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Taming the Dragon

*The Title IX Administrator's Guide to Managing Attorney Advisors
in the Sexual Misconduct Resolution Process*

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Introduction

We've entered a brave new world since 2014, when VAWA §304 first permitted students to be advised in campus sexual misconduct (sexual violence, dating violence, domestic violence, and stalking) proceedings by Dragons. Okay, attorneys, not Dragons, but we hope the comparison is both useful and mildly entertaining. Dragons may not be inherently violent creatures, but they are often approached with guarded suspicion because of their impressive capabilities. Like dragons, attorneys are often viewed with similar cautious skepticism, at least in part because attorneys are willing to be contentious and confrontational. Attorneys learn early in their careers to zealously defend and advocate for their clients; it is this approach that sometimes places attorneys, who often serve as advisors for parties in the Title IX process, at odds with the administrators who facilitate that process.

Administrators see a zero-sum game where the more legalistic the process is, the less educational and developmental it can be. They resent this perceived shift, understandably. We hear from administrators frequently that attorneys try to intimidate them, and that some succeed. We hear that some administrators immediately refer contentious attorneys to their own legal counsel, but this is usually only a temporary fix. We think attorneys are here to stay in the process, and that you are going to have to deal with them. But what if the dragon could be tamed? We really don't have a choice in the matter, so we might as well develop some mad dragon-taming skills, right? What if we in the Title IX field endeavored, to the extent possible, to make attorneys allies in the process rather than adversaries, whom we have relegated to the role of "potted plant?" It can be done, and we hope this guide assists administrators to co-exist with parties' attorneys without being burned, and at the very least, helps administrators to effectively manage an increasingly contentious and adversarial process.

The Role of Attorneys in the Title IX Process

To effectively manage attorney involvement in the Title IX process, we must first understand the role they play. On March 7, 2013, the Violence Against Women Reauthorization Act (VAWA) codified into federal law the requirement that schools must allow individuals (students and employees) involved in the college or university resolution process for allegations of sexual violence, dating violence, domestic violence, and stalking to bring “an advisor of their choice” with them to any proceeding or related meeting.¹ In its 2017 Q&A on Campus Sexual Misconduct, the Department of Education’s Office for Civil Rights (OCR) reaffirmed that the right to have an attorney or other advisor present must be made equally available to both parties involved in the Title IX process, potentially widening the VAWA protections to other behaviors covered by Title IX—but not by VAWA—such as sexual harassment. Functionally, most colleges that implemented VAWA’s extended advisor rights to all Title IX-covered offenses, even if VAWA’s protections are narrower. We expect OCR’s new guidance to require not only attorneys’ presence in investigations and hearings, but to require their active participation in the process. Attorneys are not only “here to stay,” but will become active and full participants.

While the parties may select an attorney as an advisor, we most often see attorneys serve as advisors for responding parties. This is largely because the Title IX administrative process often entails some form of hearing, which is likened to an adversarial judicial process and the underlying conduct(s) at issue may also implicate criminal statutes. Accordingly, responding parties who have the financial means to do so tend to enlist the guidance of attorneys. These attorneys often have an understanding of evidence and investigations rooted in the criminal or civil law context; they are often much less familiar with the administrative resolution processes employed by educational institutions. This is important for two reasons: they view the process and the procedure through a significantly different lens than we, as administrators, do, and they likely have studied the relevant policies and procedures in depth. As a result, they are rarely shy about questioning how some procedural element works and highlighting any deviation from the articulated process.

Understanding the Attorney’s Perspective

Attorneys are accustomed to zealously representing and speaking on behalf of their clients. That is consistent with both their training and their ethical responsibilities. Their role is to identify and gather information that supports their clients’ position, which may entail actively trying to undermine, stymie, and even discredit anyone who can harm their client, including the “opposing” party and the college. As administrators, we must first understand that perspective if we are to have any success in seeing attorneys as guardians of the rights of their clients rather than combatants. If it helps to frame it this way, consider that the attorney is hired to protect the rights of their clients, and you are required by law to protect the rights of their clients. In a

¹ 20 U.S.C. 1092(f)(8)(B)(iv)(II) states that “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”

sense, you have the same goal, though you may not always agree fully on what rights apply, how they should be applied, how extensively the laws afford protections, and when those protections should be provided. The attorney will see their role as the watchdog to make sure you don't step out of line or fail to do what you are required to, and your soundest ground is to deploy mad skills that give them confidence in your competence. Generally, they will tend to see you as rigid bureaucrats who throw their limited power around like petty tyrants. So, a key question is whether you want to reinforce that perception, or disabuse them of it. They will chafe at rigid bureaucracy, as they are often expert problem-solvers who find a process in the way of their ability to resolve their client's problem. At the same time, they really don't want to antagonize you, hoping that you will continue to show their client your goodwill, which they don't want to squander without cause. Mutual respect can be earned, but it often doesn't start from there.

When attorneys resort to their default adversarial, often combative position, they can hamper the process and may even inadvertently work against the interests of their client. Attorney advisors *can* be of tremendous value, however, both to their client and to the Title IX process. Because attorneys are well-versed in identifying and evaluating relevant evidence, they can assist their client in coherently conveying their position and relevant details in an interview, and identifying and providing evidence in support of that position. Attorneys also are trained to read and comprehend complicated laws, regulations, and policies, making them well-suited to explaining the relevant policies to their client and ensuring their client understands the various steps of the process.

So how do we put attorneys in the best position to help both their client and the Title IX process? It starts with having a sound policy on advisor roles. While VAWA precludes schools from placing limitations on *who* can serve as an advisor (though it makes sense to require that advisors be eligible and available), schools may (at least for now) place reasonable limitations on the nature of the advisor's role in the process, provided that these limitations are equitably established and implemented for all parties' advisors. An example of this type of limitation might be that advisors are not to speak on behalf of their client or disrupt meetings, hearings, or other proceedings that are part of the Title IX process. If they so choose, however, colleges may allow attorneys to actively represent and speak on behalf of their client throughout the process. Importantly, the parameters of an advisor's participation in the process, as well as the consequences for failing to respect these parameters, need to be expressly outlined in the school's policy.

However, making an attorney sit in the corner like the proverbial potted plant is not a recipe for success. The goal in limiting attorney involvement is often to prevent them from giving evidence because we want to hear directly from their client, not the lawyer. However, attorneys should otherwise be fully able to confer with their client and consult with you, as long as it does not become disruptive. Treating them like a barely-tolerated annoyance is likely to impede their ability to represent their client to the best of their ability. Treat them with respect, dignity and fairness, as they are basically an extension of their client. Offer them coffee and a quiet place to

meet with their client. Don't stick them in a cold, damp room in the basement, even if they deserve it. Dragons don't like being cooped up in caves.

In addition to sound policy, administrators need to set the tone of the proceedings. If possible, communicate with attorney advisors *prior* to any scheduled meeting to reiterate and emphasize appropriate participation and expectations for decorum, answer any questions the attorney has about the process, and begin establishing rapport. Taking the time to go over procedures and distinguish the campus process from more formal legal proceedings will prime the impending interview for success. While a phone call will suffice, allotting 10-15 minutes or so prior to a scheduled meeting to speak with the attorney in person usually yields the best results. Have a copy of the policies on hand, be open to questions, and be willing to explain why limitations on participation are in place (e.g., "This is a party-centric process and it's important that I hear directly from them.").

Generally, attorneys who understand the boundaries clearly will be more likely to respect them. Explain that if the attorney would like to confer with their client in private at any point during the meeting, interview, or hearing, they can step out of the room to do so. We should do the same for all advisors. While restricting an attorney advisor to being a "potted plant" in the room may sound appealing, doing so may well engender distrust, frustration, and potentially lead to non-participation from the client. In a tactful manner, emphasize that interviews are not depositions, the formal rules of evidence do not apply and that the college/university works hard to avoid adversarial proceedings. Establishing expectations early in the process in a respectful manner helps to both avoid potential interruptions during interviews and mitigate the risk of a hearing being derailed by a disruptive attorney advisor. Too often we make the issue one of control and power over the process; we are, in fact, stewards of the process who shepherd it to ensure fairness, rather than to flex our minimal authority.

Communications

As much as we would like the Title IX process to be entirely party-driven, the reality is that attorney advisors will likely have substantial input into any communication, especially written, between their client and investigators/administrators. In fact, it is fairly common for attorney advisors to draft, on behalf of their client: email communications, written statements for the investigation, written responses to the investigation report, and appeals. It is sometimes difficult for administrators to know if/when this occurs, and it is even harder to prevent, as these communications typically present as if they were written by the client. This practice has become pretty standard. Although frustrating to those with a student development mindset, who feel that the process should develop introspection on the part of the student, and help the student internalize the impact of their actions, or those accustomed to having more complete control over the process, trying to manage this conduct is essentially futile. In truth, there is also no reason to try to prohibit or restrict this, and doing so may run afoul of VAWA and the direction OCR is taking. Keep this possibility in mind when obtaining verbal information from a party – if it contradicts or differs from the written communication(s), press further to try and understand the discrepancies.

Parties may request that all communications regarding the process be sent directly to their attorney. Alternatively, after an initial notice email is sent to a responding party, administrators may be contacted directly by an attorney who claims they represent a party. In either case, the next step is for administrators to meet with or send an email to the party requesting confirmation that the specific attorney is, in fact, serving as their advisor. After the party has confirmed the attorney's role, administrators can clarify that all subsequent communications will be directed to the party, but that if the party requests, the administrator will copy the attorney advisor on communications for ease and efficiency. This maintains the party-centric model and also signals to the attorney that we're not intentionally trying to make it difficult for them, helping to build rapport and facilitate cooperation. An engaged attorney advisor is not a bad thing and can often be very helpful, but we want to avoid attorneys running every step of our process. While attorneys pointing out our mistakes can raise our hackles, it is better for them to do so during the process where mistake can be corrected, rather than raising them later as the substance of a lawsuit that could cost hundreds of thousands of dollars.

Meetings

The Title IX process typically involves multiple meetings, including an initial intake meeting, interviews, meetings to review the investigation report, potentially a formal hearing in front of an administrator or panel, and possibly appeal-related meetings. While we encourage—and must allow—parties to be accompanied by an advisor in all of these meetings, scheduling conflicts are a common struggle with attorney advisors, who often ask for extensions or to reschedule meetings. While it is understandable that attorneys are busy, and it is a good practice to be somewhat flexible, administrators are neither obligated to, nor should they delay the process to accommodate attorneys' schedules. If the attorney is asking for a delay of a week or more, it is certainly acceptable to ask whether another attorney in the firm could be available sooner or to ask the client if there is another person who could serve as their advisor, even temporarily. Allowing an advisor to weigh in by phone or a video call of some kind is also workable. If a party chooses an attorney who cannot be reasonably available, instruct the party to choose someone else.

Occasionally, the issue of surprise interviews comes up. A surprise interview is when you decide to interview a party without advance notice or warning. This will usually deprive them of their right to an advisor during that interview, eschews the principles of fairness and due process, and an attorney will be sure to raise that issue with you or the courts later. It may also violate VAWA by depriving the student of their right to an advisor and appropriate notice of the allegations. That said, surprise interviews can be essential in some limited situations to avoid the spoliation of evidence or compromising the integrity of an investigation. While we suggest you use surprise interviews very sparingly, if you conduct one, you should document your reasons for doing so, and communicate with the attorney as soon as is reasonably possible to explain.

Another common area of concern is the sharing of the investigation report. While the parties and their advisors are sometimes willing to review the investigation report in-person, they will often request a copy of the report. It is increasingly an industry standard to provide the student a copy of the investigation report prior to finalizing the findings. It is fair and treats the party with dignity. An increasingly common practice (and sometimes the only option) is to share the report electronically. There are several ways this can be done, from emailing a password-protected PDF document, to utilizing an online document-sharing service that allows for restricting the recipient's ability to save, print, copy, or share the document, often with the additional option to set the amount of time the link to the document is available. It is ultimately up to the school (in consultation with its legal counsel) whether to provide a copy of the report to the party and/or the advisor such that they would not have to be in the same place to review it, but we recommend being cooperative on this, with appropriate redactions as necessary. The days of requiring students and their advisors to come to your office to review the report should be behind us. Such an approach cares more about unnecessary levels of privacy than fairness. A policy on sharing of the investigation documents by the advisor would also be helpful, if that is something you are seeking to limit.

Regardless of how the document is shared, the process of reviewing the investigation report may well result in a dispute with an attorney advisor. While the parties should already be aware, and have been provided an opportunity to respond to the evidence collected during the investigation, this may be the parties' (and the advisors') first opportunity to review all the evidence organized in one place. It is also, typically, the first time the parties read the investigators' written assessment of credibility and, potentially, any recommended findings.

As they are accustomed to doing in the practice of law, attorney advisors may object to evidence that was included, may want to know why certain evidence was *not* included, and may challenge the investigators' credibility evaluations or recommended findings. Administrators/investigators should anticipate this and should not be afraid to explain their rationales for why certain evidence was relevant and included and why other evidence was excluded. Attorney advisors may try to insist that character evidence be included, such as the other party's past sexual history or their client's upstanding reputation or notable academic/athletic achievements. Having an articulated policy on whether and what type of character evidence is allowed, and following that policy, will serve you well as a reference point and provide support for how you respond to these requests. Often, attorneys make compelling cases for why evidence that seems to be character evidence speaks instead to a substantive issue, or should be admitted to counter character evidence that has been admitted that is not favorable to their client. If you are unsure of how to assess admissibility of this type of evidence, consult your own legal counsel before making the judgement call about excluding the evidence or witnesses a party seeks to offer.

If the attorney advisor brings up a valid challenge to an investigative decision, be willing to consider the challenge. If an attorney advisor points out evidentiary gaps in the investigation, identifies relevant witnesses not previously identified or interviewed, suggests that additional questions should be posed to the other party or the witnesses, or finds an error or omission in

the evaluation of the evidence, be open to reviewing those concerns. Ultimately, many of these elements will heighten the fairness of the process, which is our ultimate goal. Keeping the level of surprise in the investigation report down to a minimum, by being more transparent about evidence, applicable policies, and the process itself, is a great technique for managing these expectations and avoiding the attorney feeling like they have to do your job for you because of the extent of errors or omissions in your report. While a sound investigation will prevent most issues, we are all human, and overlooking an issue or making a mistake is possible. If you are not sure of the correct response when an attorney advisor raises their concern(s), tell them you will discuss the issue with the Title IX Coordinator, Deputy Coordinator, and/or legal counsel and will get back to them. If you are confident that the challenge lacks merit or does not need to be further considered, explain the rationale for your decision, and note that they can raise the issue on appeal (if appropriate). The parties should already have been informed early in the process that the investigator determines the content of the investigation report and should also be informed of the bases available on which to appeal the eventual decision. Reminding an attorney advisor of this may help to alleviate the tension.

Recognize that part of an advisor's role is to ensure that their client is treated fairly and equitably, and part of that responsibility is ensuring that the investigation was thorough and reliable. Be attentive to challenges at this stage. This approach will not only foster a more positive, collegial, and trusting relationship with advisors, it is not uncommon for attorney advisors to correctly identify procedural errors and/or evidentiary or material deficiencies in the investigation during the process, which provides you the opportunity to address and rectify errors before they become grounds for a lawsuit.

Contentiousness

Whether in a preliminary meeting, a formal interview, or during a hearing, it is ultimately the administrator's/investigator's responsibility to control the specific proceeding and the process in general. This starts with explaining the policies and establishing expectations early on, but can become more difficult when trying to actually enforce those policies and maintain those expectations. Attorneys are comfortable with confrontation, willing to argue their point, and accustomed to escalating situations. Attorneys will often tell administrators/investigators that they are wrong, that a policy is illegal, that certain procedures present a violation of due process, or may even threaten a lawsuit. While some of this antagonism can be mitigated by taking the steps outlined above, in some instances it simply cannot be avoided. Not all lawyers are good lawyers, or smart lawyers. Some like to throw gasoline on everything, light it, and see what is left standing. The bad ones want to try to change your process, and the good ones know that line of argument will get them nowhere.

So how should administrators/investigators address attorney advisors if and when they become combative? *Always* remain calm and professional, even when tensions flare. Never become part of the escalation – many attorneys expect that reaction and are used to that antagonism. Always look for ways to deescalate the situation. Remain steadfast if there are areas you cannot compromise, but show flexibility where you can if it does not compromise the essential

integrity of your process. If an attorney advisor becomes disruptive during an interview or a hearing, kindly remind them of the policies regarding advisor participation and expectations for proper decorum. If need be, warn them that further interruptions will have to be addressed and that, per school policy, they may be removed from the proceeding. Formal hearings will likely have a particular individual in charge of maintaining order, often a panel chair or a non-voting, largely non-participatory administrator or “Resource Person.” Whoever holds that positions needs to have the requisite training, ability, and willingness to step in if confrontations by the attorney advisor(s) arise. Do not hesitate to have an attorney advisor escorted out if need be.

Many administrators feel overwhelmed, are terrified of attorney-based confrontation, and default to the college’s own legal counsel to be present to address any issues raised by attorneys during interviews or hearings. This is a not a good idea. First, placing your attorney in the room automatically makes your relationship with the party and their attorney adversarial. Remember that you are facilitating the process, rather than being partisan. This is not “us versus them,” even if the party’s attorney makes it feel that way. Second, while your legal counsel will likely be more comfortable interacting with a party’s attorney advisor, the conflict of interest created by your attorney’s presence is significant and all-but destroys the integrity of the process. Indeed, Your college’s legal counsel is obligated to protect the interest of the college, which can differ from the fairness and equity required in a Title IX process. Additionally, your legal counsel will have eliminated their opportunity to manage any subsequent litigation because they have become a witness and possibly a party to any subsequent lawsuit. Having your attorney actively engaged in the process may help you feel better, but it ultimately creates more problems than it solves.

One of the best ways to resolve a contentious or antagonistic relationship with a party’s attorney advisor is to ensure you are treating their client with dignity, respect and providing the client with needed academic, work, or mental health support and resources throughout the process. Colleges should also use caution with interim measures that negatively impact a party’s ability to complete their coursework, be on-campus, or be involved in various extra-curricular and co-curricular activities. Attorneys will typically challenge many interim actions, particularly those a college puts into place without providing sufficient rationale and without tailoring such actions as narrowly as needed under the circumstances. Also, simply asking the party in each interview how they are doing and whether or what resources the college can provide diffuses a lot of contention and antagonism by attorney advisors.

Interference

At times, attorney involvement in the process can feel like interference. Attorneys have been known to conduct their own investigations, hire private investigators, arrange for their client to take a lie detector test, and otherwise tread on the college’s investigatory turf. But, just as police have a right to investigate, so do private citizens and entities. Colleges don’t have a monopoly on investigations, and should understand that the parties will often engage in some outside fact-finding. Usually, they’ll bring what they find to you, because they believe it will

help them in your process. There is really nothing you can do to stop this, and no reason that you should, unless abuse of the process is taking place. If the evidence is relevant, try to verify the information to the extent you can, provide the other party the opportunity to review and respond to it, and include it in your investigation report with, if necessary, investigator annotation on the limits to what we know about the additional evidence and the existence of any known contradictory and/or corroborating evidence. If evidence is destroyed, or witnesses are tampered with, or collusion is taking place, don't hesitate to hold the party/client accountable in your process for the acts of their attorney advisor. This should be a clear provision in your policy. Additionally, it could warrant you filing a complaint with the state bar association for unethical conduct by the attorney. In our experience, however, such an possibility is rare as attorneys are well trained in the ethics and limits of their profession. They will be doggedly partisan, but rarely dishonest.

Combative attorneys may try to interfere in the process by raising issues of your alleged bias, or by asserting counter-claims. When an issue of bias is raised, you cannot be the one to address it. Hand that assertion off to a neutral and objective third party to assess and determine whether you can continue in your role, or should be recused. Where counter-claims are asserted, follow your process and use due diligence to be certain they are not being alleged for retaliatory purposes.

Attorneys for the Reporting Party

You may encounter with increasing frequency reporting parties who enlist an attorney as their advisor. Sometimes the attorney is a relative or family friend, but we have also seen reporting parties specifically seek out attorney advisors when, for instance, the college has a reputation for mishandling reported incidents to the detriment of reporting parties. There are a number of advocacy organizations nationwide that specialize in victim's legal rights, and you may see their involvement (the same is true with responding parties, as a number of go-to firms have come on to the scene) in one or more of your cases.

An attorney advisor for a reporting party will function in much the same way as a responding party's attorney, assisting their client in conveying their position, identifying and presenting favorable evidence, and generally ensuring that their client gets a fair shake in the Title IX process. While nearly all of what you've read above -- including an attorney's training and aptitudes, potentially contentious disposition, and willingness to challenge procedures and evidentiary decisions -- applies to all attorney advisors, there can be a few nuances based on who the attorney represents.

Attorneys who work with reporting parties will likely be far more attentive to how their clients are *treated* throughout the process from a trauma perspective, with particular sensitivity to initial intake response, provision of appropriate interim measures, tone of questioning, and sensitivity to victim-blaming language or dismissive responses from investigators/administrators during meetings or interviews. A good attorney advisor for a

reporting party will understand the nature of Title IX liability under the *Davis*² case and will have an eye out for anything that looks or smells like deliberate indifference and that you aren't taking it allegations seriously. When the responding party is a high-profile athlete, tenured faculty member, or other influential campus community member, not only are you more likely to see a reporting party bring an attorney advisor, but that attorney will likely scrutinize every decision you make, every step you take (and even those you don't take), and will be actively looking for any evidence of bias.

Of course, these are exactly the types of concerns you would expect—and want—a reporting party's advisor to point out. Competent administrators/investigators will be scrupulous during initial intake, will use empathy and avoid victim-blaming language and dismissiveness, will be attentive to even a semblance of bias, and will provide the reporting party with needed resources, support and appropriate interim actions throughout the process. One final consideration is that reporting parties may have been initially working with a victim's advocate (or even one employed by your college), and then decide to engage an attorney. They may request that both be permitted to advise them (or for emotional support, and one for legal advice), so you will need to decide how many advisers are allowed in the room at once. And, what you do for one party, you must do for all parties. Often, you can offer clever ways to have one advisor support them at a time, in different parts of the process, or have one just outside the door during breaks, if you are not inclined to allow two advisers in the room during your meeting, interview, hearing, etc.

Conclusion

Attorneys are not dragons, but they are capable of setting fire to our policies and procedures, disrupting our investigations, and undermining our process if managed ineffectively. If treated with respect and transparency, they can be highly effective, uniquely qualified advisors, and even allies in our Title IX processes. Frustration and tensions can result from misunderstanding, miscommunication, fear on the part of administrators, desire of the college to completely control all aspects of a process, and/or a lack of information from the college to the party. Get to know the advisors a little during the process and take an interest in their practices. You might learn something very interesting (e.g.: who is footing the bill, if the attorney is working pro bono, if the attorney is a political activist, or related to the client, etc.). If you have local attorneys who regularly appear in your processes, have coffee with them outside the context of an actual case. Establish rapport and common ground. Where conflicts arise, attempting to clarify the attorney advisor's confusion and answer questions will serve you well. If an attorney threatens litigation, try to ascertain what the basis for that lawsuit would be. Don't ever invite them to sue you or arrogantly assert that you have attorneys, too. As noted above, their concerns might serve as an indication that perhaps something was missed, or a procedure wasn't followed correctly. By being deliberate and receptive, you will be able to work with attorney advisors and ensure a thorough, reliable, and impartial investigative process.

² *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 640 (1999).