Hearings 201
Day Ready, Set, Go!
Two

Jody Shipper
Managing Director
10/2/2020
Your Facilitator

Jody Shipper, J.D.
Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor’s degree from Georgetown University’s School of Foreign Service.
Overview of the Morning

01. Let's Practice!
02. Evidentiary Issues
03. Hearing Advisors
04. Being an Effective Hearing Advisor
05. How do I know which Questions to Ask?
06. Framing Questions
07. Practical Application
08. Appeals & Common Errors on Appeal
Recap and Practice

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence
Break Out!

#1

Say hi!

Pick a scribe

Discuss

• Develop Questions for Witnesses

Come back prepared to discuss

• I will call on each group one by one
Report Out

Grand River Solutions
Break Out! #2

Say hi again

Pick a scribe

Discuss

- Make determinations on questions and cite rationale
- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for Bob, Dylan, Stevie
- Group 4: Questions for Nick, Kayla, Caitlyn

Prepare to report back
Report Out
Evidentiary Issues
Evidence:

Is it . . .

- Relevant
- Reliable?
- Does it matter (is it due any weight)?
Relevance Is Not . . .

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court
What about

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News article that colleges are failing complainants

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News article that colleges fail to provide due process, are biased

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News article about a related criminal case
What about Polygraph examination

Private investigator’s interview notes

Declarations submitted under penalty of perjury
What about

An expert report discussing low incidence of false reports

An expert report discussing bias against male complainants

An expert report on reasons why blackouts are not evidence of incapacitation
What about

News article that colleges are failing complainants

News article that colleges fail to provide due process, are biased

News article about a related criminal case
Hearing Advisors
There are two types of advisors:

- Advisor (throughout whole process)
- Hearing Advisor (hearing, for poses of asking questions)
Hearing Advisor

“Such advisors need not be provided with specialized training or be attorneys because the essential function of such an advisor provided by the recipient is not to “represent” a party but rather to relay the party’s cross-examination questions that the party wishes to have asked of other parties or witnesses so that parties never personally question or confront each other during a live hearing.” 85 Fed. Reg. 30562 (May 19, 2020).
For the Limited Purpose of Asking Questions

It is in the school’s discretion to restrict advisor's active participation in the proceeding, except when it comes to asking questions of parties or witnesses (also referred to as cross examination).
Being an Effective Hearing Advisor

Before the Hearing
Make the Party Aware that . . .

• You are under no obligation to keep the information confidential
  • There is no attorney client relationship nor any other recognized privilege between you and the party
  • You are not under an obligation to keep what the party tells you confidential

• Were this matter go to a court of law, and you were asked to testify, you would have to do so, truthfully

• Do this at the outset
Exactly, What Type of Homework?

- Familiarize yourself with investigative report
- Understand the ends and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses
How do I Know which Questions to Ask?
Identify the Claims, What Needs to be Proven

• Why are we here?
• What are the elements for the charge?
• What are the definitions of those elements?
  • Consent?
  • Incapacitation?
What do I Want to Show?

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?
Foundational Questions to Always Consider Asking

- Were you interviewed?
- Did you see the interview notes?
- Did the notes reflect your recollection at the time?
- As you sit here today, has anything changed?
- Did you review your notes before coming to this hearing?
Framing Questions
Do you want to highlight or expand?
Highlighting
Expanding
Not making complex legal arguments

Are not treating parties with hostility

Rules of evidence outside of Title IX regulations do not apply

Not looking for the “gotcha” moment

Not a Court of Law
Treat the Party or Witness with Respect

- Do not harass or badger the party or witness
- This is not “Law and Order”
- Be calm and speak clearly
Practical Application
Scenario #1: You are advisor for Respondent
Scenario #1

- Complainant’s capacity to consent is an issue.

- Witness A stated to the investigator that they thought they saw Complainant have a few drinks and that complainant “might have been drunk.” Witness A believes that Complainant was drunk as Witness A has been around Complainant many times when Complainant is drunk. Witness A is now on cross examination. What question(s) will you ask?
Think About . . .

What information could be helpful for the respondent

Are you looking to expand on or simply highlight

How are you going to ask the question
Scenario #2:
You are advisor for Complainant
Scenario #2

- Witness B stated to the investigator they saw Complainant leave the party with Respondent. Before Complainant and Respondent left, Witness B saw Complainant fall and Respondent had to help Complainant up. Witness B stated they have known Complainant for five years, and when Complainant is drunk, Complainant is unable to control their motor functions. Witness B is now on cross examination.
Think About . . .

What information could be helpful for the respondent.

Are you looking to expand on or simply highlight.

How are you going to ask the question.
Scenario #3: You are the advisor for Respondent
Scenario #3

- Witness C is the roommate of the Respondent. Witness C stated to the investigator that when Complainant entered Witness C’s and Respondent’s apartment that Complainant was not visibly intoxicated, was very coherent, and able to have lengthy conversations about complex subjects. However, unbeknownst to you Witness C and Respondent have had a falling out. When Witness C is in the hearing, they say they will only answer questions from the hearing officer. You are the advisor for the Respondent, what questions will you ask?
Think About . . .

What information could be helpful for the respondent

Can this parties’ statements come in

Are you going to ask any questions
# Notification of the Appeals Process

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<tr>
<th>Who Gets Notified</th>
<th>What They are Notified Of</th>
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<tbody>
<tr>
<td>Complainant</td>
<td>Allegations</td>
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<tr>
<td>Respondent</td>
<td>Investigation Outcome</td>
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<td>Student Conduct?</td>
<td>Applicable Policy</td>
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<td>Human Resources?</td>
<td>Appeals Process</td>
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<tr>
<td>Academic personnel?</td>
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<td></td>
<td>Links</td>
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<tr>
<td></td>
<td>Dates</td>
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<td>How to submit</td>
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## Whose Job Is It?

<table>
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<th>Receive</th>
<th>Receive the appeals</th>
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<tbody>
<tr>
<td>Determine</td>
<td>Determine whether the grounds for appeal have been met</td>
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<tr>
<td>Notify</td>
<td>Notify the person(s) responsible for reviewing the appeal</td>
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<tr>
<td>Arrange</td>
<td>Arrange the logistics for the appeal</td>
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<tr>
<td>Communicate</td>
<td>Communicate with complainant and respondent and advisors and witnesses as appropriate</td>
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Differences in Burden

**COLLEGE/UNIVERSITY**
Figure out what happened and get to the truth of the matter, & error correction

**COMPLAINANT**
Persuade and point out error with supporting evidence or facts

**RESPONDENT**
Has the Burden Been Met?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds.

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.
What Does This Mean?

• You are reviewing the appeal for what it says, not how it is said.

• You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.
The Typical Grounds for Appeal

- Procedural
  - Bias/conflict of interest
  - Error
- New information
- Affected the outcome
Bias

- What constitutes bias?
- The investigator was biased against me because…
- The investigator was biased against (complainants/respondents generally) because . . .
New Information

- Is it really new?
- If it is new, would it change the findings/outcome
- Who investigates new information?
- Timeline
What Would You Do?

Appeal states there is new evidence...

Evidence not provided with the appeal

How do you know it is new?

It is new but is it relevant and reliable?
In Short

Title IX

Appeal Officer(s)
Dear Appeals Officer...

I am the victim of a false accusation.

- The police were not contacted and I was not charged by law enforcement with a crime.
- After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party.
- No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.
Common Errors on Appeal
Evidence

Direct

Circumstantial

Character
Evidence – Knowing What to Consider

<table>
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<th>Drunk vs. Intoxicated vs. Incapacitated</th>
<th>Language matters</th>
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<td></td>
<td>Clarity and consistency of application</td>
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Who has to prove consent?

Know the language of your policy
Standard of Proof

Is there a standard of proof for appeals?
Problematic Processes

Whether it is part of your official or unofficial process

- Stipulations
- Legal procedures
- Unintended consequences of assisting one or more parties with drafting the appeal
Appeals Panels That Exceed Their Authority

- Who handles
- How do you know
- How to correct
Dear Appeals Officer…

I am the victim of a false accusation. Something went terribly wrong….
Procedural Error

There was a procedural error in the process that materially affected the outcome.

- Someone was not interviewed
- I was not allowed to cross-examine the complainant
- Burden was put onto me to prove consent
Denial of A Process You Don’t Offer

- Representation
- Discovery
- Subpoena / compel witnesses
When a Party Refuses to Participate in the Process but Claims Due Process is Violated

“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson
Sometimes Institutions Do the Wrong Thing

- Missing deadlines for providing materials
- Misunderstanding of affirmative consent
- Errors at a hearing
Credibility Errors

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?
Allegations for Bias

“Pro-victim bias does not equate to anti-male bias.”
-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.
Allegations for Bias as the Basis for Appeal

An allegation of bias without factual support “no longer passes muster”.

-Doe v. University of Colorado
Sanctions Were Wrong

Is this a burden of production, or persuasion?
Solutions When You Err

- John Doe v. University of Kentucky
- Doe v. Alger

Re-do and get it right.
Lesser-Included Charges on Appeal

There are no lesser-included charges.
Reflects lack of notice and opportunity to respond.

- Powell v. St. Joseph’s University
- Doe v. U.S.C.
When a Sanction Changes Due to an Appeal

Appeals panel “sua sponte and without any explanation recommended enhancing the penalty to expulsion.”

Haug v. SUNY Potsdam
# Documenting the Appeal

## Policy
- Rights
- How notified
- Who decides
- Step-by-step process
- Communications

## Outcome
- Notification
- Decision
- Rationale
- Record-keeping
- Office of record
Questions?

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