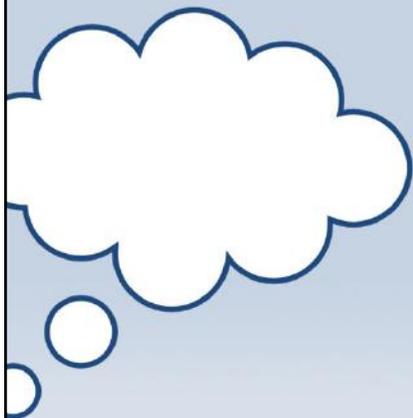
Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Role of the Advisor (Non-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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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Bottom Line for Advisors

Sexual Harassment Cases

- Advisors will **ask questions**.
- Parties **must** have advisor.

Non-Sexual Harassment Cases

- Advisors will **not** ask questions.
- Parties **may** have advisor.

All cases: Advisors are **not** to do opening statements, closing statements, lodge objections, or talk at the hearing.



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Remainder of this training...

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



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A graphic consisting of a large orange square frame containing four orange checkmarks in the left column and four orange horizontal bars in the right column. A white rectangular box with an orange border is positioned to the right of the frame, containing the text "Pre-Hearing" in orange.

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Before the Hearing:



- Review materials.
- Review your institution's policy.

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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.

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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.

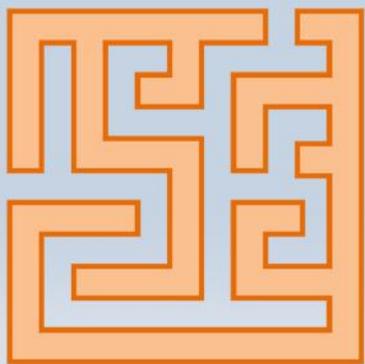
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- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Before the Hearing: Attempt to Meet With Your Advisee



- Explain your **Advisor role**. You are not “representing” the advisee.
- 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?
 - Review the investigation report & evidence. Outline what is important. What do you need from each witness to tell the story?

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



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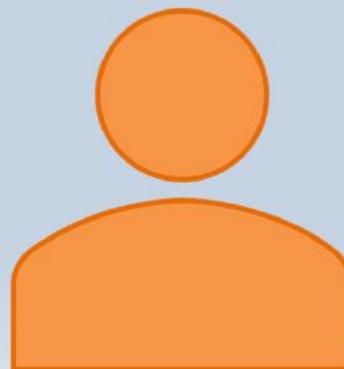
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Before the Hearing:

Tips for Examining Witnesses:

- If it’s a witness you & your Advisee are calling, before the hearing (if possible):
 - Ask your Advisee for questions they’d like asked of each witness.
 - With the Advisee & each witness: Meet or talk through what you will ask.
 - In drafting questions, focus on what is **relevant** to a potential **policy violation**.



Note: A prior meeting with the advisee or witnesses may not be possible or practicable before the hearing.

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At the Hearing


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Questioning at the Hearing

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.

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Procedure for Asking Questions

The **advisors** may ask questions under the following procedure:

1. The **advisor** will ask a question of the applicable participant.
2. **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 the question.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Relevant Evidence



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.



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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.



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Presentation of Witnesses & Exhibits



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Tips at the Hearing:

- Ensure that your Advisee is **heard** and **felt heard** by giving your Advisee an opportunity to tell their story.
- Feel free to take **breaks** & talk to your Advisee.
- **Before** finishing with a witness, ask your Advisee if he/she/they have any other questions for that witness.



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

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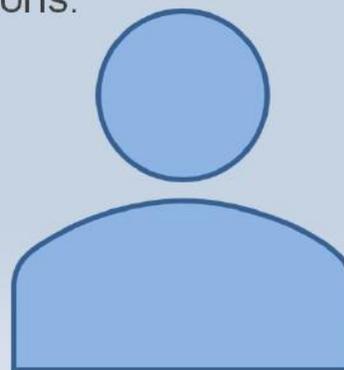
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Tips at the Hearing: Examining Witnesses

If it is a witness **you** call, tell the story.
What happened? Use open ended questions.

- *What...*
- *Who...*
- *When...*
- *What did you do next?*
- *What happened after that?*
- *Describe...*
- *Tell us...*
- *Explain to the hearing officer why...*



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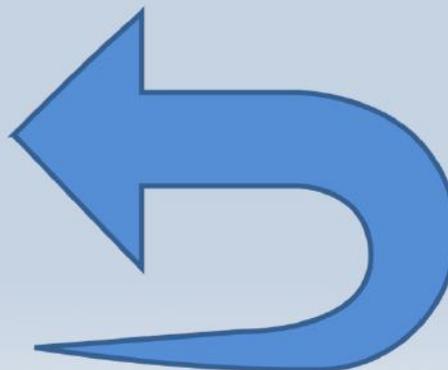
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Tips at the Hearing: Examining Witnesses

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



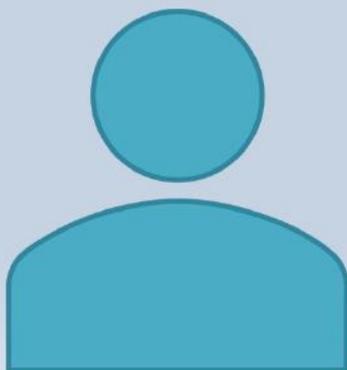
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Tips at the Hearing: Examining Witnesses

For witnesses called by the **opposing party**:



- 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...*

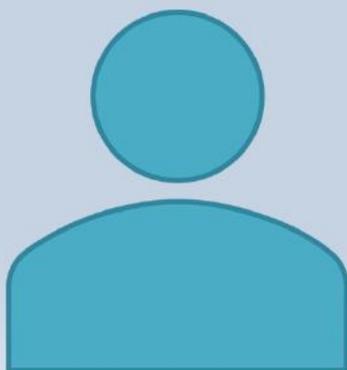


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Tips at the Hearing: Examining Witnesses



For witnesses called by the opposing party:

- 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.
- 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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Tips at the Hearing: 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?



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Tips at the Hearing: Examining Witnesses



Test for **implicit bias**:

- What is the essence?
- Create hypo that includes elements. Switch genders.



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Hypothetical 1

You have been assigned to advise a student at an upcoming hearing. Two weeks before the hearing, you attempt to 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 Considerations

“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...” (*Title IX Preamble*, p.1171)



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Hypothetical 2

You have been assigned an Advisee. Your Advisee states he/she/they 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 (RP) 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 for the other party. Together with any questions you can think of, you estimate the cross-examination will only last 5 minutes. You wonder if this is adequate.

What do you do?



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Hypothetical 3 Updates

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 (summarized in the investigation report).

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/they refuses to answer certain questions because the questions are “harassing” and “unfair.”

What do you do?



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Hypothetical 4
Considerations

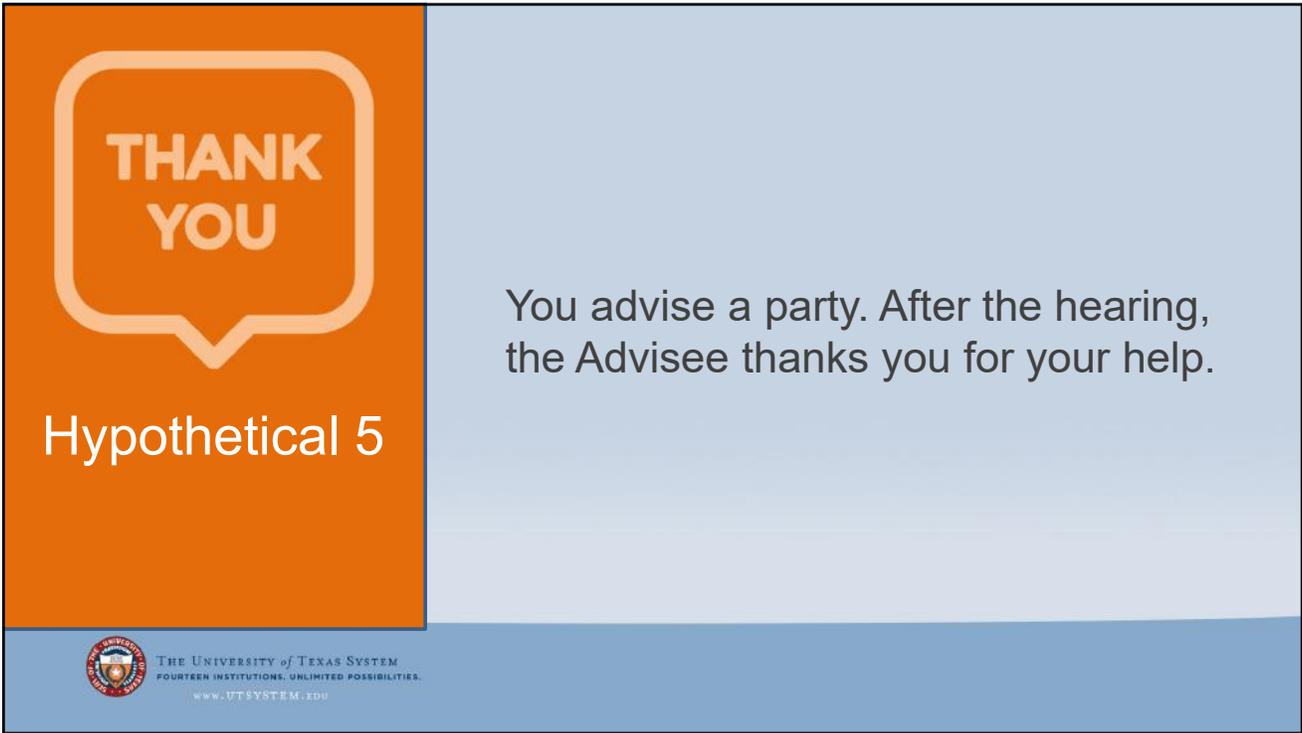
“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on **any statement** of that party or witness in reaching a determination regarding responsibility...”

Source: Title IX Regulations (2020)



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THANK YOU

Hypothetical 5

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

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Q & A



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