



BEING AN EFFECTIVE TITLE IX ADVISOR: FROM INVESTIGATION TO HEARING

AGENDA

● Overview of Title IX and its
Hearing Requirements

● Advisor Overview

● Hearing Advisor's Role

● At the Hearing

● Closing

OVERVIEW OF TITLE IX AND ITS HEARING REQUIREMENTS



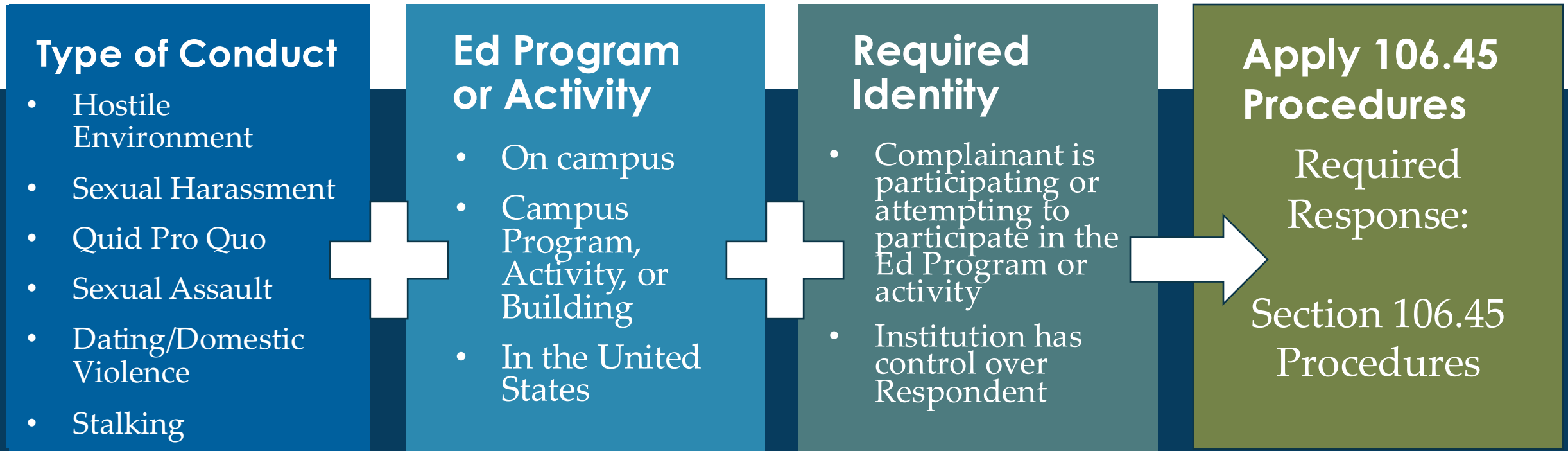
Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 (1972).



TITLE IX APPLICATION (POST-MAY 2020)



TITLE IX APPLIES TO ALL FORMS OF SEX DISCRIMINATION

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

THE TITLE IX REGULATIONS

SEXUAL HARASSMENT ONLY

1

Narrows the definition of sexual harassment;

3

Narrows eligibility to file a complaint;

2

Narrows the scope of the institution's educational program or activity;

4

Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.

SEXUAL HARASSMENT: SECTION 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

CUNY DEFINITIONS (SECTION III)

- Example g.
- **Title IX Sexual Harassment** is a subset of the broader definition of Sexual Harassment above. It is defined by the USDOE to mean conduct on the basis of sex that occurs in CUNY's education program or activity against a person in the United States and that satisfies one or more of the following:
 - (1) a CUNY employee conditioning the provision of an aid, benefit, or service of CUNY on an individual's participation in unwelcome sexual conduct;
 - (2) unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to CUNY's education program or activity; or
 - (3) Sexual Assault, Dating Violence, Domestic Violence, or Stalking as defined in this Policy.

CUNY SPECIFIC POLICY

The City University of New York Policy on Sexual Misconduct

Section XI. Title IX Sexual Harassment Matters

- TIXC makes determination if qualifies for TIX
- Notice to Parties
- Informal Resolution options
- Dismissal Options (mandatory and discretionary, process)
- Formal Resolution: Investigation and live hearing for finding

Section XII. Non-Title IX Sexual Misconduct Matters

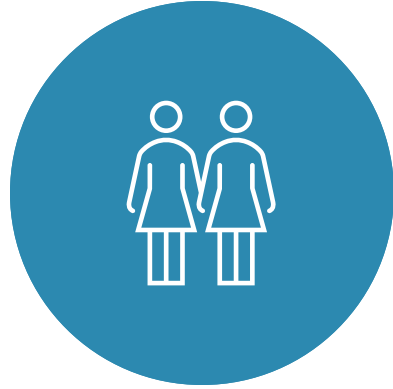
- Investigation Notice to Parties and 120 days
- Informal Resolution options
- Dismissal Options (mandatory and discretionary, process)
- Formal Resolution: Investigation with fact finding of investigator, appeal to committee and president makes disciplinary referral to SAO, determination or panel

X. Rights and Procedures that Apply to all Sexual Misconduct Matters

ADVISOR OVERVIEW



THERE ARE TWO TYPES OF ADVISORS



Advisor of Choice
(throughout whole process)



Hearing Advisor (hearing,
for purposes of asking
questions)

ADVISOR OF CHOICE

Parties are entitled to an advisor of choice.

The advisor of choice can be anyone.

This advisor may accompany the party to any interviews/meetings and the hearing.

The advisor will conduct cross examination of the other party and witnesses at the hearing

DURING THE INVESTIGATION: ADVISOR OF CHOICE

- Assist the advisee in understanding the Policy
- Assist in the identification of witnesses
- Assist in the identification of evidence
- Assist in providing the investigator with information
- Assist in preparation for investigative interviews
- Accompany advisee to investigative interviews
- Advise during the interview
- Assist with document/evidence review and response
- Assist with review of the report and development of the response



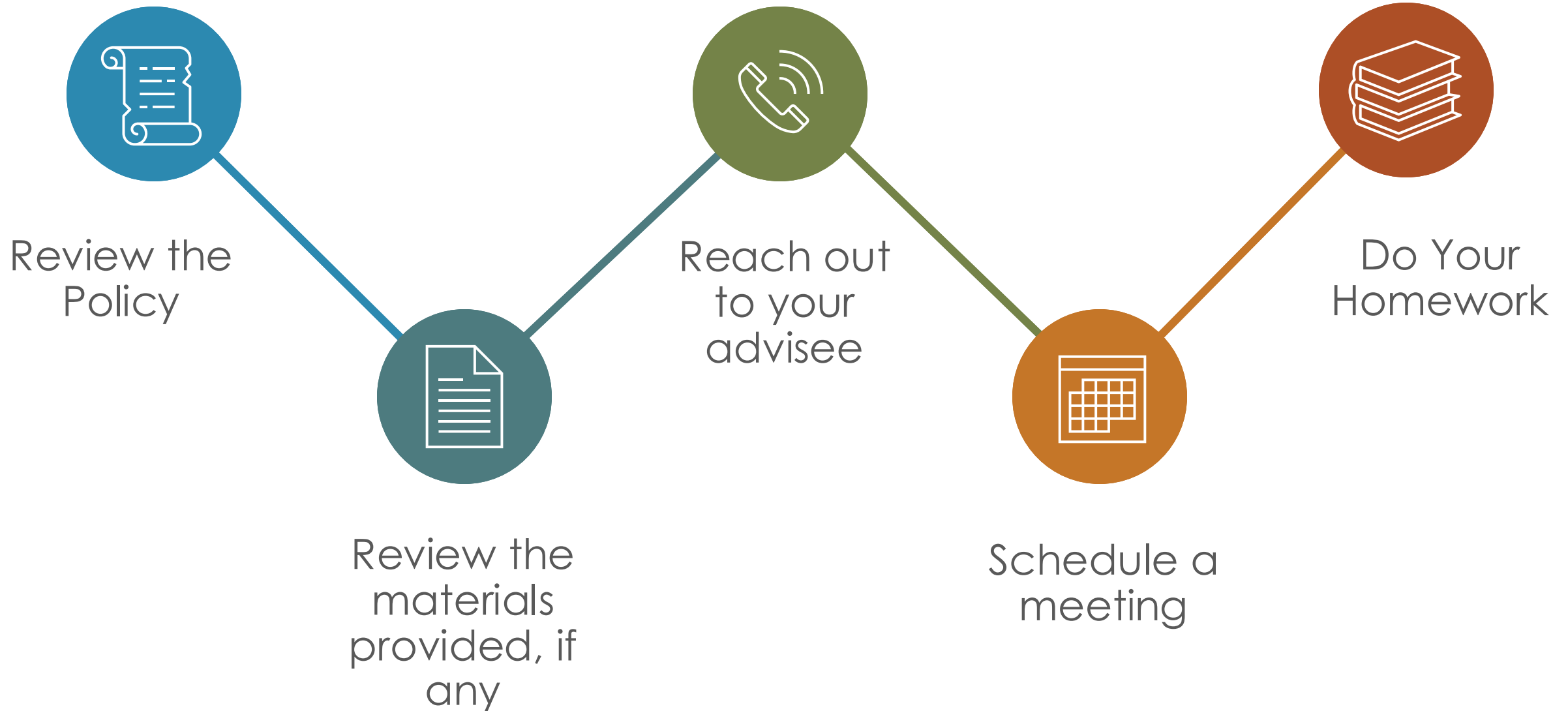
YOUR ROLE AS A HEARING ADVISOR

- The limited role of conducting cross examination on behalf of your party.
- Supporting your party.

HEARING ADVISOR'S ROLE



AFTER YOU ARE ASSIGNED A CASE AS A HEARING ADVISOR...



DO YOUR HOMEWORK

- Review applicable policy language/provisions
- Familiarize yourself with investigative report
- Understand the ins 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?
- Consult with your advisee
- Anticipate questions of others
- Consider impact of your decisions and develop a strategy



MEETING WITH YOUR ADVISEE

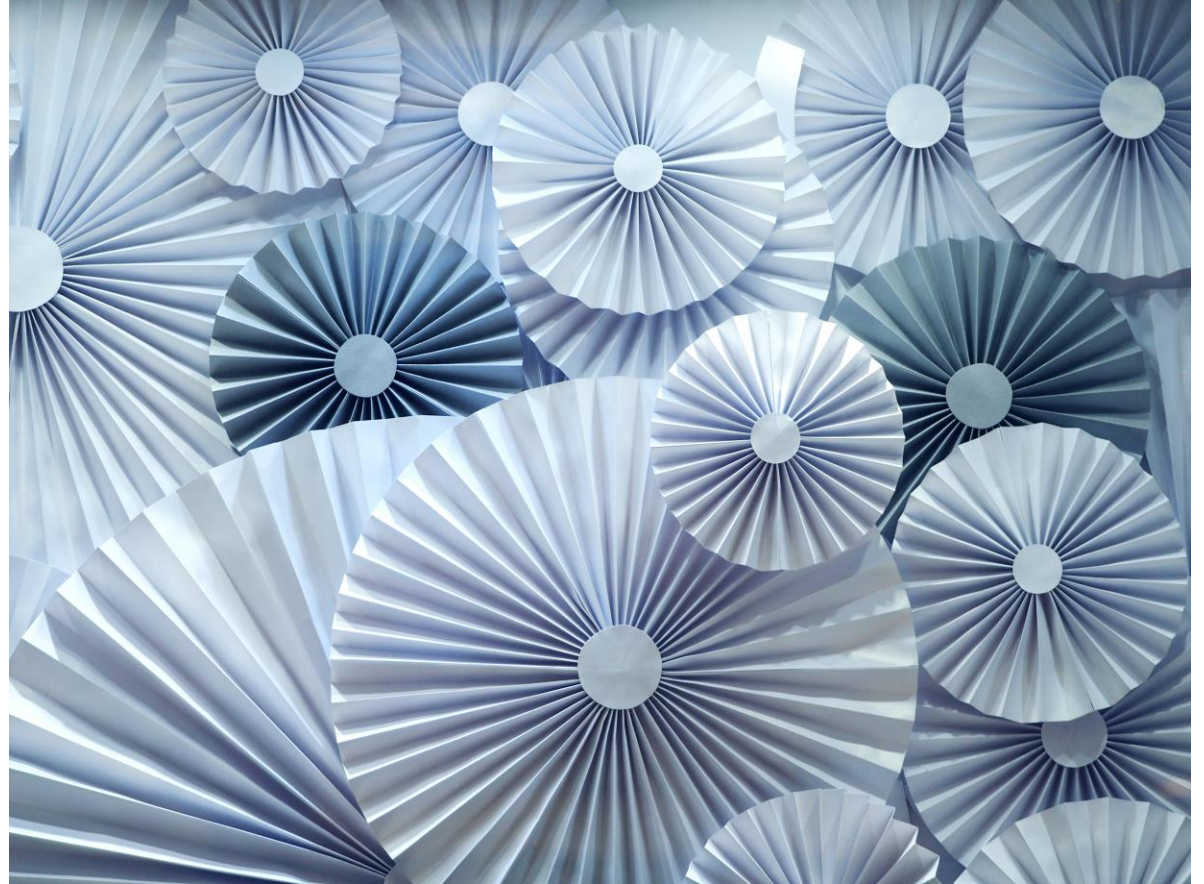
Build: Build Rapport

Explain: Explain your role

Advise: Advise them that their conversations with you are not privileged

Go Over: Go over the policy and process with them

Discuss: Discuss the evidence



PREPARE YOUR ADVISEE FOR THE HEARING



How to answer questions

Questions they can expect

How to prep for the hearing day itself and self-care

Communication during the hearing

Selective participation and potential impacts

AT THE HEARING

ORDER OF PROCEEDINGS

1. Introductions and instructions by the Chair; Opening Statements

2. Presentation by Investigator or College Presenter

3. Presentation of information and questioning of the parties and witnesses

4. Closing Statements

5. Deliberation & Determination

HEARING PARTICIPANTS

Complainant: the person bringing the complaint

Respondent: the person against whom the complaint has been filed

Advisor: will conduct cross examination

Investigator: may summarize the investigation, answer fact-based questions

Witnesses: present in the room only when answering questions

Hearing Chair: ensures a fair and equitable hearing process, acts as a resource for all participants, facilitates the hearing,

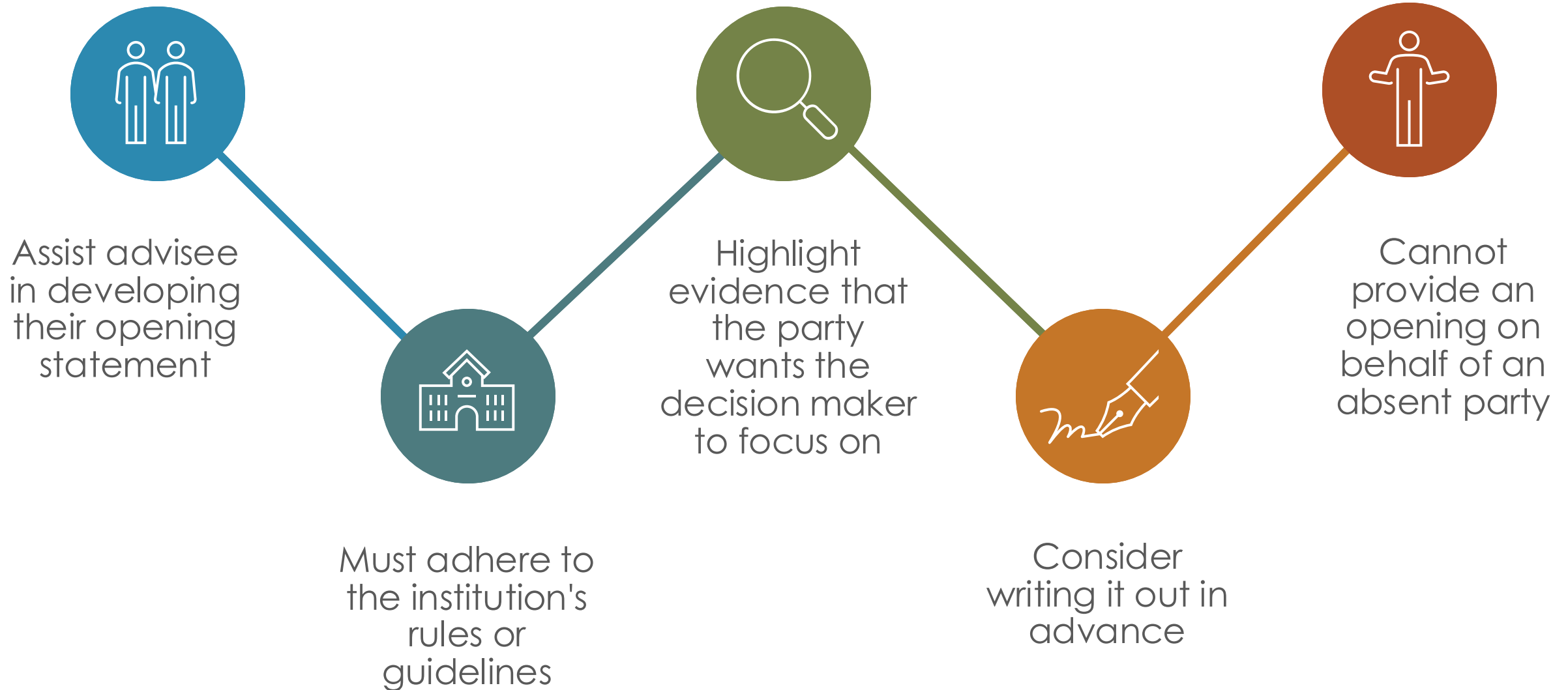
Adjudication Committee: determines if policy violations occurred, may determine sanction

Facilitator: assists with the logistical coordination of the people, the space, technology, etc.

Presenter: Presents the case to the adjudication committee

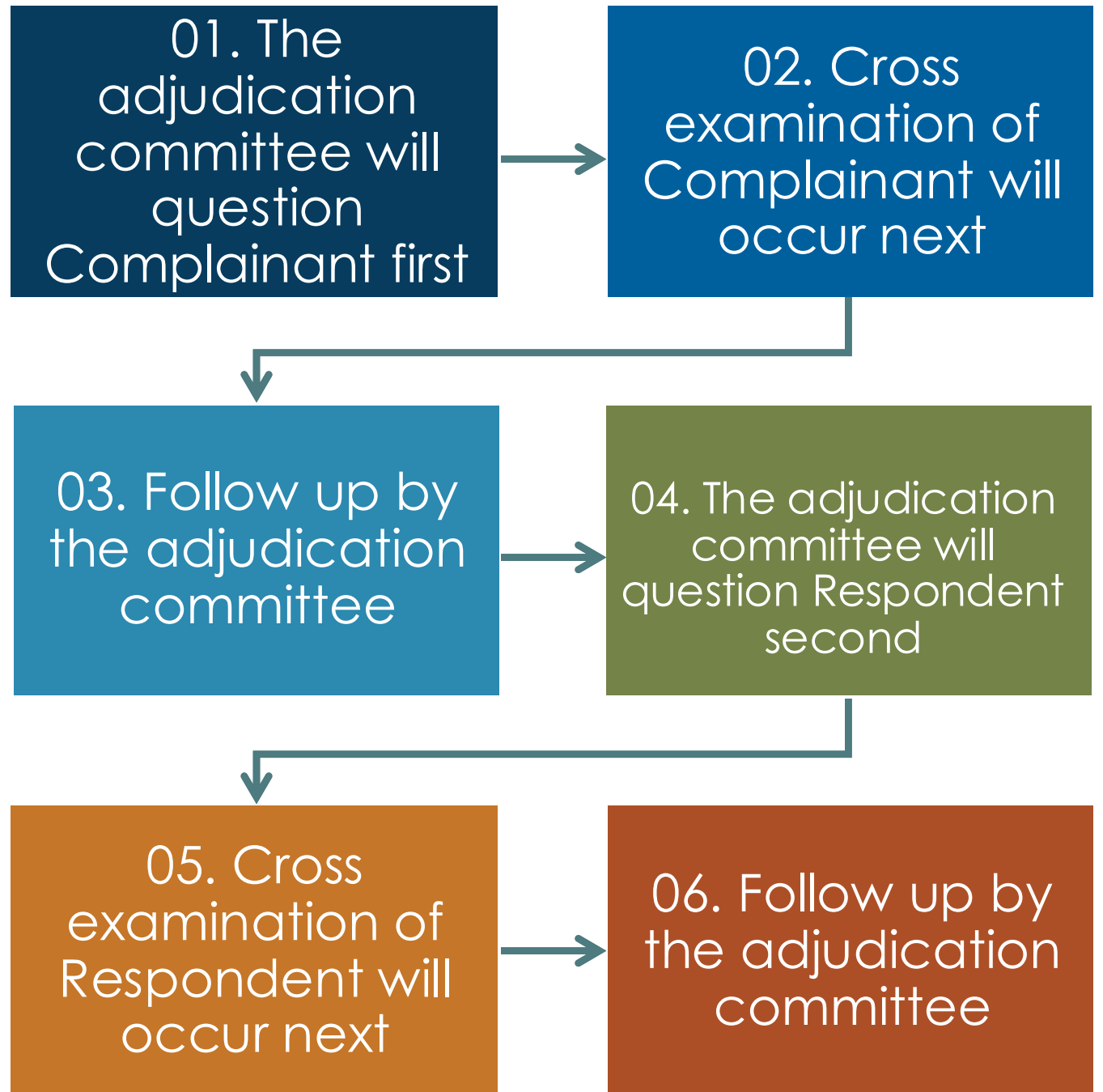
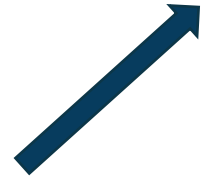


OPENING STATEMENTS




PRESENTATION OF INFORMATION & QUESTIONING OF THE PARTIES

Presenter provides case summary and is cross examined



CROSS EXAMINATION: WHO DOES IT?



Must be
conducted
by the
advisor

If party does not
appear or does
not participate,
advisor can
appear and cross

If party does
not have an
advisor,
institution must
provide one

QUESTIONING

ROLE OF THE DECISION MAKER

- The decision maker will determine whether a question posed during cross examination is relevant and permissible.
- When the decision maker determines that a question is relevant, the party/witness may answer it.
- When the decision maker determines that a question is irrelevant, they must state their reason and offer a chance to rephrase/clarify.

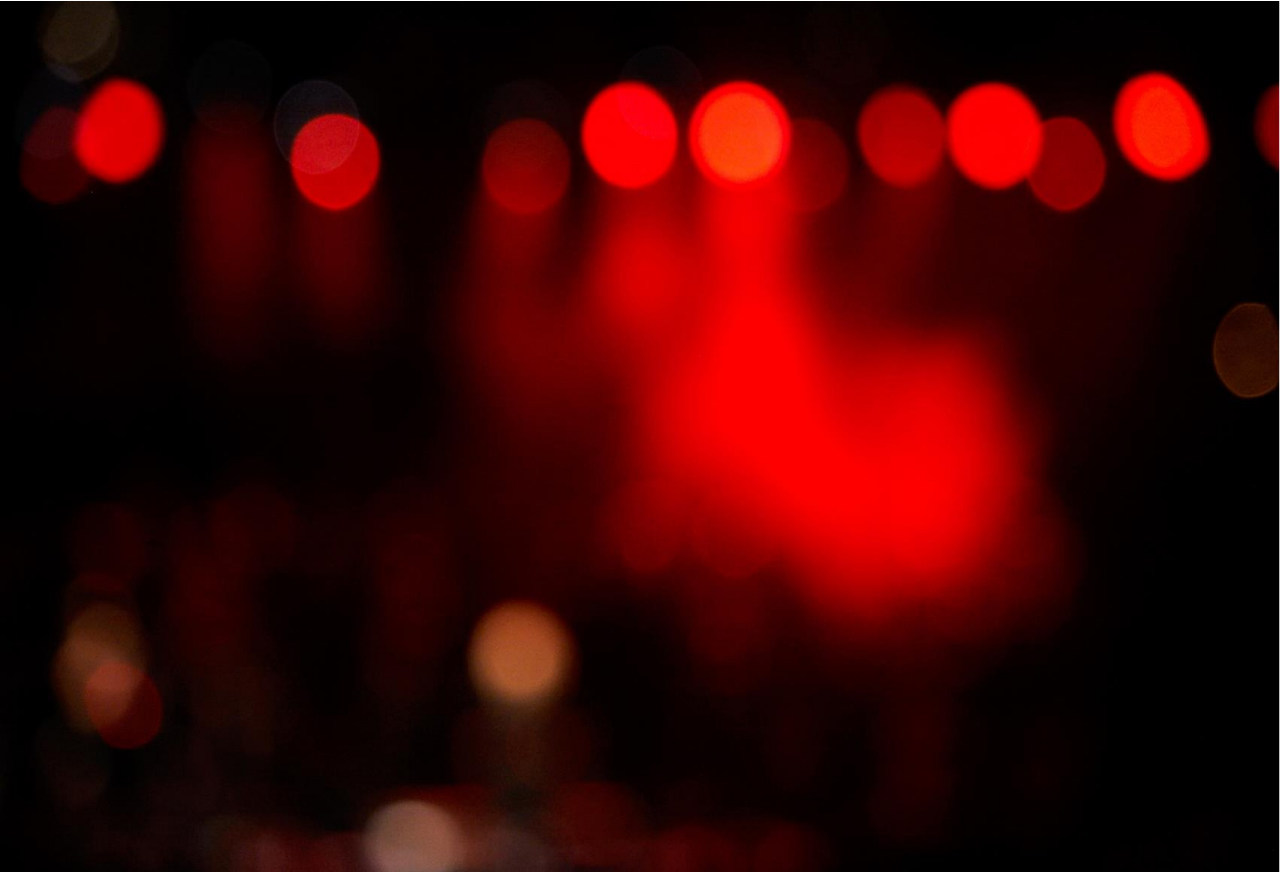


PREPARING FOR ASKING QUESTIONS

- Review and evaluate the evidence
- Identify your narrative, or the version of events that you want to illustrate
- Identify the facts at issue and the findings of fact that you want the decision maker to make
- Plan to highlight the evidence that support the narrative and the findings of fact that you want the decision maker to make
- Prepare an outline of topics to explore



What do I want to show?



- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?

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?**
 - **Coercion?**
 - **Force?**



STALKING EXAMPLE

Definition: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or suffer substantial emotional distress.

Questions to Ask:

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
 - a. Fear for their safety or the safety of others, or*
 - b. Suffer substantial emotional distress?*

RAPE EXAMPLE

Definition: The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Questions to ask:

1. Did Respondent penetrate Complainant's vagina or anus? Orally?
2. Without Complainant's affirmative consent?
 - *What is the ground for lack of consent?*
 1. Did respondent fail to seek and obtain Complainant's affirmative consent? (what is the definition of affirmative consent being evaluated?)
 2. Did Respondent force Complainant?
 3. Did Respondent coerce Complainant?
 4. Was Complainant incapacitated and therefore incapable of consent?

RELEVANT EVIDENCE

Relevant means **related to** the allegations of sex discrimination.

- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred.
- Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

EVIDENCE THAT IS "IMPERMISSIBLE"

- Questions and evidence about the complainant's sexual interests or prior sexual conduct are not relevant,
 - unless such questions and evidence about the complainant's prior sexual conduct are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant's prior sexual conduct with respect to the respondent and are offered to prove consent.
- Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
 - Example: Physical and mental health records and attorney-client privileged communications

PRIOR SEXUAL CONDUCT AND INTERESTS

- Not waivable
 - "Allowing complainants to broadly introduce the evidence prohibited by § 106.45(b)(7)(iii) threatens to deprive respondents of due process (e.g., allowing a complainant to introduce evidence of prior sexual conduct but not permitting the respondent to rebut) and might result in misuse by the parties.
- Sexual "interests"
 - Mode of dress
 - Speech
 - "Lifestyle"
- Examples of potentially impermissible prior sexual history of complainant:
 - Evidence of pregnancy
 - Use of birth control
 - Medical history of STI

ASKING QUESTIONS

Common Approaches

1. Obtain/Highlight helpful information
2. If a witness does not have information that is helpful, ask questions that illustrate that they are unimportant.
3. Highlight bias/lack of bias
4. Highlight credibility and reliability/lack of credibility or reliability
5. Discounting



QUESTIONING

How to Discount



Confirm



Compare



Conclude

DISCOUNTING EXAMPLE

Statement A:

During her interview with the investigator, Witness Y stated that she overheard Respondent and Complainant fighting inside of Complainant's bedroom. She stated that Complainant came out of the room crying and that their face was red and swollen. She stated that Respondent followed Complainant out of the room "looking angry" and grabbed Complainant by the arm "aggressively" and pulled them back into the room. The fighting then continued.

DISCOUNTING EXAMPLE



Statement B:

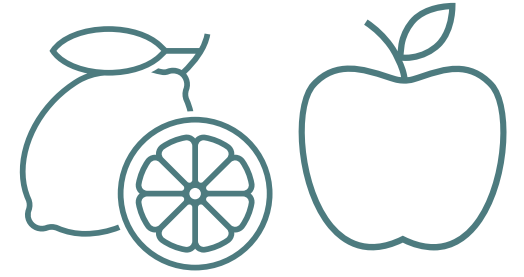
At the hearing, Witness Y tells the decision maker that while she heard loud voices, it might not have been fighting. She also stated that the parties came out of the room together, that Complainant looked upset, that Respondent looked concerned, and that they “calmly” went back in the room together.

CONFIRM



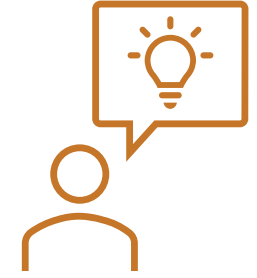
- Witness Y, earlier today you were asked about what you heard and saw on the night in question...
- And you indicated that you heard loud voices, but that you are not sure if it was fighting, is that correct?
- You also said that the parties came out together and then went back into the room, is that what you saw?
- And you are sure of this?

COMPARE



- Witness Y, this isn't the first time you shared your observations of Complainant and Respondent that night, is it?
- Did you talk to the investigator about this?
- And that statement was provided just two days after the incident, correct?
- Do you recall what you said to the investigator?
- Did you tell the investigator the truth when you were interviewed?

CONCLUDE



- Witness Y, when you spoke to the investigator, you indicated that you heard fighting, correct?
- And that Complainant came out of the room crying, isn't that right?
- And that Respondent came out looking angry, correct?
- You also stated that you saw Respondent grab Complainant and drag them back into the room, isn't that true?
- Since speaking with the investigator, you and Complainant have had a falling out, haven't you?

CROSS EXAMINATION TIPS

Do be efficient in your questioning – go event by event

Don't rehash everything someone said

Do focus on the information that is helpful

Don't call folks liars or attack them

Do make your points through pointed and calm questioning

Don't rant, rave, lose your temper

Do raise concerns about credibility and reliability

Don't forget to be prepared to pivot as information is given

Do observe, listen, and take notes during the hearing

THE PARTICIPANTS

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



CLOSING STATEMENTS: ADVISOR'S ROLE

- Assist advisee in developing their closing statement
- Summarize evidence that the party wants the decision maker to focus on
- Bullet points
- May not provide a closing on behalf of an absent party



FINAL REPORT: SEE CUNY SECTION VII.J.5

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



AFTER THE HEARING

DEBRIEF?

THE APPEAL

Lessons Learned

- Each case is different
- Observe and Listen
- Prepare and stay respectfully engaged during the hearing

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