

BENCH/ADVISOR TRAINING

TITLE IX REVIEW
MEETINGS

CONTENTS

- ▶ CROSS EXAMINATION
- ▶ RELEVANCE
- ▶ INTERACTING WITH OTHER ADVOCATES

CROSS-EXAMI NATION

REQUIREMENTS OF NEW TITLE IX REGS

- ▶ PLU must provide advisors.
- ▶ Advisors must be similarly credentialed.
- ▶ Cross exam must be conducted by the advisor.
- ▶ If a party does not participate in cross, the hearing officers must not rely on any statements provided by that party.

WHAT IS CROSS-EXAMIN ATION

- ▶ Dictionary: the formal interrogation of a witness called by the other party in a court of law to challenge or extend testimony already given. "he testified consistently under vigorous cross-examination."
- ▶ Aggressive or detailed questioning of someone. "She is capable of facing tougher cross-examination in the political debates"



TO POKE HOLES IN THE WITNESS'S
TESTIMONY OR DISCREDIT THE
WITNESS.



TO GIVE YOU THE CHANCE TO
CHALLENGE AND TEST THE
PROSECUTION WITNESS'S EVIDENCE.

PURPOSES OF CROSS-EXAMINATION

POINT OF CONTRAST

- ▶ Most lawyers do not cross-examine witnesses well and forget that the purpose of cross-examination is not simply to attack an adversary, but to strengthen your own case.

WHEN DOES CROSS-EXAM OCCUR

- ▶ Cross exam comes immediately after the direct examination of any witness, and just before the “redirect” examination of the same witness. If the judge permits it, a “re-cross” examination can occur.

HOW IS CROSS-EXAMI NATION DONE

- ▶ Normally cross-examination is limited to issues addressed on direct examination

HOW IS CROSS-EXAMI NATION DONE

- ▶ Cross exam is done by asking “leading” questions:
 - ▶ Isn't it true that?
 - ▶ Wasn't it really your intention to_____?
 - ▶ Tell me why you put drugs in her drink?
- ▶ Contrast with Direct Exam, which requires that every question begin with Who, what, when, where, why.

STEPS TO A GOOD CROSS-EXAM

- ▶ Step one: Ask yourself, Do I need to cross-examine this witness?

STEPS TO A GOOD CROSS-EXAM

- ▶ STEP TWO:
 - ▶ Establish Goals for each witness.
- ▶
 - ▶ Is the primary plan to attack the witness' credibility?
 - ▶ Is it the plan to have the witness concede key facts you will not be able to obtain from other witnesses?
 - ▶ Is it your plan to have the witness confirm key elements of your own case?
 - ▶ Develop helpful testimony before you have destroyed the witness' credibility.

STEPS TO A GOOD CROSS-EXAM

STEP THREE:

- ▶ to the extent possible, follow a pre-determined plan.
- ▶ Prepare in writing in advance – use the investigation report to do this.
- ▶ Have “citations” in the investigation report ready to impeach the witness. – Be able to challenge an inaccurate statement quickly.
- ▶ Ask questions in an organized manner – don’t jump from point to point.

STEPS TO A GOOD CROSS-EXAM

- ▶ STEP FOUR
- ▶ Keep it short. The longer cross-exam goes on, the less effective it is.
- ▶ The goal is to undermine the other side's story or reinforce your own.
- ▶ Every question should make a point or set up the next question that *will* make a point.

STEPS TO A GOOD CROSS-EXAM

STEP FIVE:

- ▶ Know when to stop. If you have “destroyed” the witness, stop or you look like a bully.

STEPS TO A GOOD CROSS-EXAM

- ▶ STEP SIX
- ▶ Use only leading questions, which ideally can be answered with only yes or no.
- ▶ Tell a story. You may not even need to literally ask a question, and if so, the question at the end of your statement is, “Isn’t that correct?”

STEPS TO A GOOD CROSS-EXAM

- ▶ STEP SEVEN
- ▶ Challenge Credibility through Cross Examination:
- ▶ Challenge the witness' ability to perceive
- ▶ Challenge Reliability
- ▶ Challenge Truthfulness

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RELEVANCE UNDER THE NEW TITLE IX RULES

RELEVANCE

UNDER THE

INFLUENCE

OF THE

Scary





Relevance is a key concept under the new rules.



Relevance is a very complicated legal concept.



Its application in the Title IX Hearings is more complicated than in a courtroom.

RELEVANCE

DEFINITION OF RELEVANT

- ▶ Relevant means having a bearing on or connection with the matter at hand.

DEFINITION OF LEGAL RELEVANCE

- ▶ **Relevance**, in the common **law** of evidence, is the tendency of a given item of evidence to prove or disprove one of the **legal** elements of the case, or to have probative value to make one of the elements of the case likelier or not. Probative is a term used in **law** to signify "tending to prove".

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- ▶ A **fact** is **legally relevant** if it had an impact on the case's outcome.

FEDERAL RULE OF EVIDENCE (ER) 401

- ▶ Evidence is relevant if:
- ▶ **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
- ▶ **(b)** the fact is of consequence in determining the action.

- ▶ In a personal injury action arising from a car accident, the color of the parties' cars seldom would be **relevant** to the case's outcome.
- ▶ The prosecution wants to offer **evidence** that Ruby's mom had refused to buy her a Halloween costume.
The **evidence** is **relevant** to prove that Ruby had a motive for stealing the makeup.

EXAMPLES OF LEGAL RELEVANCE



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JUDICIAL DISCRETION IN THE CIVIL LAW

- ▶ A judge may determine that evidence that is relevant should not be admitted because such relevant evidence may be
 - ▶ unduly prejudicial,
 - ▶ concern prior bad acts, or
 - ▶ constitute character evidence," in the context of a case.
- ▶ A judge does not have to state the reason he thinks an offered piece of evidence is not relevant.

IN A CIVIL TRIAL:

IN A TITLE IX REVIEW MEETING:

- ▶ a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

- ▶ The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report.
- ▶ The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held;
- ▶ either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).

OTHER KEY RELEVANCE CONSIDERATIONS

The hearing officer
has to say why
each offered piece
of evidence is
relevant.

Not just when
objections are
made, but any
time a question is
asked.

IN A TITLE IX REVIEW MEETING:

Question/Type	Relevance	Reason	Citation
General questions, including inculpatory questions, exculpatory questions.	Relevant	(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.	34 CFR Part 106.45
	Not Relevant	The question asks about information that is not probative of any material fact concerning the allegations.	Commentary, Federal Register p. 30344, on 34 CFR § 106.45(b)(6)(i)
Victim's Sexual History (but see exceptions)	Not Relevant	Deemed irrelevant by DOE	34 CFR Part 106.4
Exception One: such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant.	Relevant	Deemed relevant by DOE	34 CFR Part 106.45
Exception Two: 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.	Relevant	Deemed relevant by DOE	34 CFR Part 106.45
Duplicative Questions	Not Relevant	Deemed Not Relevant by DOE	34 CFR Part 106.45
Party's treatment records without the party's (or parents) voluntary consent	Not Relevant	Deemed Not Relevant by DOE	
Questions that badger a witness	Violates PLU Hearing Rule No. _____.		34 CFR Part 106

- ▶ The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.
- ▶ If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.

ADDITIONAL HELP FOR HEARING OFFICERS

MANAGING DIFFICULT ADVISORS

