

University Representative Role in Sexual Misconduct Hearings

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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



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2

Background and Context



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3

3

Purpose of Hearing

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



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4

Distinctions...

1. Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

vs.

2. Non-Sexual Harassment Other Inappropriate Sexual Conduct



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 (2020)*



6

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



Example: Other Inappropriate Sexual Conduct



7

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that they created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct...



8

Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



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Source: UT System Model Policy for Sexual Misconduct (2020)

9

Important Distinction for Sexual Harassment Cases



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



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10

10

Advisor Role at Hearing

Sexual Harassment Cases	Non-Sexual Harassment Cases
<ul style="list-style-type: none"> Advisors will ask questions. Parties must have advisor. 	<ul style="list-style-type: none"> Advisors will not ask questions. Parties may have advisor.

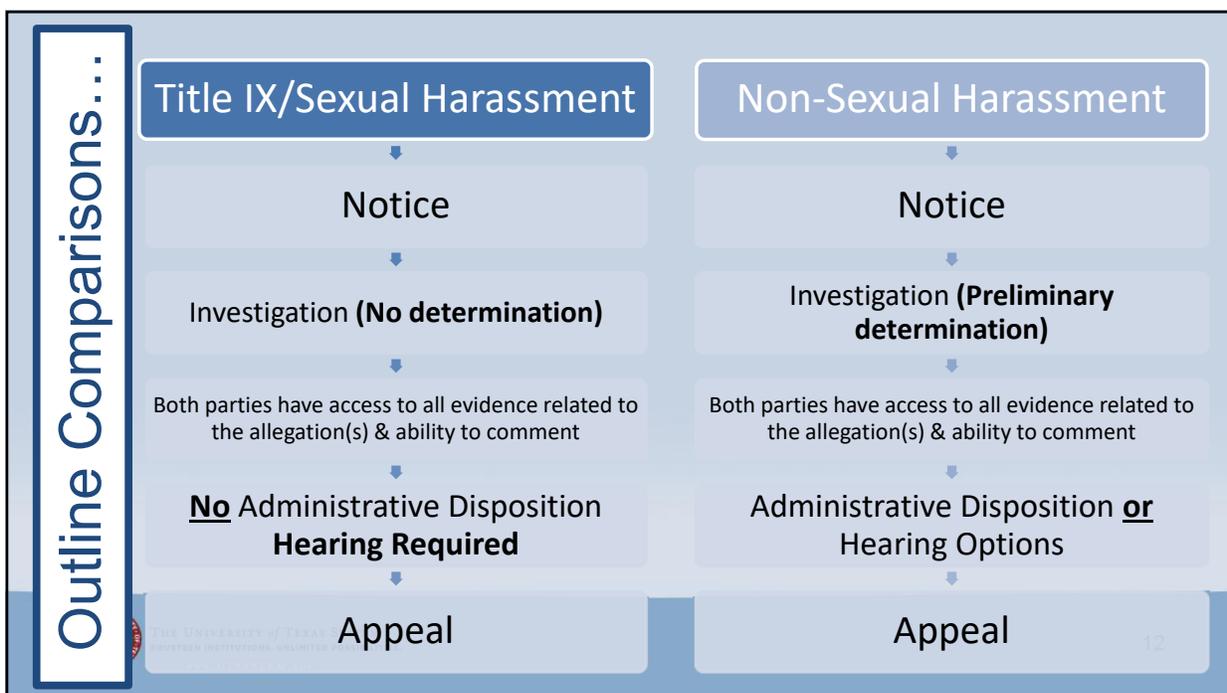
All cases: Advisors are **not** to do opening statements, closing statements, lodge objections, or talk at the hearing.



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11

11



12



A graphic consisting of a large orange square frame. Inside the frame, there are four orange checkmarks on the left and four horizontal orange lines on the right, representing a checklist. A white rectangular box with an orange border is positioned to the right of the frame, containing the text "Pre-Hearing" in orange font.

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13

13

Before the Hearing:



An icon of a blue silhouette of a human head in profile, facing right. Inside the head, there are three interlocking white gears of different sizes, symbolizing thought, processing, or preparation.

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

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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.
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16

16

Before the Hearing:



Witnesses to call:

- CP
- RP
- Witnesses
- Investigator?

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



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17

17

Before the Hearing:

Test for implicit bias:

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



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18

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)



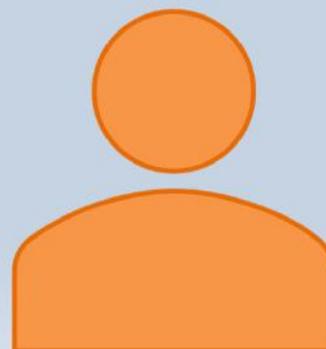
19

Before the Hearing:

Tips for Examining Witnesses:

- If it's a witness the University Rep is calling, before the hearing (if possible):
 - Talk through what you will ask that person.
 - In drafting questions, focus on what is **relevant** to a potential **policy violation**.

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



20



At the Hearing



21

21

Burden of Proof

Preponderance of the Evidence Standard

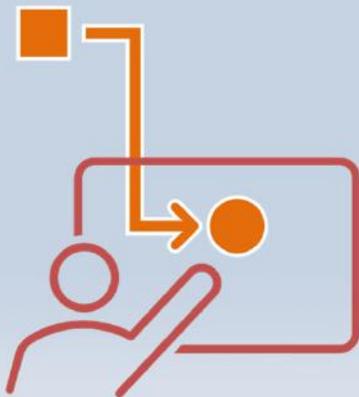
Note: The Respondent is presumed **not responsible**.



22

22

Overview of Hearing



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



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23

Questioning at the Hearing

The **hearing officer** may, at the hearing officer's discretion, ask questions during the hearing of any party or witness and may be the first person to ask questions of any party or witness.

Each party's advisor will have an opportunity to ask relevant questions and follow-up questions of the other party and of any witnesses that participate in the hearing, including questions that challenge credibility.

- **Each advisor** has the ability to ask questions directly, orally, and in real time at the hearing.
- The **parties** will **not** be permitted to personally ask questions of the other party or any witnesses that participate in the hearing.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

25

Presentation of Witnesses & Exhibits



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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.



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27

27

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.”



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28

28



Special Issues
at the Hearing



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29

29



Exchange of Witness
Lists & Documents



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30

30

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.



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31

31

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.



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

32

“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



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Source: Title IX Regulations (2020)

33

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.



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Source: UT System Model Policy for Sexual Misconduct (2020)

34

34

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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

35

35

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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

36

36

Exclusion of Statements

Not submitting to cross-examination:

If a **party or witness** refuses to submit to any cross-examination questions during the hearing, the **hearing officer** will **not** rely on any statement of that party or witness, when reaching a responsibility determination.

The **hearing officer** will **not** draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions.



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37

37

Possible Exclusions:

- Statements against interest by RP
- Statements made by CP
- Statements made by nurse as author of SANE exam
- Statements made by any person who does not attend hearing
- Emails/Texts



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38

38

Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: I got too drunk. LOL.
- W1: Did you see CP?
- RP: Yeah, but I did something stupid. I pinched CP's butt.



39

Possible Exclusion (Example)

- W1: Hey, how was the party last night?
- RP: ~~I got too drunk. LOL.~~
- W1: Did you see CP?
- RP: ~~Yeah, but I did something stupid. I pinched CP's butt.~~



40

But, An Exception on Exclusions...

“A respondent’s alleged verbal conduct that itself constitutes the sexual harassment at issue is not the respondent’s ‘statement’ as that word is used [in the regulations] because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself.”

- OCR Blog, May 22, 2020



41

Exclusion Exception (Example)

- RP: If you go out with me, I'll give you an A in the course.

Because this is the underlying conduct and it is not a “factual assertion to prove or disprove the allegations,” this remark may be considered by the hearing officer even if the RP does not submit to cross examination.



42

No Inference Based on Absence or Refusal



“[T]he decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”



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Source: Title IX Regulations (2020)

43

43

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.



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44

44

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.



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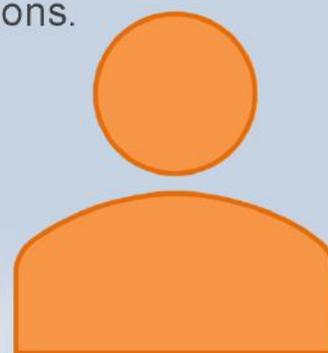
45

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...*



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46

46

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

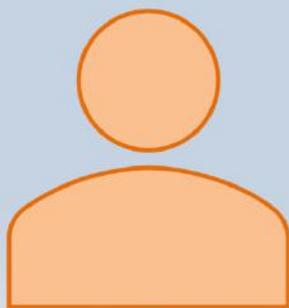


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47

47

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.



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48

48

Tips at the Hearing: Examining Witnesses

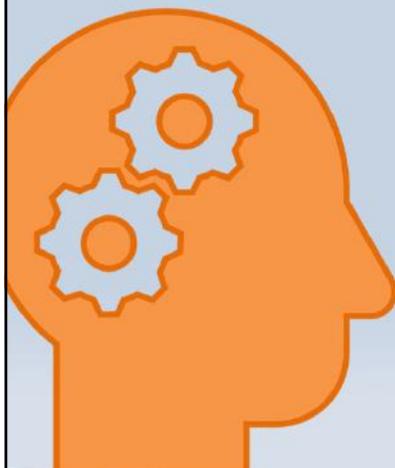
Credibility:

- 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?



49

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.



50



Hypothetical 1

In a domestic violence case, you have prepared exhibits and questions for several witnesses—all of whom witnessed the alleged incident. You are ready to establish all the various “elements” of the policy provision and you know the recommended sanction. In the respondent’s (RP) opening statement, however, the RP surprises you. The RP accepts responsibility, apologizes, and states that the recommended sanction is too harsh.

What do you do? Do you call all your witnesses to establish what happened?



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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.

What do you do?



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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?



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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?



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Hypothetical 5

The respondent did not identify the respondent as a witness. At the hearing, the respondent tries to testify.

What do you do?



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Hypothetical 6

A party is represented by a lawyer. The lawyer has been aggressively asking questions of every witness. You objected when you thought the lawyer's conduct was out-of-line, but the hearing officer overruled your objection. On the latest question, the lawyer makes a facial expression, showing disbelief at the witness's answer—which you tend to believe.

What do you do?



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56



57

Contact Information

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58

58