



PRESUMPTIONS, EVIDENCE & BURDENS

EQUITY & TITLE IX TRAINING
NOVEMBER 2022

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1



THE PRESUMPTION



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2

PRESUMPTION OF NON-RESPONSIBILITY

- Respondent is **presumed not responsible** for any violation; determination regarding responsibility should be made *only* at the conclusion of the process after consideration of the relevant evidence.
- Fact-finders are not charged with finding a *particular* outcome.
- Fact-finders should avoid pre-conceived notions and consider *only* the information provided during the process.



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EVIDENCE



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TYPES OF EVIDENCE

DIRECT EVIDENCE

- Evidence that directly proves a key fact at issue
- No inference or conclusion has to be drawn to show that something happened.
- *EX:* Eyewitness testimony

CIRCUMSTANTIAL EVIDENCE

- A set of facts that, if true, allows a person to infer the fact at issue
- Requires drawing a conclusion/ inference based on the circumstances to show that something happened.
- *EX:* Witness saw two people emerge from the same room and one was disheveled; could infer that a fight or assault between the two took place.



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RELEVANCY & EVIDENCE

- Fact-finders should determine the "facts" based on the relevant evidence presented at the hearing.
- Fact-finders *must* address conflicting evidence that bears on the outcome of the proceeding.
- Relevancy and admissibility of any evidence offered at the hearing shall be determined by:
 - Title IX → Hearing Officer
 - Equity → If requested by member of Hearing Panel, the question presented by Chair will be decided by majority vote



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WHAT IS RELEVANT EVIDENCE?

- Evidence is relevant if:
 - It has a 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. (FRE 401)
- The Hearing Officer or Panel Chair **has the discretion** to determine the relevance of any witness or documentary evidence and may exclude information that is **irrelevant, immaterial, cumulative, or more prejudicial than informative**.



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TEST FOR RELEVANCY

- To determine the relevancy of evidence that is being offered at a hearing, follow these steps:
 1. Consider the evidence that is being offered.
 2. Consider the allegations of the (Formal) Complaint.
 3. Does the evidence that is being offered have the potential to prove or disprove the allegations?



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What Evidence Should (not) be Considered?

- The formal rules of evidence do not apply; but the evidence must be relevant.
- Questions and evidence about the Complainant's pre-disposition or prior sexual behavior are not relevant, unless offered to prove that someone other than the Respondent committed the alleged conduct.
- Evidence concerning specific incidents of the Complainant's prior sexual behavior with respect to the Respondent is not relevant unless it is offered to prove consent.
- Character evidence is of limited utility and should not be admitted unless relevant.
- Incidents or behaviors of a party not directly related to the alleged conduct should not be considered unless it shows a pattern of related misconduct that is deemed relevant.
- Records of a party made or maintained by a physician or similar professional in connection with the provision of treatment to a party may not be used without the party's express consent.
- Information protected under a legally recognized privilege shall not be allowed, relied upon or otherwise used unless the person holding the privilege has waived that privilege.



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**QUESTIONING & CROSS-EXAMINATION
UNDER TITLE IX (600.030)**

- A Party is subject to direct cross-examination by the other Party's Advisor; the Parties may not directly question each other.
- A Party's Advisor will be permitted to ask the other Party and any witnesses relevant questions and follow-up questions, including those challenging credibility.
- Before a Party or witness answers a question, the Hearing Officer must determine whether the question is relevant.
- If a question is excluded as not relevant, the Hearing Officer must explain the decision to exclude that question.
- Where the Hearing Officer permits a question to be answered, there is a presumption that the Hearing Officer found the question to be relevant.
- The Parties' Advisors may object to questions on limited grounds as set forth in the Rules of Decorum.



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**QUESTIONING & CROSS-EXAMINATION
UNDER TITLE IX (600.030)**

- No Party or witness can be forced to participate in the 600.030 process, including testifying at a hearing.
- If a Party or witness fails to submit to cross-examination at a hearing, the Hearing Panel shall not rely on any statement of that Party or witness in reaching a determination regarding responsibility.
- The Hearing Panel shall not draw any inference about the determination regarding responsibility based solely on a Party's or witness's failure to submit to cross-examination.



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11

**QUESTIONING UNDER EQUITY
(600.040/600.050)**

- Under the 600.040 hearing process:
 - Parties will be provided the opportunity to present facts and arguments in full and question all present witnesses during the hearing.
 - Parties may submit questions for each other to the Hearing Panel Chair, who will determine if the questions are relevant and appropriate, and if so, will ask the questions on behalf of the submitting Party.
 - If both Parties request the opportunity, direct questioning between the Parties will be permitted.
 - Advisors are present solely to advise their Party, and may not participate directly in the hearing.
 - The Chair of the Hearing Panel, in consultation with the Parties and investigators, may decide in advance of the hearing that certain witnesses do not need to be physically present if their testimony can be adequately summarized by the Investigator(s) in the investigative report or during the hearing. All Parties will have ample opportunity to present facts and arguments in full and question all present witnesses during the hearing, though formal cross-examination is not used between the Parties.
- Under the 600.050 process, there is no hearing; Parties may submit questions for the other party to be asked by the decision-makers.



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BURDEN OF PROOF



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BURDEN OF PROOF

What is "Burden of Proof?"

The level of certainty and the degree of evidence necessary to establish a violation of policy.



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14



COMMON BURDENS OF PROOF

- *Beyond a Reasonable Doubt*: "firmly convinced"
- *Clear and Convincing*: "substantially more likely than not"
- **Preponderance of the Evidence**: "more likely than not"; 50%+
 - *This is the standard of proof in the Title IX and Equity Resolution processes.*



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PREPONDERANCE OF THE EVIDENCE

- This preponderance is based on the **more convincing evidence and its probable truth or accuracy and not on the amount of evidence.** ... A preponderance of evidence has been described as “just enough” evidence to make it more likely that the fact the claimant seeks to prove is true.



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16



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17
