

# University Representative Role in Sexual Misconduct Hearings

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

Spring 2023



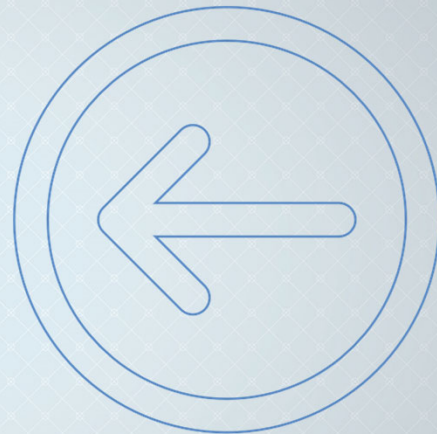
THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

1

## Agenda

1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Pre-Hearing
4. At the Hearing
5. Special Issues
6. Hypotheticals



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

2

2

# Background and Context



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

## Purpose of Hearing

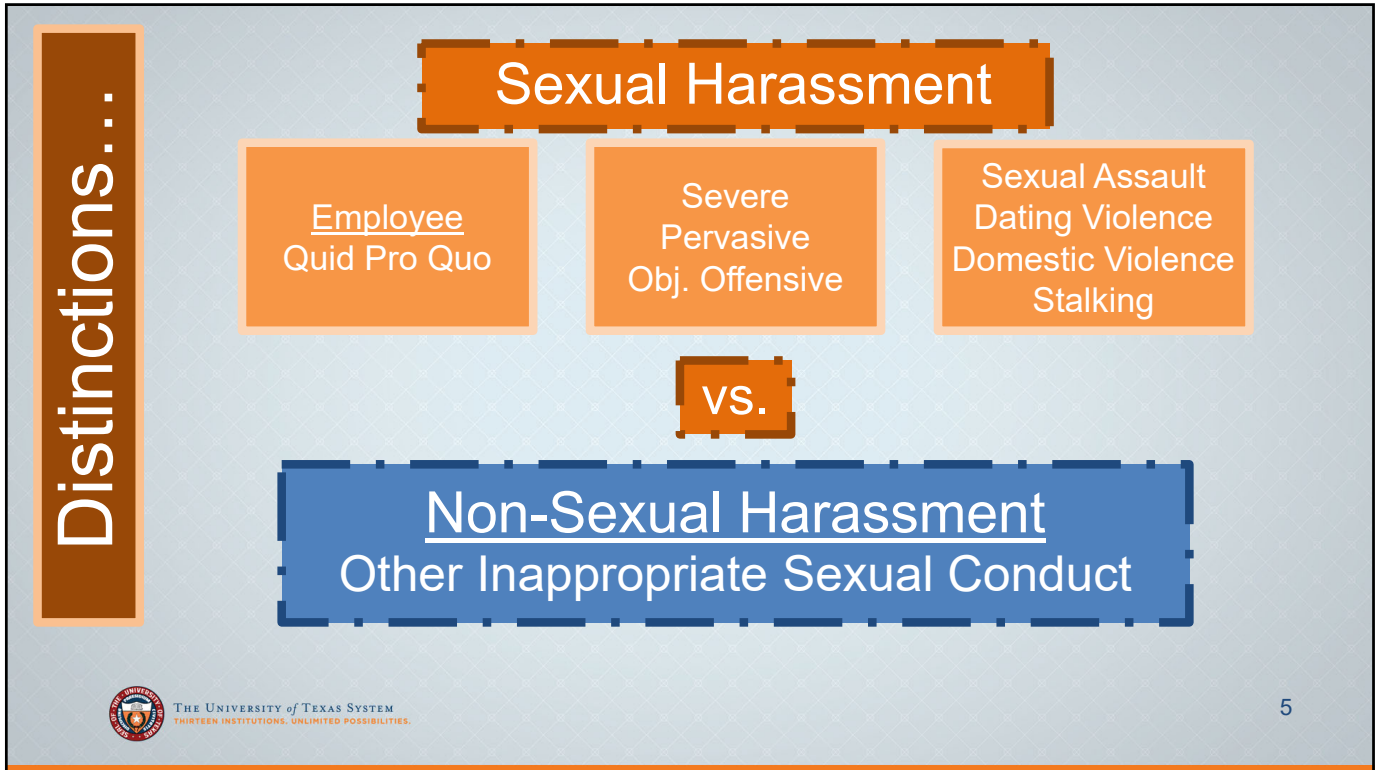
- It may be required by law
- Due Process
  - Notice
  - Opportunity to be heard
- Determined by Impartial Hearing Officer
- Whether the RP committed a university policy violation.



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4



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)

6

6

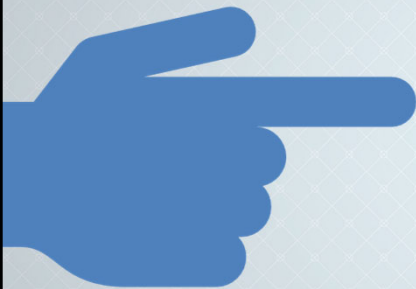


What is not “Sexual Harassment” but may be an issue at a hearing?




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

University Representative Role

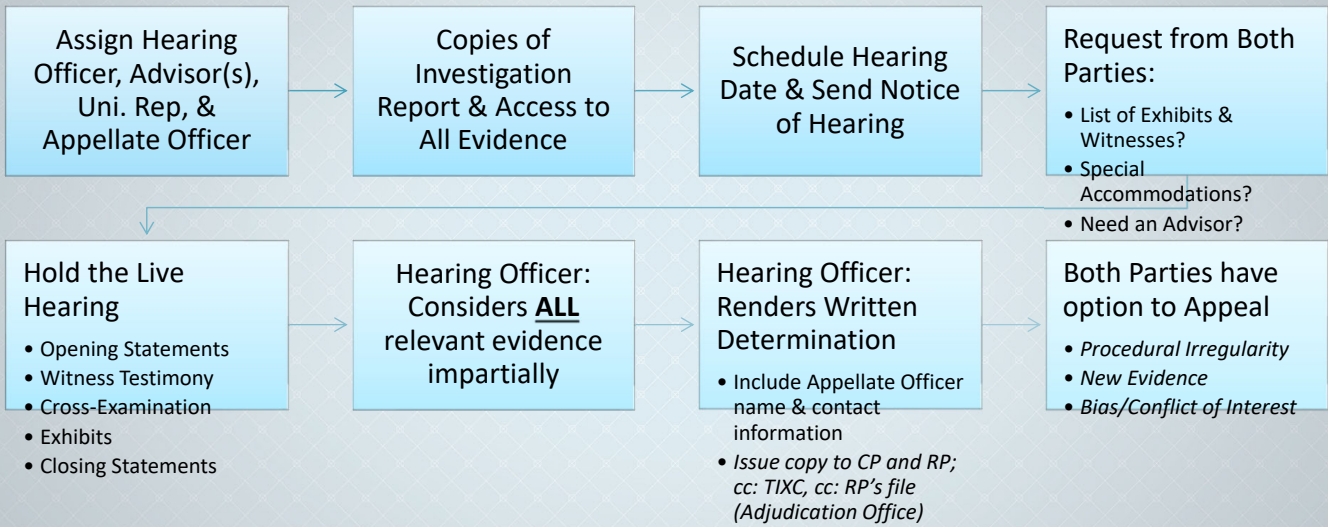


THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

## Live Hearing: Logistics Flowchart



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

## University Representative Role at Hearings

1. Facilitate the presentation of relevant facts and witnesses.
2. An option to present example sanctions, of similar circumstances, if a determination of responsibility is rendered.







A graphic consisting of a large orange square frame. Inside the frame, on the left, are four orange checkmarks stacked vertically. On the right, there are four horizontal orange bars, also stacked vertically. A white rectangular box with an orange border is positioned to the right of the frame, overlapping the bars. Inside this box, the text "Pre-Hearing" is written in orange.

 THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

13

13

## Before the Hearing:



An icon of a blue human head profile facing right. Inside the head, there are three interlocking grey gears of different sizes, symbolizing thought or process.

- Mindset:
  - **Fairness** and **appearance of fair.**
  - Parties to **be heard** and **feel heard.**
- Review materials.
- Review policy.

 THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

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.

15

15

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.

16

16



## Before the Hearing:

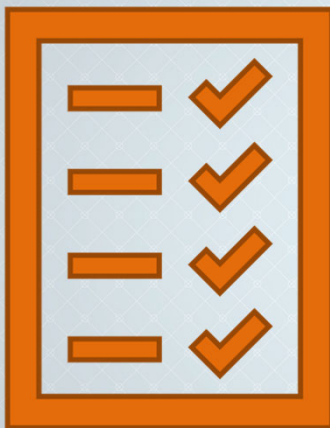


### Witnesses to call:

- CP
- RP
- Witnesses
- Investigator?

**Remember:** Burden of proof is on the **institution**, not the Complainant.

## Before the Hearing:



- Review your institution's policy.
- Get legal assistance from Legal Affairs at your institution or UT System's Office of General Counsel
  - Some institutions use Legal Affairs. Others use UT System's OGC.
  - To request OGC assistance, consult with Legal Affairs/Title IX Coordinator.  
OGC contact: Tamra English  
([tenglish@utsystem.edu](mailto:tenglish@utsystem.edu))



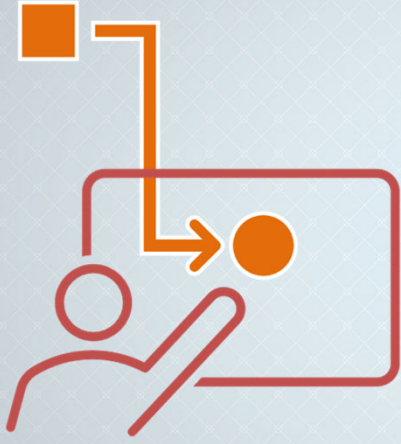
At the Hearing




19

19

## Overview of Hearing



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



20

20



## 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.



## Burden of Proof

### Preponderance of the Evidence Standard

**Note:** The Respondent is presumed **not responsible**.



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

23

23

## 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.

24

24

## 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.

25

25

## 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.

26

26



## Tips for the Hearing:

- Passionate v. Dispassionate:
  - Tone, Volume, Facial Expressions
- Respectful demeanor
- Objections?

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



Special Issues  
at the Hearing



# Logistics

“At the request of either party, the [institution] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously **see & hear** the party or the witness answering questions.”



## Exchange of Witness Lists & Documents



## Exclusion of Privileged Information unless Waived



No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.

## Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



## Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

*Source:*

*UT System Model Policy for Sexual Misconduct (2021)*

33

33

## Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,  
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?  
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.*

**Note:** A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

*Source:*

*UT System Model Policy for Sexual Misconduct (2021)*

34

34

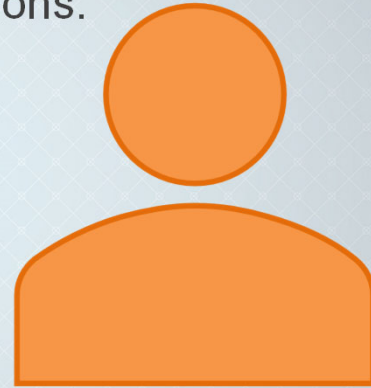


## Tips at the Hearing: Examining Witnesses

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...*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

35

35

## 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

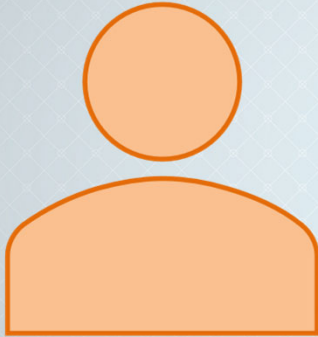


THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

## Tips at the Hearing: Examining Witnesses



- 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.
- Questions may focus on credibility.



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

37

37

## 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?



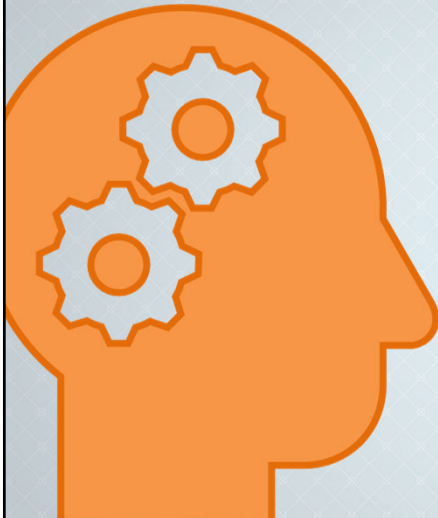
THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

38

38



## Tips at the Hearing:



- **Mindset:**
  - **Fairness** and **appearance of fair.**
  - Parties to **be heard** and **feel heard.**
- Feel free to take **breaks.**
- **Closing** statement:
  - What are the main points?
  - Emphasize elements & evidence.



## What about Sanctions?

- How do you introduce this topic?
- When do you do so?
- What sanctions are appropriate?







## Hypothetical 1

One of the parties does not appear.

*What do you do?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

41

41



## Hypothetical 2

On the day of the hearing, the complainant (CP) expresses that the CP has additional exhibits for the hearing officer to consider. You've never seen these documents before and neither has the respondent.

*Do you object?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

42

42



## Hypothetical 3

You are preparing for a hearing. As you do so, you begin to think that the RP is not responsible for the alleged conduct or that the conduct does not meet the definition of what is prohibited.

*What do you do?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

43

43



## Hypothetical 4

You presented a witness at the hearing. On cross-examination, a party's advisor (either the CP's or RP's advisor) elicits testimony that makes the witness appear not credible.

*What do you do?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

44

44



## Hypothetical 5

There are 5 witnesses who will say the same thing. Do you call all of them?

*What do you do?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45



## Hypothetical 6

You are preparing for a hearing in which the respondent is accused of stalking a fellow student.

During the course of preparations, you find out that there has been a prior report against this same respondent the year before but the case never proceeded to a formal complaint. Apparently, a different complainant had said that respondent was “creepy” and “was always around.”

*Do you include this in your presentation?*



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

46

46





**Q & A**



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

47

47

## 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: <a href="mailto:kranderson@utsystem.edu">kranderson@utsystem.edu</a>	Email: <a href="mailto:sflammer@utsystem.edu">sflammer@utsystem.edu</a>



THE UNIVERSITY of TEXAS SYSTEM  
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

48

48