

The Value of Relevance During Cross-Examination in Title IX Hearings



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learning
OUTCOME

After participating...
*you will be able to identify
questions of relevance during
your live Title IX Hearing.*




AGENDA

1) Review Your Process

- How well do your procedures align with the new rule
- Actualize the role of the Advisor
- Respond to difficult situations

2) Case Study



#1

Review Your Process

NEW RULE — *Live Hearings*

- Colleges must have a live hearing to reach determinations regarding responsibility for sexual harassment
- IF live hearings occur... in separate rooms, then must conduct with technology enabling participants to see and hear each other
- Specifically allows technology platforms for virtual live hearings where a party can participate remotely
- Must be trained on the tech platforms

NEW RULE — *Cross-Examination*

- Either party has the right to undergo a live hearing and cross-examination in a separate room
- Questions or evidence regarding a complainant's sexual behavior not relevant except in 2 areas
- CROSS must be done: "directly, orally, and in real time"
- CROSS must be done by advisor (parties must **never personally question** each other), and if a party does not have their own advisor of choice at the live hearing, school provides (at no fee or charge) with an advisor of the school's choice, for [this purpose]

Cross-Examination

- Before a complainant, respondent, or witness answers a cross-examination or other question, **the decision-maker(s) must first** determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- 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 **PROVIDED...**

CHAT



**What stage are you in
drafting your new policy
to comply with the new
regulations?**

What is a **Statement**?

- Statements made during **the hearing**;
- any statement of the party or witness who does **NOT submit to cross-examination**; and
- **Police reports, SANE reports, medical reports, and other documents and records ...if** they contain the **statements of a party or witness** who has not submitted to cross-examination.

**“Statements” has its ordinary meaning...doesn’t include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements.

Relevance

FRE 401 – 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.

**REGS – layperson applying logic and common sense* -
decision-maker looking for plausibility and consistency
without prejudging**

FRE 401 – low threshold for admissibility

**REGS - permit a wide universe of evidence that may be
“relevant” (and thus not subject to exclusion)**

Rape Shield Exceptions

·§ 106.45(b)(6)(i) -

Sexual behavior *questions and evidence* are IRRELEVANT except:

1. are offered to prove that someone other than the respondent committed the conduct alleged by the complainant;
2. if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Role of Advisor

- Same opportunities to have advisors present...and participate in Title IX proceedings, subject to equal restrictions on advisors' participation, in recipients' discretion
- MAY place restrictions on active participation by party advisors (except for cross)
- 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

Role of Advisor Per New Mandate

A party cannot “fire” an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is **refusing** to “conduct cross-examination on the party’s behalf,” then the recipient is *obligated* to provide the party an advisor to perform that function, whether that means **counseling** the assigned advisor to perform that role, or **stopping** the hearing to assign a different advisor

Challenges in a Hearing

1. Advisors tell party not to answer *a cross-examination*** question
2. Unprepared/Unskilled/Outmatched Advisor(s)
3. Emotional/Difficult Party/Witness
4. Expert Witnesses
5. Privileged Material
6. Physical Evidence
7. New evidence brought to the hearing



POLL



**Who will be seeking
outside legal
professionals to either
serve as a neutral
gatekeeper of evidence
or as their hearing chair
to rule on relevance?**

Questions You May Have

- Yes, an investigator can be called as a witness
- Yes, an advisor can also be a witness
- No, cannot represent self – must have advisor
- Yes, if respondent counter-claims against the original complainant and is thereby designated a complainant, rape shield protections are then afforded the respondent as well
- Yes, anyone can ask the rape shield exception questions if relevant (not just respondent's advisor)
- Yes, pattern of inappropriate behavior may be asked if deemed relevant and applied to both parties

Relevance Exercises

Must exercise muscle to decide relevancy
— *Practice, Practice, Practice*

Any scenario can do this — need to build confidence

Legal experts often disagree on relevance in gray areas, so don't beat yourself up. It's squishy!

Relevance Exercise #1

Show me the body

- D charged with the murder of a man - had business dealings with V
- 3 days after V disappeared, police visited D's home
- D brought police to the kitchen through the back door, they handcuffed him and advised him of his rights
- His wife then entered the kitchen and, very excitedly, asked what was going on. Police answered that her husband was under arrest for murder. She then yelled, "Murder? Where is the body? Show me the body. Where is the body if there's a murder?" Another arresting officer testified that the defendant's wife, very agitated, shouted "Where's the body? Where's the body? I challenge you to tell me where the body is."
- At this time, the police had not discovered the victim's body

Relevance Exercise #2

Brotherhood

At the defendant's trial on a robbery charge, a government witness, Ehle, testified that the defendant had taken part in the crime. The defendant later called a witness, Mills, who testified that Ehle had told Mills in prison that Ehle intended to implicate the defendant falsely. On cross-examination, the prosecutor then asked Mills if he and the defendant were members of a "secret type of prison organization" that had a creed requiring members to lie and kill for each other.

Relevance Exercise #3

Dating relationship

Julie is dating Ethan at the time of the alleged incident of sexual assault by Zack. Ethan and Julie had been dating over a year by the time the incident occurs. Can Zack's advisor ask the following cross-examination question?

"Julie, at the time of the alleged incident, were you dating Ethan?"

Without more context, can the advisor ask a follow up question and probe the sexual nature of Julie and Ethan's relationship?

CHAT



Share potentially relevant questions related to the "rape shield" exceptions in a sexual harassment case.

Type out in chat or "raise hand" and wait to be called to share aloud.



#2

Case Study

ACTIVITY

Flash round with Hearing Panelist, Jill Thomas

1. Please review the Julie and Zack case study.
2. Next, please review the consent definition.
3. Please write at least 3 questions (no more than 5) that you want to ask Julie if you were Zack's Advisor.
4. Next, please write at least 3 questions (no more than 5) that you want to ask Zack if you were Julie's Advisor.
5. In a flash round style, we will ask you each to submit one of your questions, and, Jill (playing a hearing panelist) will decide if your question is relevant or not.
6. Please avoid asking questions already asked.
7. Please also intentionally try to plant some "irrelevant" questions in your mix so we can consider those too.

ACTIVITY

The Mock Hearing – Julie and Zack Case Study

PRACTICE: Attendee(s) plays hearing panelist chair to rule on cross-examination questions and evidence using the Julie and Zack case study.

2 advisors, 2 hearing panelists, 1 hearing chair to rule on each question as relevant or not relevant.

Rabia and Jill will play Julie and Zack respectively.

QUESTIONS?

RESOURCE



https://www.law.cornell.edu/rules/fre/rule_401

- includes advisory notes

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

TAKEAWAYS

- Relevance is the only gatekeeper
- Understand the rape shield exceptions
- Training and *practice* is key to developing muscle
- Recipients can put parameters around advisors and ASK advisors to state relevant reason for question/evidence
- Ensure a robust, tried and true tech platform to conduct hearing

Thank you!

Please remember to complete the *event evaluation*.
Your comments will help us continually improve the
quality of our programs.

Please refer to the Chat box to access the evaluation link.