

Building Skills to Successfully Mediate Title IX Sexual Harassment Cases

Welcome & Faculty Introductions



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November 18 & 19, 2020



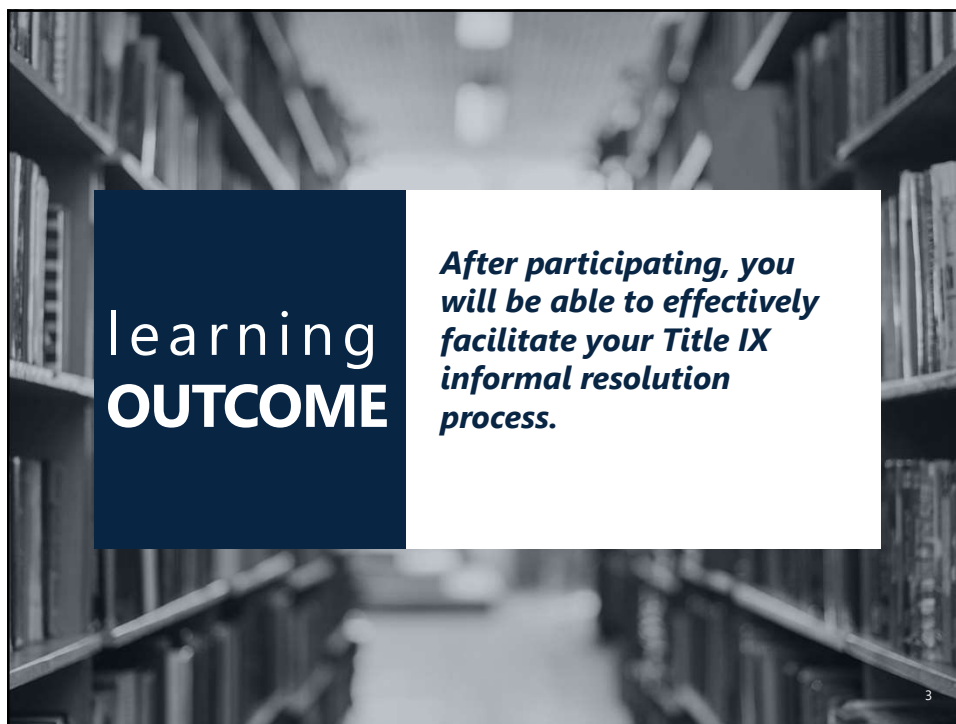
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The Big Why!



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**Learning
OUTCOME**


After participating, you will be able to effectively facilitate your Title IX informal resolution process.

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Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available during this training are for training and general informational purposes only.

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RESOURCES

Welcome to Zoom and its features:

- A. Mics (keep muted please)
- B. Camera (option to keep on or off)
- C. Gallery vs. Speaker View
- D. Participant List with Emoji's
- E. Chat Box
 - Use whenever you need it to ask questions or respond
 - Look here for downloadable files during the presentation
 - Option to send private messages to each other or host
 - Chats will be transcribed (not private ones)
- F. Close windows (e.g., polls)
- G. Recording (except during breaks or in small groups)
- H. Changing your name option (hover over your name, select "more" then "rename" to change your name)

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AGENDA

November 18, 2020

1. Informal Resolution Overview
2. Mediation in the Context of Title IX and Pre-Mediation Prep
3. Role of the Mediator & Setting the Environment
4. The Mediation – Critical Steps & Considerations
5. The Mediation – Fundamental Skills
6. Day One Q&A & Reception

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AGENDA

November 19, 2020

1. The Mediation – Communication Strategies
2. Preparing the Agreement
3. Failure to Reach Agreement
4. Preparing for Mock Mediation
5. Module 1: Setting the Scene & Messaging
6. Module 2: Dealing with Party Advisors and Saving the Mediation
7. Mock Mediation Debrief
8. Day Two Q&A

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Meet Your Expert Faculty



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Judicial Arbitrator Group
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Informal Resolution Overview

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Informal Resolution Under The Final Regulations

The Final Regulations allow for informal resolution in lieu of the investigatory and/or hearing process after a formal complaint is filed. §106.45(b)(9).

- Informal resolution is a *voluntary* option that allows parties to resolve disputes in a forum that is separate and distinct from the institution's live-hearing process.
- It's discretionary whether to offer informal resolution at all or only in certain cases.
- Informal resolution processes must have reasonably prompt timeframes.

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Informal Resolution Under The Final Regulations (continued)

- Parties can withdraw from the informal resolution process and resume the §106.45 grievance (investigation and/or hearing) process at any time.
- Informal resolution can be facilitated any time prior to reaching a determination regarding responsibility.
- Both parties must voluntarily agree in writing to participate in an informal resolution process.

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Truly Voluntary?



How do you know if the consent is truly voluntary?

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Written Notice

Institution **MUST** provide *written notice* to the parties disclosing the:

- Allegations. §106.45(b)(9)(i)
- Discussion about the availability of informal resolution. §106.45(b)(A)
- The types of informal resolution processes available. §106.45(b)(2)(i).

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Range of Conflict Resolution Strategies

Informal resolution may encompass a broad range of conflict resolution strategies, including but not limited to:

- Facilitated dialogue resulting in remedies-based resolution
- Respondent accepts responsibility
- Mediation
- Restorative justice
- Arbitration

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Written Notice: Requirements

Institution MUST provide written notice to the parties disclosing the:

- Requirements of the informal resolution process. §106.45(b)(2)(i)
 - Voluntary consent; without coercion. §106.45(b)(2)(ii)
 - The circumstances that preclude the parties from resuming a formal complaint. §106.45(b)(9)(i)
 - Can withdrawal any time before resolution agreement reached.
 - Facilitation by neutral, objective and trained facilitator. ¹⁵

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Written Notice: Consequences

Institution MUST provide written notice to the parties disclosing the:

- Consequences from participation in informal process
 - The records that will be maintained or that could be or could not be shared. §106.45(b)(10). Examples...
 - Resolution agreement subject to a subpoena.
 - Resolution agreement maintained as educational record.
 - Whether there is confidentiality within the informal resolution process.
 - Whether facilitator will be called as a witness in the formal grievance process if informal resolution fails. ¹⁶

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Informal Resolution Participants

Participants within the Informal Resolution Process:

- The Complainant(s): A "complainant" refers to an individual who is alleged to be the victim of conduct that could constitute sexual harassment (or sex discrimination or retaliation). §106.30(a).
- The Respondent(s): A "respondent" refers to an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. §106.30(a).
- The Facilitator: An objective and neutral third party who facilitates the informal resolution process (e.g., mediator).

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Advisors

Additional participants within the Informal Resolution process:

- Advisors: Individuals who may accompany a complainant or respondent to any meeting or proceeding within any the grievance proceeding. §106.45(b)(1)-(9).
 - No requirement that institutions provide an advisor prior to or during informal resolution or that the parties must consult with an advisor prior to entering the informal resolution process.

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Visualization



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Facilitator's Role

A facilitator of informal resolution plays an essential role within the process.

- The facilitator brings the parties together,
- Encourages and guides meaningful dialogue between the parties, allowing each party to feel that they have been heard,
- Helps uncover the parties' underlying needs and interests, and
- Guides the parties toward an amicable resolution.

Facilitators have no power to render a resolution to the matter – only the parties do.

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Facilitators Free of Bias/Conflict of Interest

Facilitators of informal resolution MUST:

- Facilitate impartially (independent, neutral and objective)
 - No conflicts of interest. §106.45(b)(1)(iii).
 - No bias for or against complainants or respondents generally or an individual Complainant or Respondent. §106.45(b)(1)(iii).

**Recommendation: Allow for challenge of the informal resolution facilitator for perceived bias or conflict of interest.*

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Facilitator Training

Facilitators of informal resolution MUST undergo "robust" training.

➤ Training topics include:

- The §106.30 definitions of sexual harassment.
§106.45(b)(1)(iii)

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Title IX Sexual Harassment (§106.30)

Sexual Harassment is conduct based on sex that satisfies one or more of the following:

- Quid Pro Quo harassment. 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.
- Hostile environment harassment. "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 school's education program or activity."
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under the Clery Act and VAWA

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Facilitator Training Topics

Training topics (cont.):

- The scope of the institution's program or activity.
§106.45(b)(1)(iii)

Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

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Training Topics (continued)


- How to conduct an informal resolution process. §106.45(b)(1)(iii)
- How to serve impartially, including by avoiding prejudgment of the facts at issue. §106.45(b)(1)(iii)
- *The §106.45 formal grievance process.*
- *The Institution's policy against sexual harassment and discrimination (generally).*
 - *Institution's definitions of "Consent," "Incapacitation," and "Retaliation."*

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Informal Resolution Agreements

- Terms/outcome of the resolution are negotiable.
 - May or may not include a respondent's admission of harm or responsibility.
- May result in party-imposed corrective or punitive measures for a Respondent.
- Informal resolution agreements may become binding according to their terms (i.e., contractual in nature).
- Outcome should be enforceable by the institution.

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Appeal

Informal resolution agreements may or may not be subject to appeal.

- On the one hand, § 106.45(b)(8) states that recipients must offer both parties an appeal from determinations regarding responsibility, or from a recipient's dismissal of a formal complaint or any allegations contained in a formal complaint.
- But, *Preamble* states, "Importantly, the final regulations require recipients to offer both parties an appeals process to help mitigate risks such as procedural irregularity and investigator, decision-maker, or informal resolution facilitator bias." *Preamble*, p.1374 (Federal Register version)

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CHAT

What are the reasons a party would want to challenge resolution agreement after the fact?

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Record Keeping

An institution must maintain records relating to informal resolutions and the result thereof for at least seven (7) years.

- Notice of Allegations discussing informal resolution
- Written agreement to enter informal resolution
- Signed resolution agreement, including terms thereof

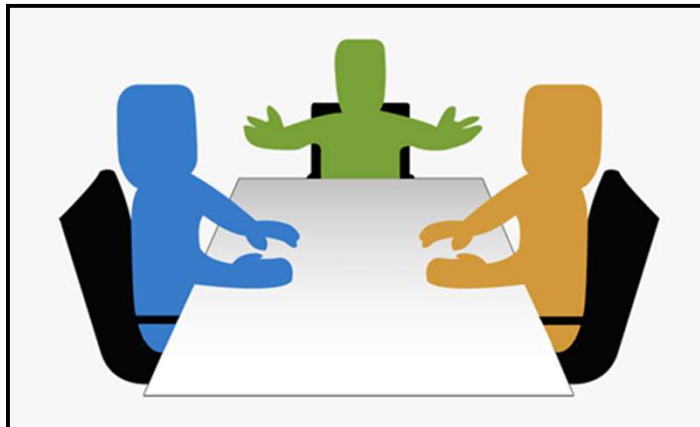
§106.45(b)(10)

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Title IX Cases Conducive to Informal Resolution



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Limitations

No limitations on the availability of informal resolution except:

- Institutions must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. §106.45(b)(9)(iii)

Just because you can facilitate informal resolutions in all other Title IX sexual harassment cases doesn't mean you should.

- Amenity for informal resolution should be conducted on a case-by-case basis.
- Title IX Coordinator remains in control over decision to allow informal resolution and when to allow it.

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Title IX Cases *Generally* Conducive to Informal Resolution

Cases *generally* amenable to Informal Resolution:

- Hostile environment sexual harassment cases between employees or between students where little to no power differential.
- Non-sexual harassment cases:
 - Retaliation
 - Sex discrimination (including pregnant and parenting discrimination)

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Title IX Cases Generally Conducive to Informal Resolution - EXAMPLES

- Lower-level sexual assault cases.*
- Sexual assault cases resulting from miscommunication.*
- Dating/domestic violence cases where mutual harm is alleged.*
- Stalking potentially connected to a mental health or personality disorder.

*

Sexual/dating/domestic violence cases are the most challenging to informally resolve due to the nature and intimacy of the harm and the power imbalances often associated with these offenses. Accordingly, proceed with caution.

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Title IX Cases Generally Not Conducive to Informal Resolution

Cases *generally not* amenable to Informal Resolution:

- Alleged offenses involving:
 - Physical or threatened violence,
 - Predation,
 - Intimidation,
 - A dangerous pattern of conduct, or
 - Where the power differential between the parties, under the circumstances, could exacerbate the harm.

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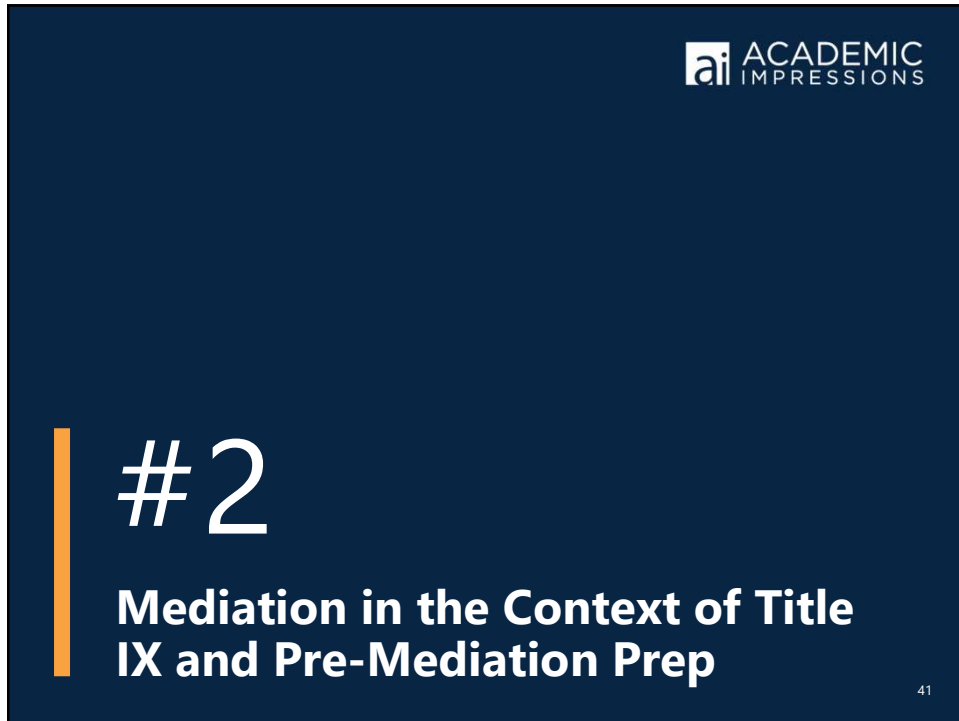
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#2

Mediation in the Context of Title IX and Pre-Mediation Prep

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This slide features a dark blue background. In the top right corner is the logo for 'ai ACADEMIC IMPRESSIONS'. On the left side, there is a vertical orange bar. To the right of this bar is the large white text '#2'. Below this is the title 'Mediation in the Context of Title IX and Pre-Mediation Prep' in white. A small '41' is in the bottom right corner.

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CHAT

Mediation is a "collaborative process."

What does "collaborative process" mean to you?

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This slide has a background of overlapping grey papers and speech bubbles. A dark blue square on the left contains the word 'CHAT' in white and a white speech bubble icon. To the right is a white box with the text 'Mediation is a "collaborative process."' and 'What does "collaborative process" mean to you?' in bold black. A small '42' is in the bottom right corner.

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Mediation – The Characteristics

- Voluntariness
- Informed Consent
- Impartiality of Facilitator
- Party control over outcome
- Confidentiality

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Mediation – The Types

- *Facilitative* - conducted by third-party neutral with no authority to propose a solution or opine on issues
- *Evaluative* - conducted by third-party neutral who may give opinions and propose solutions
- *Title IX Hybrid* – facilitative with measured evaluation

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Pre- Mediation Communication

Contact with the Parties

- Email or call to set up pre-mediation conference
- Pre-mediation conference
 - 5-7 days before mediation
- Memorialize all contact

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Pre-Mediation Conference – Do's

Do


- Introduce yourself
- Get to know the party
- Explore comfort/discomfort
- Explain role – neutral facilitator
- Explain compromise is often a part of the process

Do

- Explain process
- Explain goal
- Explain option and role of advisor
- Explain confidentiality
- Explain that party has a voice in the outcome

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Pre-Mediation Communication – Don'ts

<u>Don't</u>	<u>Don't</u>
<ul style="list-style-type: none"> • Discuss what happens if no agreement • Pre-judge issues • Predict outcome • Discuss conversations with other party 	<ul style="list-style-type: none"> • Sound rigid, managerial, controlling • Evaluate claims of either party • Discuss what other observers/witnesses say • Overload

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ACTIVITY



The telephone call to the Respondent pre-mediation.

The Do's

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Pre-Mediation - Preparation

- Read materials
- Outline strong facts and weak facts for Complainant (weak facts for Complainant are strong facts for Respondent and strong facts for Complainant are weak facts for Respondent)
- Determine how to structure mediation
- If possible, determine expectation of parties

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Pre-Mediation - Evaluation

- Is case possible to resolve by mediation?
- What are the undisputed facts?
- The human element
 - Who, if either, do the facts favor?

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Pre-Mediation – Framing the Issues

- What are the issues?
- Determine if there are issues outside of the Complaint and Respondent.
- Do the parties see the issues differently?

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Pre-Mediation – Focusing on Objectives

- Where might compromise be achieved?
- What are the respective party objectives?
- What might the ultimate agreement look like?

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Pre-Mediation - Strategy

- Who do I talk to first?
- What will I address in the first session with each of the parties?
 - Undisputed facts
 - Non-threatening issues
 - Confirming objective(s) of each party
- When and how will I address the more sensitive facts?

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Resolution Agreement Form and Draft

- Preparation pre-mediation is essential
 - Anxiety
 - Relief
 - *"I want to go."*
- Alternative results

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Mediation preparation, like mediation, is often an intuitive exercise for the mediator.

What are your reactions and additional recommendations?

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#3

Role of the Mediator & Setting the Environment

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Personality & Communication Strengths

<u>Personality Strengths</u>	<u>Communication Strengths</u>
<p>Tolerant</p> <p>Thoughtful</p> <p>Practical</p> <p>Collaborative</p> <p>Respectful</p> <p>Empathetic</p> <p>Intuitive</p> <p>Self-Aware</p> <p>Creative</p> <p>Non-Judgmental</p> <p>Open-Minded</p> <p>Credible</p>	<p>Characterize but don't criticize</p> <p>Clarity</p> <p>Emotional control</p> <p>Simplicity trumps complexity</p> <p>Facts are foundation to persuasion</p> <p>Eye contact</p> <p>Relaxed tone</p> <p>Avoid negative body language</p> <p>Avoid negative verbal reactions</p> <p>Avoid negative facial expressions</p>

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The Facilitator, Communicator and Neutral

- Empathetic listening
- Paraphrase and summarize
 - *"I want to make sure I understand, it is rare for you to drink in excess."*
 - *"You were embarrassed to tell your roommate."*
- Validate
 - *"Not wanting to tell someone else is not unusual. It happens all the time."*

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Continued

The Facilitator, Communicator, and Neutral

- Avoid negativity
 - *"He/She doesn't understand the seriousness of what he/she has done."*
- Participatory empowerment
 - *"What would you like me to tell him/her about how you are feeling?"*
 - *"What do you want me to say to him/her about the fear you continue to have?"*

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The Evaluator

- Subtle opinions
 - *"I know you don't want to agree to these restrictions but if we don't reach an agreement you risk more severe restrictions imposed by others."*
 - *"These particular facts may not be helpful to you..."*
 - *"I believe he/she is both remorseful and embarrassed."*

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The Physical Environment

- The venue
 - Ensures privacy/confidentiality
 - Is not intimidating
 - Comfortably accommodates multiple participants
 - Not a busy place
- The rooms
 - Sufficiently separated from one another
 - Large enough to be comfortable
 - Extra room necessary
- Administrative
 - Computer, copier, etc.

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The Virtual Environment

- Structure the start
 - Parties to join at different times
 - Discuss the success of virtual mediation
- Explore:
 - Is anybody with or intending to be with party
 - Need to get comfortable with technology
- The pragmatics
 - Get cell numbers from all participants
 - No recording by anybody
 - Insist on live video
 - Clarity of visual image

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CHAT

Based upon your experience, going into mediation...

What might be Complainant's perspective?

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CHAT

Based upon your experience, going into mediation...

What might be Respondent's perspective?

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Avoid Joint Sessions with Parties

- Mediation historical perspective on joint caucus
- Dynamic of parties meeting in joint caucus
- Will it ever be appropriate to bring the parties together in a joint caucus?

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Facilitating Introductions

- 1st session with both parties
 - Introduction
 - Get to know party
 - Discuss process
 - Discuss goal
 - Avoid talking about substance of case

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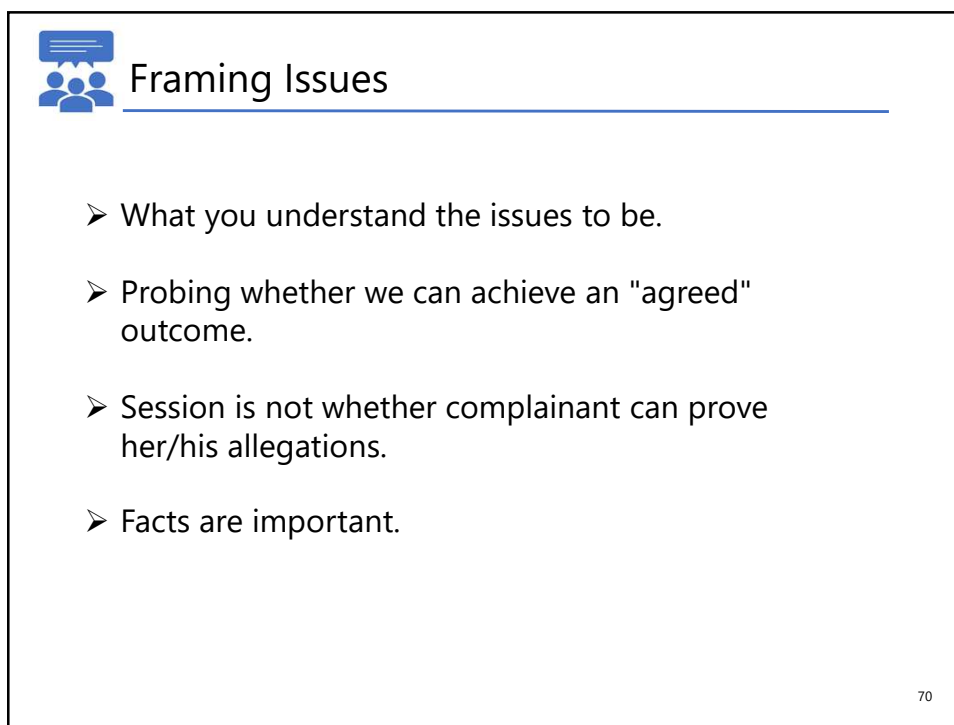



First Session w/Party

- 1. Introduction**
- 2. Get to know party**
- 3. Discuss process**
- 4. Discuss goal**

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 **Framing Issues**

- What you understand the issues to be.
- Probing whether we can achieve an "agreed" outcome.
- Session is not whether complainant can prove her/his allegations.
- Facts are important.

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Establishing Common Grounds

- What are the facts not in dispute?
- What do parties individually hope to accomplish?
- Why is it important to reach an agreement?

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Searching for Shared Values

- Subtly probe
 - Do each hope an agreement can be reached?
 - If agreement reached, what if any relationship will exist with the other party?
 - Are there underlying interests?

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Establishing Credibility

- The mediator
- The process
- The agreement

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Maintaining Confidence

- It is a process, not an event.
- Patience is key.
- Report where progress is being made.
- Sharing positive aspects of what you have heard and observed.

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Dealing with Party Advisors

- Victim advocates, parents, roommates, friends, and lawyers
- Role can be restrictive
- A role of support and collaboration
- An advisor who is challenging, adversarial, intimidating, and/or dominating is not acting in the best interests of the party they are supporting
 - Handling the challenge

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The Mediation – Fundamental Skills

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Questioning Techniques

Open-ended questions

- Encourages party to open-up, vent and articulate.
- Allows story to be told.
- Who, what, when, where, why, how, describe, explain, tell...
 - *"Describe what happened after he/she left your room?"*
 - *"Who was with you?"*
 - *"Why did you wait until the next afternoon to call?"*
 - *"Tell me how you felt when you saw him/her earlier?"*

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Questioning Techniques continued

Closed or leading questions.

- Question suggests the answer
 - *"You called the Title IX Coordinator two days later."*
 - *"So, your roommate called him/her to ask if he/she was ok?"*
- Confines response
- Summarizes

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Questioning Techniques – Probing Questions

Probing questions.

- Exploring feelings, opinions, thoughts...
 - *"How would you feel if we are unable to reach an agreement?"*
 - *"What is the best result for you today?"*
 - *"If you couldn't achieve the best result what will you need to feel comfortable about an agreement?"*
- A guide to persuasive discussions with the other party.

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ACTIVITY

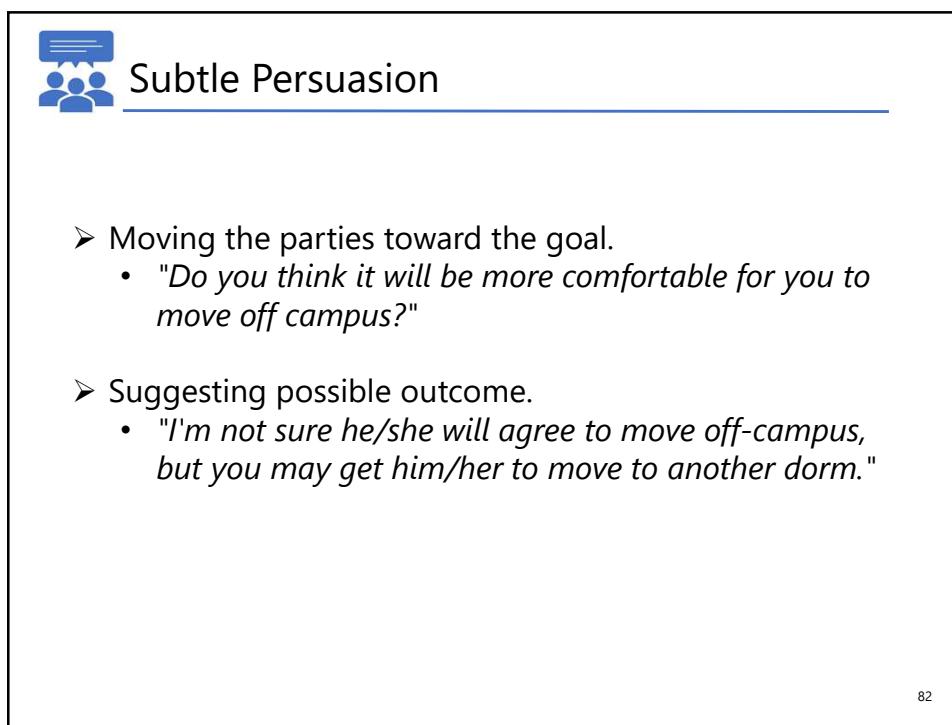



Respondent
"He was not drunk, and we talked about this. When I got back to my room, I told my roommate I want to see him again."

Follow-Up Questions

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 **Subtle Persuasion**

- Moving the parties toward the goal.
 - *"Do you think it will be more comfortable for you to move off campus?"*
- Suggesting possible outcome.
 - *"I'm not sure he/she will agree to move off-campus, but you may get him/her to move to another dorm."*

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The Facts

- Addressing factual strengths
- Addressing factual weaknesses
- Addressing contested facts

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CHAT

**Why are "the facts"
the most important
component of any
case?**

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Dealing with Unreasonable Demands

- Won't lead to agreement.
- Won't be able to achieve demand in the next stage.
- Won't be seen as a compromise gesture.
- May be met with an unreasonable response.

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ACTIVITY

**NETWORKING
RECEPTION**

We invite you to turn on your cameras and mics to ask any remaining questions and to network with each other.

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