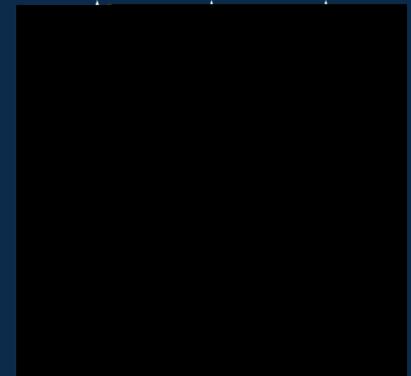

Advanced Title IX Decision-Maker Training

FEBRUARY 25, 2021

MARCH 18, 2021



Presenters - Erin

Erin E. Butcher

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Assistant Attorney General, OAG
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2303
ebutcher@bricker.com

Presenters - Jessica

Jessica L. Galanos

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Deputy Title IX Coordinator
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2341
jgalanos@bricker.com

Disclaimers

Presentation Rules

Questions are encouraged

Aspirational Agenda

1:00-1:30	Overview of Scenario/Investigation Report
1:30-2:30	Relevancy refresher
2:30-2:45	Presentation to model
2:45-3:00	Break and join small group
3:00-3:45	Practice in small groups
3:45-4:00	Break
4:00-4:15	Debrief what learned in small groups
4:15-5:00	

Posting these Training Materials?

Review of Investigation Report

Relevancy Refresher

Relevancy Refresher

(1 of 10)

- Regulations do not define “relevant,” but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
 - “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - **“Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the**

Relevancy Refresher

(2 of 10)

Under the **preponderance of the evidence/clear and convincing** standard:

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Relevancy Refresher

(3 of 10)

Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

Relevancy Refresher

(4 of 10)

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (Preamble, p. 30331)
- A recipient may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Relevancy Refresher

(5 of 10)

What is NOT relevant:

Questions and evidence about the **complainant's** sexual predisposition or prior sexual behavior **are not relevant, UNLESS**

- 1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- 2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

What is NOT relevant:

Information protected by a legal privilege

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel.
Most common in this context are:

- a) Attorney-client privilege
- b) Doctor-patient/counselor-patient
- c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Relevancy Refresher

(8 of 10)

What is NOT relevant:

No improper inference from a party or witness electing not to participate in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Relevancy Refresher

(9 of 10)

Consideration of past statements of a party or witness that does not answer questions on cross-examination.

- Preamble
- Open Source and September 4, 2020 Q&A

Discuss with your legal counsel and Title IX Coordinator.

Relevancy Refresher

(10 of 10)

When statement IS the sexual harassment...

Relevancy Refresher

Decorum

Relevant questions must not be abusive and enforcement of decorum must be applied evenhandedly. Where the substance of a question is relevant, but the manner of the question is “harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space).” (Preamble 30331)

The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

Relevancy
Refresher: Practice
Making Relevancy
Determinations

Relevancy Determination Hypotheticals

(1 of 2)

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

Relevancy Determination Hypotheticals

(2 of 2)

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?

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.

Practice Hypothetical #2

Question from Felicia (Cassie's advisor) to Roger

Roger, you didn't ask Cassie if she wanted to have sex, did you?

Practice Hypothetical #3

Question from Anders (Roger's advisor) to Cassie

Cassie, you'd agree that it seems difficult to have sex as you've described?

Practice Hypothetical #4

Question from Anders (Roger's advisor) to Rogers

Roger, could you have physically had sex with Cassie in the way she described it?

Practice Hypothetical #5

Question from Anders (Roger's advisor) to Cassie

Cassie, you've had sex with other men you met at parties, right?

Practice Hypothetical #6

Question from Felicia (Cassie's advisor) to Roger

Roger, you've had sex with other women you met at parties, right?

Practice Hypothetical #7

Question from Anders (Roger's advisor) to Cassie

Cassie, could you have had sex with someone else that night too?

Practice Hypothetical #8

Question from Anders (Roger's advisor) to Cassie

Practice Hypothetical #9

Question from Felicia (Cassie's advisor) to Roger

Roger, I got your counseling records right here from a friend, can you read aloud your statement here?

Practice Hypothetical #10

Question from Felicia (Cassie's advisor) to Cassie.

Cassie, you brought your counseling records today, correct?

Practice Hypothetical #12

Question from Felicia (Cassie's advisor) to Roger

Roger, did you tell your attorney during break that you thought today was not going well for you?

Practice Hypothetical #13

Question from Felicia (Cassie's advisor) to Roger

Roger, did you tell your counselor you raped Cassie?

Decision-Maker Hearing Practice

Debrief Practice in Large Group

Hearing Scripts and Toolkit Refresher

Hearing Script Checklist (1 of 6)

- Introduction
 - Identify parties and advisors
 - Identify specific allegations and policy violations
 - Identify specific elements of each policy violation
 - Identify standard of proof and presumption of no violation
 - Identify order of questioning of parties and witnesses

Hearing Script Checklist (2 of 6)

Introduction (continued)

- Use of breaks
 - Explain that you will provide breaks as needed and that a party, witness or advisor may request a break at any time
 - You may call a break at any time
 - You have a duty and responsibility to question parties and witnesses to ensure the questions you need answered are addressed

Hearing Script Checklist (4 of 6)

Introduction (continued)

- Expectation for Advisors
 - Explain that, in addition to the expectations of decorum, advisors are expected to:
 - ask only relevant question
 - Speak only when the decision maker has provided an opportunity for them to ask questions or asked the advisor a question
 - No other comments or arguments from advisors are tolerated and will be considered an issue of decorum

Hearing Script Checklist

Refresher on Decision-Making Tools

- Pre-hearing conference
- Use of scripts
- Use of breaks
- Call to TIX Coordinator or designee
- Remember that relevancy determinations are not the same as weight of evidence (the two-roles of the decision maker)
 1. Run the hearing and make relevancy determinations
 2. Write the decision and weigh the evidence in the record

Questions?

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on **Twitter** at
@BrickerHigherEd

Erin Butcher
ebutcher@bricker.com

Jessica Galanos
jgalanos@bricker.com

**Sign up for
email insights
authored by
our attorneys.**

Text 'Bricker'
to 555888.