

# Presumptions, Burdens & Evidentiary Issues

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Equity & Title IX Annual Volunteer Training  
August 2023



University of Missouri System  
COLUMBIA | KANSAS CITY | ROLLA | ST. LOUIS

# THE PRESUMPTION

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## 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.



# **THE BURDEN OF PROOF**

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## BURDEN OF PROOF

**What is “Burden of Proof?”**

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



# 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.



## 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.



# **THE EVIDENTIARY ISSUES**

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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, video

## 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.



## 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



## 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)
- All relevant evidence does **not need to be given equal weight**.
  - Evidence may have some tendency to make something more or less probable, but not much.
  - ASK: How probative is the evidence?



# 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?



## RELEVANCY & EVIDENCE

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.**



## WHAT NOT TO CONSIDER ...

- Complainant's **prior sexual behavior** (with two exceptions)
- Information **protected by legally recognized privilege**
- **Party's treatment records** without that Party's voluntary, written consent
- **Statements not subject to cross-examination** (in Title IX hearing)
- **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



# PRIOR SEXUAL HISTORY

- Generally, questions and evidence about a complainant's sexual predisposition or prior sexual behavior *are **not relevant*** and will not be admitted as evidence during a Title IX hearing
- *Exceptions:*
  - Where the sexual behavior is used to show that someone other than the Respondent committed the conduct alleged by the Complainant
  - Evidence concerning specific incidents of the Complainant's prior sexual behavior with respect to the Respondent if offered to prove consent



# KNOWLEDGE CHECK

## SCENARIO A

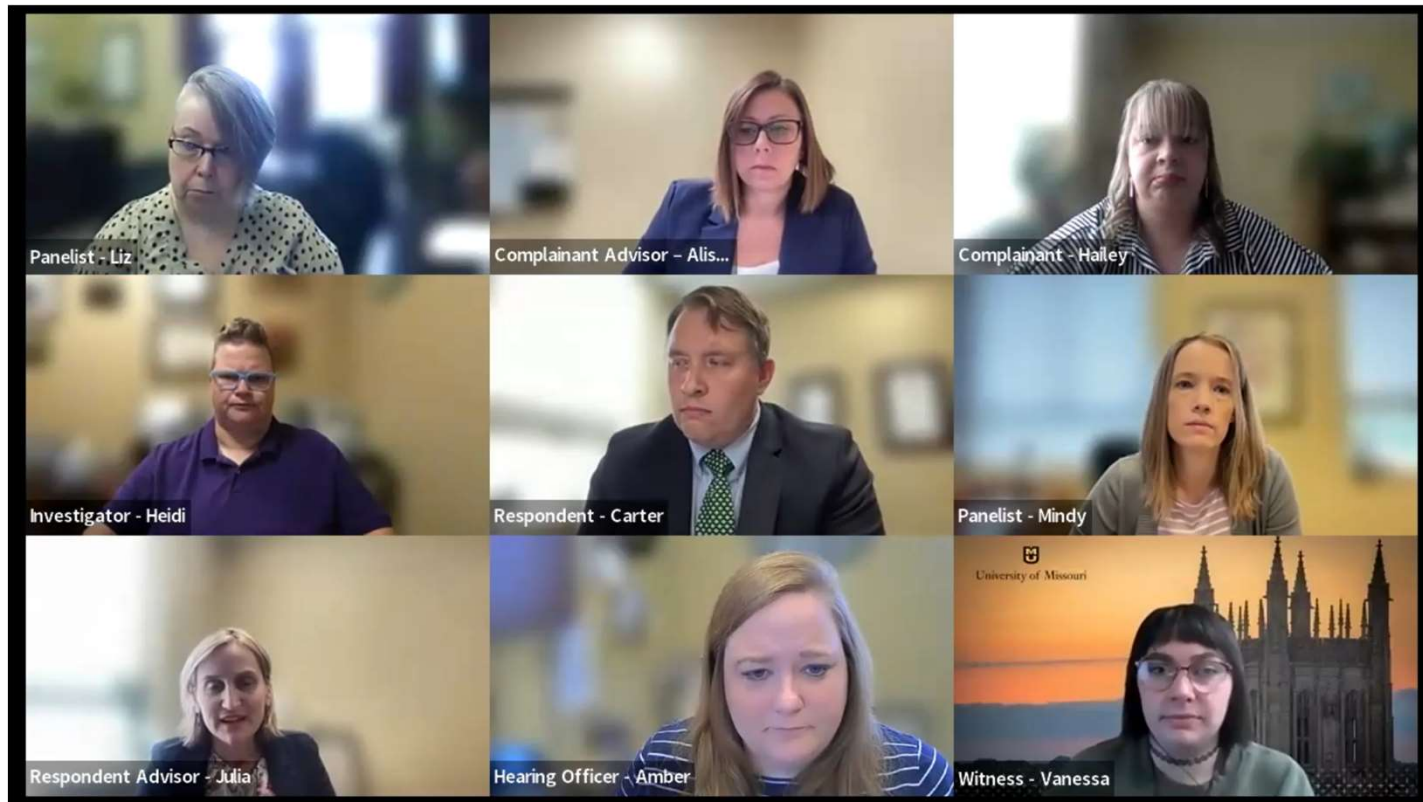
- In a sexual harassment case, the Respondent's friend says that the Respondent is honest, kind, and treats others with respect.
  - Relevant?
  - Weight?





# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO



# KNOWLEDGE CHECK

## SCENARIO B

- National original discrimination alleged against faculty Respondent by graduate student. Respondent has received accolades for extensive scholarship.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

## SCENARIO C

- In a domestic violence case, the Complainant's counselor diagnosed Complainant with PTSD.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

## SCENARIO D

- In a sexual harassment case, the Complainant made another report of sexual harassment against a different person two years before this report.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

## SCENARIO E

- In a sexual harassment case, the Respondent has been found responsible for spiking a drink on two prior occasions.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

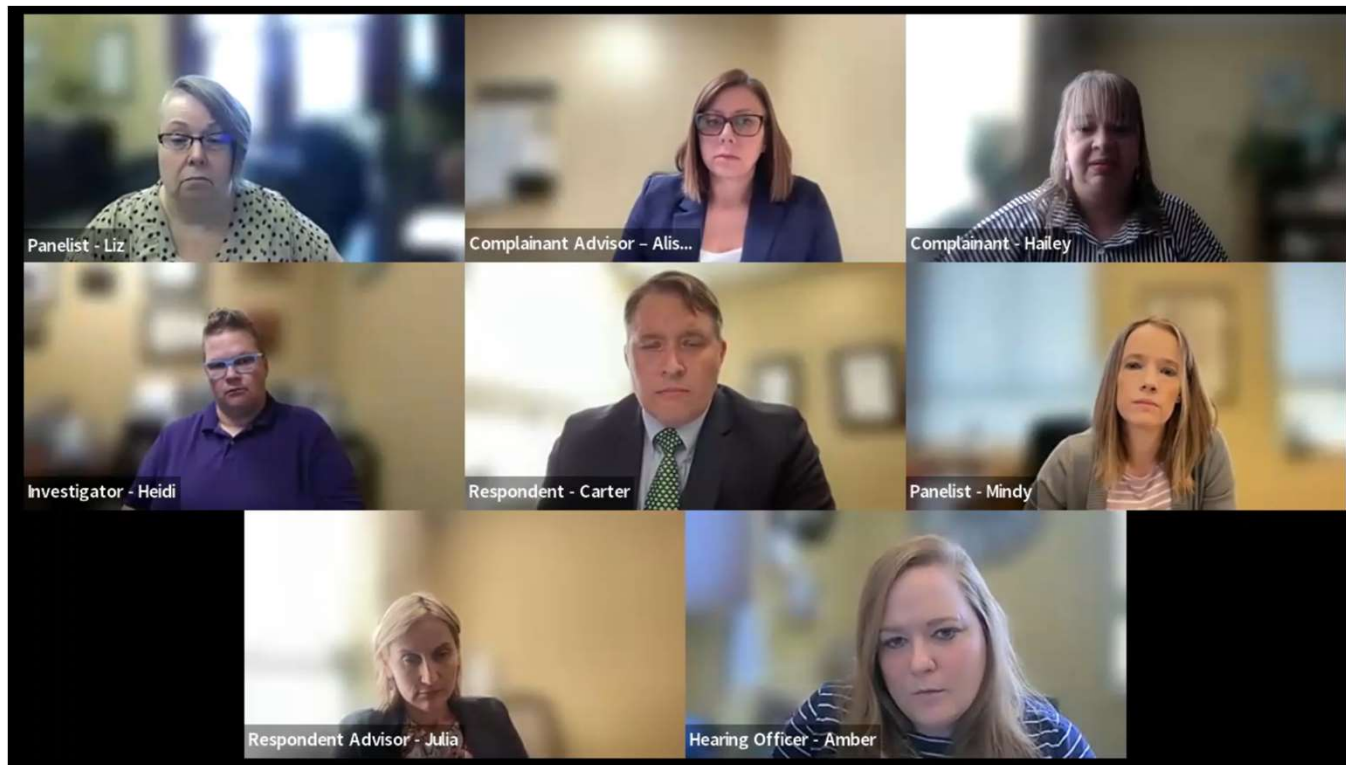
## SCENARIO F

- In a sexual harassment case, the Complainant alleges that there was not consent because the Respondent did not specifically ask Complainant for her consent on the night in question. Respondent wants to offer evidence that the Parties have been intimate on several prior occasions.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO



# **QUESTIONING & CROSS-EXAMINATION UNDER TITLE IX**

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CRR 600.030



# QUESTIONING & CROSS-EXAMINATION UNDER TITLE IX

- Party is subject to direct cross-examination by the other Party's Advisor; 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 that challenge credibility.
- The Hearing Officer determines whether an Advisor's questions are relevant.
  - If the Hearing Officer permits a question to be answered, there is a presumption the Hearing Officer found the question to be relevant.
  - If the Hearing Officer determines a question is not relevant it is excluded, the Hearing Officer must explain the decision.
- Advisors may object to questions on limited grounds as set forth in the Rules of Decorum.



# EVALUATING CREDIBILITY

## Demeanor

- Did the Party or witness speak confidently or convincingly?
- Was the Party or witness uncertain, confused, self-contradictory or evasive?

## Interest

- Does the Party or witness have a motive to lie, exaggerate or distort information?

## Detail

- How was the Party or witness' recall?
- Did the Party or witness use detail when making their statement?
- Did the recall or level of detail make sense given the circumstances?

## Corroboration

- Was the Party or witness' statement contradicted or supported by other statements and/or evidence?

## Common Sense

- Does it all add up?
- Gut check - Is there something missing?



# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO

- The Complainant reported that she had not consumed any alcohol but said the Respondent had consumed a couple of mixed drinks, each with 3-4 shots.
  - Relevant?
  - Weight?



# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO

- What if Complainant did not make report until May?
  - Would it make a difference if she said it was because she wanted to wait until she no longer worked at the library with Respondent?
  - Would it make a difference if she reported the incident just after she she learned that Respondent started dating someone?
  
- Relevant?
- Weight?



# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO

- Vanessa made a statement at the hearing. She began by reiterating that Hailey tells her everything so she would believe what Complainant tells her. She also stated that Complainant never disclosed to her that Complainant and Respondent had been romantically involved before. Complainant however admitted in her statement and at the hearing that they were.
- How does this impact Vanessa's credibility, if at all?



# KNOWLEDGE CHECK

## MOCK HEARING SCENARIO

- How do you deal with the differences in Complainant and Respondent's statements during the incident(s) in question?



## QUESTIONING & CROSS-EXAMINATION UNDER TITLE IX

- No Party or witness can be forced to participate in the Title IX process, including testifying at a hearing.
- **HOWEVER**, 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 of 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' failure to submit to cross-examination.



# KNOWLEDGE CHECK

Can a Party's Advisor appear and conduct cross-examination even when the Party whom they are advising does not appear?





# KNOWLEDGE CHECK

Can a Party's Advisor appear and conduct cross-examination even when the Party whom they are advising does not appear?

- Yes. Advisor can cross examine the appearing Party on behalf of the non-appearing Party, resulting in consideration of the appearing Party's statements but not the non-appearing Party's statements.
- An Advisor will be provided if Party's Advisor of choice is not available.



# QUESTIONING & CROSS-EXAMINATION UNDER EQUITY

## Students & Faculty

- Parties may present facts and arguments in full and question all present witnesses. Formal cross-examination is not used between the Parties.
- Parties may submit questions for each other to the Hearing Panel Chair, who will determine if the questions are relevant and appropriate.
  - If so, Hearing Panel Chair 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 may not participate directly in the hearing.
- The Hearing Panel Chair, 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.

## Staff

- There is no hearing; Parties may submit questions for the other party to be asked by the decision-makers.



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