

**Civil Rights
Advisor Training
for the
Texas A&M University System**



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February 2022

Civil Rights Advisor Training

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Agenda


1. Due Process in Higher Education

The Texas A&M University System  3

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Due Process in Higher Education (students)



The Texas A&M University System  4


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Due Process in Higher Education (students)

Due Process

Who has authority over you... how many jurisdictions do you live in? (POLL)

- International Law
- Federal Law
- State Law
- County/Municipalities
- Professional
- Personal

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Due Process in Higher Education (students)

Due Process

Do all of these jurisdictions provide the same due process elements if there is a conflict?

NO --- they do not, but why not?

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Due Process in Higher Education (students)

Due Process

Due process is the process that is due to us based on:

- The nature of the relationship
- The rights or privileges at stake

The greater the potential loss of rights, the higher amount of process that is due.

Due Process in Higher Education (students)

- President James Madison (Dem-Rep., 4th President)
 - Authored the 5th Amendment to the U.S. Constitution; ratified in 1791
 - 5th Amendment requires due process of law in order for the government to deprive an individual of **life, liberty, or property**
 - 5th Am. prohibits self-incrimination and double jeopardy in criminal proceedings
 - 5th Amendment protections date back to the Magna Carta (1215)
- Senator Jacob Howard (Rep., Michigan)
 - Worked closely with President Lincoln on passage of 13th Amendment to abolish slavery
 - Served on Joint Committee on Reconstruction
 - Drafted the 14th Amendment, which requires equal protection under the law for all persons born or naturalized in the United States; ratified in 1868
 - Reversed (USSC) Dred Scott decision that black persons were not citizens
 - **Due process clause guarantees substantive and procedural process in state legal proceedings (14th Amendment is primary source of due process in higher education)**
 - Privileges or Immunities Clause protects individual state citizenship from interference by other states



Due Process in Higher Education (students)

Dixon v. Alabama (1961, 5th Circuit)

- School expelled six students for unspecified reasons without a hearing after those students participated in a civil rights demonstration
- Circuit Court held that **minimal due process (notice and hearing)** was required or the expulsion of a student
- Ended legal relationship of *in loco parentis* (THE landmark case)



Due Process in Higher Education (students)

Esteban v. Central Missouri State College (1969, 8th Circuit)

- School suspended two students for participation in civil rights demonstrations
- Both students in attendance, but claimed to be spectators
- Esteban refused order to return to his room
- Students sued in 8th Circuit
- Court required a second hearing with adequate procedural due process, including: written notice of charges; students permitted to review all materials to be used at the hearing in advance; allowed advisement; students allowed to present own stories, exhibits, and witnesses; decision to be based only on facts in evidence; and recording of the hearing could be made by either side
- After second hearing resulted in suspensions, court refused to intervene since procedural due process had been provided




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Due Process in Higher Education (students)

Goss v. Lopez (1975, USSC)

- Nine students suspended from a public high school for ten days for destruction of property
- Ohio law allowed this sanction without a hearing
- USSC determined that a suspension without a hearing violated 14th Amendment Due Process Clause


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Due Process in Higher Education (students)

1968 General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education

- Issued by a local group of judges in the Western District of Missouri and included Harry Blackmun, who served as an Associate Justice on the USSC from 1970 to 1994
- Group of judges issued strong statements about distinctions in due process between criminal justice system and higher education; their observations have stood the test of time


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Due Process in Higher Education (students)

1968 General Order – key quotes:

“[S]chool regulations are not to be measured by the standards which prevail for criminal law and for criminal procedure.”


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Due Process in Higher Education (students)

General Order – key quotes:

“The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary processes not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. **The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.**”


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Due Process in Higher Education (students)

1968 General Order – key quotes:

“In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline maybe teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. **By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.**”

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Due Process in Higher Education (students)

Can we impose the death penalty on our community members? NO
 Can we imprison our community members? NO
 Can we deprive our community members of substantial property???

Is there a right to a higher education? (Implicit – Yes, Explicit – No)

Separate rights from privileges...

Once we extend a privilege, revoking it may require due process, most especially when we are altering the relationship between the individual and the institution

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Due Process in Higher Education (students)

In general, minimum due process includes:

- Notice of Allegations/Charges
- Right to a hearing prior to suspension/expulsion
- Opportunity to see and respond (challenge) to information/evidence
- Attendance of an Advisor (VAWA, Title IX)
- Students allowed to make their own statements, as well as submit evidence and witnesses

Due process does not include:

- Representation by advisor; advisor limited to role established by the institution (except to ask questions in Title IX live hearings)
- Use of "beyond a reasonable doubt" standard; about 90% of colleges and universities have been using a preponderance test for all student cases dating back to the 1960s
- Deferral to criminal process where there is a concurrent criminal investigation or where concurrent criminal charges are pending
- "Presumption of Innocence" (Title IX only – responsibility)
- Right of Appeal (Title IX only)


Due Process in Higher Education (students)Takeaways


- There is no explicit right to a higher education, but once accepted, a student is owed due process to have the privilege of attendance taken away
- Due process (in our administrative legal setting) does not and should not reflect the due process expectations of the criminal process; our process runs independent of the criminal or civil court systems
- Behaviors may be both criminal in nature and violations of institutional regulations; educational institutions are no more qualified to say a crime has occurred than a court is qualified to say that a school's regulation have been violated
- In general, court challenges to institutions has been in the areas of substantive and procedural due process, and not an interpretation of an institution's regulations (1st Amendment being the exception)



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Due Process in Higher Education – Questions?




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System Regulation 08.01.01 and the Adjudicatory Process


08.01.01 Civil Rights Compliance

Revised [July 7, 2020](#) (Effective [August 14, 2020](#))
 Next Scheduled Review: July 7, 2025
 Click to view [Revision History](#).



Regulation Summary

The Texas A&M University System (system) will provide equal opportunity to all employees, students, applicants for employment and admission, and the public. This regulation provides guidance to each member in complying with local, state and federal civil rights laws and regulations (laws) and related system policy.


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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

- Title IX (4.2.10)
- Sex-based Misconduct (4.2.11)
- Other Civil Rights (4.2.12)



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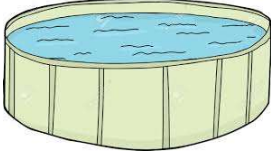
System Regulation 08.01.01 – Major Changes by Section – Section 4

Section 4.2.9 – Types (“Pools”) of Cases

Is it a Title IX complaint?


Mandatory Dismissals:

- Case would need meet definition of sexual harassment if proved
- Did not occur in member’s education program or activity
- Did not occur in the United States



Discretionary Dismissals:

- Complainant wishes to withdraw complaint (noted in writing)
- Respondent no longer enrolled/employed with member
- Member is unable to collect sufficient evidence
- Complainant’s identity is not known
- When same allegations have already been investigated and adjudicated

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System Regulation 08.01.01 – Major Changes by Section – Section 4

Title IX – Sexual Harassment
 Unwelcome conduct on the basis of sex (of a sexual nature or otherwise): (1) by an employee of the member who conditions the provision of an aid, benefit, or service of the member on an individual's participation in that unwelcome sexual conduct; (2) determined by a reasonable person to be so **severe and pervasive and objectively offensive** that it effectively denies a person equal access to the member's education program or activity; or (3) sexual assault or dating violence, domestic violence, or stalking based on sex.


Sex-Based Misconduct – Hostile Environment
 unwelcome conduct on the basis of sex that is **severe, persistent, or pervasive** enough to create a work, educational, or campus living environment that a reasonable person would consider **intimidating, abusive, or offensive**. Sex-based misconduct is explicitly prohibited under this regulation. Aiding another in the commission of sex-based misconduct is also prohibited under this regulation. Sex-based includes, but is not limited to, sexual assault, sexual exploitation, dating violence, domestic violence, and stalking based on sex.

Student/Employee Conduct
 Did it **happen**? If it happened, did it **violate** published student rules or professional expectations (by the letter of the expectation)?

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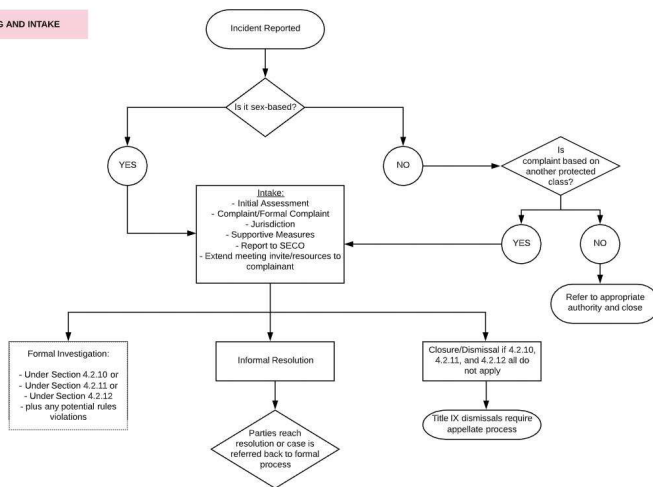
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	TITLE IX (4.2.10)	SEX-BASED MISCONDUCT (4.2.11)	OTHER CIVIL RIGHTS (4.2.12)	STUDENT CONDUCT / EMPLOYEE PROFESSIONALISM
Supportive Measures	Yes	Yes	Yes	Yes
Requires	Formal Complaint	Report/Complaint	Report/Complaint	Awareness and Evidence
Standard of Evidence	Preponderance	Preponderance	Preponderance	Preponderance
Informal Resolution Allowed?	Yes – with SECO approval	Yes – with SECO approval	Yes – with SECO approval	Yes
Role of Investigative Authority	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence; conclude if allegations are substantiated but not if 08.01.01 or member rules were violated	Refer to Member Rules and appropriate System Regulation
Adjudication	Formal (Live) Hearing	Formal (Live) Hearing	Written Review	Refer to Member Rules and appropriate System Regulation
Adjudicator	Hearing Officer or Hearing Panel (in role of DA)	Hearing Officer or Hearing Panel (in role of DA)	Designated Administrator	Refer to Member Rules and appropriate System Regulation
Allowed an Advisor?	Yes – provided by Member for formal hearing if no advisor is present	Yes – provided by member for formal hearing if no advisor is present	Yes	Yes
Role of Advisor	Cross-examination and Support	Cross-examination and Support	Support	Support
For a Finding...	Severe and Pervasive and Objectively Offensive (SPOO) OR Quid Pro Quo (employee respondents only)	Severe or Persistent or Pervasive and Objectively Offensive (hostile environment) OR Quid Pro Quo	Severe or Persistent or Pervasive and Objectively Offensive	Did it take place? Does it violate the published rule/expectation?
Appeal?	Yes	Yes	No	Refer to Member Rules and appropriate System Regulation

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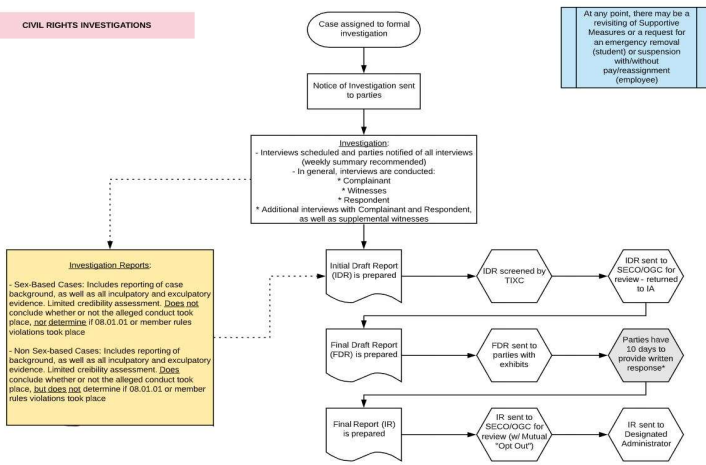
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CIVIL RIGHTS REPORTING AND INTAKE



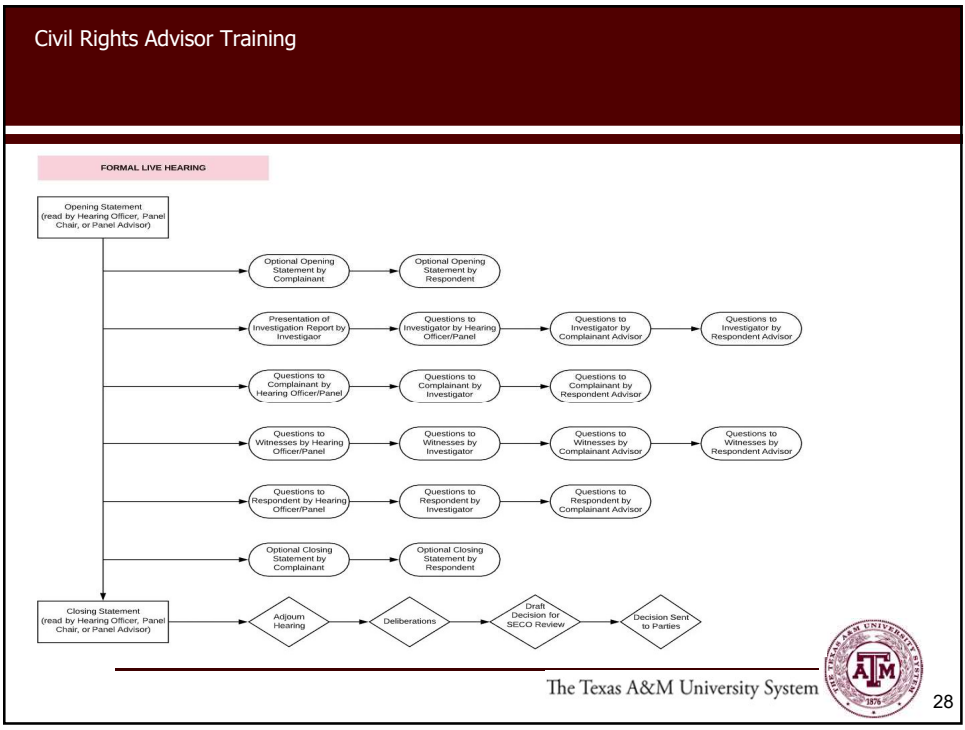
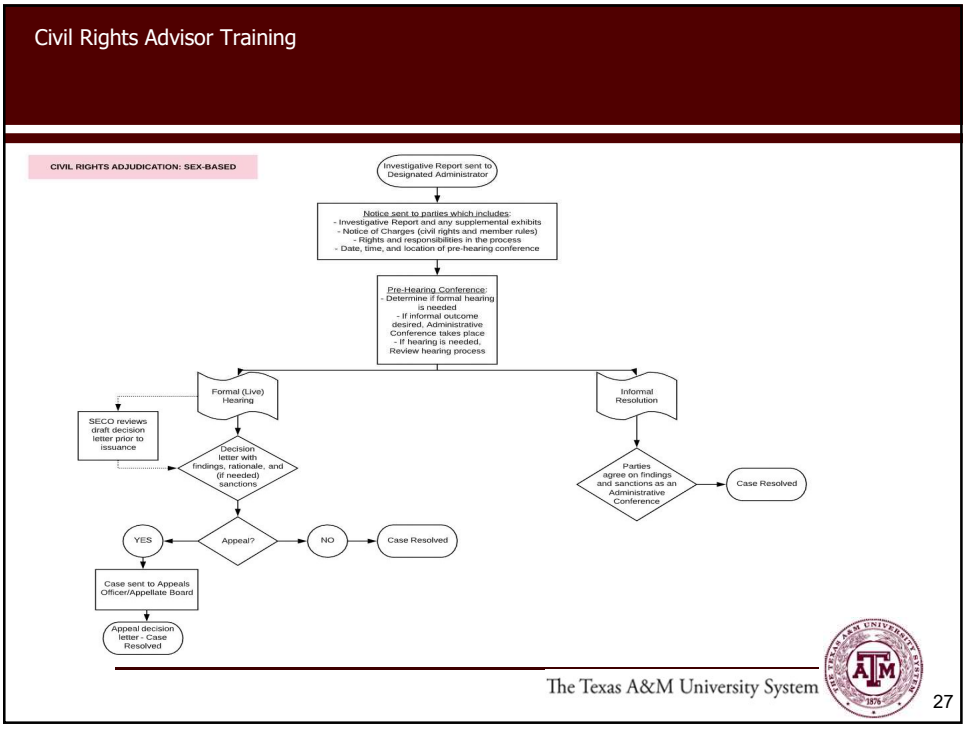
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CIVIL RIGHTS INVESTIGATIONS



* For sex-based cases, written responses are taken from parties; in non sex-based cases, questions for parties and/or witnesses are taken from the parties





System Regulation 08.01.01 and the Adjudicatory Process – Questions?



The Role of the Advisor



The Role of the Advisor

- A. Process Advisors
 - i. Help the party prepare for each meeting and advise ethically, with integrity, and in good faith
 - ii. Assist party with review/preparation of any prepared statements
 - iii. Attend the pre-hearing conference
 - iv. Preparing for formal live hearing
 - v. Attend live hearing and conduct questioning of parties and witnesses
 - vi. Assist the party in the development of any appeal
- B. Hearing-only Advisors
 - i. Help the party prepare for the live hearing and advise ethically, with integrity, and in good faith
 - ii. Preparing for formal live hearing
 - iii. Attend live hearing and conduct questioning of parties and witnesses



The Role of the Advisor

- A. Preparing for a formal live hearing
 - i. Discuss the investigative report with the party
 - a) What do they see as their strengths in the report?
 - b) What areas of vulnerability do they see in the report?
 - c) What questions to they want to have you ask of the opposing party and of specific witnesses (including the investigator)?
 - d) What questions do you believe your party would benefit from having asked?
 - e) Discuss and outline questions prior to attending hearing



The Role of the Advisor

A. Preparing for a formal live hearing

ii. Limitations of serving as advisor

- a) Remember the role of the advisor as outlined in the Advisor Acknowledgement form
- b) Tell the party you are advising that they cannot disclose to you any civil rights violations that they may have possibly committed; as a university/agency official you do not maintain privilege and you can be called as a witness during the process by the adjudicatory body
- c) Your only active involvement in the process is to ask questions of the opposing party and witnesses; you may not otherwise make statements or answer questions on behalf of the party
- d) You must respect all supportive measures in place, and may not interfere in the investigatory or adjudicatory process
- e) The party you are advising may seek your removal as advisor at any time in the process



The Role of the Advisor

B. At the formal live hearing

- i. Abide by the instructions and rulings of the Hearing Officer/Hearing Panel Chair at all times
- ii. Provide advisement without disrupting the proceedings (pass notes or whisper quietly)
- iii. Ask questions of the opposing party and witnesses by directing those questions to the Hearing Officer/Panel Chair and pausing to allow a ruling on admissibility; questions directed to the opposing party and witnesses must be relevant to the complaint and may not be repetitive
- iv. If a question or set of questions is ruled admissible, you may ask the Hearing Officer/Panel Chair for an opportunity to explain why you believe the information should be admissible, with the opposing party being given an opportunity to make an argument against admissibility




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The Role of the Advisor


B. At the formal live hearing


- v. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- vi. Hearing officers/hearing panels cannot draw an inference 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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System Regulation 08.01.01 and the Adjudicatory Process – Questions?



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Effective Questioning



Effective Questioning

In the criminal justice system the questioning of opposing parties and witnesses (i.e., cross-examination) is been dedicated to getting the opposition to provide answers that do not support the opposing case. This is often accomplished by asking “yes” or “no” questions that limit the development of context for answers or providing questions framed in such a way that neither choice of answer is beneficial to the person answering the question. Leading questions are also employed both to imply an answer and to influence the person answering to provide feedback that aligns with the question asked. However, hearings in the higher education setting allow the person responding to a question to provide a full answer to an inquiry and to provide context for the answer. As a result, traditional cross-examination techniques have limited application.




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Effective Questioning


Rather than to create an adversarial relationship with the opposing party and witnesses, advisors are encouraged to focus on the details of the complaint and of the investigative report. As a result, more effective questioning centers on the following lines of inquiry:


- Portions of the person’s statements that lack specificity
- Portions of the person’s statements that might appear substantively inconsistent or contradictory
- Determining if the potential bias of parties may have influenced their statements
- Testing whether or not parties or witnesses are generalizing or making assumptions based on incomplete information

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Questions about Effective Questioning?



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Records and Privacy



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Evidence Collection: What goes in the report and exhibits?

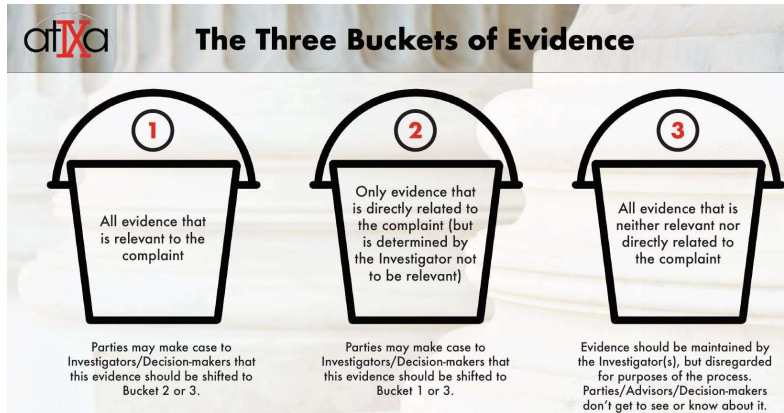
REPORT will contain: ALL evidence relevant to the complaint (inculpatory and exculpatory)

EXHIBITS will contain: ALL EVIDENCE relevant to the complaint and ALL EVIDENCE directly related to the complaint that the investigator(s) determines is not relevant

NOTES will contain: ALL information collected, including evidence that is neither relevant nor directly related to the complaint – information deemed by investigators to be not related and not relevant will not be included on the Interview Summary form completed for each interview; notes are not shared with the parties and are typically destroyed when the final report has been created

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When Parties Provide Feedback on Final Draft Report:



Adapted from ATIXA



It's time for everyone's favorite game show...



Which Bucket Does the Evidence Go In?



Evidence Collection: What goes in the report and exhibits?**WHICH BUCKET?**

A respondent in a sexual assault case provides photos taken on his phone to seek to establish that at the time of the alleged incident he was actually several blocks away drinking with some friends.

Which “bucket” does it go in?

BUCKET #1: The investigators determine that the evidence is relevant to the allegations in the complaint and if corroborated would tend to be exculpatory. The material is attached to the Interview Summary and included in the investigation report.

Evidence Collection: What goes in the report and exhibits?**WHICH BUCKET?**

A complainant in a dating violence submits emails written by the respondent months before the alleged incidents that speak to the respondent’s family history, including information about a controlling and manipulative parent. In the email the respondent indicates a concern about becoming “like” that parent and tells the complainant that they are going to get counseling.

Which “bucket” does it go in?

BUCKET #2: In this case, the investigators decide that although the emails might relate to the allegations, as they spoke to behaviors similar to what the complainant alleges, the material is not directly related to the allegations as they do not make the allegations any more or less likely to be true. They are included with the Interview Summary form (which is an exhibit) but not referred to in the investigation report.



Evidence Collection: What goes in the report and exhibits?**WHICH BUCKET?**

A witness in a stalking complaint details an interaction that they had with the respondent, in which the respondent acted in a manner that they describe as “creepy.” There is no direct connection to the incidents under investigation, nor are the behaviors described related to the behaviors described in the complaint.

Which “bucket” does it go in?

BUCKET #3: In this case, the investigators decide that the behavior is completely unrelated to the complaint and that its inclusion would only serve as unfairly prejudicial against the respondent. The information is recorded in the investigator’s notes, but not included in the Interview Summary (exhibit).

Privacy Considerations

- Advisors will be required to sign a statement at the time of their appointment indicating that they will not redisclose information shared with them by the System Member
- Advisors appointed to parties or selected by parties who are employed by a System Member are not providing legal counsel, and have no expectation of privilege; if called on to testify in the adjudicatory process they are expected to do so willingly and truthfully (this is unlikely unless cause has been provided)
- Advisors will cooperate fully and comply with directives from the System Member, the System Ethics and Compliance Office, and the Office of General Counsel



Records and Privacy – Questions?



*Thank
you* 

... for your participation in today's training program. We hope that the information provided today better equips you to fulfill your role as an advisor.

