

Practice Making Relevancy Determinations

Relevancy Determination Hypotheticals



Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Relevancy Determination Hypotheticals



For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

Relevancy Determination Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Our complainant is Jennifer. Our respondent is Bob.

Practice Hypothetical #1



“Bob, isn’t it true you were accused of violating appropriate instructor/student boundaries with a student last year too?”

Practice Hypothetical #2



“Jennifer, isn’t it true you texted Bob last week and signed off 😊 Jenn”

Practice Hypothetical #3



“Jennifer, didn’t you get into trouble last year for sexual misconduct on school grounds?”

Practice Hypothetical #4



“Jennifer, isn’t it true you received a bad grade on the test, and that made you angry?”

Practice Hypothetical #5



“Bob, did your counselor tell you that you have anger issues?”

Practice Hypothetical #6



“Bob, are you choosing not to answer my questions because you lied to investigators?”

Practice Hypothetical #7



“Jennifer you were afraid your boyfriend would be jealous about your relationship with Bob, weren’t you?”

Practice Hypothetical #8



“Jennifer, you could be wrong about that timeline, right?”

Practice Hypothetical #9



“Bob, this isn’t the only Title IX complaint against you right now, is it?”

Practice Hypothetical #10



“Jennifer, your witness, Carrie, didn’t even show up today, right?”

Practice Hypothetical #11



“Bob, in the police report it says you told the Officer that you ‘didn’t recall when Jennifer was in your car,’ right?”

Practice Hypothetical #12



“Bob, you’re even paying for a private defense attorney instead of a free advisor, right?”

The Hearing

The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- “At recipient’s discretion, can allow any or all participants to participate in the live hearing virtually” (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process



- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Advisors



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 recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
(106.45(b)(6)(i) and preamble 30339)

Advisors



- Advisors do not require Title IX Training, however a recipient may train its own employees whom the recipient chooses to appoint as party advisors (30342)
- A party cannot “fire” an appointed advisor (30342)
- “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 counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

Advisors



- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.” (30343)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing



- Order of questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

Questioning by the Decision-Maker



- The neutrality of the decision-maker role and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker’s own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)

The Hearing



- Ruling on relevancy between every question and answer by a witness or party
 - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
 - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
 - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
 - Cons: may lengthen hearing

The Hearing



- “[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker’s explanation that was provided during the hearing.” (30343)

The Hearing



- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
 - Perhaps allow support person to meet in waiting rooms or before and after hearing
 - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Hearing Toolbox

Hearing Toolbox: Prehearing Conference



- Pre-hearing conference – helps inform parties and set expectations – have one separate with each party and the party’s advisor
- Provides opportunity to address issues common to both parties:
 - Parties and their representatives will often not understand the process: help educate and answer questions (again, know your institution’s grievance process)
 - Jurisdictional challenges: perhaps less of an issue with new jurisdictional terms—many issues were related to off-campus extension of jurisdiction (may tell advisor that you will provide the opportunity for advisor to state on the record at the hearing)

Hearing Toolbox: the Pre-Hearing Conference



- Parties may want to add evidence and witnesses that were not in the investigation for the first time at the hearing (perhaps outside of the process).

Hearing Toolbox: Use of a Script



- Responsible for running an orderly and fair hearing.
- A script can serve as a checklist of everything the decision-maker wants to cover and a cheat sheet for reminders of allegations, alleged policy violations, and elements of the alleged policy violations
- Helps ensure rights, responsibilities, and expectations are set
- Helps provide consistency between one hearing and the another
- Helps provide transparency
- Can even have a separate one for prehearings

Hearing Toolbox: Decorum



- Evaluating each question for relevancy before a party or witness can answer can help set the tone
- Remind parties about expectations of decorum

Hearing Toolbox: Breaks



- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

Hearing Toolbox: Questions



- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
 - “In the report you said... Help me understand...”
 - “You stated... Tell me more about that.”
 - “Could you give more information about what happened before/after...”

Hearing Toolbox: Considerations for Panels



Hearing panel:

- Identify one person on the panel to make relevancy rulings
- Identify one person to draft the decision (for review of other panel members)
- Determine how panel members will ask questions (e.g., will only one person ask the questions or will panelists take turns?)

Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievance procedures)
- Must begin with a presumption of no violation by Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes



Consider the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes



Also, consider the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes



Also consider the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes



Also consider the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#1 Keep an Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial



- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

#5 Weight of Evidence



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#5 Weight of Evidence



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Weight of Evidence Example



The preamble provides in the discussion:

“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility,** so long as the decision-maker’s evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.**” (30337)

#6 Evaluate Witness Credibility



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence



Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and **ALWAYS** start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence



- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#9 Don't Consider Impact

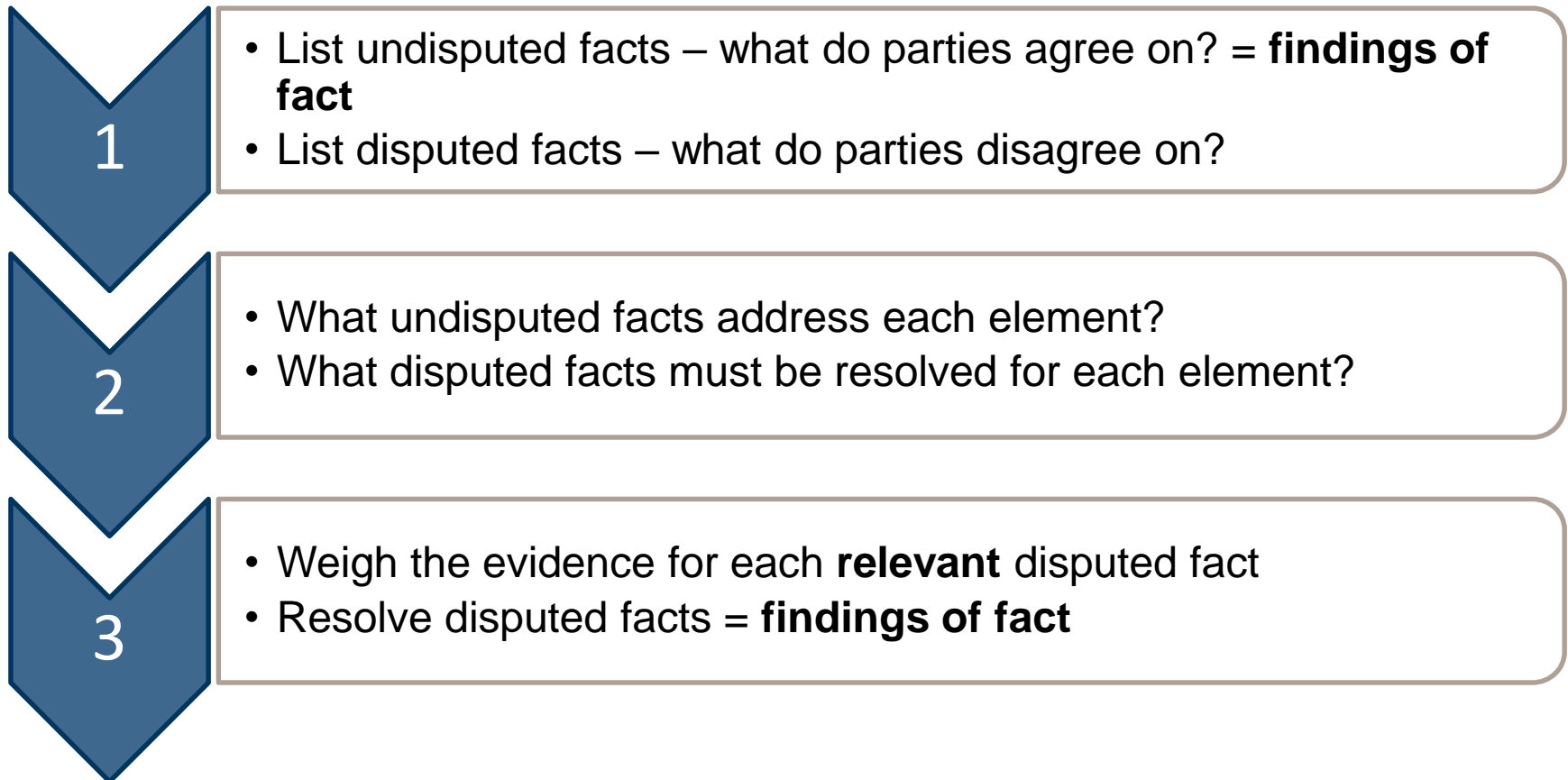


- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

The Written Decision

Resolving Disputes

Fact Finding Process:



Written Determination in 106.45(b)(7)(ii)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)



Purpose of key elements of procedural steps
“so the parties have a thorough
understanding of the investigative process
and information considered by the recipient
in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii) Continued



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii) Continued



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii) Continued



- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii) Continued



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii) Continued



Reference to code of conduct not prohibited:

“Recipients retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only.
(30389)

Written Determination in 106.45(b)(7)(ii) Continued



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.

Goals



- Be consistent in terminology
- Be clear as to the source of information.
Compare:
 - “Bob stated that this happened.”
 - “This happened.”

Unambiguous



- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy



- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive



- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what



Handling Appeals

Identity of the Appeals Officer

- You cannot hear an appeal of your own decisions
 - The Appeals Officer cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case
- The Appeals Officer must be trained in the same manner as the Decision-Maker

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A recipient may offer an appeal equally to both parties on additional bases

Appeals

- As to all appeals, the recipient must:
 - Offer the appeal to either party
 - Let both parties know when an appeal has been filed
 - Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.