

Sexual Misconduct Advisor Training

Sean Flammer, Assistant General Counsel
Krista Anderson, Systemwide Title IX Coordinator

Spring 2023



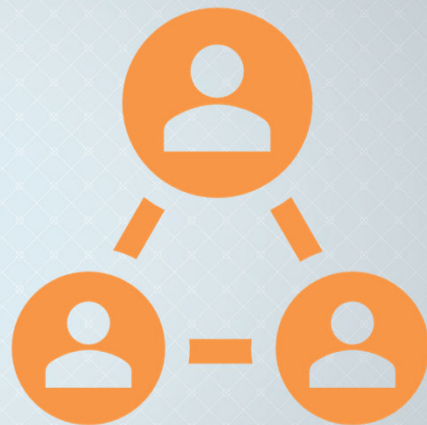
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

1

Agenda

1. Background
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Basics: Advisor Role
4. Pre-Hearing
5. At the Hearing
6. Hypotheticals



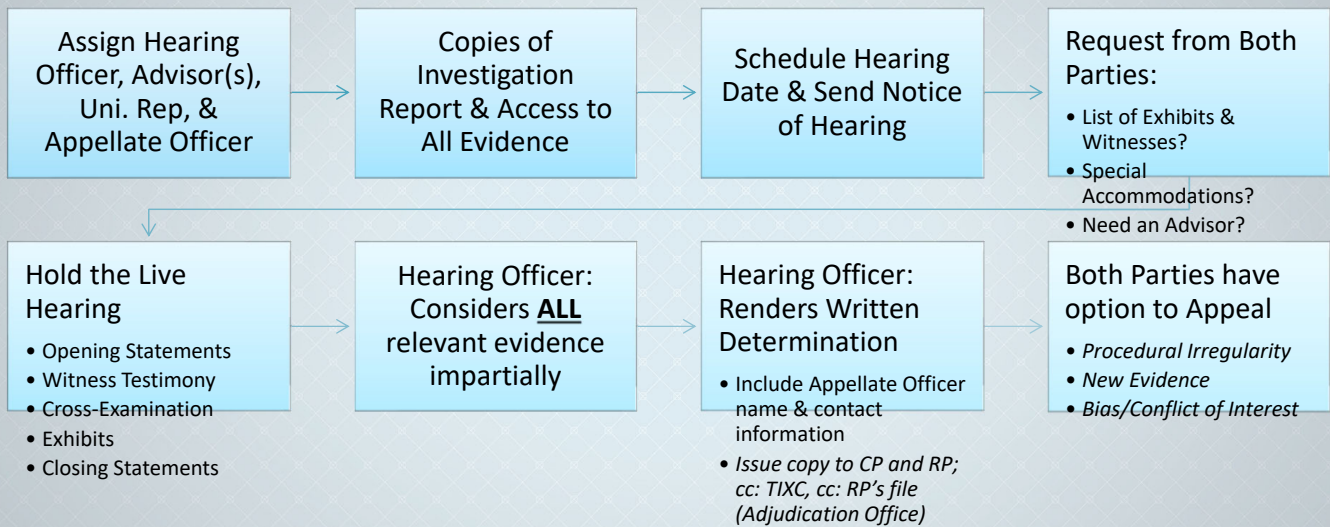
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

2

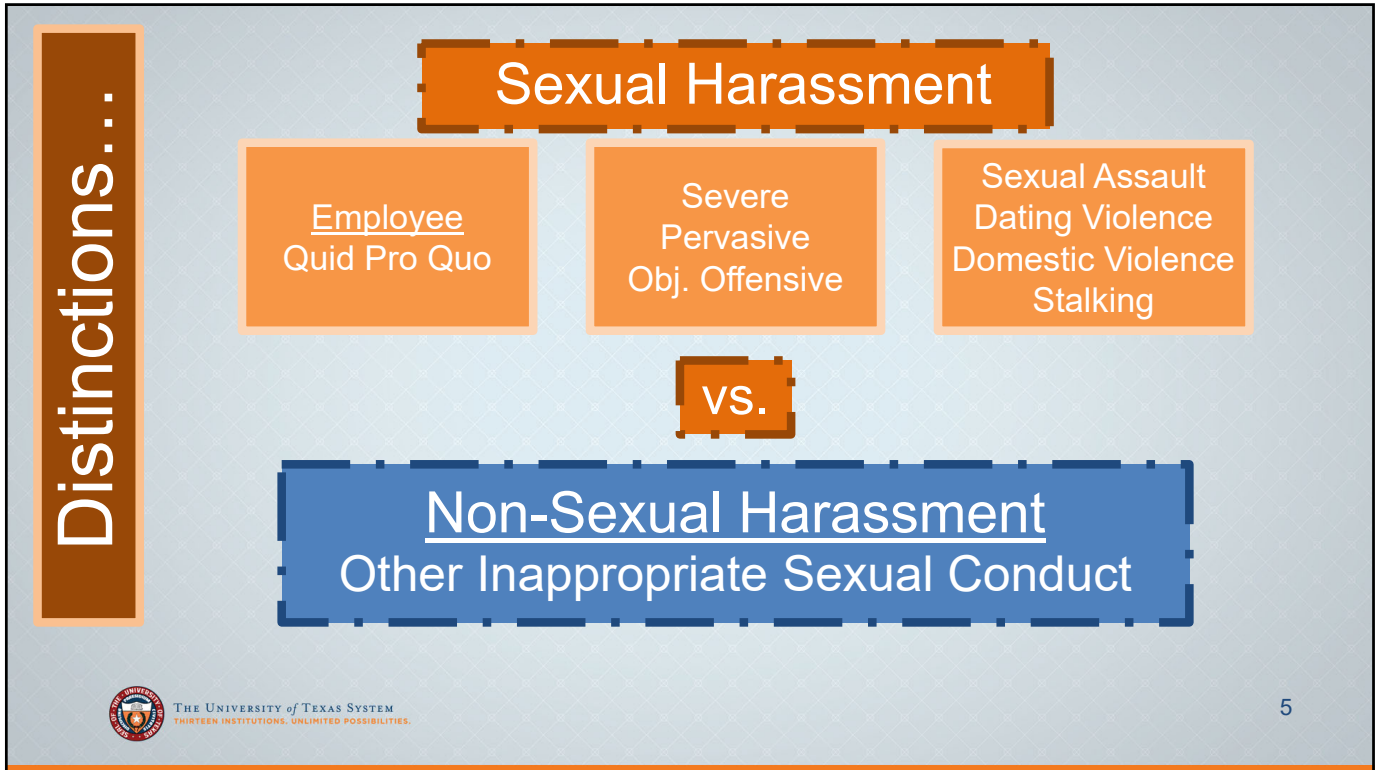
2



Live Hearing: Logistics Flowchart



Specific deadlines may be published in the institution's policy and/or procedures.



5

Definition of "Sexual Harassment"

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution's education program or activity; or
3. **"Sexual assault," "dating violence," "domestic violence," or "stalking"** as defined under Clery/VAWA.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2021)

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

6

6

What is not “Sexual Harassment” but may be an issue at a hearing?

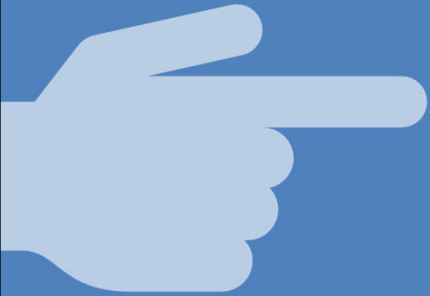


Example: Other Inappropriate Sexual Conduct

Important Distinction for Sexual Harassment Cases




If the conduct alleged is “**sexual harassment**,” then the advisors will **ask questions** at the hearing.



Remainder of this training...

Applies to Sexual Harassment Cases & advisors **asking questions** during the hearing.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

9

9



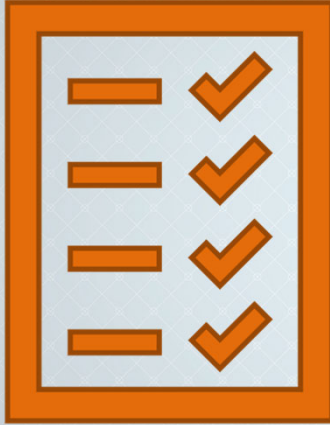
Pre-Hearing

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Before the Hearing:



- Review materials.
- Review your institution's policy.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

11

11

Look at the Provision(s) at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

12

12

Look at the Provision(s) at Issue:

Engaging in a (1) **course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.**

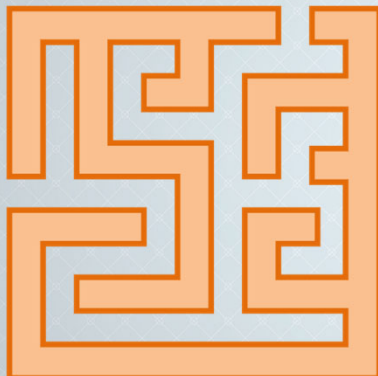
For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

13

13

Before the Hearing: Attempt to Meet With Your Advisee



- Explain your **Advisor role**. You are not “representing” the advisee.
- Discuss a **strategy**:
 - Accept responsibility? No administrative disposition. RP may agree to conduct. Do you want to focus on mitigating factors?
 - What is the story? What evidence exists to support that story?
 - Review the investigation report & evidence. Outline what is important. What do you need from each witness to tell the story?

Note: The use of the word “**story**” does **not** mean false. Different people often have different perceptions of same events.

14

14

Before the Hearing:

Tips for Examining Witnesses:

- If it's a witness you & your Advisee are calling, before the hearing (if possible):
 - Ask your Advisee for questions they'd like asked of each witness.
 - With the Advisee & each witness: Meet or talk through what you will ask.
 - In drafting questions, focus on what is **relevant** to a potential **policy violation**.



Note: A prior meeting with the advisee or witnesses may not be possible or practicable before the hearing.

15

15



At the Hearing

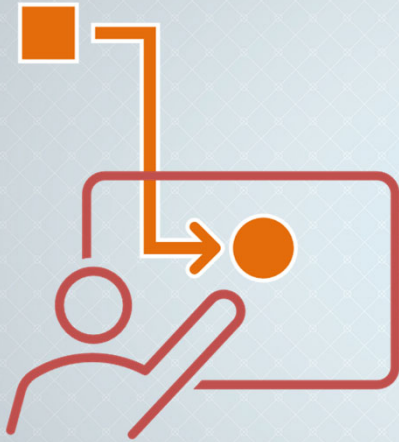


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

16

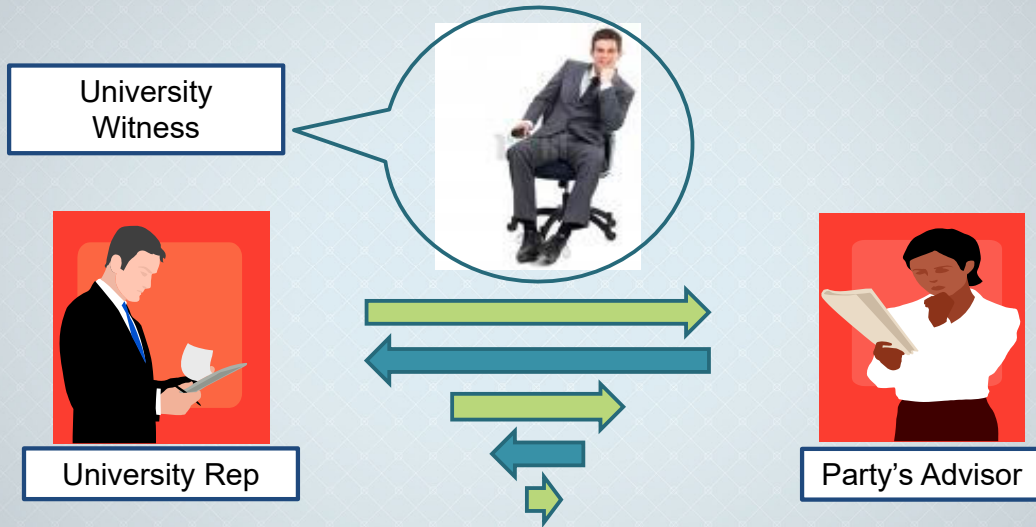
16

Overview of Hearing



- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements

Presentation of Witnesses & Exhibits



Procedure for Asking Questions

The **advisors** may ask questions under the following procedure:

1. The **advisor** will ask a question of the applicable participant.
2. **Before** the participant answers a question, the **hearing officer** will rule as to whether the advisor's question is **relevant** to the alleged conduct charges.
 - If the hearing officer rules the advisor's question as not relevant, then the hearing officer must **explain any decision** to exclude a question as not relevant.
 - If the hearing officer allows the question as relevant, the **participant** will answer the question.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

19

19

Relevant Evidence



Evidence is **relevant** if:

- The evidence has any 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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Relevant Evidence—Examples



- Statements consistent or inconsistent?
 - “X is so annoying. I would never hook up with X.” or “X is so hot. I am going to hook up tonight.”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

21

Relevance: Prior Sexual History



A Complainant’s sexual predisposition or prior sexual behavior are not relevant **except** where questions and evidence about a Complainant’s prior sexual behavior are offered to prove that **someone other than the Respondent committed the alleged conduct** charged by the Complainant **or** if the questions or evidence **concern specific incidents of the Complainant’s prior sexual behavior with the Respondent and are offered to prove the Complainant’s consent** of the alleged conduct.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

22

22

Tips at the Hearing:

- Ensure that your Advisee is **heard** and **felt heard** by giving your Advisee an opportunity to tell their story.
- Feel free to take **breaks** & talk to your Advisee.
- **Before** finishing with a witness, ask your Advisee if he/she/they have any other questions for that witness.



Remember: This is likely a **major life event** for both the Complainant & Respondent.

23

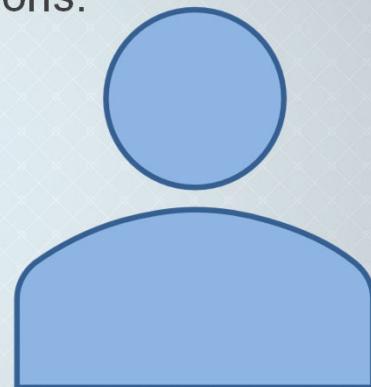


23

Tips at the Hearing: Examining Witnesses

If it is a witness **you** call, tell the story.
What happened? Use open ended questions.

- *What...*
- *Who...*
- *When...*
- *What did you do next?*
- *What happened after that?*
- *Describe...*
- *Tell us...*
- *Explain to the hearing officer why...*



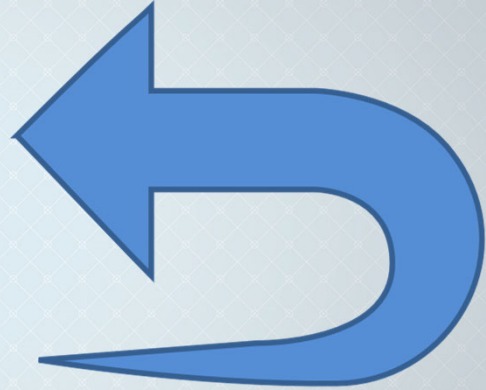
24

24

Tips at the Hearing: Examining Witnesses

Focus on what is important.

- Policy violation
- Example: *Stalking*
 - (1) Course of conduct
 - (2) directed at a person
 - (3) that would cause a reasonable person to fear for their safety or cause substantial emotional distress



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

25

25

Tips at the Hearing: Examining Witnesses

For witnesses called by the **opposing party**:



- Get in. Get out. Could be very short.
- Brief questions.
- Leading questions.
 - *Isn't it true that...*
 - *XYZ, right?*
 - *XYZ, correct?*
 - *Its also true that...*

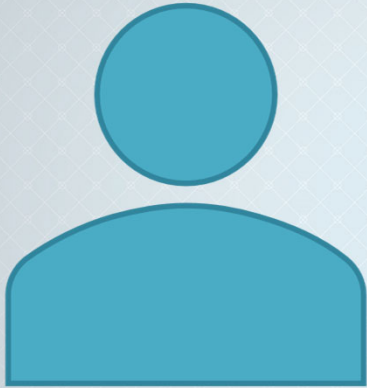


THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

26

26

Tips at the Hearing: Examining Witnesses



For witnesses called by the opposing party:

- Calm demeanor. Normal volume. Not TV.
- Listen.
- Don't quarrel or fight.
- If the answer is contrary to the evidence, it shows the witness is not credible.
- If the witness's explanation doesn't make sense, you just made your point. Don't ask them to explain. Move on.
- Questions may focus on credibility.

Tips at the Hearing: Examining Witnesses

Credibility:

- Are there inconsistencies? Is an explanation plausible?
- What did the witness do? What did they *not* do?
- Are there motives for the witness to be less than truthful?
- Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
- Is there an opportunity for a good faith mistake?



Tips at the Hearing: Examining Witnesses



Test for **implicit bias**:

- What is the essence?
- Create hypo that includes elements. Switch genders.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29

29



Advisor FAQ's & Hypotheticals



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

30



Question 1

Should an institution assign advisors for both parties as soon as the formal grievance process begins? Upon request from a party? At the closing steps of the Investigation Stage?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

31



Question 2

If a party has an advisor of choice, should the institution appoint a university advisor as a back-up in case that party's advisor does not attend the hearing?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32



Hypothetical 1

You have been assigned to advise a student at an upcoming hearing. Two weeks before the hearing, you attempt to contact the student but the student doesn't respond. You email again two more times and call the student. The student does not respond.

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33



Hypothetical 2

You have been assigned an Advisee. Your Advisee states he/she/they did not commit the policy violation. Among the evidence is a video showing the person committing the policy violation. The Advisee wants you to ask cross-examination questions of the witnesses and to ask questions that you think are ridiculous.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34



Hypothetical 2 Continued

If a party wants to ask a question that the advisor thinks is not a good idea (and is potentially even detrimental to the party's position), does the advisor have to ask that question?

In other words, if the party and advisor disagree on a course of action, must the advisor go along?

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35



Hypothetical 3

You are advising a student (RP) in a case where the student is accused of sending three inappropriate text messages expressing a romantic interest in the CP. You ask the RP for any questions RP has for the other party. Together with any questions you can think of, you estimate the cross-examination will only last 5 minutes. You wonder if this is adequate.

What do you do?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36



Hypothetical 4

You advise a party. After the hearing, the Advisee thanks you for your help.



Q & A



Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

