

TITLE IX HEARING PRACTICE TIPS

A CONSENT AND QUESTIONING OVERVIEW



CONTENT WARNING

**CONSENT, SEXUAL VIOLENCE
SCENARIOS**

INTRODUCTIONS

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- Who do we have in the room?
- What brings you here?

PURPOSE:

- Practice Tips
- Title IX Hearing Requirements
- Content Knowledge
- Resources



PRACTICE TIPS

OVERVIEW, NOTE TAKING, FRAMING
THE QUESTION

CONDUCT BOARD: OVERVIEW

- Review the evidence presented and make a determination/finding
 - Does the evidence support a finding that a provision of the Harassment and Sexual Misconduct Policy was violated?*
- An investigation has been conducted and you are reviewing the evidence and making a determination
 - What is your evidence: witness statements, photos, text messages, emails, videos, Facebook posts, witness demeanor, etc.
 - The investigator's report is a summary, but you cannot rely on it as evidence
 - SO - what does that mean? The complainant and respondent must present the evidence that you will evaluate and you should be ready to ask questions in areas that you believe need clarification.
 - Yes, there can be many gray areas
 - How can you prepare for that?

*The Title IX Policy is split from the Nondiscrimination Policy this year. These standards apply only to the Harassment and Sexual Misconduct Policy, not the Nondiscrimination Policy.

PRACTICE TIPS

- As you review the report in preparation for the hearing, note the areas where questions arise for you
- Write out the questions and note who might have the information you need
- Work on framing your questions - **the art of language**
- **Inconsistent Statements** - good idea to anticipate them
- May not always have the witness testify; good to know who else might have the information you need

PRACTICE TIPS: NOTE TAKING

- Note-taking Suggestion:T-chart
 - Write evidence favoring the complainant in one column, and favoring the respondent in the other column.
 - You may have evidence from the same source in both columns
 - Align evidence on the same points across from one another in the T-chart
 - Note the source so you can revisit later if you still have questions
 - When there's conflict, make a credibility determination to see who you believe

Respondent	Complainant
Went to the bar at 9 pm.	Went to the bar at 8 pm
Met the complainant around midnight.	Drank about 5 strong mixed drinks and a shot before 9:30 pm
Complainant invited him in, he knew she wanted to have sex. They didn't talk about not wanting sex.	Met the Respondent sometime in the night
Complainant initiated kissing	Invited him to her house, but said she was not ready to have sex.
Complainant started touching him through his clothes	Kissed, laid on the bed.
Complainant was quiet during sex. He left because she was sleeping right after.	Felt really sick, can't remember what happened.
	Groggy, saw respondent on top of her, felt something inside her vagina. Not sure if it was a penis or a finger.
	Woke up the next morning and went to the hospital.

PRACTICE TIPS: FRAMING THE QUESTION

- Sometimes the questions have to be asked - but do so with sensitivity
- Open-ended questions are good: let the witness tell you the story
- Can be specific
- Frame the question: when, where?
 - Specific, open-ended, framed: “I want to focus on the 10 minutes you were sitting on the couch.”
 - **Instead of: What were you thinking?**
 - Try: I would really like to understand what was happening in that moment? Can you walk me through the thoughts running through your head, if you had any in that moment? What were you feeling?

PRACTICE TIPS: FRAMING THE QUESTION

- Why didn't you just leave? *What happened next? How did you get home?*
- Why didn't you tell anyone right away? *Did you talk to anyone about it?*
- Why didn't you go to the police? *Were you able to talk to the police?*
- Why didn't you tell him/her to stop? *Gather the surrounding details*
- What were you wearing? *Not relevant*
- Why were you drinking? *Were you drinking? (gather in the details)*
- Why did you leave the party with him/her? *Gather the surrounding details*
- What did you think was going to happen? *Gather the surrounding details*
- Did you fight back? *Gather the surrounding details*



TITLE IX HEARING REQUIREMENTS: A HIGH BAR

**ADVISOR OF CHOICE, DIRECTLY
RELATED EVIDENCE, RELEVANCE,
CROSS-EXAMINATION**

ADVISOR OF CHOICE

- Who is an advisor?
 - Anyone the party asks to represent them: friend, family, lawyer, or Discrimination Complaint Advisor
 - Advisor, in most cases, will not be a support person
- Cases that go forward under our Harassment and Sexual Misconduct Policy require an advisor to complete cross-examinations
 - Does not apply for cases going forward under other policies
 - Advisor participation is limited to cross-examination of parties and witnesses only
 - Not opening/closing statements
 - Not objections to the panel
 - Advisors *MAY* speak to their own party as much as they want
 - Advisors *MAY* make reasonable requests in the judgment of the chair such as taking a break
- Hearing Panel must enforce rules of decorum and remove any advisor who acts inappropriately

DIRECTLY RELATED EVIDENCE

- Directly Related Evidence: documentation submitted to the Hearing Panel that is somehow related to the hearing. This is more broad than “relevant” evidence.
 - See examples in your hearing packet handout
 - Not illegally obtained
 - Investigator, Dean of Students, Human Resources, Title IX Coordinator have a right to redact information that is not relevant or protected by privilege

RELEVANCE

- Relevant: probative of any material fact concerning the allegations
 - Standard: a layperson’s determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise
 - See examples in packet
 - Restrictions on Questions about Prior Sexual History: not relevant UNLESS
 - Offered to prove that someone other than the respondent committed the conduct alleged, or
 - Questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent
 - Repetitions of things that have already been stated are not relevant
 - Information protected by a legally recognized privilege are not relevant unless parties gave voluntary written consent
 - Medical or psychological or similarly protected records
 - **PARTY OR WITNESS STATEMENTS THAT HAVE NOT BEEN SUBJECTED TO CROSS EXAMINATION AT A LIVE HEARING ARE NOT RELEVANT**

RELEVANCE: OBJECTIONS

- All parties can object for relevance: complainant, respondent, or hearing panel. Parties are expected to make the objections on their own, and not through their advisors.
- Hearing Panel makes determination on relevance through the Chair, but all panel members should make suggestions
 - Hearing panel will explain briefly why they made the determination they chose
 - Cannot challenge the determination on relevance in a hearing. Hearing Panel decision is final
 - You can challenge an investigator's determination of relevance in the written response to the Hearing Panel and make a verbal argument at the hearing

CROSS-EXAMINATIONS

- Only statements subject to cross-examination are relevant
- Statements not subject to cross-examination cannot be considered in a determination
 - If a party alleges a certain fact and refuses to answer a follow-up question on that fact, that fact cannot be considered in a determination
 - Written statements cannot be relied upon unless subject to cross-examination
 - Includes Police and SANE reports: Police and SANE nurses must participate in the hearing for their statements to be relied upon
 - Text messages/emails: when statements of both parties are intertwined, and one party submits to cross-examination and the other does not, only the statements of the individual who submitted to cross-examination can be relied upon.
 - Video evidence: where video evidence exists, the decision-maker may rely on the video even if parties do not subject themselves to cross-examination



CONTENT KNOWLEDGE

**CONSENT, INTOXICATION,
NEUROBIOLOGY OF TRAUMA,
CREDIBILITY DETERMINATIONS**

CONSENT

- The Indiana Criminal Code does not define consent in reference to sexual activity.
- Valpo Policy defines consent as “informed, freely given, and mutually understood. Consent requires an affirmative act or statement by each participant. Consent is not passive.”
 - Consent to one form of sexual activity does not imply consent to other forms of sexual activity
 - Consent can be withdrawn
 - A person who initially consents to sexual activity is deemed not to have consented to any sexual activity that occurs after he or she withdraws consent.
 - Consent to previous sexual activity does not imply consent to future sexual activity

CONSENT

- Under Indiana law, THERE IS NO CONSENT and a sex crime is committed if:
 - The victim is compelled by force or imminent threat of force
 - The victim is unaware that the sexual intercourse or other sexual conduct is occurring; or
 - The victim is so mentally disabled or deficient that consent to sexual intercourse or other sexual conduct cannot be given (IC 35-42-4-1; 35-42-4-8)
- Additionally, under Valpo Policy there is NO CONSENT if
 - Coercion, intimidation, threats, and/or physical force are used
 - A person is mentally or physically incapacitated or impaired by alcohol or drugs such that the person cannot understand the fact, nature, or extent of the sexual situation
 - A person is asleep or unconscious

CONSENT

- A great deal of gray area exists
- We require affirmative consent; consent is not passive
- Consent must be drawn from the “totality of the circumstances”
 - Can be verbal statements, physical reactions, texts, videos, crying, shaking of the head, etc.
 - Failure to resist is not consent
- Consent may be for some of the conduct, but not all
- Consent may be withdrawn at any time

CONSENT

- Can come down to a credibility determination
- Your questions, if needed, are key
- Document your decision
- Consult with Title IX Coordinator



CONSENT IS LIKE TEA

<https://www.youtube.com/watch?v=fGoWLWS4-kU&t=6s>

CONSENT: EXAMPLES

CLEAR CONSENT DETERMINATIONS

- Clear consent:
 - Being asked to engage and answering with a clear, sober
 - Yes!
 - Nodding “yes”
 - Inviting their partner(s) to engage
- Clear lack of consent
 - No!
 - Asleep
 - Silence
 - Drunk and vomiting

GREY AREAS

- Someone is drinking, stumbling, slurring their words, and obviously intoxicated, but otherwise holding conversations. When asked whether they want to have sex, the person gives a verbal “yes” to engage in sexual activity.
- A complainant reports they “cant remember” whether they consented, but the respondent reports “they initiated the sexual contact”

INTOXICATION/INCAPACITATION

- Goal today is not about making you an expert regarding intoxication or incapacitation
 - There are no bright line rules - except for unconsciousness
 - You must be able to identify evidence or evoke answers that suggest whether someone was more likely intoxicated or incapacitated
- Involves substances:
 - Alcohol, illegal drugs, prescribed medication, or a combination of substances

INTOXICATION/INCAPACITATION

- Intoxication and Incapacitation are not the same
 - As an example: intoxication can range to have some alcohol to can't drive per law, but may still be able to make decisions
- **Indiana description of INCAPACITATION:**
 - The person is unaware that the sexual intercourse or other sexual conduct is occurring (IC 35-42-4-1).

INTOXICATION/INCAPACITATION

-Why does intoxication matter?

- Can affect capacity to give consent
- Can affect recollection
- Can affect your assessment of witness credibility

INTOXICATION/INCAPACITATION

- As a board do you have enough to make a decision regarding intoxication and incapacitation one way or another? If you are not sure, communicate with the Title IX Coordinator.
- Indicia of intoxication:
 - Slurred speech, off-balance when walking, glassy eyes, odor of alcohol from breath, vomiting, coherence, demeanor, etc.
- Indicia of incapacitation:
 - Unconscious, unable to articulate coherent sentences, going in and out of consciousness, unable to walk, cannot stand, involuntary urination, etc.

INTOXICATION/INCAPACITATION

- Lots of gray
- Facts must be determined on a case by case basis
- You may consult with Title IX

NEUROBIOLOGY OF TRAUMA

- How victim's record memory during an event
 - Memory is impaired
 - The emotional and sensory parts of the brain are responding
 - Memory is fragmented, and difficult to retrieve (not stored in orderly chronological way)



NEUROBIOLOGY OF TRAUMA

Dr. Rebecca
Campbell,
Neurobiology of
Trauma - “Post-It
Notes” [end at 5:41]

<https://www.youtube.com/watch?v=AnRpoGSOkZs>

CREDIBILITY DETERMINATION

- Means: who do you believe if there are conflicts in the recollections?
 - Complainant (victim): when recollections are different, you believe the complainant
 - Respondent (accused): when recollections are different, you believe the respondent
 - Both: when recollections are different, you are unable to make a determination. You can still make a finding based on admitted facts from both parties.
 - Neither: when recollections are different, you are unable to make a determination. You can still make a finding based on admitted facts from both parties.
- Think: how do I rectify conflicts?
 - Keep in mind neurobiology of trauma, possible intoxication



RESOURCES

POLICIES & HANDBOOKS,
DEFINITIONS, & COMPLAINT
FLOWCHART

POLICIES: READ CLOSELY

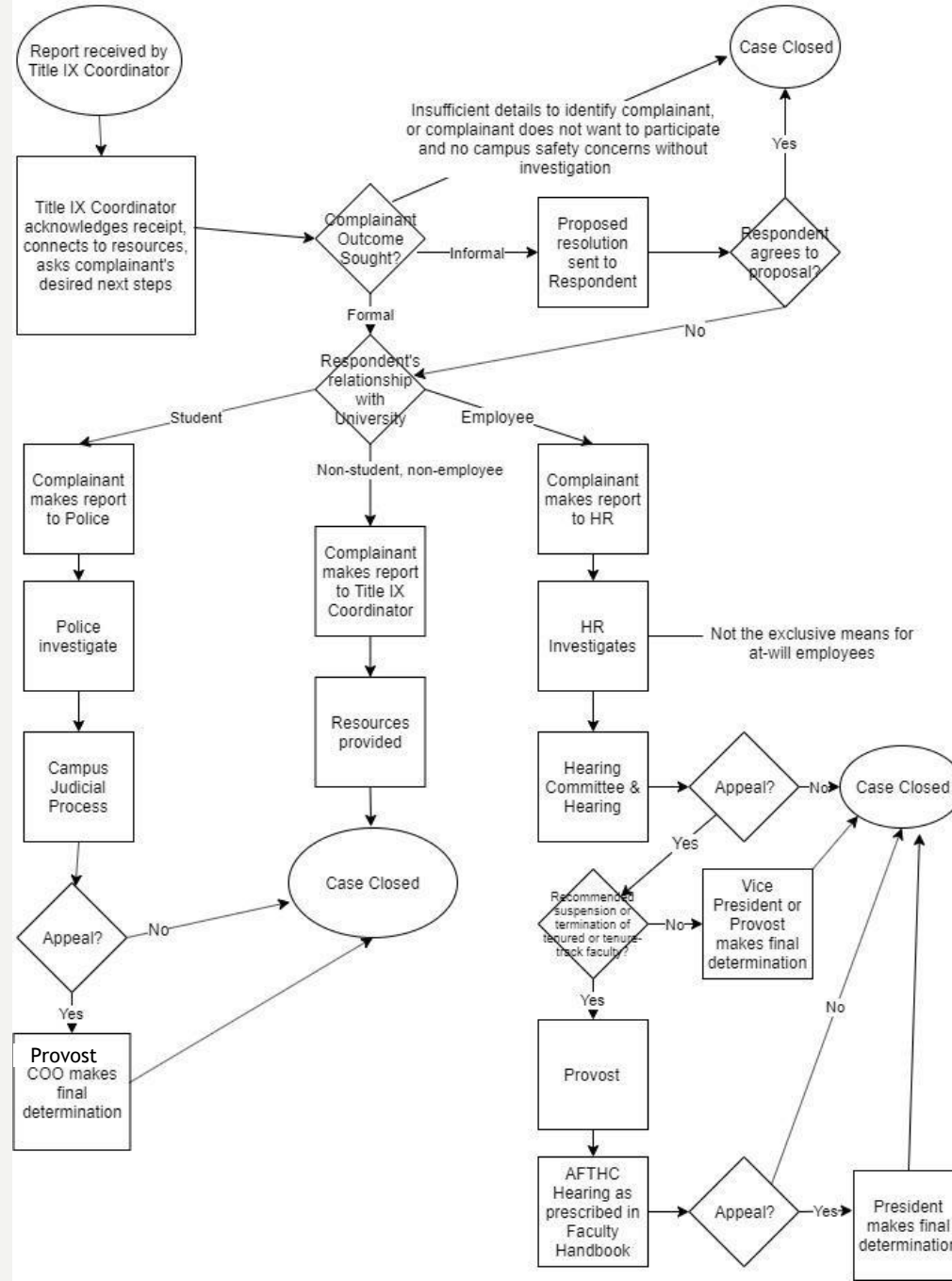
- Student or Student Employee respondent:
 - Nondiscrimination Policy
 - Harassment, and Sexual Misconduct Policy
 - Student Guide to University Life
- Employee respondent
 - Nondiscrimination Policy
 - Harassment, and Sexual Misconduct Policy
 - Staff Employee Handbook
 - Prohibited Consensual Relationships, 2.6.3
 - Disciplinary Action 2.6.9
- Faculty respondent
 - Nondiscrimination Policy
 - Harassment, and Sexual Misconduct Policy
 - Faculty Handbook
 - Prohibited Consensual Relationships between faculty and students, Appendix P
 - Termination of Tenure and Tenure-Track Faculty, 2.3.10

DEFINITIONS TO KNOW: VALPO POLICY, INDIANA & FEDERAL LAW

- Sexual Harassment
- Sexual Violence
- Rape
- Sexual Assault
- Dating/Domestic Violence
- Fondling
- Incest
- Statutory Rape
- Stalking
- Consent

***See your attached definitions handout.

Title IX Case Management



END

- Thank you for your service to Valpo and our campus community!!
- Please closely review the resource packet “Title IX Judicial Board Packet” and prepare any questions for the training
- Additional questions may be directed to Title9@valpo.edu or 219-464-6370