

Issues of Relevancy at the Hearing



- Only relevant cross-examination and other questions may be asked of a party or witness.
- The Hearing Officer or Hearing Panel must decide if question is relevant before it is answered at the hearing and explain any decision to exclude a question.



Cross-Examination



- Live hearing must provide opportunity for cross-examination of parties and witnesses
- To be conducted by advisors
- Cross-examination must be conducted directly, orally, and in real time

Hearing – Provision of an Advisor

If a party does not have an advisor present at the live hearing, the university must provide without fee or charge to that party, an advisor of the university's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

ADVISOR

Hearing – Exclusion of Statements

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The hearing officer cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.



To keep in mind (cont.) ...

Written determinations may be appealed on following bases:

- Procedural irregularity that affects the outcome
- New evidence that was not reasonably available at the time of the determination that affects the outcome
- Bias or conflict of interest that affects the outcome
- See additional University of Nebraska policy bases



Evaluation Evidence and Making a Finding

Concepts we use to evaluate evidence

- **Relevance**
 - Tends to make a fact more or less probable than it would be without that evidence
 - Assists in coming to the conclusion – it is “of consequence”
- **Credibility**
 - Has to do with a witness’s veracity; their believability
- **Reliability**
 - Accurate
 - trustworthy
- **Weight**
 - The value you give to piece of evidence

What is “relevant evidence?”

- Use logic and common sense
- Toss out old rules/practices regarding categories of information permitted (except for three situations)

Irrelevant

Irrelevant

Relevant

Irrelevant

Irrelevant

Relevance

Relevance IS

- Tends to make a fact more or less probable than it would be without that evidence
- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”



Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court



Special categories of evidence that are off-limits



- **IRRELEVANT:** Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- **IRRELEVANT:** Information protected under a legally-recognized privilege
- **CAN'T USE:** Medical, psychological and similar records without written consent of party

Evaluating relevance part I

Skill-building exercise

How to determine if a person is credible?

EEOC says to consider:

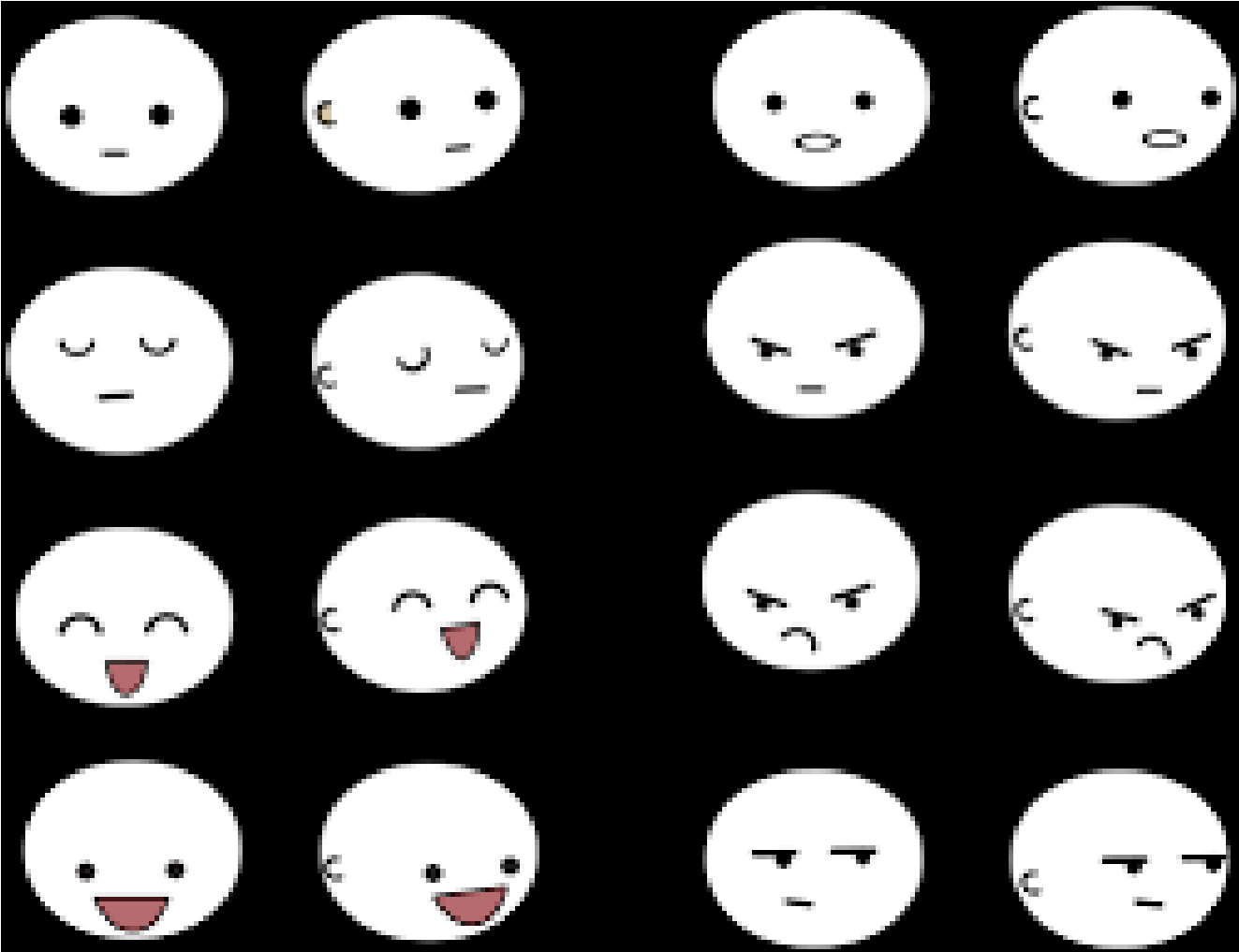
- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, 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 a 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.

Caution re: demeanor evidence



Evaluating inconsistencies & unanswered questions



Evaluating relevance part 2: Ruling on advisor's questions

Skill-building exercise

The process as a whole: Weighing the evidence and making a determination



1. Making the factual determination of what happened
2. Analyzing whether the conduct that happened constitutes a violation of your institution's policies

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate



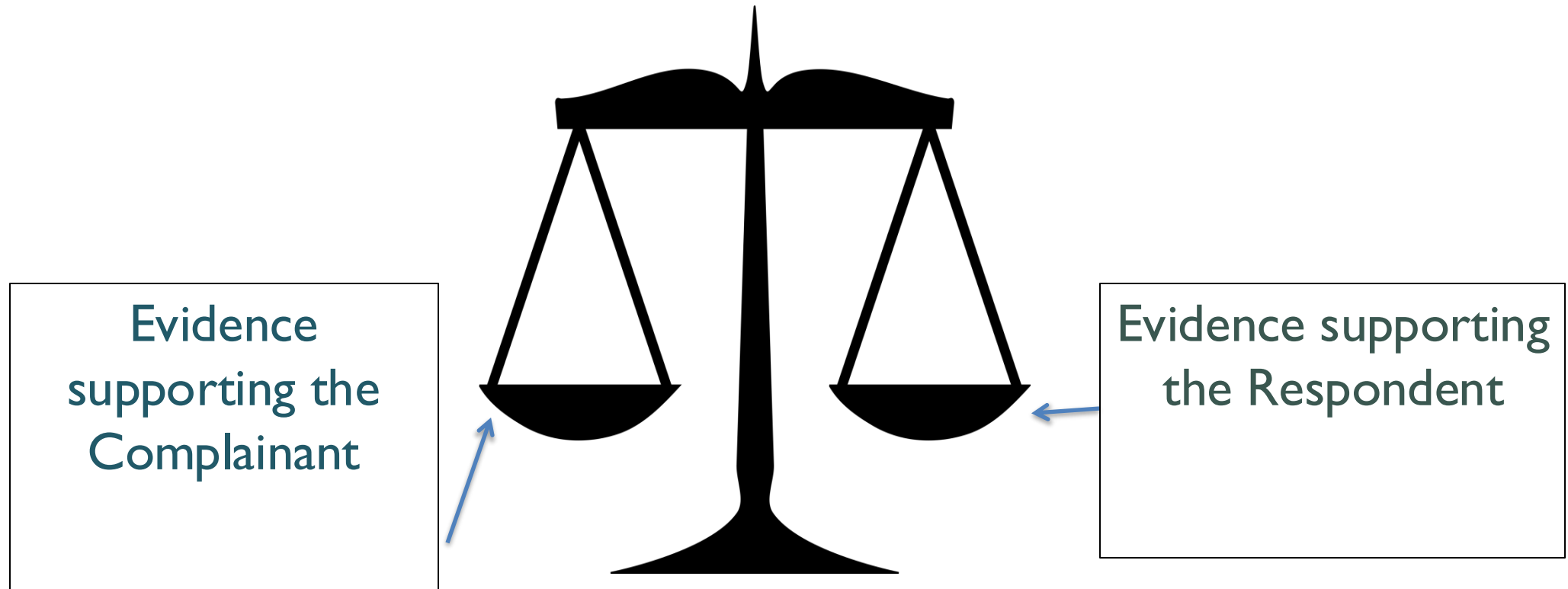
Once factual findings are made, analyze under Title IX policy definition

Sexual 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 recipient's education program or activity

What questions do you have?

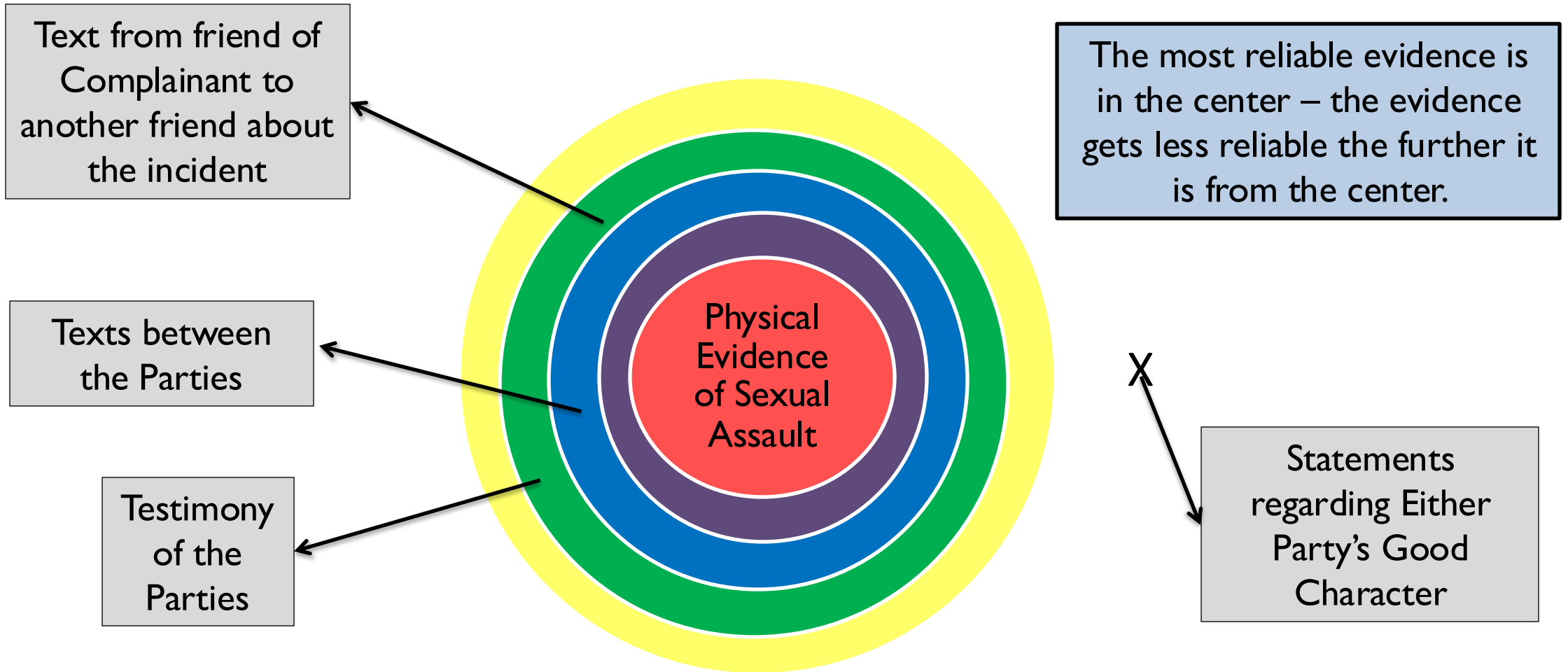
Skill-building exercise

Evaluating the Evidence



Which has the greater weight?
“More likely than not”?

Evaluating the Evidence – Bulls Eye



Preponderance of the Evidence



Preponderance of the evidence

IS

- Starting from the presumption of non-responsibility, is the complainant's account supported by the majority of the evidence?
- Starting from the presumption of non-responsibility, does the evidence establish that the complainant's account is most likely to have occurred?

IS NOT

- I think the information shows the respondent most likely to have engaged in the conduct, but I am not convinced beyond a reasonable doubt
- I think the information shows the respondent most likely to have engaged in the conduct, but I am not firmly convinced
- Since the prosecutor declined to file charges, I don't think we should hold the respondent responsible either

Your reasoning should NOT sound like this:

- I don't think the evidence is sufficient to support a finding of responsibility, but I don't want to cause a problem for UNL because this is a high-profile matter.
- I think the respondent did it, but I don't like the complainant and think the complainant filed this claim just to hurt the respondent.
- Yes this is a technical violation of the policy, but I disagree with the policy's definition of consent.
- I don't really think the respondent did it, but I feel really bad for the complainant who is clearly traumatized.
- I think the respondent did it, but I don't want to ruin the respondent's life.

Written Determination

- Must provide to the parties simultaneously
- The determination regarding responsibility becomes final either:
 1. on the date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or
 2. if an appeal is not filed, the date on which an appeal would no longer be considered timely



Written Determination

The written determination must include:

- Allegations
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts using the applicable standard of evidence
- A statement of, and rationale for, the result as to: each allegation, including a determination regarding responsibility, any disciplinary sanctions the university imposes on the Respondent, and whether remedies will be provided by the university to the Complainant
- Appeal procedures

More important points for the final letter

- Use standard format and language
- State that you considered the totality of the circumstances
- Identify inculpatory and exculpatory evidence -- address significant pieces of evidence that are contrary to your finding(s) and why you do not find them persuasive

Other things to consider



- Consistency: Sanctions that have been imposed for the same category of prohibited conduct, and how this matter is similar and different to those matters
- Proportionality: Sanctions should ultimately be proportional to the behavior
- Explanation: Sanctions must be objectively explained in the written determination

Considerations for the Imposition of Sanctions

- The nature of the conduct at issue
- The impact of the conduct on the Complainant
- The impact of the conduct on the community or the university, including protection of the university community
- Prior misconduct by the Respondent, including relevant prior discipline history, both at the university or elsewhere, including criminal convictions
- Maintenance of a safe and respectful environment conducive to learning

QUESTIONS NOW AND LATER: OUR CONTACT INFORMATION

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