

Cross-Examination and Advisors in the 6th Circuit and Beyond

Courts in the 6th Circuit have found that the facilitation of cross-examination during a sexual misconduct disciplinary hearing is a required component of due process when the credibility of the parties is in dispute, is material to the outcome, and the responding party is facing potential suspension or expulsion.

Earlier 6th Circuit court rulings noted that the responding party does not have a right to directly confront the reporting party. Courts found that an institution's process of allowing the parties to submit written questions to hearing panel members, who then determined relevance and posed appropriate questions, was a sufficient method of cross-examination when all parties were present at the hearing. See *Doe v. Cummins, et. al.*, 662 Fed. Appx. 437 (6th Cir. 2016); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017). However, in *Doe v. Baum, et.al.*,¹ the court went further and found that institutions must provide the responding party or their agent an opportunity to cross-examine the reporting party and adverse witnesses in the presence of a neutral fact-finder. OCR's proposed Title IX regulations are aligned with the *Baum* decision as the proposed regulations also require cross-examination during a live hearing, although they mandate that cross-examination be conducted by the parties' advisors.

ATIXA's interpretation of *Baum*² is that it adds to but does not explicitly overturn decisions rendered by *Doe v. Cummins* and *Doe v. Univ. of Cincinnati*. If the 6th Circuit had meant to overturn rather than add to these decisions, it would have said so. Further, the *Baum* decision repeatedly requires "live" cross-examination (meaning in-person), but never requires "direct" cross-examination. In fact, the opinion never uses the word "direct" at all. The *Baum* court discusses who can pose questions during cross, but never suggests those questions cannot or should not be regulated by a chair or panel, as was approved in *Cummins*. Thus, ATIXA takes the position that the following provisions are now applicable and permissible in the 6th Circuit:

- Where credibility is at issue, the reporting party must participate in the hearing if a finding of responsibility is to be sustained;
- The investigator should appear at the hearing as a witness;

¹ Case No. 17-2213, 2018 U.S. App. LEXIS 25404 (6th Cir. Sept. 7, 2018).

² Of course, ATIXA is not an attorney and is not your legal counsel. ATIXA's interpretation is not definitive, and it appears that further litigation will be necessary in the 6th Circuit to clarify how direct cross-examination must be conducted. Before acting on any information shared here, you are encouraged to consult your own legal counsel. ATIXA's recommended approach is not necessarily the "safest" approach from a legal standpoint, but it is the most protective of the sensitive and potentially traumatic nature of these hearings. As an approach that intentionally engenders risk, ATIXA believes it is worth it, but institutional legal counsel may be more risk-averse and wish to permit direct cross-examination with less intervention by the decision-maker or Chair.

- The reporting party must participate live, but can participate remotely via technology or in-person with a physical partition, as long as the decision-maker can see all parties;
- Each party or their advisor/representative can question all other parties and witnesses; the decision-maker(s) can question all parties/witnesses;
- All questions can be posed verbally, subject to interjection by the decision-maker or Chair (who may also consult with general counsel on questions of admissibility);
 - All questions should be permitted unless:
 - Abusive and/or bullying
 - Irrelevant
 - Confusing
 - More prejudicial than probative
 - Unduly repetitive
 - Prohibited by established procedural rules (e.g., prior sexual history, designed to elicit impermissible character evidence, etc.)
- The decision-maker or Chair will vet all questions, and either:
 - Direct the witness/party to answer the question as posed;
 - Direct the witness/party not to answer the question as posed, and explain why; or
 - Rephrase the question and direct the witness/party to answer the question as rephrased or ask the questioner to rephrase or reframe the question based on the articulated concerns of the decision-maker or Chair.
- The decision-maker or Chair is charged with the responsibility to determine admissibility and controls all evidence.
 - The decision-maker or Chair should err on the side of admitting evidence if admissibility is reasonably arguable.
- The decision-maker or Chair will admonish any questioner who uses the questioning opportunity to intimidate or abuse, and will control any party, advisor, or representative who exceeds the scope of their role or the bounds of propriety/civility appropriate to the decorum of a formal hearing.
- Questions by the parties/witnesses posed to the panel will only be answered at the sole discretion of the decision-maker or Chair, including any questions/concerns regarding bias, qualifications, or training.

BEST PRACTICE NOTES:

- ATIXA strongly recommends that the decision-maker(s) conduct their questions of all parties/witnesses first, as they have a right to do. Then, the parties or their representatives may question each other. This should empower the decision-maker or

Chair to limit unduly repetitive questioning by the parties or representatives, if the decision-maker(s) has already posed questions that are asked again subsequently.

- ATIXA strongly recommends that the decision-maker or Chair, during cross-examination, plays a role akin to a referee or traffic signal. If the question is permissible (green), direct or indicate that it be answered. If the question is generally acceptable, but could be clearer, better framed, or slightly limited or adjusted (yellow), the decision-maker or Chair should either fix the question and re-pose it or ask the questioner to do so pursuant to their instructions. Finally, if the question is unacceptable (red) for any of the reasons listed above, the decision-maker or Chair should indicate it is unacceptable and note the reason(s) why, directing the question not be answered.

Explaining the Cross-Examination Process

The courts believe that cross-examination is the most effective way to ascertain the truth as it affords the fact-finder an opportunity to observe the demeanor of the parties and witnesses in order to make a thorough credibility assessment. As part of the cross-examination process at institutions governed by 6th Circuit precedent, the parties and witnesses will provide testimony during the hearing, after which, the other party or their advisor/representative will have an opportunity to ask questions of the individual in the format described above. Alternatively, an institution can permit direct cross-examination, but that is not ATIXA's recommendation at this time. Interposing the decision-maker or Chair between the parties is an important protection and an essential procedural responsibility of the institution that ATIXA believes is not fatal to effective cross-examination, but rather vital to it and its success in the education environment.

The Role of an Advisor, Representative, Advocate and/or Support Person

In accordance with VAWA §304, "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." While this mandate only applies to cases of sexual assault, interpersonal violence (domestic and dating violence), and stalking, best practice dictates expanding this to all sexual misconduct-related cases, including matters involving sexual harassment. The OCR proposed Title IX regulations expand this mandate to all Title IX-covered proceedings. VAWA contemplates one advisor but does not limit parties to one. If institutions want to permit more than one advisor, or some other form of support person to be present, that is permissible. Since there is no limit on who can serve as an advisor, the parties can choose an advisor who is an attorney. This does not give the parties the right to fully functioning adversarial counsel in the process, but it does provide parties access to an advisor with the specialized skills of a lawyer.

Because of the variations on who can advisor can be, and what they can do, the VAWA term “advisor” is somewhat limiting. Therefore, we try below to meaningfully distinguish between advisors, representatives, advocates, and support persons. As shorthand:

Advisor – An individual who is typically familiar with institutional policies and procedures and assists the party with respect to the resolution process;

Representative – An individual who, in addition to their familiarity with institutional policies and procedures, affirmatively acts to represent the interests of the party in the process.

Support Person – An individual who provides the party with moral and emotional support. May or may not have a formal role in the process;

Advocate – An individual who provides moral and emotional support and has the specialized training and credentials of a victim’s advocate.

In terms of terminology and further explication, an advisor is someone who acts in the best interest of their advisee (either the reporting or responding party) to assist in navigating the institution’s resolution process. An advisor can be whomever the party chooses, including an attorney, friend, family member, etc. The advisor must be available and not have any conflicting role in the process. The advisor is permitted to attend each and every meeting, interview, and hearing that their advisee attends, and the advisee should be informed of their right to have an advisor accompany them from the inception of the process.

An advisor’s primary focus is their advisee’s best interests and an advisor should ensure they understand the process and are capable of assisting the advisee in its navigation. ATIXA strongly suggests that each institution comprehensively train a pool of advisors who can assist parties and have intimate understanding of the institution’s policies and procedures. Assigning an advisor to each party is becoming a more common practice, though of course the parties have the right to reject an offered advisor and choose someone else from within or outside the pool. If you offer a pool of advisors, they must be well-trained on questioning techniques and your procedures for conducting cross-examination in hearings.

The scope of the advisor’s role can vary and is primarily dependent upon what the advisee wants and how much guidance the advisee needs. An advisor may assist their advisee with preparing for meetings and interviews, accompanying their advisee to meetings and interviews, serving as a liaison between the institution and the advisee (when permitted), helping their advisee review and respond to evidence (e.g. interview notes, investigation report, etc.),

answering any questions about the institutions' policy and procedures and, in the 6th Circuit, conducting cross-examination during hearings. The way we are using the term advisor here does not suggest that they act formally as an attorney within the institution's process. Nor is the advisor aligned with a particular position or desired outcome that they are trying to advance through their work (the way that an advocate or representative would).

A support person is someone who may help the party manage the emotions that are often part and parcel of a resolution process. An advocate is a support person with appropriate victim advocacy training and credentials. We are using the term advocate here not in the legal sense, but only in the victim's advocate context. A support person or advocate's primary purpose is to ensure the well-being of the party. A support person may be someone with whom the party has a close, personal relationship (e.g. parent/guardian, friend, mentor, etc.). A support person does not need to be focused on, or even aware of, the process. Rather, a support person is focused on trying to meet the party's emotional needs as they proceed through the process.

A representative is an advisor, advocate, or support person who actively champions the interests of a party and conducts evidentiary collection, frames arguments, and/or conducts cross-examination.

Each institution may implement guidelines that govern the nature of an advisor, advocate, support person, or representative's role in the resolution process and the consequences for failing to adhere to those parameters. For example, it is common for institutions to note that the advisor/support person can not speak on behalf of the party (except perhaps at the hearing), they cannot be disruptive during meetings or will face removal, and/or that the institution will communicate directly with the parties who are themselves responsible for relaying information to their advisor/support person.³

As noted above, more and more institutions are moving to allow parties an advisor in addition to a support person present during all meetings and interviews, to include a disciplinary hearing. There is a point at which this becomes absurd, but given the active role the advisor may play during a hearing (e.g. actively listening to the testimonies of parties and witnesses to identify areas to probe during cross-examination), it can be argued that it is not feasible for an advisor to also provide emotional support and comfort for a party. The practice of allowing parties access to both an advisor and a support person, if only during the disciplinary hearing if not throughout the entire resolution process, may well be the direction that institutions – at least in the 6th Circuit – are heading.

³ Another perspective is that it's just common courtesy to copy the advisor once proper releases are signed.