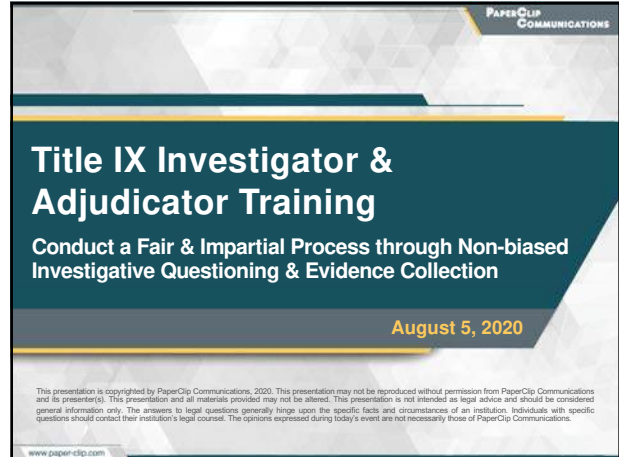




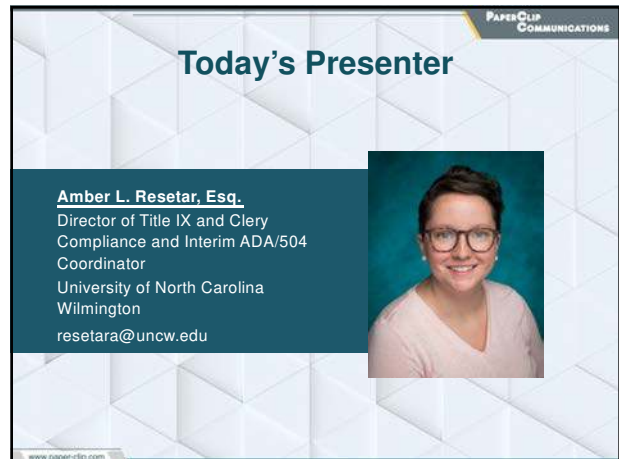
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General Considerations

- This presentation is meant to provide general information and is not intended to constitute legal advice.
- The presentation will focus on generalities, including the requirements of federal law with some allusions to state law. It is not a comprehensive legal summary.

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General Considerations

- Legal questions should be referred to a lawyer licensed in the relevant jurisdiction who can analyze all specific facts of the case.

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General Considerations

- What is legally required versus what is in the best interest of the students, employees, or institution should be part of your individual analysis of all of these issues.

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THE LANDSCAPE

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The Landscape

- Clery Act
 - Violence Against Women Act (VAWA)
- Title IX
 - Dear Colleague Letters
 - Case Law
 - Regulations
 - Resolution Agreements
 - Pending Legislation
- Constitutional considerations

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Clery Requirements

- Must provide and publish policies and procedures related to sexual misconduct
 - Clery focuses on VAWA crimes
- Requires interim accommodations
- Requires prompt, fair, and impartial proceedings conducted by trained, unbiased individuals
- Requires advisor of choice for both parties

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Constitutional Considerations

- Due process is comprised of two pieces: substantive due process and procedural due process
- Origins: Fifth and Fourteenth Amendment of the U.S. Constitution requiring protections against the deprivation of life, liberty, or property
- Important education-related case: *Goss v. Lopez*, 419 U.S. 565 (1975).

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Active DOE/OCR Guidance

- With the issuance of interim guidance in September 2017, Secretary DeVos stated that “[t]his interim guidance will help schools as they work to combat sexual misconduct and will treat all students fairly... But the process also must be fair and impartial, giving everyone more confidence in its outcomes.”

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Active DOE/OCR Guidance

- The September 2017 statement concluded with "...the era of rule by letter is over."
- Initial speculation about the regulations indicated that they would include:
 - Allowance to choose evidentiary standard
 - Flexibility on appellate process
 - Formalization of evidence exchange and cross examination
 - Allowance of mediation

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OCR COVID-19 Guidance

- Q and A document issued May 12, 2020
- Listed several considerations for institutions regarding ongoing operations during the current pandemic, including:
 - Disability accommodation requirements
 - Resource provision related thereto
 - Sign language versus closed captioning
 - Continuity of Title IX cases

"Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency."

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2020 DOE/OCR Regulations

- On May 6, 2020, the Department of Education released new regulations entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," at 34 CFR Part 106.
- Implementation of these regulations is required by August 14, 2020.

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2020 DOE/OCR Regulations

- The preamble provides that "the final regulations: affirm that the Department's Office for Civil Rights ("OCR") may require recipients to take remedial action for discriminating on the basis of sex or otherwise violating the Department's regulations implementing Title IX, consistent with 20 U.S.C. 1682..."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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2020 DOE/OCR Regulations

- Further, "...clarify that in responding to any claim of sex discrimination under Title IX, recipients are not required to deprive an individual of rights guaranteed under the U.S. Constitution; acknowledge the intersection of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to Title IX rights..."

"Nondiscrimination on the Basis of sex in Education Programs or Activities Receiving Federal Financial Assistance."

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PRELIMINARY CONSIDERATIONS

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Framing the Policy Process

- Requirements versus allowances
- Student processes versus faculty and staff processes
 - Collective bargaining agreements?
 - Faculty/staff handbooks?
 - At will, temporary, and other classification differences
- Policy revision processes
 - Cabinet and/or board approval

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Identifying Relevant Partners

- EEO office/Title IX office
- General Counsel
- Human Resources
- Office of the Dean of Students
- Advisory boards

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REQUIRED POLICY DEFINITIONS

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Policy Definitions

- Section 106.30
 - Complainant
 - Formal Complaint
 - Grievance Process
 - Respondent
 - Sexual Harassment
 - Retaliation
 - Jurisdiction
 - Standard of Evidence

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Complainant

- “Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”

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Respondent

- “Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

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Formal Complaint

- “Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”

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Formal Complaint

- “A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.”

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Sexual Harassment

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - 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 recipient's education program or activity; or...

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Sexual Harassment

- “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - ...‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”

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Retaliation

- Section 106.71: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

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Retaliation

- Retaliation includes: intimidation, threats, coercion, discrimination, “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances” for the “purpose of interfering with any right or privilege secured by title IX.”

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Jurisdiction

- Section 106.44
 - Covers all students, faculty, and staff
 - Must be:
 - Part of “education program or activity”
 - “Against a person in the U.S.”

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Dismissal

- Section 106.45(b)(3)(i)-(iii)
 - Required dismissal:
 - If the conduct does not constitute sexual harassment
 - Did not occur in the institution’s program or activity
 - Did not occur against a person in the U.S.
 - Optional dismissal:
 - Complainant withdrawal from process
 - Respondent no longer enrolled/employed
 - Insufficient evidence available to make a determination

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Standard of Evidence

- 106.45(b)(1)(vii) and 106.45(b)(7)(i):
 - The standard of evidence must be publicized. Institutions may select between preponderance and clear and convincing.
 - In so choosing, the institution must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”

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PROCEDURAL COMPONENTS

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Formal Grievance Procedure

- 106.45(b)(1)(i): Equitable Treatment of Complainants and Respondents
- 106.45(b)(1)(ii): Objective Evaluation of All Relevant Evidence
- 106.45(b)(1)(iv): Presumption of Non-Responsibility
- 106.45(b)(1)(v): Reasonably Prompt Time Frames

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Formal Grievance Procedure

- 106.45(b)(1)(vi): Describe Range or List of Possible Sanctions and Remedies
- 106.45(b)(1)(vii): Describe Standard of Evidence
- 106.45(b)(1)(viii): Procedures and Bases for Appeal
- 106.45(b)(1)(ix): Describe Range of Supportive Measures
- 106.45(b)(1)(x): Privileged Information

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Evidence

- Privileged information not permitted unless disclosed by individual holding the privilege
- Evidence may also be restricted based on rape shield-type policy or based on relevance
- No evidence (specifically statements) permitted to be considered if an individual does not present for cross-examination

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Investigation

- The single investigator model is now prohibited (106.45(b)(7)(i)).
 - There must be autonomy between the Title IX Coordinator, the investigator(s), the adjudicator(s), appellate decision-maker(s), and facilitator(s) of informal resolution.

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Investigation

- Burden of proof and evidence collection is placed upon the institution (106.45(b)(5)(i)).
- All parties must have an equal opportunity to present witnesses and other evidence (exculpatory and inculpatory) (106.45(b)(5)(ii)).
- No gag orders permitted (106.45(b)(5)(iii)).

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Investigation

- Advisors of choice must be permitted. Participation in the process can be controlled by the institution, but must be done fairly (106.45(b)(5)(iv)).
- Written notice of all hearings, meetings, and interviews must be given with adequate time for the individual to prepare (106.45(b)(5)(v)).

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Investigation Report

- The investigation report is required to “fairly” summarize “relevant” evidence (106.45(b)(5)(vii)).
- Parties must be given an opportunity to review and inspect all evidence.
- Additionally, parties must be given ten (10) days to review and comment upon the investigative report prior to finalization.

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Hearings

- Live hearings required (*see 106.45(b)(6)(i)*)
 - Facilitating technology permitted
 - No barriers to sight/sound permitted
- Cross-examination required
 - All cross-examination must be conducted by advisor (either of choice or supplied by the institution)
 - Relevance determinations must be made prior to any question being answered and decisions to exclude must be placed on record in real time.

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Determination of Responsibility

- 106.45(b)(7)(ii): Written Determination Regarding Responsibility Must Include Certain Details
 - Identification of the allegations
 - Description of the procedural steps from the initiation of the process onward
 - Includes determination of responsibility, notifications to parties, interviews with parties and witnesses, site visits, methods to gather evidence, and hearings

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Determination of Responsibility

- 106.45(b)(7)(ii) (*continued*):
 - Findings of fact supporting the determination of responsibility
 - Application of the code of conduct to the facts
 - A statement of the result of each allegation and rationale
 - Includes determination of responsibility, sanctions, remedies provided to complainant
 - Notice of appellate process and procedure

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Appeals

- 106.45(b)(1)(viii) and 106.45(b)(8) require that both/all parties must be offered the opportunity to appeal from a determination of responsibility or from a dismissal of a formal complaint (in its entirety or in parts) on the following grounds:
 - Procedural irregularity that impacted the outcome
 - New evidence that was not reasonably available
 - Staff/facilitator bias for/against complainants or respondents generally or the parties in the case

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Record Retention

- An institution must maintain records for seven (7) years, including:
 - Sexual harassment investigation including determination regarding responsibility
 - Sanctions imposed
 - Remedies issued
 - Appeals, including results
 - Informal resolutions, including results
 - Training materials

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ADDITIONAL OPTIONAL CONSIDERATIONS

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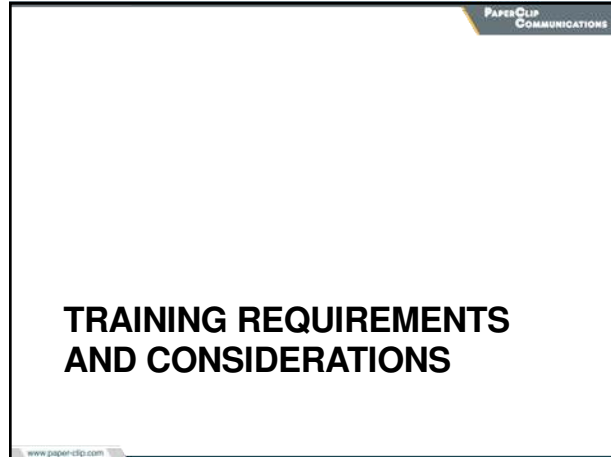
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Informal Resolution

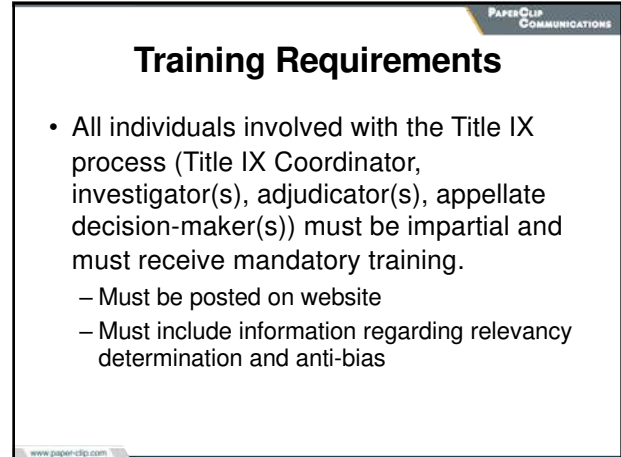
- 106.45(b)(9): At any time after the filing of a formal complaint, but before reaching a determination regarding responsibility for allegations, an institution may facilitate an informal resolution process like mediation (that does not involve a full investigation and adjudication).
 - Written notice still required
 - Right to withdraw prior to resolution
 - Must have voluntary, written consent of parties

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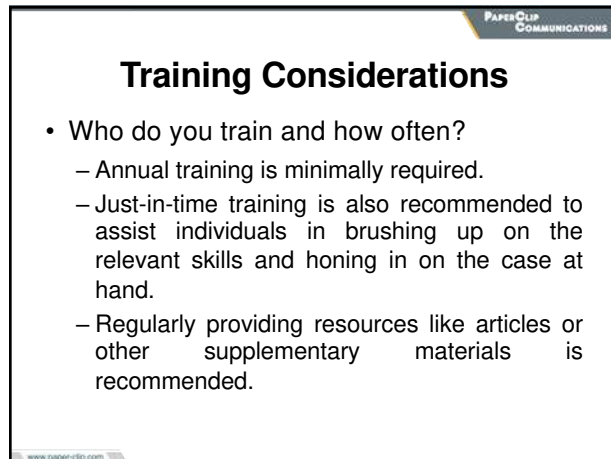
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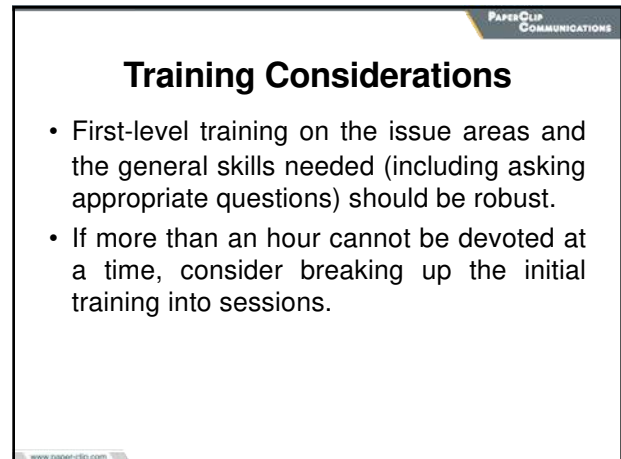
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Training Considerations

- Once familiarity with the topic area and skills is established, all staff involving in the process need to become familiar with the institution's policies and procedures.

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Now it's time for a short break.

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TRAINING CONTINUED

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Bias

- Oxford Languages defines bias as "prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair."
- The regulations hone in on both generalized bias against parties and specific bias against a particular, named party.

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Anti-Bias Training

- Unconscious bias training/exercises
 - Start with assessment
 - IAT (Project Implicit)
 - Engage with activities
 - Counterstereotype
 - Negation
 - Perspective-taking
 - Follow up/continual training
- Diversity and inclusion training

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Relevance

- Federal Rule of Evidence 401 gives the following test for relevant evidence: “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.”

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Relevancy Determinations

- Relevance plays a role in the investigation and report related thereto. Ensure part of the report is dedicated to documenting relevance as a guidepost for future proceedings.

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Relevancy Determinations

- Establish a system of documentation as it relates to real-time relevancy determinations at hearings.
 - First, document all questions proposed by advisors.
 - Indicate whether the questions were relevant or not. Also document why.

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Evidence Collection

- Start by requesting in writing that parties and witnesses bring relevant evidence with them to the initial interview.
- Investigators should verbally reiterate the request both generally and specifically if there is reference to items that would be helpful to the investigation during the interview.

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Evidence: Statements

- For interviews, establishing rapport should be first on the list.
 - Start with a statement of neutrality and an explanation of the investigator role.
 - Allow space and time for breaks.
 - Acknowledge that “I don’t know” is an acceptable answer from the outset.
 - The parties or witnesses are the expert in that moment. Let them know that.

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Evidence: Statements

- For questions at any time during the process, the staff involved should be trained to examine:
 - “Why do I want to know this information?”
 - Relevance
 - “How will it lead me to a greater understanding of the situation at hand?”
 - Relevance
 - “What’s the best possible way to ask this question?”
 - Neutrality

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Evidence: Statements

- Ask open ended questions:
 - Start by asking the individual to generally narrate the incident in question.
 - Follow up with other open ended questions: “what are you able to tell me about...”
 - What you saw?
 - What you heard?
 - How that made you feel?
 - What you thought would happen?
 - What are you able to tell me about your thought process when...?

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Evidence: Statements

- Technical or specific, directed questions should be saved for when open-ended questions are exhausted.
- If more information is needed about a response, good follow-ups include “tell me more about...” or “I’d like to go back to when you said...”

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Evidence: Statements

- Respond to inconsistencies with curiosity, not interrogation:
 - “What are you able to tell me about that?”
 - “Can you help me understand...”
 - “Can you tell me more about that?”

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Evidence: Statements

- Avoid “blaming language.”
- Breaks and silence can be productive. Don’t rush.
- Be aware of nonverbal messages.
- Close with asking if there is anything else the party or witness thinks should be known.

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STANDARD OF EVIDENCE

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“The Legal Concept of Evidence.”

- “On one interpretation, the standard of proof is a probabilistic threshold. In civil cases, the standard is the ‘balance of probabilities’ or, as it is more popularly called in the United States, the ‘preponderance of evidence’. The plaintiff will satisfy this standard and succeed in his claim only if there is, on all the evidence adduced in the case, more than 0.5 probability of his claim being true.”

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“The Legal Concept of Evidence.”

- “At criminal trials, the standard for a guilty verdict is “proof beyond a reasonable doubt”. Here the probabilistic threshold is thought to be much higher than 0.5 but courts have eschewed any attempt at authoritative quantification. Typically, a notional value, such as 0.9 or 0.95, is assumed by writers for the sake of discussion.”

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“The Legal Concept of Evidence.”

- “Where, as in the United States, there is an intermediate standard of “clear and convincing evidence” which is reserved for special cases, the probabilistic threshold is said to lie somewhere between 0.5 and the threshold for proof beyond reasonable doubt.”

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Preponderance of Evidence

- The Legal Information Institute more simply defines preponderance as the burden of proof that “is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.”

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Clear and Convincing

- The Legal Information Institute defines “clear and convincing” as meaning that “the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.”

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Clear and Convincing

- The Legal Information Institute goes on to explain that “[t]his is a medium level of burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt...”

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Clear and Convincing

- “...In order to meet the standard and prove something by clear and convincing evidence, the party alleging the contention must prove that the contention is substantially more likely than not that it is true.”

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STANDARDIZATION OF DOCUMENTATION

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Documentation

- All reports should be formal and, when relevant, written in the third person.
- Neutrality is critical in all documentation.
 - Policy
 - Notice of investigation
 - Email correspondence
 - Investigator inquiries
 - Adjudicator questions/interactions

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Documentation

- Establish clear guidelines on language to be used. It is advisable to use the language set forth in the regulations, particularly “complainant” and “respondent.”

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Template Creation

- There are items that should be consistent throughout each investigative report. They include:
 - A description of the allegations/the commencement of the investigation (including relevant dates)
 - Interviews (including date and type of interview)
 - “Charges”

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Template Creation

- Relevant policies (including full definitions)
 - Scope of investigation
 - Standard of evidence
 - Jurisdiction
- Conclusion
 - Recommendations
- Background Information

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Template Creation

- Discussion
 - Broken down by charges
 - Every element examined and connected to factual findings
 - Credibility analysis
 - Relevancy analysis
 - Recommendations reiterated

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Template Creation

- Appendices
 - Witness statement summaries
 - Evidence
 - If not documentary, a description thereof
 - A summary timeline, if appropriate

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Additional Templates

- Notice of investigation
- Notice of outcome determination
 - Allegations
 - Procedural steps
 - Findings of fact
 - Application of code to findings
 - Individual findings and sanctions
 - Appellate rights

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Now it's time for today's key takeaways.

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Today's Key Takeaways

1. The first fundamental step to meeting the legalistic challenge of these new regulations is having clear, well publicized, and easily navigable policies and procedures so that all parties (and their advocates/support people) know what to expect and how to prepare.

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Today's Key Takeaways

2. Some have likened the process required in the regulations to the court system or a trial. Court is an adversarial process and attorneys may assume that the same lens is applicable to university conduct. Although there is an element of adversarial nature to these cases, the process inherently is not meant to be so. Setting a standard of institutional neutrality at the outset is crucial to ensuring that the process is compliant as well as a process that engenders the trust of all participants.

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Today's Key Takeaways

3. Creation and utilization of a template for investigative reports, notice documents, and other writings in the process is critical for timeliness, impartiality, consistency, and compliance.

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Today's Key Takeaways

4. Every element of every relevant charge must be examined individually. Jurisdiction, standard of evidence, and credibility should be similarly broken down and analyzed. Just as it is critical to "show your work" when completing a math problem, it is equally as critical to "show your work" in analysis in synthesis in the investigative report and the notification of outcome.

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Today's Key Takeaways

5. Consistent, thorough training on process and procedure are equally important to training on issues specific to sexual violence and harassment, relevancy determinations, and anti-bias considerations. Further, training is not an annual occurrence with no further work until the following annual cycle. It should be ongoing.

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Now it's time for the Q&A.

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Complimentary Resources

PaperClip Communications knows how difficult and uncertain this time is, and we're happy to offer these complimentary resources to help our colleagues during this crisis.

COVID-19 Resources

ON-DEMAND TRAININGS

- ▶ **Supporting Your Remote Staff:** Balance Productivity Levels with Sensitivity to Isolation Anxiety, Uncertainty & Grief
- ▶ **Anticipatory Anxiety:** Evolving & Exacerbated Mental Health Crisis Created by the COVID-19 Pandemic & Ways to Address It Effectively

PDF DOWNLOADS

- ▶ Positive Higher Ed News During Difficult COVID-19 Days
- ▶ The Very Real Problem of Coronavirus-Related Racism
- ▶ How to Deal with Discrimination
- ▶ Characteristics of Hate Episodes on Campus
- ▶ And More

Diversity & Racism Resources

PDF DOWNLOADS

- ▶ Racial Identity and Dynamics Workshop
- ▶ Diversity and Social Justice Workshop
- ▶ 5 Key Characteristics of Implicit Bias
- ▶ DIVERSITY is...
- ▶ In a Community of Respect
- ▶ Change
- ▶ We Are All Beautiful Mosaics
- ▶ We Learn About One Another's Differences & Commonalities
- ▶ We Embrace the Diversity That Makes Our Community Strong & Beautiful

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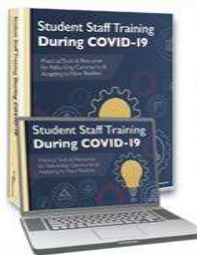


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Student Staff Training During COVID-19

Practical Tools & Resources for Rebuilding Community & Adapting to New Realities

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