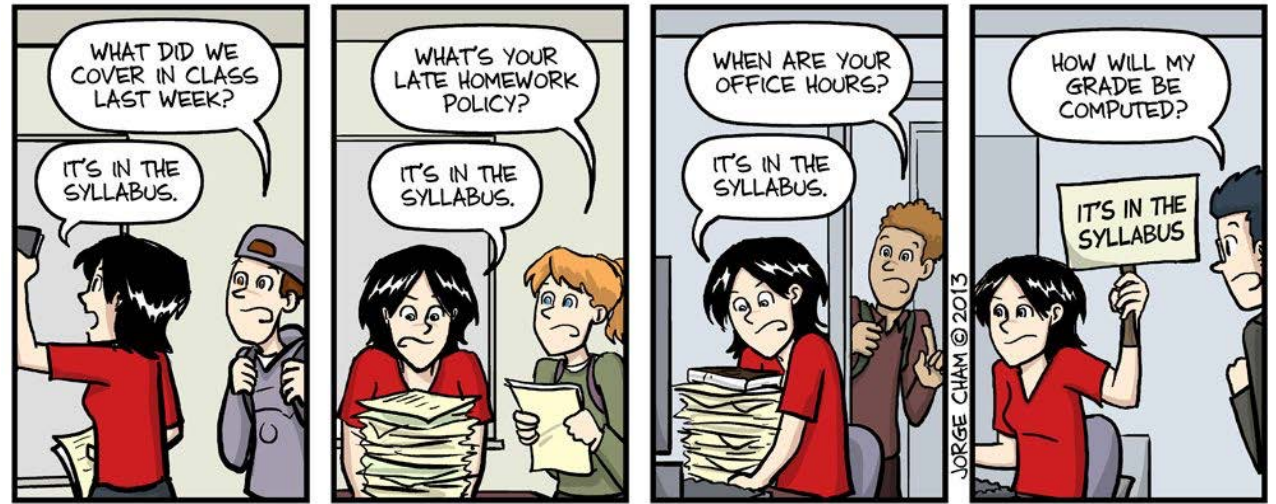


Relevant Questions and Cross- Examination



IT'S IN THE SYLLABUS

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AND NOW IT'S IN THE
REGULATIONS!

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USA&M

ADVISORS

If a party does not have an advisor at the live hearing:

The school **MUST** provide an advisor of the school's choice without charge, who may be an attorney to conduct Cross-Examination.

- Applies to both Complainant and Respondent.
- Guiding principle is equal and equitable.
- Attorney vs. Non- Attorney.
- Is paid for or provided by the school.
 - Law School clinic.
 - Local Bar Association for pro bono or reduced rate.
 - Grant writing.
- Critical because only Advisors may cross-examine a witness.

CROSS- EXAMINATION

- At the hearing each party must be given the opportunity for relevant questions and cross- examination to be performed by the advisor and never by the party that includes challenging the credibility of a witness.
- Cross- examination must be conducted directly, orally, and in real time.

Note: the Regulations do not address the swearing in of a witness. Best practice would be to swear in the witness prior to hearing testimony.



RELEVANCY AND CROSS-EXAMINATION

- At the hearing each party must be given the opportunity for relevant questions and cross-examination to be conducted by the advisor of the other party and any witnesses, including challenging credibility.
- The cross-examination must be conducted directly, orally, in real time, and only by the advisors; never by the party.
- Only relevant questions may be asked of a witness in cross-examination or other questions and before a question is answered the hearing officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statements of that party or witness in reaching a determination of responsibility.
- The hearing officer cannot draw an inference regarding responsibility based solely on the refusal to appear or failing to submit to cross-examination.

IT IS ALL ABOUT RELEVANCY

"Relevant evidence" is not defined by the Regulations.

- "Relevant evidence" is defined by Black's Law Dictionary to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
- Regulations focus on the investigator and hearing officer consider relevant evidence. A school may not adopt evidentiary rules of admissibility that might serve to exclude relevant information.

Polygraph/ Voice Stress Analysis/ Sexual Assault Kits

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove someone other than the respondent committed the alleged conduct or to prove consent.



QUESTIONS TO CONSIDER?

- Must a hearing officer rule on each and every question asked of each and every witness as to relevancy? Must they do so without an objection from an advisor?
- Is it relevant evidence to take testimony about the following:
 - The complainant's attire.
 - The use of alcohol or drugs by any party or witness.
 - Emotional state of either party or witness.
 - Mental health diagnosis/treatment of either party or witness.
 - An arrest record of either a party or a witness.
 - A criminal history of either a party or a witness.
 - The occupation or job of either a party or a witness.
 - Prior complaints that were filed by a complainant/ the disposition of the complaint
 - Prior complaints that were filed against the Respondent/the disposition of the complaint
 - Previous sanctions imposed by the school or another school on a party or witness
 - Sexual history or dating history of the parties

STANDARD OF EVIDENCE



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Standard of evidence is determined by the school and can either be:

- A preponderance of the evidence OR;
 - A clear and convincing standard of evidence
 - School must choose one standard of evidence and include it in the School's general code of conduct.
- Caveat: The same standard of evidence must be used for formal complaints against students as is used for formal complaints against employees, including faculty, and the same standard must be applied to all formal complaints of sexual harassment. "Same standard" may require a school to apply the higher standard of evidence due to the school's general code of conduct or employee/faculty contract.