Today we will cover

• Asking questions
• Evaluating evidence
• Explaining determinations
• Thorny issues

To ask the right questions, you must:

- Know the elements of the prohibited conduct alleged
- Remember what UM policy says is off-limits
- Be familiar with what each party and witness said during the investigation
- Be familiar with the evidence that was collected
- Identify the areas that still need development/clarification
- Structure your notes in a way that puts all of that together
Quiz:
What is the point of a hearing officer’s questions?

a) To show how smart the hearing officer is
b) To find out what each party said happened
c) To get clarity on portions of evidence that may be unclear that are relevant to the determination
d) To get details that are relevant to the determination where they are missing from the investigation report
e) To engage with the parties and witnesses to the extent it assists your credibility determination
f) C, D and E

What will help you get that information?

• Rapport building: What does this look like at the hearing stage?
• Roadmaps
• Segues into questions
• Using a human(e) style

Practice:
How would you ask about . . .

• Alcohol consumption
• Specific details of/surrounding the sexual act
• Post-incident initiation of contact by Complainant toward Respondent
• Complainant’s 18-month delay in reporting incident
Weighing the evidence and making a determination

1. Fact-finding: Making the factual determination of what happened,
   and then,

2. Policy analysis: Did what happened constitute a violation of UM’s policy?

Step One: Fact-finding: Determining what happened

- If there is a factual dispute, you must make a factual determination of what happened:
  - Identify key components of each party's account
  - Identify pieces of evidence that support each person's account or that contradict each person's account
  - Determine the weight you will give each piece of evidence

Important concepts

- Relevance
- Reliability
- Credibility
- Weight/probative value
Determining credibility

How to determine if a person is credible?

EEOC says to consider:

• Inherent plausibility: Is the testimony believable on its face? Does it make sense?
• Demeanor: Did the person seem to be telling the truth or lying?
• Motive to falsify: Did the person have a reason to lie?
• Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party’s testimony?
• Past record: Did the alleged harasser have a history of similar behavior in the past?
How to determine if person is credible?

Jury instruction says to consider:

- Relationship to the Plaintiff or to the Defendant
- Interest, if any, in the outcome of the case—Anything to gain or lose from the case
- Manner of testifying—Did they appear to be lying? Appear to be telling the truth?
- Opportunity to observe or acquire knowledge concerning the facts about which the witness testified
- Candor, fairness and intelligence
- The extent to which testimony has been supported or contradicted by other credible evidence
- Any bias or prejudice?
- Inconsistency within testimony? Reasonable/minor or significant?
- Use your common sense and your everyday experience in dealing with other people.

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How to determine if person is credible?

Cops say:

- Body language
- Gut feeling
- Experience
- If person has prior criminal history

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Lunch time!
(and review the report)

Testing relevance and sufficiency of the evidence:
Fun activity applying evidence in a sexual harassment matter

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school’s education program or activity
To ask the right questions, you must:

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<th>Task</th>
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Workshop on asking the necessary questions

Group discussion: Explaining our factual findings
Weighing the evidence and making a determination

1. Fact-finding: Making the factual determination of what happened, and then,

2. Policy analysis: Did what happened constitute a violation of UM’s policy?

Step Two:
Policy analysis: Did what happened constitute a policy violation?

- If there is a factual dispute, make a factual determination of what happened:
  - Identify key components of each party’s account
  - Identify pieces of evidence that support each person’s account or that contradict each person’s account
  - Determine the weight you will give each piece of evidence

Step Two:
Policy analysis (a fun activity)

1) Complainant and Respondent were in a dating relationship.
2) The parties engaged in sexual intercourse on one prior occasion.
3) Complainant attended a party at FUN fraternity on October 26, 2021.
4) Within one minute of Complainant entering the front door of the fraternity house, Respondent ran over to her.
5) Complainant was facing away from Respondent.
6) Respondent ran up to Complainant, yelling “Hi hottie!”
7) Respondent aggressively bear-hugged Complainant.
8) Respondent put his mouth on Complainant’s neck, biting her.
Analyzing the evidence: Step 2

**Fondling (Title IX misconduct)**
The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of that person

Break down the elements:
- Touching
- Private body parts of another person
- For purpose of sexual gratification
- Without consent

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**Thorny issue:**
Character v. pattern evidence

- UM rules regarding character evidence:
  - Witnesses will not be permitted to participate solely to speak about an individual’s character, because character evidence is generally not relevant.
  - Prior sexual contact between a complainant and a respondent is not relevant to prove character or reputation.
  - Prior or subsequent conduct of the respondent will never be used to prove character, but may be considered for other purposes, such as determining pattern, knowledge, or intent.

- Pattern evidence may come from:
  - Evidence in current case regarding conduct before or after incident
  - A finding from a previous investigation
  - Evidence from a previous investigation that didn’t rise to level of a policy violation

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**Thorny issue:**
New evidence offered at hearing

- UM Policy says:
  - In the absence of good cause (as determined by the hearing officer), information, including the identification of witnesses that is discoverable through the exercise of due diligence, that was not provided to the investigator during the investigation phase, will not be considered during the hearing.
  - If the hearing officer agrees to the admission of new evidence offered at the hearing, the hearing officer may delay the hearing and instruct that the investigation be reopened to gather any new evidence.
  - Any party or witness who submits to cross-examination at the hearing must have first been interviewed (or otherwise offered a statement) by the investigator.
  - A party who has not previously participated in the investigation process may be limited (as determined by the hearing officer) in the evidence or statements the party may present.

- What are we doing in practice?
**Thorny issue:**
Dealing with statements from uncrossed witnesses

- The mother of all exclusionary rules is gone. Good riddance.
- Doe v. Baum governs now. Anyone remember what Doe v. Baum said?
- The rest of the regulations are still in place.
- So, what does this look like in practice?

Thank you for attending!