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RELEVANCY OF EVIDENCE IN STUDENT SEXUAL MISCONDUCT HEARINGS

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HOW TO ASSESS RELEVANCY

WCU Policy definition of relevancy: includes both inculpatory and exculpatory evidence and questions (i.e., tending to prove and disprove the allegations)

Put another way, does the evidence tend to make a material act more or less true?

Generally speaking, a question or evidence not directly related to the allegations will generally be irrelevant.

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IRRELEVANT EVIDENCE

WCU Policy defines irrelevant evidence as

1. Evidence and questions about the Complainant's sexual predisposition or prior sexual behavior unless:
   a) They are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
   b) They concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove Consent.

IRRELEVANT EVIDENCE

2. Evidence and questions that constitute, or seek disclosure of, information protected under a legally-recognized privilege including attorney-client privilege; or

3. Any party's medical, psychological, and similar records unless the party has given voluntary, written consent.

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ASSESSING RELEVANCY

1. Is the relevant evidence **authentic**?
   - Is it what it purports to be? If so, why? If not, why not?
   - Digital evidence should be corroborated
   - Expert witnesses need to have knowledge of the matter at hand

ASSESSING RELEVANCY (Continued)

2. Is the relevant evidence **credible**
   - Is the evidence worthy of belief?
   - Is the witness worthy of being trusted?
   - Did the witness have inconsistencies in their testimony? Were the inconsistencies explained by idiosyncrasies or being stressed from participating in a case? Were the inconsistencies an attempt to be evasive?

ASSESSING RELEVANCY (Continued)

3. Taken as a whole, is the evidence sufficient in strength and amount to be "**substantial**" support for the charge?

- In the context of measuring support, the measure is the "more likely than not" or preponderance of the evidence standard

Documenting the Relevancy Determination

- As part of the hearing and in the decision, all relevancy determinations should be documented
- If a question is raised as to the evidence or testimony and its relevancy, the decision maker(s) should explain why he/she/they deemed the evidence relevant or not
- Decision maker(s) can decide evidence is relevant but choose to give it less weight (i.e., character witness testimony or expert witness testimony)

When to Assess Relevancy

At the hearing, questions posed by advisors must be evaluated for relevancy in real time

According to Final Rule §106.45(b)(6)(i):

> Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, **the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant**.

Real-time Assessment of Relevancy

Look at whether the question seeks information that will help you, as the decision-maker, in making the underlying determination. Put another way, does the question ask about a detail that is probative of any material fact concerning the allegations?

- Who asked the question should not matter
- The motives of the questioner should not matter
- Who the question was directed at should not matter
- The tone or style of the question should not matter
- The sex of the party of the questioner or the person being questioned, or their status as Complainant or Respondent should not matter

Relevancy "Ranking"

- The highest weight (relative to other testimony) should be given to first-hand testimony by Parties and Witnesses regarding their own memory of specific facts that occurred
- Both inculpatory and exculpatory (i.e., tending to prove and disprove the allegations) evidence must be weighed in equal fashion.

Special Situations

A relevant question is asked but in an abusive or argumentative manner

- Decision-makers can ask the advisor to rephrase the question in an appropriate manner, consistent with WCU's decorum policy

Special Situations

Prior sexual history of Complainants is deemed irrelevant except for exceptions noted in final Title IX rules

- Decision-makers cannot apply a balancing test as to whether the evidence is more probative than prejudicial
- Prior dating history can be relevant as long as no sexual details are shared

Special Situations

The question asked is "prejudicial" or concerns sensitive or embarrassing issues

- Sexual misconduct hearings almost always involve sensitive and/or embarrassing information.
- Consistent with the Final Title IX Regulations, relevant questions need to be considered even if a party or advisor believes the danger of unfair prejudice substantially outweighs the probative value.

Special Situations

Prior sexual history of Respondents is not specifically excluded from consideration, however:

- Decision-makers should first make a determination as to relevancy (whether it tends to make a material fact more or less true) with respect to the **authenticity**, **credibility** and "**substantiality**" of support for the charge

QUESTIONS?

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