

Legal Considerations in Decision Making

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Scenario

- CP is a 19-year-old Freshman sorority member
- RP is a 19-year-old Freshman fraternity member
- CP and RP meet at a party at his fraternity
- Both consume 4-5 cups of the “social drink”
- CP & RP go to RP’s room and have sex
- CP files a Title IX complaint, claiming she was too intoxicated to consent



Implicit Bias Check

- Knowing nothing more, what is your instinctive reaction?
 - Issue with underaged drinking?
 - Issue with Greek life?
 - Think girls over report or guys take advantage of drunk girls?
 - Other issues?



Due Process

Notice

- Notice of Allegations
- Notice of Hearing
 - Where you'll find what you need to decide

Opportunity to Be Heard

- Meet with investigator
- Participate in hearing



Burden of Proof

The standard of proof will be “preponderance of the evidence,” defined as determining whether the evidence shows it is more likely than not that a policy violation occurred.

Presumed Not Responsible



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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."



Evidence – Title IX

1. CP may give a statement

- Panel asks questions
- Cross Exam by RP's attorney

2. CP calls witnesses

- Panel asks questions
- Cross Exam by RP's attorney

3. RP may give a statement

- Panel asks questions
- Cross Exam by CP's attorney

4. RP calls witnesses

- Panel asks questions
- Cross Exam by CP's attorney

5. Investigator answers questions

- Panel asks questions
- Cross Exam by CP's attorney
- Cross Exam by RP's attorney

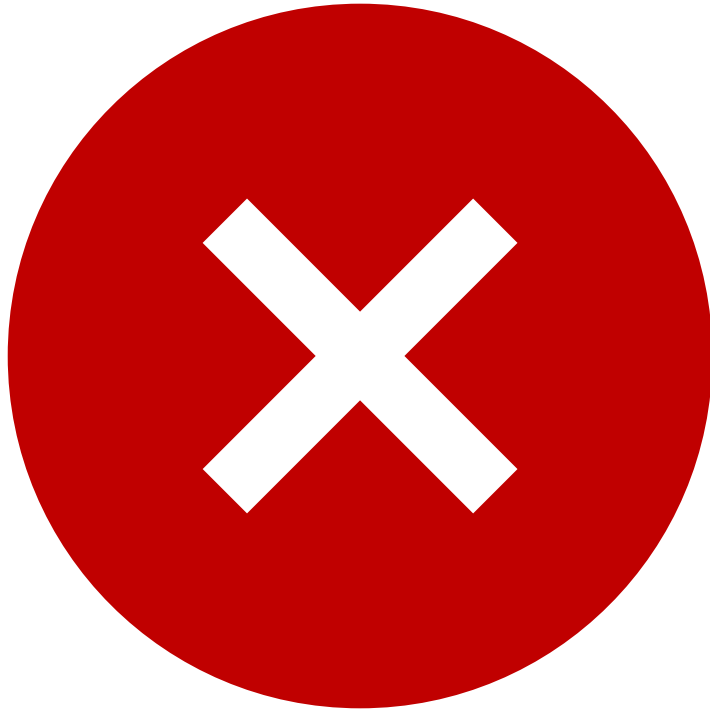
6. Investigator calls witnesses

- Panel asks questions
- Cross Exam by CP's attorney
- Cross Exam by RP's attorney

* All parties can submit documentary evidence



Title IX No-Nos



- **Not Subject to Cross = No Reliance**

“If a Party or witness does not submit to cross-examination at a hearing, the Hearing Panel must not rely on any statement of that Party or witness in reaching a determination regarding responsibility, but no inference can be drawn from the fact that a Party or witness failed to submit to cross-examination.”

CRR 600.030.Q.11.I



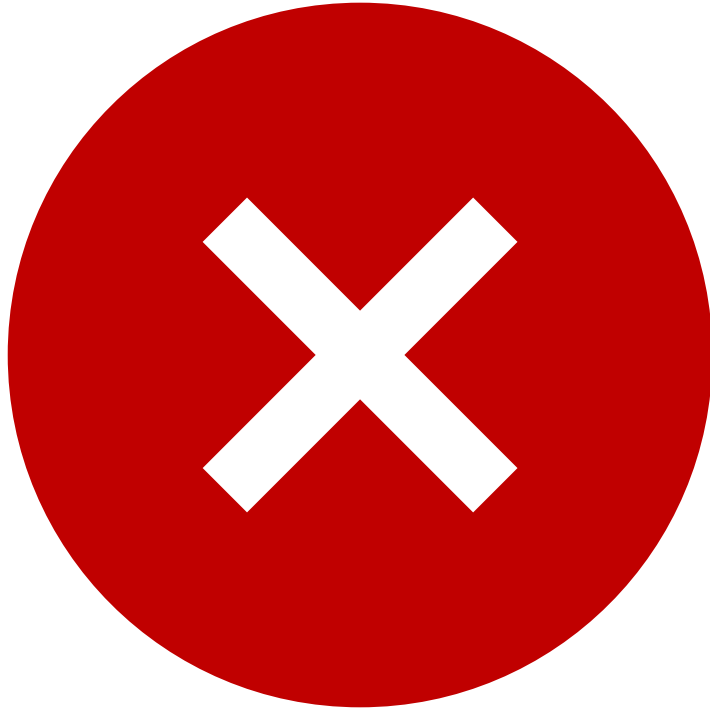
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Title IX No-Nos



- **Not Subject to Cross = No Reliance**
- **No Character Evidence**
- **No Other Bad Acts (unless shows pattern)**
- **No Dr/Patient Records**
- **No Privileged Records**
- **No Violation of Rules of Decorum**



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Title IX Objections

- Hearing Officer decides:
 - “The relevancy and admissibility of any evidence offered at the hearing shall be determined by the Hearing Officer, whose ruling shall be final.”
 - “The Party’s Advisors may object to questions on limited grounds as specified in the Rules of Decorum. The Hearing Officer will rule on such objections and that ruling shall be final.”
 - “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 Complainant, Respondent or witness answers a cross-examination or other question, the Hearing Officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. Where the Hearing Officer permits a question to be answered, a presumption shall be made that the Hearing Officer determined that the question was relevant.”



Break-Out: Consider the Evidence?

- CP flirted with multiple men at the party
- Someone took pictures of CP making out with RP at the party and sent them to her boyfriend
- CP goes to parties every weekend and consistently drinks multiple drinks
- CP went to the hospital the next day to get a tox screen and a rape kit completed
- Witness who took the pictures does not attend the hearing
- RP invokes the 5th amendment – appears but does not answer questions
- RP answers questions, but states he was too drunk to remember anything, so gives no substantive answers



Equity

"The University of Missouri does not discriminate on the basis of race, color, national origin, ancestry, religion, sex, pregnancy, sexual orientation, gender identity, gender expression, age, disability, protected veteran status, and any other status protected by applicable state or federal law."



Evidence – Equity

1. Investigator's Report & Testimony

- Panel asks questions
- CP asks questions
- RP asks questions

2. Investigator calls witnesses

- Panel asks questions
- CP asks questions
- RP asks questions

3. CP's Testimony

- Panel asks questions
- RP's questions are read to CP by panel

4. CP's Witnesses

- CP asks questions
- RP asks questions
- Panel asks questions
- Investigator asks questions

5. RP's Testimony

- Panel asks questions
- CP's questions are read to CP by panel

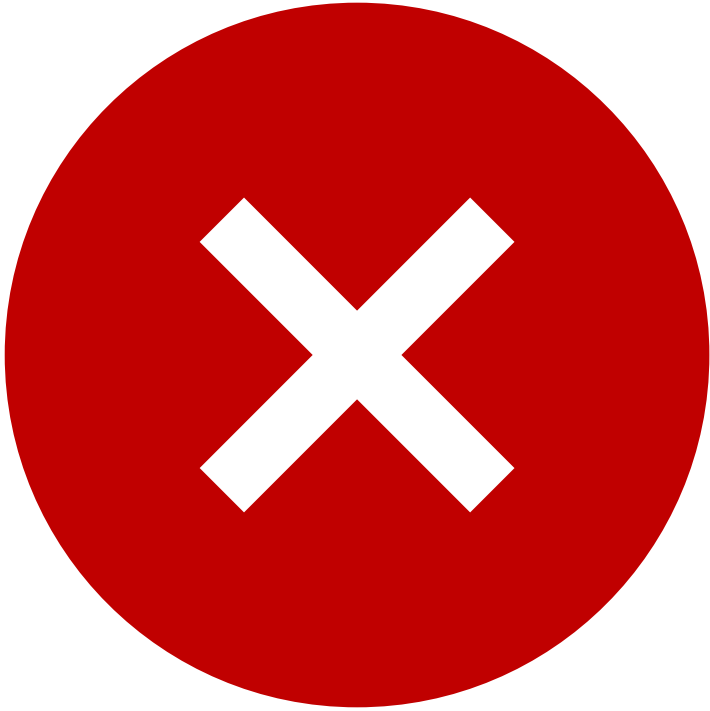
6. RP's Witnesses

- RP asks questions
- CP asks questions
- Panel asks questions
- Investigator asks questions

* All parties can submit documentary evidence



Equity No-Nos



- **No Direct Questioning**

“The Respondent may not directly question the Complainant and the Complainant may not directly question the Respondent. However, if both Complainant and Respondent request the opportunity, direct questioning between the Parties will be permitted in the Hearing Panel Resolution Process. Otherwise written questions will be directed to Hearing Officer, and those questions deemed appropriate and relevant will be asked on behalf of the requesting Party.”

CRR 600.040.R.4



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Equity No-Nos



- **No Direct Questioning**
- **No Character Evidence**
- **No Other Bad Acts (unless shows pattern)**
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- **No Violation of Rules of Decorum**



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Equity Objections

- Hearing Officer decides unless a panel member request they presents the question to the panel for decision.
 - Majority vote is final



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I Consent



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Consent

Consent to sexual activity is knowing and voluntary.

No consent if:

- Younger than legal age (17 years-old)
- Incapacitated
- Coercion, force, or threat of either

“It is the responsibility of each person to ensure they have the consent of all others engaged in the sexual activity.”



Consent

- Consent, lack of consent, or withdrawal of consent:
 - Words
 - Non-Verbal Acts
- Silence or absence of resistance does not establish consent.
- Current or former relationship or activities does not alone indicate consent
- Consent to one activity does not imply consent to other activities



Consent - Incapacitation

- Incapacitation: rational decision-making is rendered impossible
 - Drugs
 - Alcohol
 - Disability
 - Sleep
 - Unconsciousness
 - Illness
- Respondent knew or should have known



Consent - Incapacitation

- Indicators of incapacity
- Lack of awareness of circumstances or surroundings (e.g., an inability to understand, either temporarily or permanently, the who, what, where, how and/or why of the circumstances; blackout state)
- Inability to physically or verbally communicate coherently, particularly with regard to consent (e.g., slurred or incoherent speech)
- Lack of full control over physical movements (e.g., difficulty walking or standing without stumbling or assistance)
- Physical symptoms (e.g., vomiting or incontinence).



Break-Out: Consent?

- CP vomits on RP's floor
- Alternatively: RP doesn't know CP vomited.
- While being cleaned up, CP tells bystander she knows where she is and wants to stay
- CP & RP walk up two flights of stairs to RP's room
- CP & RP have sex 30 minutes after vomiting
- CP & RP have sex 6 hours after vomiting
- Witness: No protests/both participate



Questions



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