



# Title IX Sexual Harassment Training: Relevant Evidence DECISION-MAKER

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Understanding Issues of Relevant Evidence As  
Part Of The Title IX Sex Harassment Complaint  
Procedure



**MARICOPA**  
COMMUNITY COLLEGES

*Quarles & Brady* LLP

# Road Map

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- Background on Evidence
- Different Types of Evidence
- Direct v. Circumstantial Evidence
- Determining Initial Relevancy
- Title IX Rape Shield Protections
- Complete Relevancy Analysis Process
- Quiz – Test your relevancy skills!
- Questions?

# Background on Evidence

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- Every Title IX investigation involves the collection and review of "evidence" from the complainant, respondent, and often times other witnesses.
- **Evidence:** The facts available to the Title IX investigator.

# Background on Evidence

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- **Examples of Potential Evidence In Title IX Complaint Process:**
  - Text messages between a complainant and respondent
  - Witness testimony from a classmate who observed a reported incident
  - Pictures of physical injuries from a complainant
  - Attendance records indicating a respondent was not in a particular location at the time of a reported incident
  - Testimony from a complainant or respondent

# Types of Evidence

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- There are various "types" of evidence that may be brought forth through the Title IX complaint process. The types of evidence may include:
  - Physical Evidence
  - Documentary Evidence
  - Demonstrative Evidence
  - Verbal Evidence

# Types of Evidence: Physical Evidence

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- **Physical Evidence:** Objects or things used to prove an incident occurred.
- **Examples of Potential Physical Evidence in Title IX Sex Harassment Complaint Process:**
  - Emails
  - Snapchat screenshots
  - Photos of bruises, injuries

# Types of Evidence: Documentary Evidence

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- **Documentary Evidence:** Any evidence that is written down, on paper or electronically.
- **Examples of Potential Documentary Evidence In Title IX Sex Harassment Complaint Process:**
  - E-mails
  - Text Messages
  - Class records
  - Medical records
  - Police reports

# Types of Evidence: Demonstrative Evidence

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- **Demonstrative Evidence:** Evidence that represents or preserves a piece of physical evidence
- **Examples of Potential Demonstrative Evidence in Title IX Sex Harassment Complaint Process:**
  - Photos of injuries
  - Security footage of an incident
  - Drawing of a respondent



# Types of Evidence: Verbal Evidence

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- **Verbal Evidence:** Oral report of memories of a witness' experiences or observations related to the time and place of the incident under investigation - a story.
- **Examples of Potential Verbal Evidence In Title IX Sex Harassment Complaint Process:**
  - Complainant Verbal Report
  - Respondent Verbal Report
  - Classmate Verbal Report
  - Professor/Other College Employee Verbal Report

# Types of Evidence: Verbal Evidence

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- A type of verbal evidence is "**hearsay evidence**"
- **Hearsay Evidence:** The report of another person's words by a witness.
- **Example of Potential Hearsay Evidence Title IX Sex Harassment Complaint Process:**
  - A classmate's testimony of what a complainant said to him about an incident with the respondent**Hearsay is not excluded in this context.**

# Types of Evidence: Verbal Evidence

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- Relevant hearsay evidence may be gathered and included in a Title IX complaint investigation report.
- The Department of Education has different rules regarding the admissibility/use of hearsay evidence in *a hearing and final determination (including when it cannot be considered if witness does not subject him or herself to cross examination during the Title IX hearing)*, which we will cover in greater detail during our training on the hearing process.

# Direct v. Circumstantial Evidence

- **Evidence in a Title IX Sex Harassment investigation can be "direct" or "circumstantial"**
- **Direct Evidence:** Doesn't require drawing a conclusion/inference to show that something happened.
  - *"I was in the bedroom and saw Nolan push Kelly into the corner and kiss Kelly. I heard Kelly say, "Stop," but Nolan just laughed. Then I saw Kelly smack Nolan and run out of the room crying."*
  - What the witness reports personally seeing and hearing is direct evidence that Nolan assaulted Kelly and was met with Kelly's self-defense.
- **Circumstantial Evidence:** Requires drawing a conclusion/inference based the circumstances to show something happened.
  - *"I was in the living room when I saw Nolan and Kelly go in the bedroom. A few minutes later, Kelly ran out of the bedroom crying. Then Nolan came out with a big red mark on their cheek."*
  - The witness didn't see/hear what happened in the bedroom, but we could conclude/infer from what the witness saw/heard in the living room that Nolan assaulted Kelly in the bedroom, and was struck in self defense.

# Determining Relevancy of Evidence

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- While there are many types of evidence that may be presented during the course of Title IX sex harassment investigation, only ***relevant evidence*** should be considered when issuing a determination regarding a Title IX complaint.
- **Relevant Evidence:** Facts that *potentially* describe or explain an event or incident under investigation.
- **Irrelevant Evidence:** Facts that do not have the potential to describe or explain an incident under investigation.

# Determining Relevancy of Evidence

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- **Initial steps for determining relevancy of evidence in Title IX Sex Harassment Complaint Process**
  - **Step 1:** Review the evidence being offered
  - **Step 2:** Consider the allegations of the Title IX sex harassment complaint
  - **Step 3:** Ask yourself whether the evidence being offered has the potential to prove/explain or disprove an incident under investigation

# Determining Relevancy of Evidence

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- **Scenario A:** A complainant has reported that a classmate has sent them unwanted sexually explicit e-mails and text messages despite requests from the complainant that the respondent stop. The complainant presents evidence of the text messages and e-mails as part of his Title IX complaint.

# Determining Relevancy of Evidence

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- **Initial Relevancy Analysis of Scenario A**
- **Step 1 (review the evidence):** E-mails and text messages between the respondent to the complainant.
- **Step 2 (consider the Title IX complaint):** The complainant reported that the respondent was sending unwanted sexually explicit e-mails and text messages.



# Determining Relevancy of Evidence

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- **Initial Relevancy Analysis of Scenario A continued.**
- **Step 3 (assess whether evidence potentially proves/disproves an incident of the Title IX Complaint):**  
Yes – the emails and text messages (which are documentary evidence) could either prove or disprove that the respondent was sending sexually explicit communications to the complainant, which are the key allegations of the complaint.

# Determining Relevancy of Evidence

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- **Scenario B:** A complainant has reported that a teaching assistant in one of her courses said that the teaching assistant offered an "A" in the course in exchange for the complainant providing sexual favors throughout the semester.
- In support of the complaint, the complainant has submitted racially insensitive social media posts that the respondent has shared on various social media accounts. The posts do not mention/relate to the complainant but complainant claims the posts show the respondent has racist viewpoints and is the "the type" that would engage in the behavior reported in the Title IX complaint.

# Determining Relevancy of Evidence

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- **Initial Relevancy Analysis of Scenario B**
- **Step 1 (review the evidence):** Racially insensitive social media posts purportedly shared by the respondent.
- **Step 2 (consider the Title IX complaint):** The complainant reported that the respondent offered an "A" in a course in exchange for sexual favors.

# Determining Relevancy of Evidence

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- **Initial Relevancy Analysis of Scenario B continued.**
- **Step 3 (assess whether the evidence potentially proves/disproves an incident of the Title IX complaint):** No – the social media posts have no bearing on the allegations of the complaint and would not prove (or disprove) whether the TA offered the complainant an "A" in exchange for sexual favors throughout the semester.
- That the TA may have shared racially insensitive material in the past does not make it more (or less likely) that the individual would have engaged in sexually harassing behavior.
- The posts should therefore not be considered as part of the determination of the Title IX sexual harassment complaint.

# Title IX Rape Shield Protections

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- Every relevance analysis in a Title IX Sex Harassment investigation **must** also include a consideration of Title IX's rape shield protections.

# Title IX Rape Shield Protections

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- Title IX's rape shield protections provide that questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior **are presumptively not relevant**, unless they are offered under two limited exceptions.

# Title IX Rape Shield Protections

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- **Rape Shield Exceptions:** Evidence/questions regarding a complainant's sexual predisposition or prior sexual behavior may be deemed relevant only if:
  1. The questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
  2. The questions and evidence relate to specific incidents of the complainant's prior sexual behavior *with respect to the respondent* and are offered to prove consent.

# Title IX Rape Shield Protections

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- **Scenario C:** A complainant reported a sexual assaulted by a classmate at an on-campus event. As part of the investigation process, the respondent has submitted witness statements from other class members who claim that the complainant regularly "sleeps around" and has a reputation for being "easy" in support of the respondent's defense that their encounter was consensual.



# Title IX Rape Shield Protections

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- **Rape Shield Analysis of Scenario C:** Title IX's rape shield protections bar the investigator from considering witnesses' statements regarding claims that complainant "sleeps around" and is "easy."
- This is because the witnesses' statements relate to the complainant's sexual predisposition/prior sexual behavior generally and are not being utilized to prove either that: (1) someone other than respondent engaged in the purported conduct or (2) a prior sexual relationship between the complainant and the respondent existed.

# Title IX Rape Shield Protections

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- **Scenario D:** A complainant reported that a teammate sexually assaulted him while they were staying in a hotel at a weekend tournament.
- In response to the charge, the respondent has presented text messages and testimony suggesting a consensual sexual relationship existed between the respondent and the complainant.

# Title IX Rape Shield Protections

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- **Rape Shield Analysis of Scenario D:** This evidence *would not* be barred by Title IX's rape shield protections, as it relates to a prior sexual relationship between the complainant and respondent and is being offered by the respondent to prove that the incident in question was consensual.

# Complete Relevancy Analysis Process

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- **Step 1:** Review the evidence being offered
- **Step 2:** Consider the allegations of the Title IX complaint
- **Step 3:** Ask yourself whether the evidence being offered has the potential to prove/explain or disprove an incident under investigation
- **Step 4:** Consider whether evidence falls into rape shield protections or rape shield exceptions

# Complete Relevancy Analysis Process

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- **Scenario E:** A complainant reports that a coach has engaged in making sexually harassing comments throughout the team's season.
- In support of the claim, the complainant presents witness testimony from two other teammates who state they heard the coach call players, including the complainant, "baby," "cutie," and "hottie" during practices throughout the season.

# Complete Relevancy Analysis Process

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- **Step 1 (review the evidence being offered):** Testimony from teammates regarding what they heard the coach say to players, including the complaint, during practices (note: this is hearsay evidence)
- **Step 2 (consider the allegations of the Title IX complaint):** Complainant reported that coach repeatedly made sexually harassing comments to him throughout their season.

# Complete Relevancy Analysis Process

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- **Step 3 (does the evidence have the potential to prove/explain or disprove an incident under investigation):** Testimony by players (that the coach called players names as such as "baby" and "hottie") has the potential to prove that coach made harassing comments to the complainant (and other players) throughout the season and is therefore relevant to the investigation.
- **Step 4 (consider rape shield protections):** Complainant's sexual history not involved in this witness testimony— rape shield protections are therefore not implicated.

# Quiz – Test Your Relevancy Skills!

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- Kelly files a Title IX sex harassment complaint alleging that a classmate, Nolan, sent sexually explicit pictures during classes. In response to the complaint, Nolan presents evidence from another classmate, Dan, that Kelly regularly exchanges sexually explicit pictures with him.
- Nolan claims Kelly's text messages with Dan prove that his (Nolan's) messages were not harassing and that Kelly was not offended/or harassed by sexually explicit messages he sent.
- **Quiz: Are Kelly's text exchanges with Dan relevant to the investigation of her complaint against Nolan?**



# Quiz – Test Your Relevancy Skills!

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- **Answer:** No – Kelly's text messages with Dan are not relevant to her complaint against Nolan.
- **Reasoning:** The fact that Kelly exchanged explicit texts with Dan doesn't mean the photos were welcome from Nolan, and Nolan isn't offering Dan's texts to show that someone other than Nolan sent the texts in question or that Kelly engaged in prior "sexting" or other consensual sexual activity with Nolan.

# Quiz – Test Your Relevancy Skills!

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- Chris files a Title IX complaint alleging that a lab partner, Allie, inappropriately kissed and groped him following completion of a chemistry lab. In response to the claim, Allie presents emails between she and Chris where they discuss romantic feelings for one another and potentially exploring a relationship outside of school.
- Are the emails between Chris and Allie relevant to the investigation of the complaint?

# Quiz – Test Your Relevancy Skills!

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- **Answer:** Yes – The e-mails relate to a potential relationship between Chris and Allie and could potentially prove (or disprove) the allegations of Chris' complaint.
- **Reasoning:** The e-mails relate to a prior sexual relationship with Chris and Allie, and are being used by Allie to establish that Chris consented to any conduct in question, and therefore fall into one of the limited rape shield exceptions.

# Quiz – Test Your Relevancy Skills!

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- Sam files a Title IX complaint against a sociology professor, alleging that the professor failed Sam because Sam refused to give into the professor's sexual advances throughout the semester.
- In support of the claim, Sam presents an old news article stating that the professor was fired from a previous college after the professor admitted to using drugs with students.
- Is the news article relevant to the investigation of Sam's complaint?

# Quiz – Test Your Relevancy Skills!

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- **Answer:** Likely not – The news article does not serve to prove that Sam's professor subjected her to sexual advances or that the failing grade was retaliation.
- **Reasoning:** The professor's prior dismissal, although involving inappropriate conduct with students (and poor judgment), does not involve sexual harassment or retaliation allegations, nor does it serve to show that the professor engaged in the conduct alleged by Sam. Simply because the professor was fired previously for unrelated inappropriate conduct does not mean the professor sexually harassed or retaliated against Sam or was likely to engage in such behavior.

# Quiz – Test Your Relevancy Skills!

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- Let's consider the same factual scenario (i.e., Sam has filed a Title IX complaint against the sociology professor, alleging that the professor retaliated issued a failing grade because Sam refused to give in to the professor's sexual advances throughout the semester.)
- In response to the complaint, the professor offers proof that Sam has failed two other classes (with different instructors) and that, on a consistent basis, 10% of their classes each semester received a failing grade.

# Quiz – Test Your Relevancy Skills!

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- **Answer:** Yes – Sam's other failing grades, and the fact that the professor regularly fails students, may serve to prove the professor's defense that Sam was not treated differently than other students and that Sam somewhat regularly does poorly in classes.
- **Reasoning:** Although Sam's grades in other courses and the professor's class records are not definitive proof that the professor is innocent, they would serve to support the defense that Sam received the failing grade based on poor performance.

# Quiz – Test Your Relevancy Skills!

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- Frank files a Title IX complaint alleging that a teammate, Dennis, engages in "hazing" and sexually harassing conduct throughout Frank's freshman year season. In support of the claim, Frank provides pictures of bruises and injuries that are a result of Dennis' hazing throughout the season.
- Are the pictures relevant to Frank's Title IX complaint?



# Quiz – Test Your Relevancy Skills!

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- **Answer:** Yes – the pictures of bruising may prove that Frank was hazed and/or sexually harassed by Dennis.
- **Reasoning:** The pictures are demonstrative evidence which may/may not prove Frank's allegations against Dennis.

# WHAT QUESTIONS DO YOU HAVE?

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