

University Representative Role in Sexual Misconduct Hearings

Sean Flammer, Assistant General Counsel
Krista Anderson, Systemwide Title IX Coordinator

Fall 2021

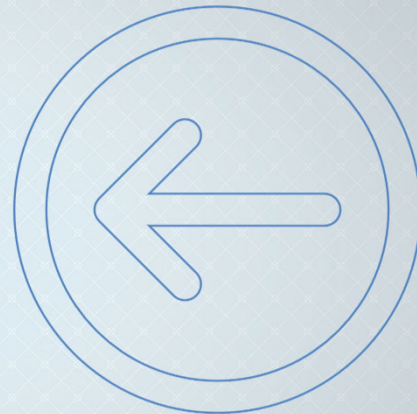


1

1

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



2

2

Background and Context



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

Purpose of Hearing

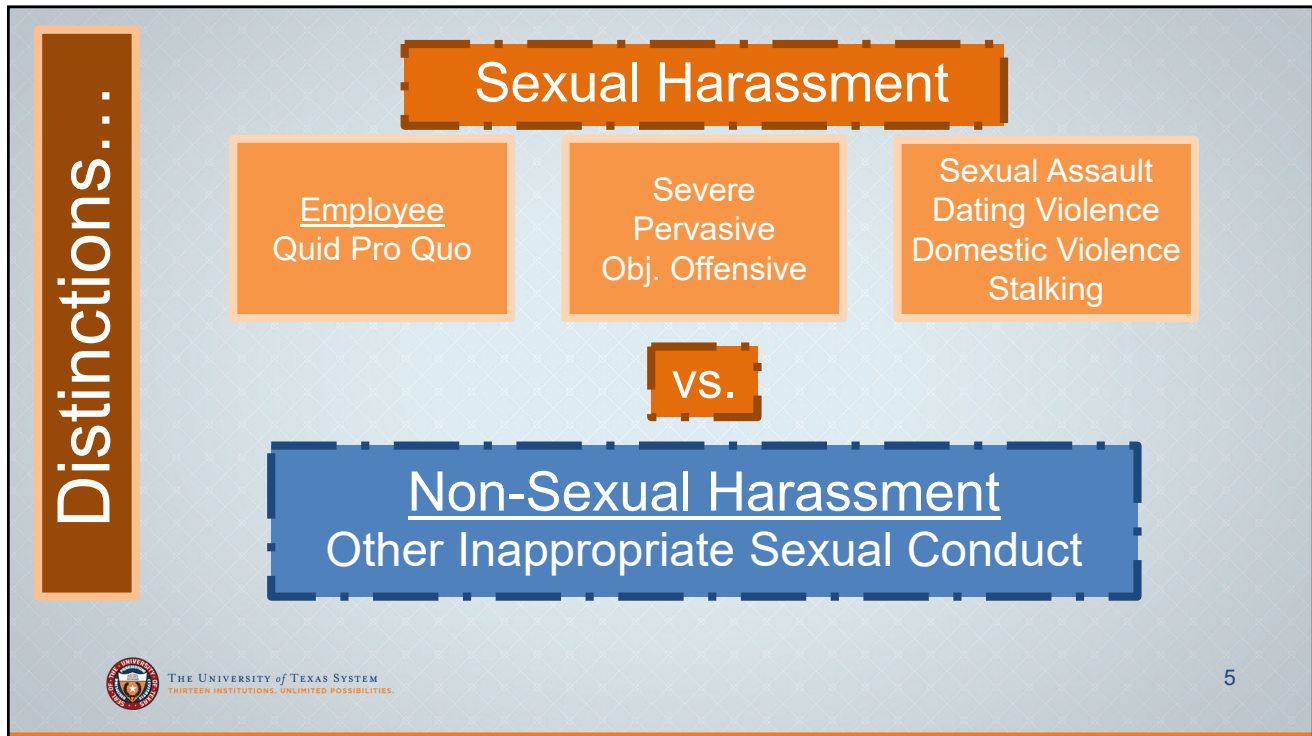
- It may be required by law
- Due Process
 - Notice
 - Opportunity to be heard
- Whether the RP committed a university policy violation.
- Determined by Impartial Hearing Officer



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4



5

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.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2021)

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

6

6

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



Example: Other Inappropriate Sexual Conduct



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

7

7

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...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

8

8

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;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

9

9

Important Distinction for Sexual Harassment Cases



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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Advisors at the Hearing

Sexual Harassment Cases

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

Non-Sexual Harassment Cases

- Advisors will **not** ask questions.
- Parties **may** have advisor.
- **Cross-examination** questions go through the **Hearing Officer**.

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



Outline Comparisons...

Title IX/Sexual Harassment

Notice

Investigation (**No determination**)

Both parties have access to all evidence related to the allegation(s) & ability to comment

No Administrative Disposition
Hearing Required

Appeal

Non-Sexual Harassment

Notice


Investigation (**Preliminary determination**)

Both parties have access to all evidence related to the allegation(s) & ability to comment

Administrative Disposition **or**
Hearing Options

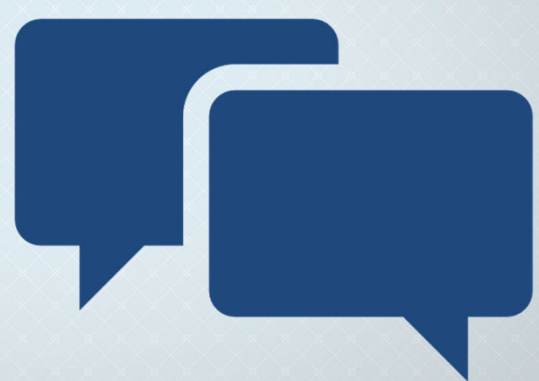
Appeal





Remainder of this training...

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

13

13

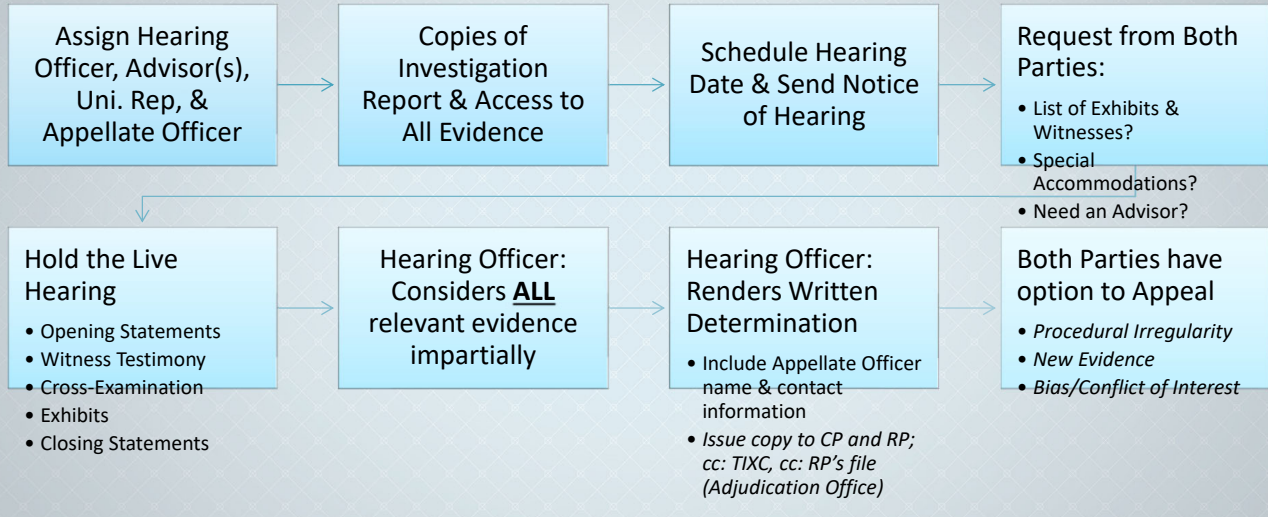
University Representative Role

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Live Hearing: Logistics Flowchart



Specific deadlines may be published in the institution's policy and/or procedures.

University Representative Role at Hearings

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





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

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

17

17

Before the Hearing:



An icon of a blue human head profile facing right, with three white gears of different sizes inside, symbolizing thought or mindset.

- Mindset:
 - **Fairness** and **appearance of fair.**
 - Parties to **be heard** and **feel heard.**
- Review materials.
- Review policy.

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

18

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.

19

19

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.

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.

20

20

Before the Hearing:



Witnesses to call:

- CP
- RP
- Witnesses
- Investigator?

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

21

Before the Hearing:

Test for **implicit bias**:

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

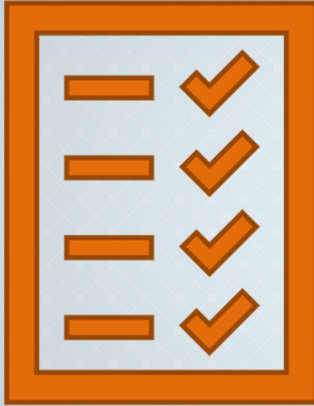


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

22

22

Before the Hearing:

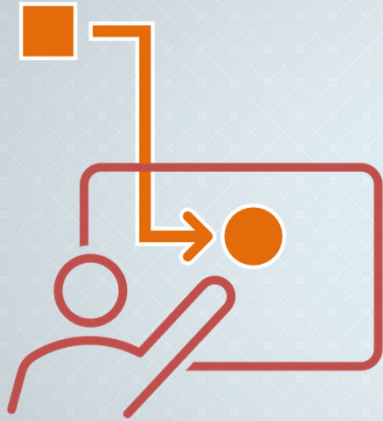


- Review your institution's policy.
- Get legal assistance from Legal Affairs at your institution or UT System's Office of General Counsel
 - Some institutions use Legal Affairs. Others use UT System's OGC.
 - To request OGC assistance, consult with Legal Affairs/Title IX Coordinator.
OGC contact: Tamra English
(tenglish@utsystem.edu)

At the Hearing



Overview of Hearing



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

Burden of Proof

Preponderance of the Evidence Standard

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





27

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.



Source:

UT System Model Policy for Sexual Misconduct (2021)

28

28

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

29

29

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

30

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

31

31

Tips for the Hearing:



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

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



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

32



Special Issues
at the Hearing



33

33

Logistics

“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.”




34

34

Exchange of Witness Lists & Documents



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

This Photo by Unknown Author is licensed under [CC BY-SA](#)

35

35

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

37

37

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

38

38

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

39

39

Hearsay Rule Updates



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

40

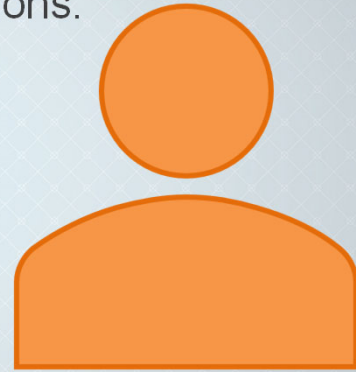
40

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...*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

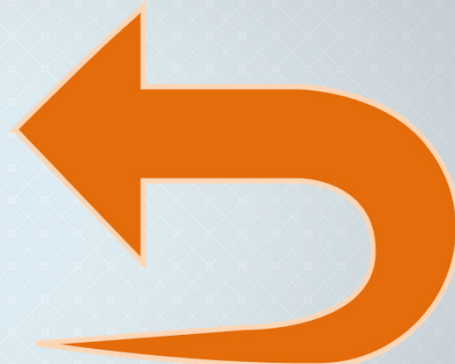
41

41

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

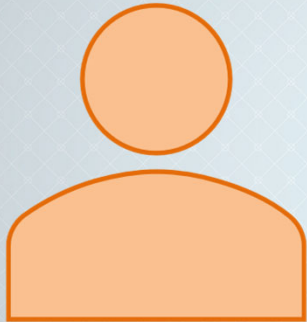


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

42

42

Tips at the Hearing: Examining Witnesses



- 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.

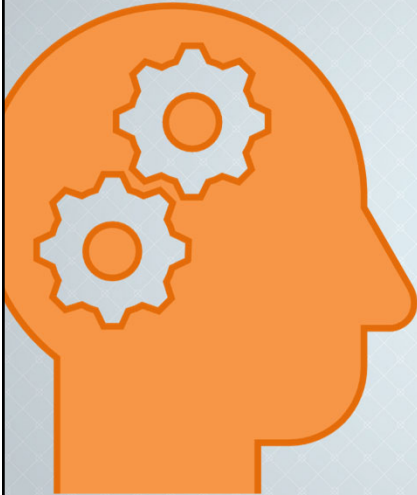
Tips at the Hearing: Examining Witnesses

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?



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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45



Hypothetical 1

In a domestic violence case, you have prepared exhibits and questions for several witnesses—all of whom witnessed the alleged incident. You are ready to establish all the various “elements” of the policy provision and you know the recommended sanction. In the respondent’s (RP) opening statement, however, the RP surprises you. The RP accepts responsibility, apologizes, and states that the recommended sanction is too harsh.

What do you do? Do you call all your witnesses to establish what happened?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

46

46



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?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

47

47



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?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48



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?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

49

49



Hypothetical 5

The respondent did not identify the respondent as a witness. At the hearing, the respondent tries to testify.

What do you do? Do you object?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

50

50



Hypothetical 6

A party is represented by a lawyer. The lawyer has been aggressively asking questions of every witness. You objected when you thought the lawyer's conduct was out-of-line, but the hearing officer overruled your objection. On the latest question, the lawyer makes a facial expression, showing disbelief at the witness's answer—which you tend to believe.

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

51

51

Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

52

52

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

53