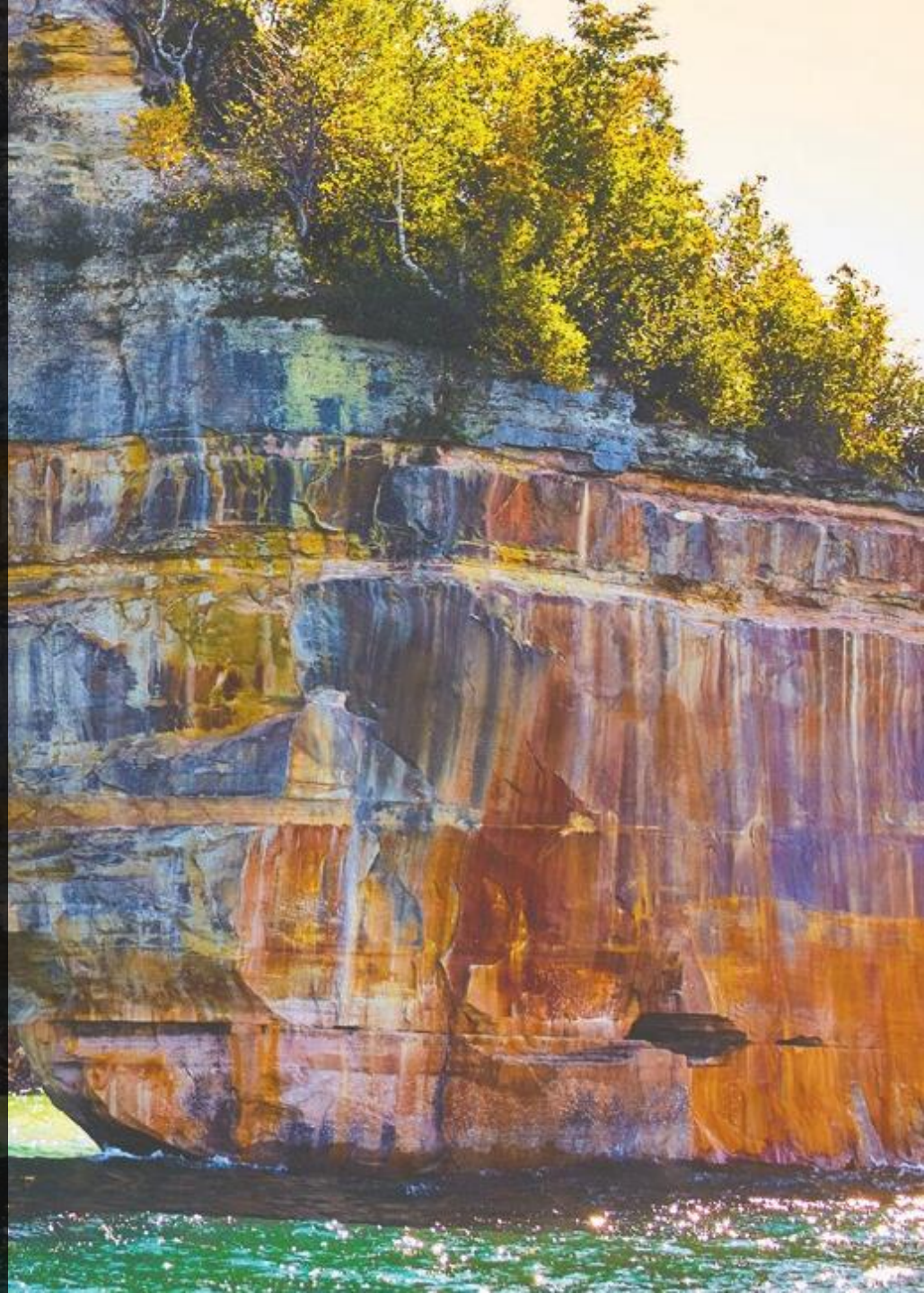
AT THE HEART OF HIGHER EDUCATION

Title IX Regulations: Investigators

August 18, 2021

BARNES & THORNBURG LLP



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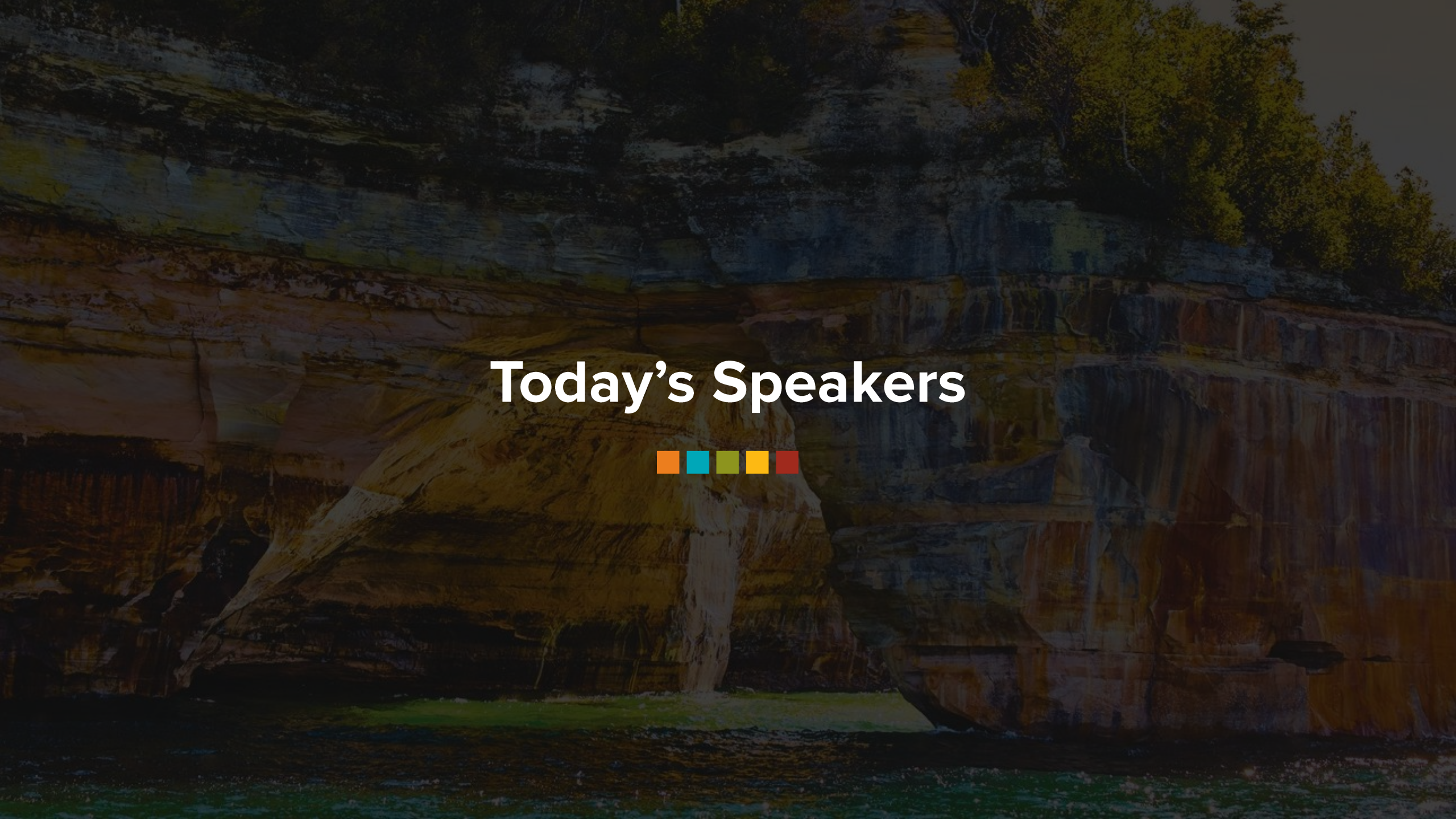

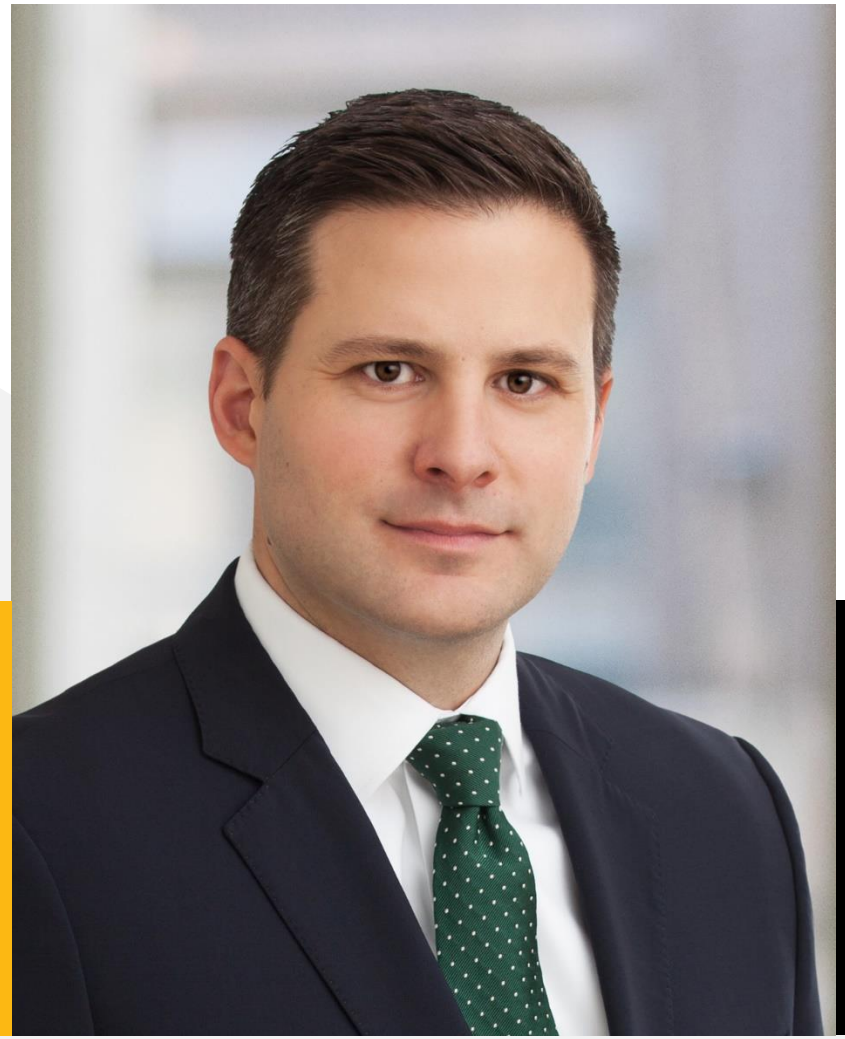

TEAM LEAD

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Chris serves as vice chair of the firm's Higher Education Practice Group, where he advises institutions of all sizes. He represents and counsels higher ed clients in diverse areas of law, including civil defense, investigations, enforcement actions, financial responsibility, Title IV student financial aid, and Title IX litigation and compliance. A former Division I student-athlete, Chris also counsels colleges and universities on athletics compliance and best practices.

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Janilyn represents educational institutions, including clients involved in higher education and K-12. She works with colleges, universities and other educational facilities to comply with Title IX issues related to race, gender and the like, as well as assists them through and beyond student challenges such as myriad disability accommodation matters.

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A significant portion of Don' practice is devoted to representing college and university clients in labor and employment matters and student affairs, athletic program compliance, internal investigations, tenure denial disputes, and facility and program accessibility issues.

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As a member of Barnes & Thornburg's labor and employment group, Teresa advises clients on a variety of employment-related matters, including discrimination and harassment, wage and hour issues, and disability accommodation, and she has extensive litigation experience. Her practice extends beyond employment, and includes fair housing, and personal injury defense. Clients include institutions of higher education as well as K-12 schools, including the University of Notre Dame where she was the Assistant Vice President and Counsel before joining the firm. In addition to counseling clients to ensure Title IX compliance, Teresa has served as an investigator in a number of Title IX claims filed by faculty, staff, and students.

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In addition to labor and employment matters, Mark is also a member of the firm's School Law Practice Group, in which he provides a broad range of legal services to primary, secondary, and post-secondary public and private schools. He has represented school corporations on matters pertaining to teacher and student discipline, discrimination complaints, sports and other extra-curricular issues, and civil litigation.

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Agenda

- Welcome & Introduction
- Title IX Overview
- Grievance Procedure: Investigations
- Hypothetical Scenario
- Evidentiary Issues
- The Investigative Report
- Key Takeaways & Discussion
- Questions & Answers

NEXT UP: **DECISION MAKER / ADVISOR TRAINING SESSION**

AUGUST 18, 2021; 12:30 – 4:00PM

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Title IX Overview

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What is Title IX?

Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

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Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
  - Effect of Coronavirus?
- Remember—the regulations are the law!

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What's New?

- Mandatory Training
- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Actual Knowledge Standard
- Grievance & Hearing Procedures
- Retention of Records

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Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decision-maker(s)

Key Change: The Decision-maker **cannot be** the same person as the Title IX Coordinator or the Investigator.

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Training Requirements

A [University] must ensure that Title IX Coordinators, **investigators,** decision-makers, and any person who facilitates an informal resolution process, receive training on the **definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, **how to conduct an investigation** and grievance process including hearings, appeals, and informal resolution processes, as applicable, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias**...A [University] also must ensure that investigators receive training on **issues of relevance** to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

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Sexual Harassment Definition

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

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Sexual Harassment Definition

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) 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; or

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(3) "Sexual assault" as defined in 20 U.S.C.1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Scope of Coverage

- Covers sexual harassment occurring “in the school’s education program or activity, against a person in the United States.”

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Scope of Coverage

- Covers sexual harassment occurring "in the school's education program or activity, against a person in the United States."
- What is the school's "education program or activity?"
  - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
  - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

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Who can report?

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).

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How?

In person, by mail, by telephone, or by electronic mail, using the contract information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

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When?

At any time (including during non-business hours)

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When does a university have an obligation to respond?

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment

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Actual Knowledge – Who?

- Title IX Coordinator, AND
- A designated school official
  - Must have authority to institute corrective measures on the school's behalf

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Grievance & Hearing Procedures

- “Single Investigator” Model is banned
- Live Hearings
- Advisors
- Cross-Examination

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Guaranteeing a Fair & Impartial Process

- Presumption of Innocence
- Conflicts of Interest
- Bias

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Does this situation cause bias?

A member of the Title IX department shares the following image on their personal social media page:

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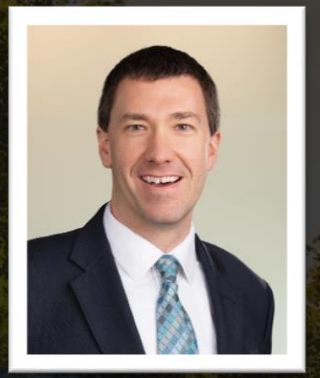
MARK SCUDDER



Grievance Procedure: Investigations

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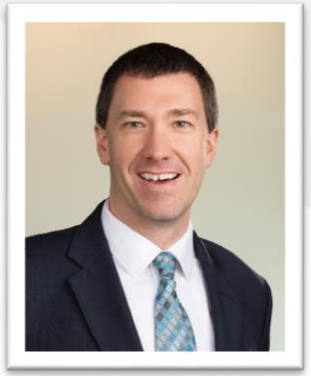

Investigation Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering

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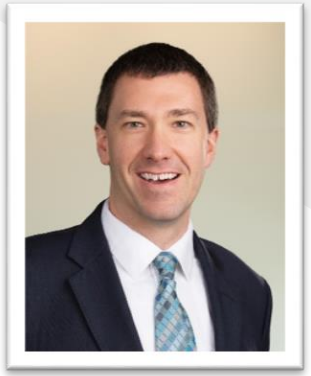

Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

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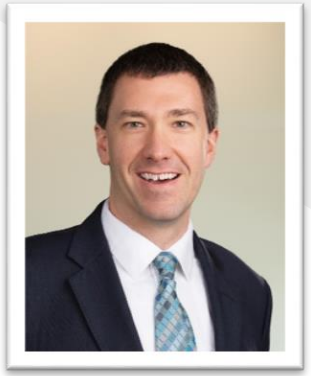

Big Picture Items

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

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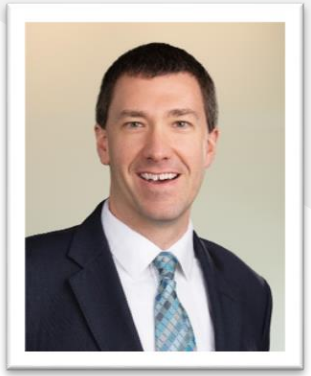

Timeline

- Conduct the investigation
  - Interview witnesses, gather evidence, etc.
- Produce the evidence to both sides
- Finalize the report
- Conduct a hearing

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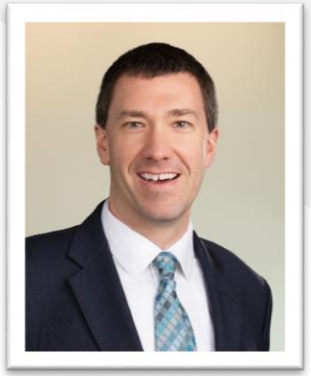

Investigation Overview

- Coordinate with law enforcement as needed
  - Never force or discourage a complainant go to the police
- Gather as much evidence as possible
  - Texts, e-mails, pictures, etc.
- Strategically schedule interviews
  - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

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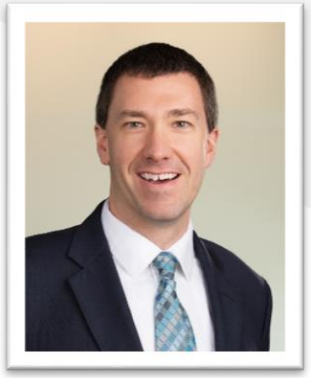

Evidence Gathering

- Equal opportunities for both parties to have witnesses
- Can’t restrict parties from discussing allegations or presenting evidence
- Access to have other people present, including advisors or attorneys
- Must provide written notice to all parties of date, time, location, participants, and purpose of all hearings, interviews, and other meetings with sufficient time for the party to prepare
- Equal opportunities for parties to inspect and review evidence obtained and a opportunity to respond to evidence

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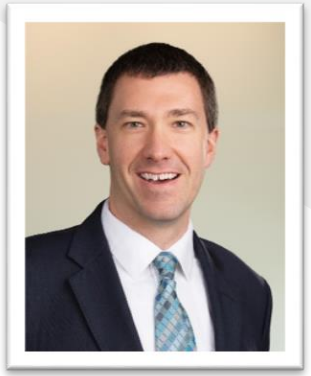

Interview Basics

- Typical strategy for witness interviews:
  - Put the witness at ease
  - Explain the procedure and situation
  - Let the witness give a narrative
  - Ask questions based on the narrative as well as questions that may be outside the narrative
- Consider whether a specific interview requires a different approach

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MARK SCUDDER

Putting the Witness at Ease (or Not)

- Private location
- Comfortable
- Avoid displays of power
  - “Scary” office
  - Sitting across desk
  - High chair, etc.
- Have a note-taker so the interviewer can just have a conversation

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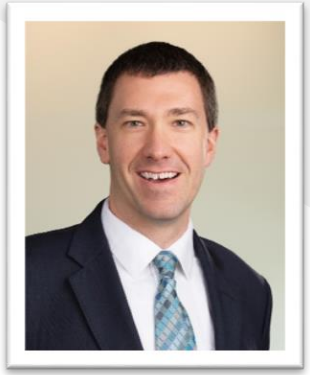

Explain the Procedure

- Set the tone for the interview
- Review the policy as necessary
  - Be clear about confidentiality
  - Explain what steps have been taken
  - Remind them of anti-retaliation provisions
- After the interview, explain the next steps

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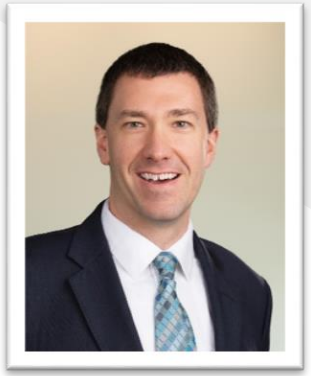

Questioning

- The goal is an open-ended conversation
- The narrative – Just let the witness talk
  - Fill in the gaps and get specifics
- Questions outside the narrative are particularly helpful for third party witnesses
- Be non-judgmental
- Get more information than you give
- Listen carefully for witnesses and tangible evidence that would be helpful for the investigation

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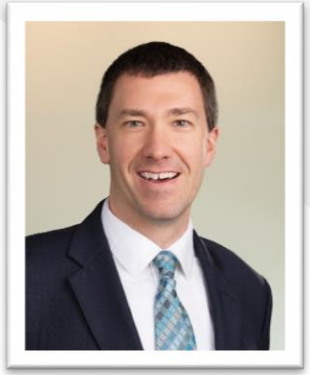

Making Credibility Determinations

- Watch for witnesses changing their story – particularly after witnesses may have talked with one another
- Is the witness' story consistent with tangible evidence
- Does it make sense?
- A Respondent's statements are not inherently less valid than a Complainant's and vice versa

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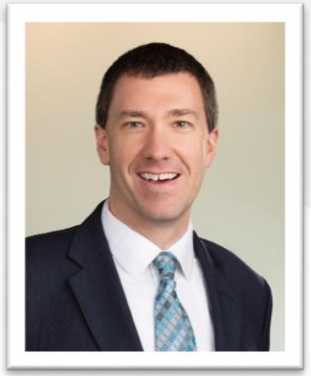

Let's watch a few interview interactions...

These first three videos feature the complainant in an investigation, Sophia.

Keep an eye out for the good, the bad, and the ugly.

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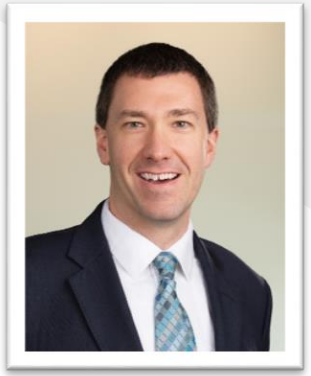

Investigator Interview with Complainant #1

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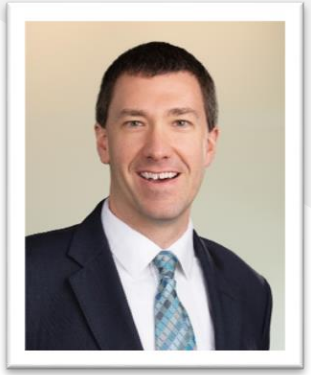

Investigator Interview with Complainant #1

Discuss: What are your thoughts?

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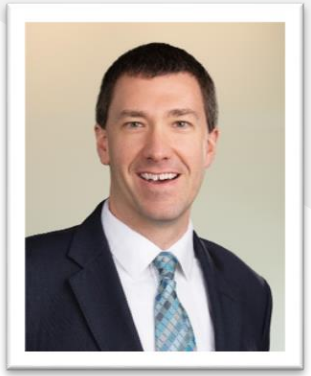

Investigator Interview with Complainant #2

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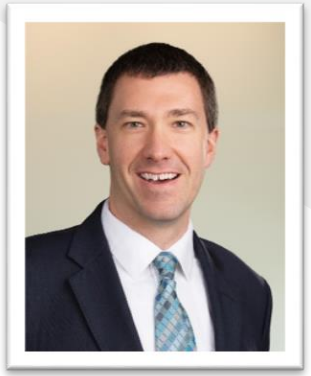

Investigator Interview with Complainant #2

Discuss: What are your thoughts?

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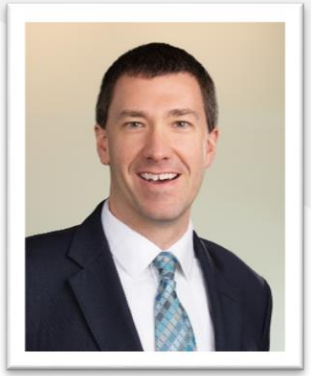

Investigator Interview with Complainant #3

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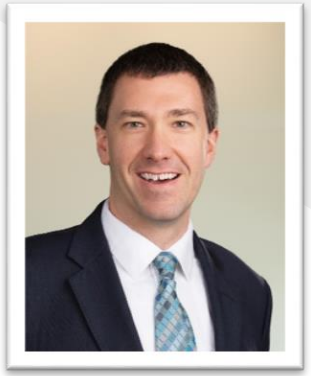

Investigator Interview with Complainant #3

Discuss: What are your thoughts?

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Let's watch a few interview interactions...

Last up is one final interview featuring a friend of the complainant, Olivia.

Any problems that you notice?

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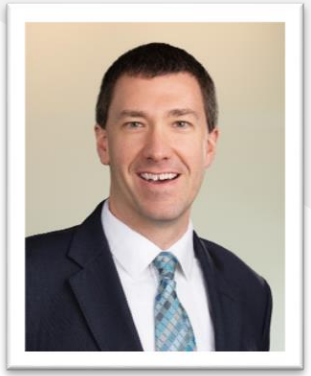

Investigator Interview with Witness

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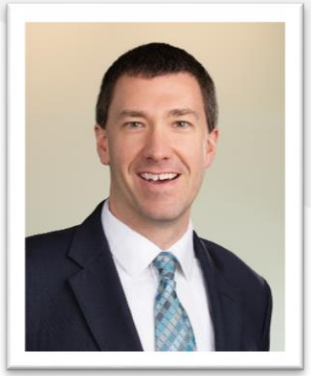

Investigator Interview with Witness

Discuss: What are your thoughts?

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Production of *All* Evidence to Both Parties

- Universities are required to produce all evidence directly related to the allegations to both sides
- The parties get ten days to respond to this evidence before the investigative report can be finalized

What does this mean for the identity of any witnesses?

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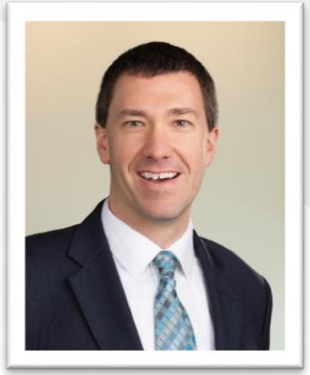

Investigative Report – Requirements

- Universities must prepare investigative report on the allegations of the formal complaint
- Must provide ten days after finalizing to circulate before hearing and determination of responsibility

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Hypothetical Scenario

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Ready to give this a try?

Let’s take a look at a hypothetical situation...

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Some additional evidence for your case file…

- Summary of Interviews
- Additional Evidence:
  - Text messages
  - Snapchats

Take a few minutes to look over these documents and be prepared to discuss.

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Discussion

- ❑ Who should you interview?
- ❑ What's a reasonable timeline for the investigation?
- ❑ What types of things are you going to be looking for?
- ❑ Can you identify any areas of potential bias?

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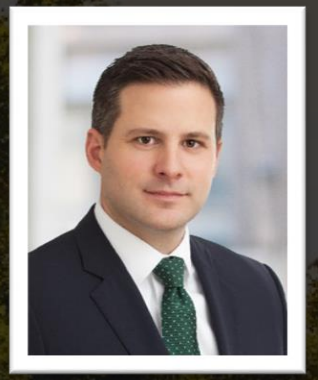

Evidentiary Issues

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Two Opportunities to Weigh In

Opportunity 1: The Evidence

§ 106.45(b)(5)(vi):

- Equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - including the evidence upon which the recipient does not intend to rely in reaching a determination
  - inculpatory or exculpatory evidence whether obtained from a party or other source
- Send to advisors
- Provide both sides at least 10 days to submit a written response
- Consider those in completing the investigative report

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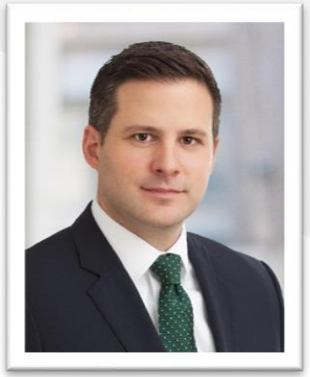

Two Opportunities to Weigh In

Opportunity 2: The Report

§ 106.45(b)(5)(vii):

- Create an investigative report that fairly summarizes relevant evidence
- At least 10 days prior to the hearing, send to each party and the party's advisor the investigative report
- Provide 10 days for their review and written response

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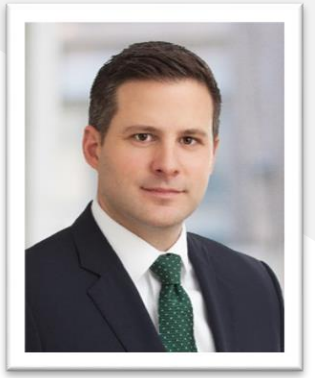

Common Pitfalls

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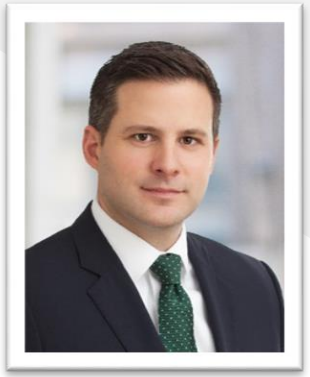

Bias & Evidentiary Issues – Key Points

- Dispassionate, plain statement of the relevant facts
- Key: the "relevant facts"
- Framework: chronological, reporting side, responding side
- If evidence is missing, explain why
- No credibility judgments
- Avoid opinions or conclusions
- Avoid words that subtly signal opinions or conclusions
  - Adjectives and adverbs – just the facts!
  - "However"

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Relevance & Cross-Examination

- All evidence must be **“relevant”**
- Looking ahead, any admitted “statement” must be subject to **cross-examination**

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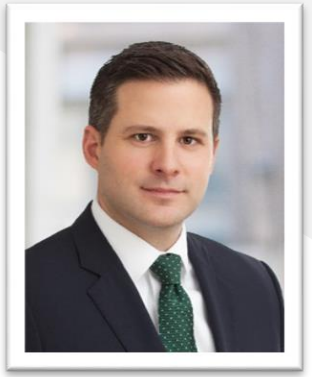

Relevance – how defined?

- "The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied." Cmts. p. 811, fn 1018.
- A school "may **not** adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence." Cmt. p. 812.

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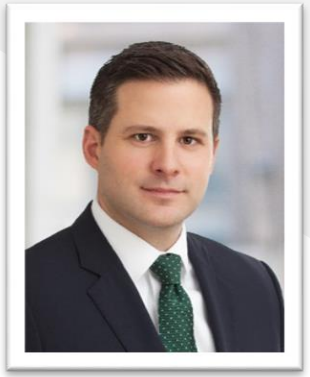

Relevance – any specifics?

- A few – § 106.45(b)(6)(i):
  - Irrelevant: "the complainant's sexual predisposition or prior sexual behavior"
    - Think: rape shield laws
- Exceptions—where prior sexual behavior may be relevant:
  - Assailant identity: "to prove that **someone other than the respondent** committed the conduct alleged"
  - Prior complainant-respondent relations: evidence "concern[ing] specific incidents of the complainant's prior sexual behavior **with respect to the respondent** and are offered to prove consent"

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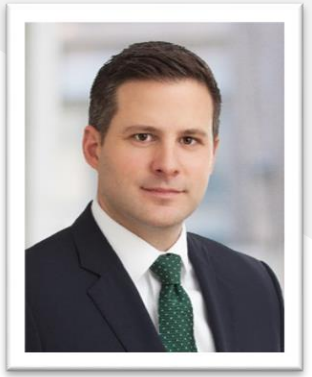

Relevance – any specifics?

- What if we get a relevance call wrong?
  - Chance to reexamine it: “if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under § 106.45(b)(5)(vii).”
- This may suggest erring on the side of inclusion… or not.
  - Impact of changing the call
  - How to responsibly include close-call evidence, if you choose to do it

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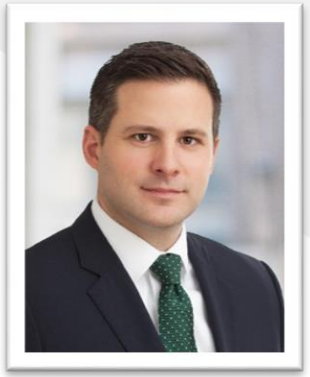

Cross-Examination: how it bears on investigation

- Conduct your investigation with an eye toward the requirement of cross-examination.
- To be admitted, any "statement" must be subject to cross-examination.
- "Statement" is broad.
  - It "has its ordinary meaning."
  - It "would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements."
  - Includes "police reports, SANE reports, medical reports, and other documents and records… to the extent that they contain the statements of a party or witness."
- Who makes the statement is important.

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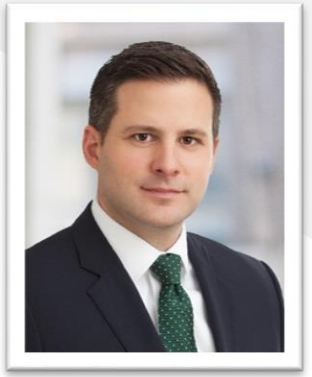

Hearsay – what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6)(i) “states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination” Cmt. p. 811 & fn. 1017.

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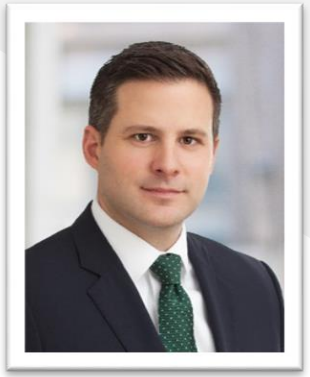

Let's take a look at our investigative file...

Relevant or not?

In our investigation, two interviewees—both of whom are Complainant's sorority sisters—stated that Complainant has had many sexual partners, including one-night stands with men she has met on the same night of their encounters.

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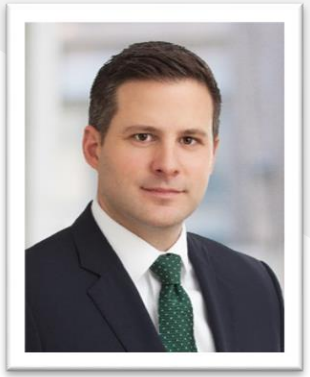

Let's take a look at our investigative file…

Relevant or not?

Pictures from the night in question show Complainant at a bar with her friends. It was Halloween, and complainant is pictured wearing a very revealing costume. In our investigation, one of her friends who was out with her that night stated that Complainant referred to her costume as "sexy superhero."

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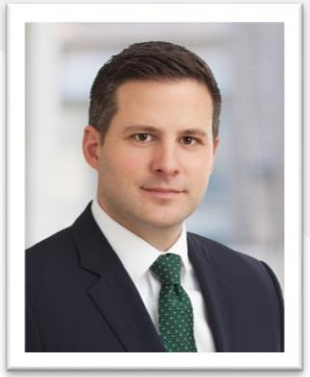

Let’s take a look at our investigative file…

Relevant or not?

We spoke to both Complainant and Respondent. They both agree that they have had consensual sex on two prior occasions. Complainant says that this latest encounter was not consensual; Respondent says that it was.

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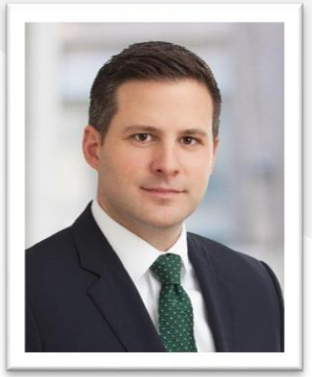

Let's take a look at our investigative file...

Relevant or not?

Investigation shows that Respondent used campus computers to access and view pornographic videos on two occasions.

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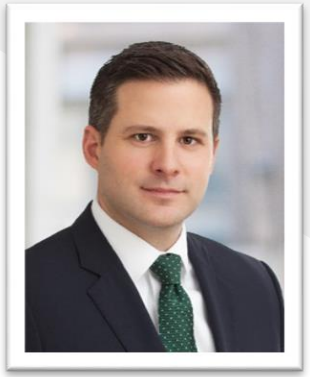

Let's take a look at our investigative file…

Relevant or not?

Two interviewees stated:

- They have heard rumors that Respondent has behaved in a sexually inappropriate way with women before, with no specifics;
- Respondent is generally thought of as a "creep."

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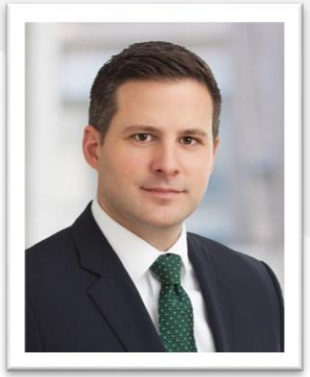

Let's take a look at our investigative file...

Relevant or not?

In the investigation, we interviewed Jennifer, a friend of the Complainant. Jennifer stated that her old roommate, Elizabeth, once confided in Jennifer that the Respondent had sex with her while she was unconscious during freshman orientation two years ago. Elizabeth never filed a Title IX complaint, never contacted law enforcement, and never told anyone else about the incident.

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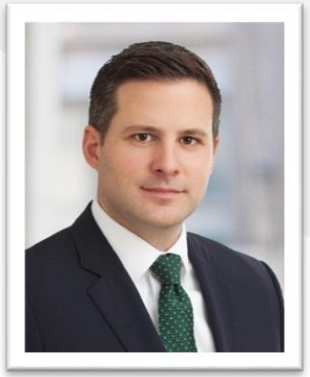

Let's take a look at our investigative file...

Relevant or not?

One of Complainant's friends stated that Complainant has a reputation for lying and exaggerating. The friend offered two examples.

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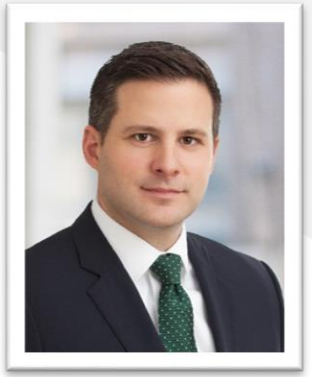

Let's take a look at our investigative file...

Relevant or not?

Respondent has some criminal history. Last year, he was arrested and charged with public intoxication and underage consumption when police found him staggering home alone late one night. He paid a fine and the charge was expunged. The year before, he was charged with credit card fraud. He pleaded to a Class A misdemeanor and received probation and a fine.

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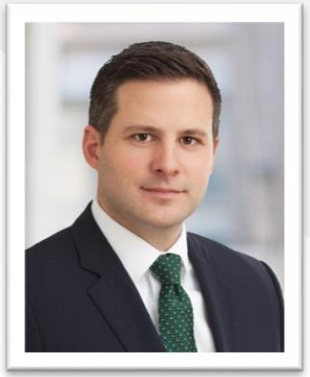

Importance of the Investigative Report

- Foundation for the hearing
- Pre-hearing opportunity for Complainant and Respondent to "litigate" what, exactly, are the facts and what facts should come into evidence at the hearing
- Laying ground for eventual appeal

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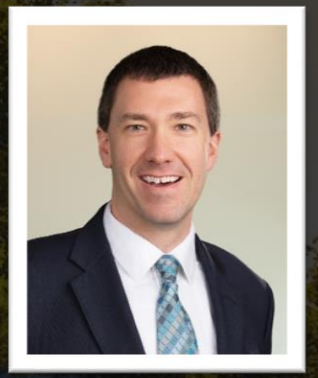
MARK SCUDDER



The Investigative Report

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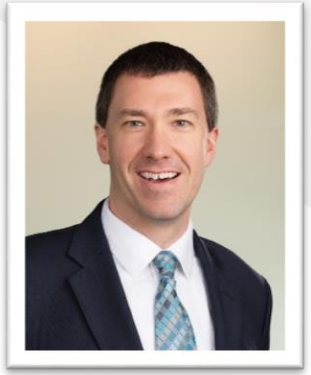
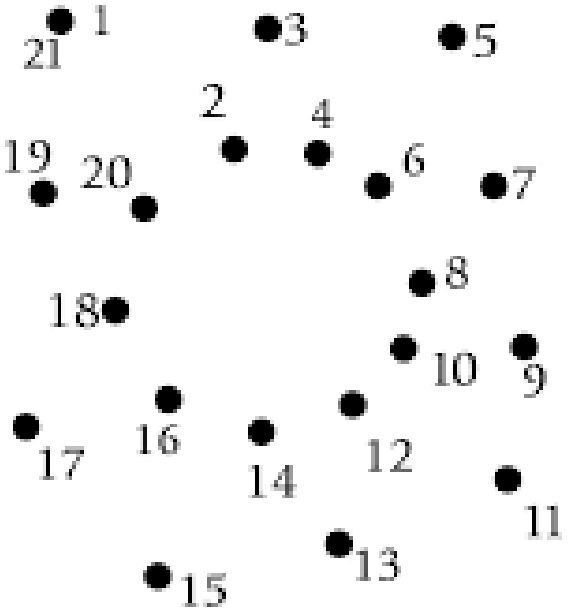


Writing a Strong Investigative Report



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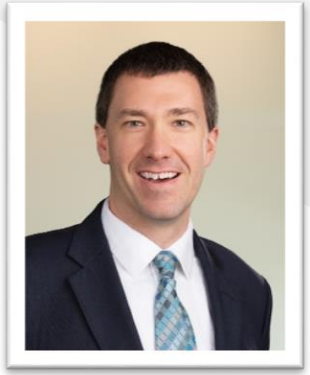
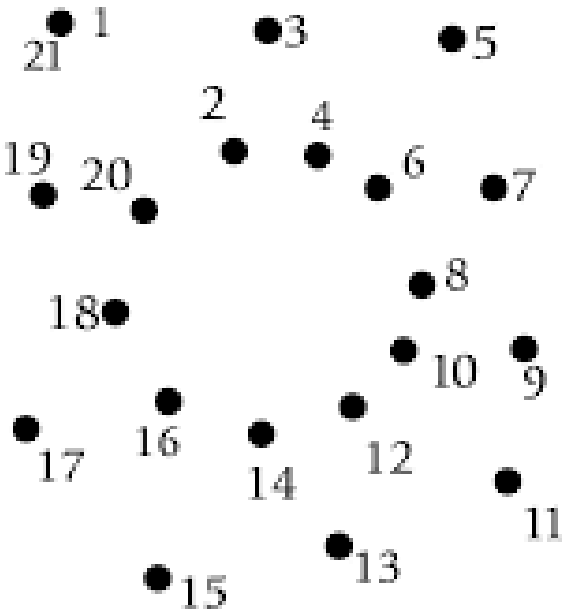


Writing a Strong Investigative Report



- It's important to connect ALL of the dots in order to paint a complete picture that fully supports any future conclusions.
- Keep an eye out for gaps or missing connections in order to produce the strongest investigative report possible.

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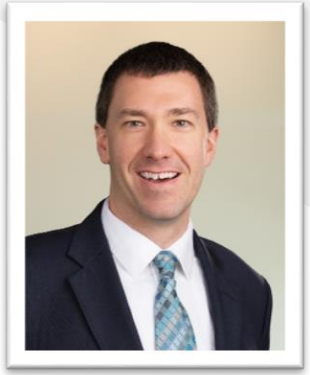

Writing a Strong Investigative Report

Remember:

- Don’t forget to outline the procedural steps that have been followed
- Pain the complete picture with relevant, unbiased evidence
- Write from a point of neutrality
  - Avoid any implications of bias or conflicts
- Look to the template as a starting point

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YOU ARE LISTENING TO: JANILYN DAUB

Key Takeaways & Discussion

YOU ARE LISTENING TO: JANILYN DAUB

Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- We must do our best to provide an impartial, unbiased process for all parties involved.
- Always keep relevance in mind!
- Develop an investigative report that connects the dots and sets you up for success should there be a future appeal.

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Questions & Answers

Chris Bayh
Indianapolis

Janilyn Daub
South Bend / Elkhart

Don Lawless
Grand Rapids

Tracy Maginn
South Bend / Elkhart

Mark Scudder
Fort Wayne

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Next Up: Decision
Maker/Advisor Training

AT THE HEART OF HIGHER EDUCATION

Title IX Regulations: Decision Makers & Advisors

August 18, 2021

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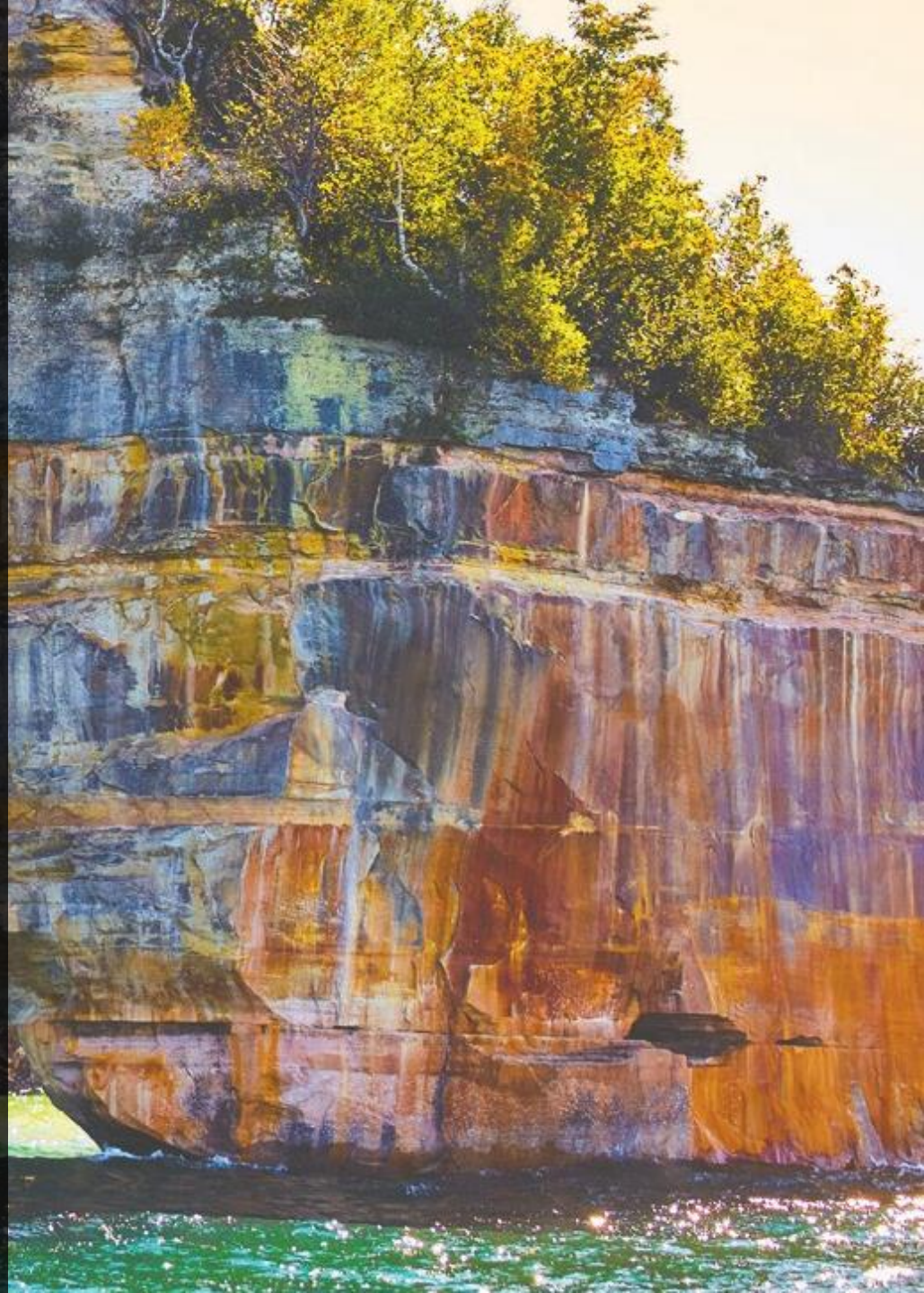

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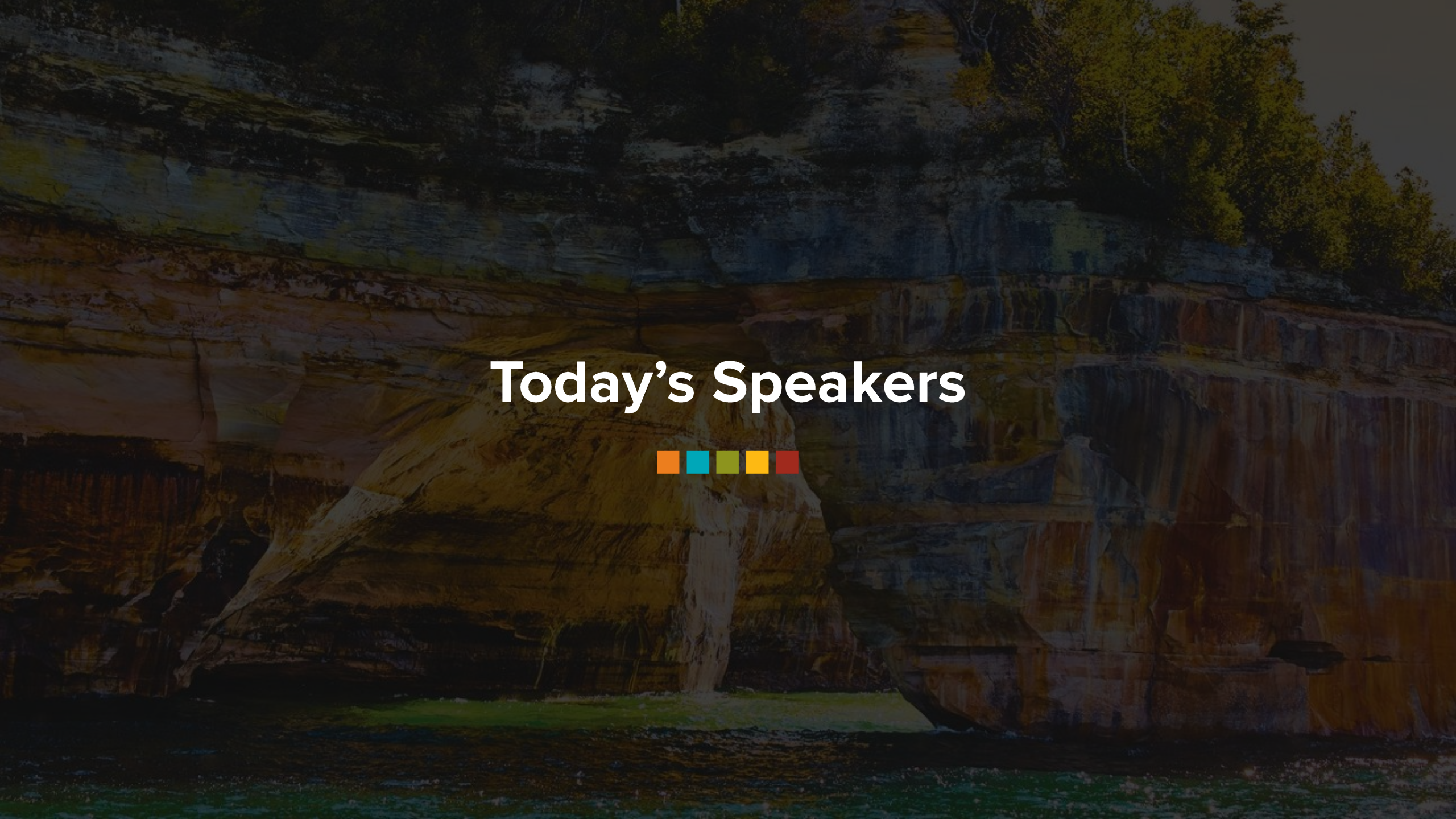
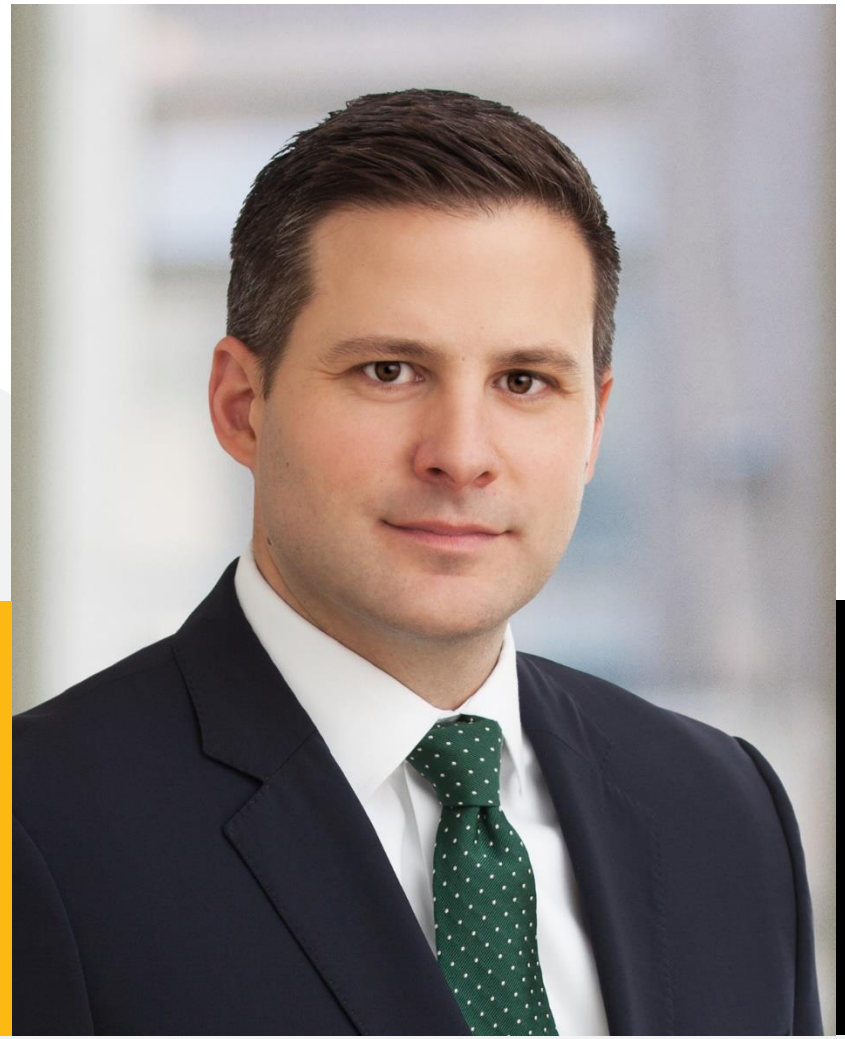
Today's Speakers





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Chris serves as vice chair of the firm's Higher Education Practice Group, where he advises institutions of all sizes. He represents and counsels higher ed clients in diverse areas of law, including civil defense, investigations, enforcement actions, financial responsibility, Title IV student financial aid, and Title IX litigation and compliance. A former Division I student-athlete, Chris also counsels colleges and universities on athletics compliance and best practices.

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Janilyn represents educational institutions, including clients involved in higher education and K-12. She works with colleges, universities and other educational facilities to comply with Title IX issues related to race, gender and the like, as well as assists them through and beyond student challenges such as myriad disability accommodation matters.

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A significant portion of Don' practice is devoted to representing college and university clients in labor and employment matters and student affairs, athletic program compliance, internal investigations, tenure denial disputes, and facility and program accessibility issues.

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From 1996-2001, Teresa was the Assistant Vice President and Counsel for the University of Notre Dame, Office of the General Counsel. During her time with the university she provided advice on issues related to employment discrimination and harassment, employment policies and procedures, wage and hour issues, employee benefit plans, workers' compensation, and disability accommodation issues.

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In addition to labor and employment matters, Mark is also a member of the firm's School Law Practice Group, in which he provides a broad range of legal services to primary, secondary, and post-secondary public and private schools. He has represented school corporations on matters pertaining to teacher and student discipline, discrimination complaints, sports and other extra-curricular issues, and civil litigation.

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Agenda

- Welcome & Introduction
- Updated Hearing Procedures
- Mock Hearing & Evidentiary Issues
- Final Determinations / Appeals
- Key Takeaways & Discussion
- Closing Remarks / Q&A

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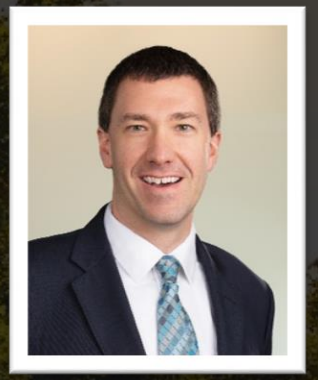

Hearing Procedures

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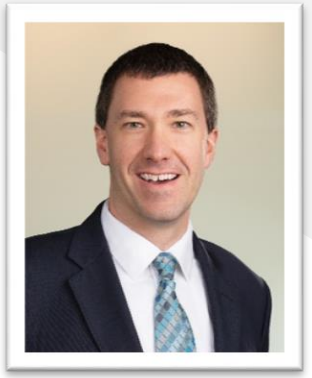

Hearings Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Hearings
- Advisors & Cross-Examinations

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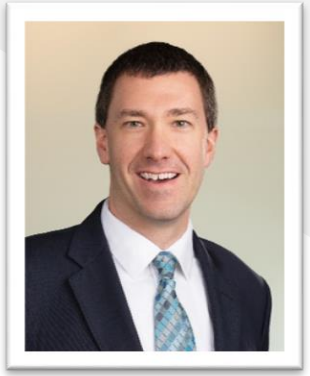

Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

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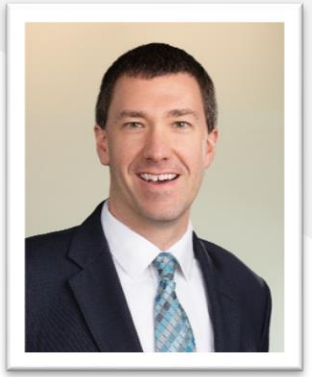

Roles Within School's Title IX Department

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

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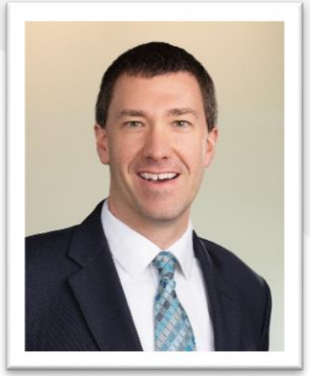

Hearings

- Hearings are now *mandatory* for all post-secondary schools
- Must be conducted live with both parties able to simultaneously see and hear each other
  - If requested by either party, the hearing can be conducted in separate rooms with technology to enable this requirement
  - Can also be done virtually

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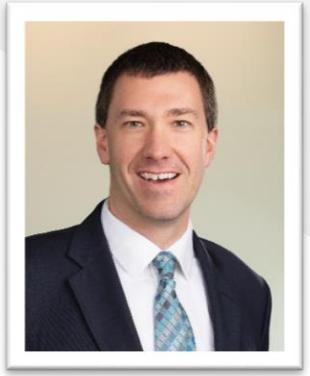

Hearings

- Recordings of the hearings must be available for all parties to inspect and review
  - Audio
  - Audiovisual
  - Transcript

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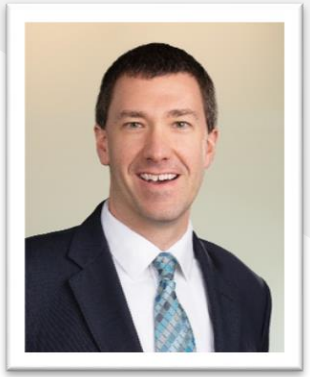

Hearing Procedure

- Opening statements?
- Order of witnesses?
- Questions for the hearing officer?
- Closing statements?

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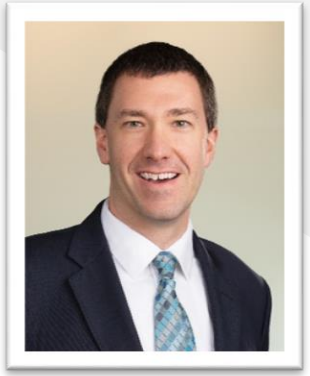

Advisors & Cross-Examinations

- Cross-examinations are now allowed by regulation
- Parties can *not* directly cross-examine each other
  - Questions must be asked by a party's advisor or attorney
- Schools must provide an advisor for the purpose of cross-examinations if parties do not have one
  - Does not have to be a lawyer

This is another area that may result in requiring additional staff!

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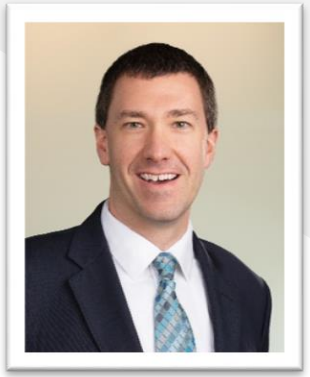

Advisors & Cross-Examinations

- Questions must be relevant before the party or witness provides an answer
- Relevance is not defined within the regulations
- Questions regarding prior sexual history are only allowed when:
  - Such information is offered to prove someone other than the respondent committed the sexual harassment, or:
  - Prior sexual behavior between the parties offered as proof that there was consent

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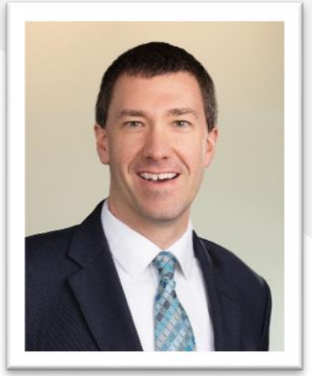

Limitations on Advisor's Role

- Advisors must be allowed to cross-examine and question witnesses
- Any other restrictions are allowed, but must be applied equally to all parties

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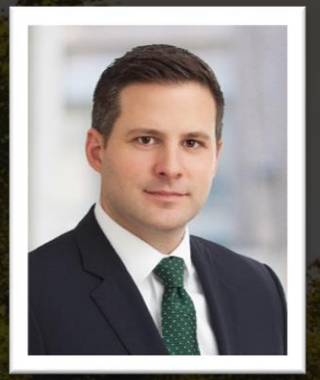

Mock Hearing Scenarios/ Evidentiary Issues

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Scenario

- Scenario to illustrate some key concepts

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Starting the Hearing

- Proceedings must be equitable and governed by consistent procedures
- Opening statements discretionary
  - Time limit?
  - Party versus advisor?
  - Excluded entirely?

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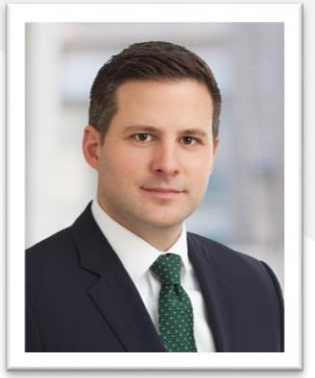

Direct Examination of Complainant (Sophia)

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Key Issues We Tackled

- General process
- Opportunity to be heard
- Relevance
- Leading questions
- Bias

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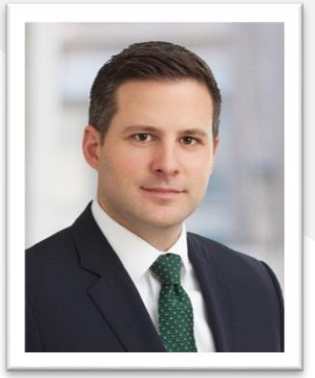

Cross Examination of Complainant (Sophia)

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Key Issues We Tackled

- Relevance
- Sexual history & predisposition
- Mistaken identity
- Intoxication
- Badgering the witness

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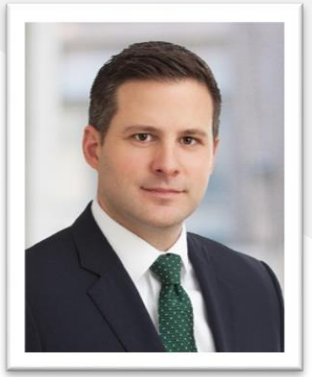

Relevance – how defined?

- "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied." Cmt. p. 811, fn 1018.
- Something that has a tendency to make a consequential fact more or less probable than it would be without the evidence.
- A school "may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence." Cmt. p. 812.

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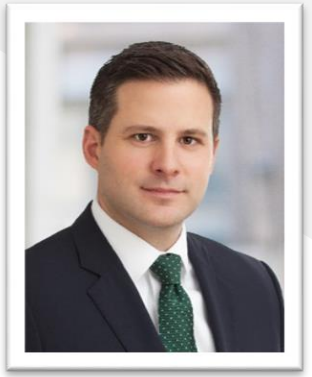

Relevance – any specifics?

- A few – § 106.45(b)(6)(i):
  - Irrelevant: "the complainant's sexual predisposition or prior sexual behavior"
    - Think: rape shield laws
  - Exceptions—where prior sexual behavior may be relevant:
    - Assailant identity: "to prove that someone other than the respondent committed the conduct alleged"
    - Prior complainant-respondent relations: evidence "concern[ing] specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent"

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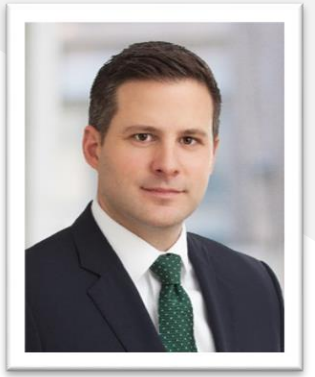

Relevance – making the call

- Chance to address it from the investigation report.
- "[I]f a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii)."
- Chance to address it during or even after the hearing.

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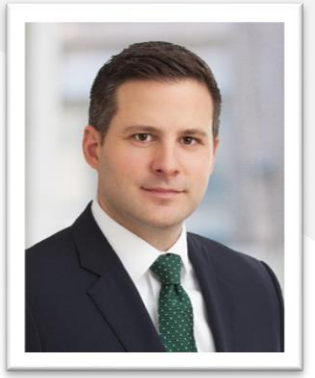

Absent Witnesses

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Key Issues We Tackled

- Opportunity to be heard
- Relevance
- Cross-examination of “statements”

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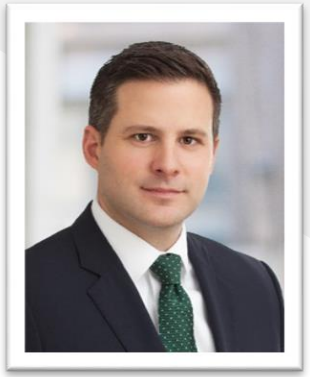

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Cross-Examination

- To be admitted, any "statement" must be subject to cross-examination.
- "Statement" is broad.
  - It "has its ordinary meaning."
  - It "would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements."
  - Includes "police reports, SANE reports, medical reports, and other documents and records… to the extent that they contain the statements of a party or witness."
- Who makes the statement is important.
  - Rule is limited to cross-examination.

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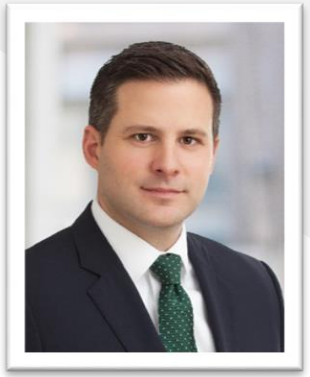

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Cross-Examination – trouble spots

- Where concerns tend to show up:
  - Formal reports: police, SANE, medical, other investigations
  - Emails and text messages
  - Hearsay—"I heard…"; "he told me…"; etc.
- Is it really cross-examination? Look out for:
  - Which side is offering the statement into evidence? It's the other side that must have the chance to ask the speaker about it.
  - Think: whether the person who made the statement may wish to avoid that statement by refusing to testify.

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Deciding what evident can be part of the record

From: Jennifer Travelor <jennifertravelsalot@gmail.com>
Sent: Saturday, July 25, 2020 4:38 PM
To: Investigator, Sophia
Subject: [EXTERNAL]Fwd: Title IX Witness Statement

Good Afternoon:

I am writing this statement to the investigator. I was asked to write about my experience with Aiden. He is a bad guy. Last semester I was at a party and had too much to drink. When I woke up, Aiden was in a bed with me and I quickly realized he had sex with me. I did NOT ask him to have sex. He should be locked up.

I am writing this while I am still at the port. I will be at sea for the next 2 months and will not have service. Please accept this as my written statement.

Thanks,
Jennifer

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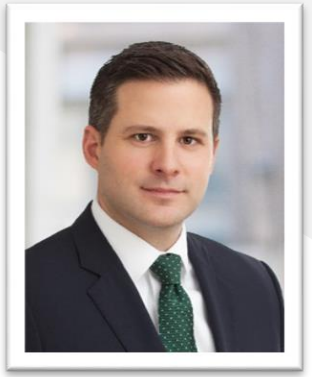

Hearsay – what about that?

- "the proposed rules do not speak to admissibility of hearsay"
- However, § 106.45(b)(6)(i) "states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination" Cmts. p. 811 & fn. 1017.
- Think:
  - Is an affirmative statement of fact being left unchallenged?
  - Or is the original speaker the complainant or respondent?

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Direct Examination of Aiden

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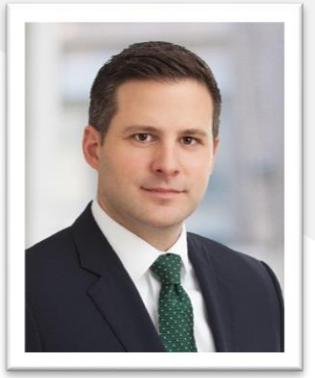

Key Issues We Tackled

- Relevance

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Cross Examination of Aiden

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Key Issues We Tackled

- Opportunity to be heard
- Relevance
- Cross-examination

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Deciding what evident can be part of the record

Complainant wishes to rely on a text message that the Respondent sent to a friend the day after the events in question. The text reads, “I don’t remember much from last night but I think I did something bad.” Respondent refuses to testify.

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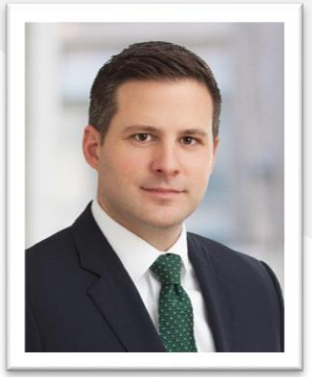

Refusal to Answer Questions

- § 106.45(b)(6)(i)
  - "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on **any statement** of that party or witness in reaching a determination regarding responsibility;"
  - "provided, however, that the decision-maker(s) **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."

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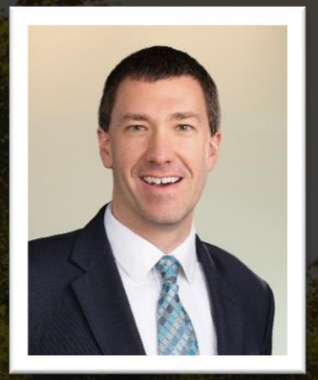

Final Determinations & Appeals

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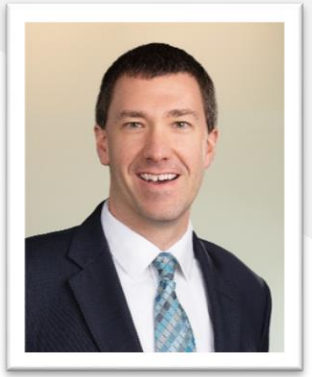

What happens after the final determination is made?

After the hearing has been concluded and a final determination has been made, the decision-maker prepares the written determination.

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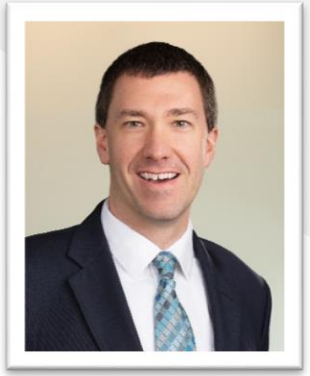

Evidentiary Standard

- The new Rule provides the choices between 2 standards:
  - the preponderance of the evidence standard; **or**
  - The higher clear and convincing evidence standard.

What's the difference?

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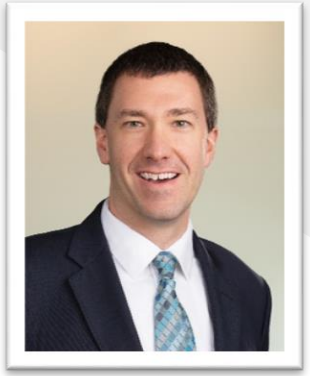

What are your thoughts?

Would Aiden be found to be responsible under PREPONDERANCE OF THE EVIDENCE standard?

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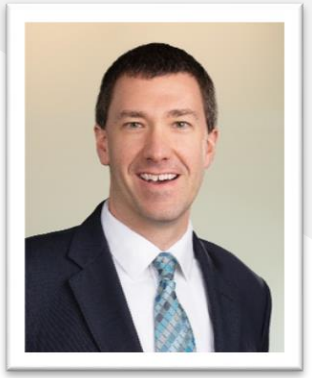

What are your thoughts?

Would Aiden be found to be responsible under a CLEAR AND CONVINCING EVIDENCE standard?

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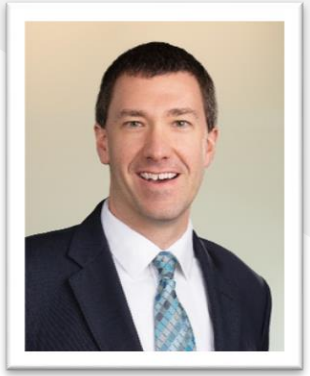

What must be included?

- Identification of the allegations
- Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Must include:
    - Any notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather evidence
    - Hearings held

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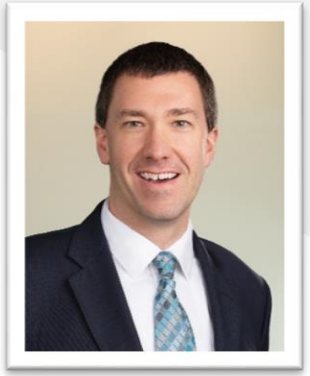

What must be included?

- Findings of fact supporting the determination;
- Conclusions regarding the application of the Code of Conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- Any disciplinary sanctions imposed;
- Any remedies provided to the Complainant;

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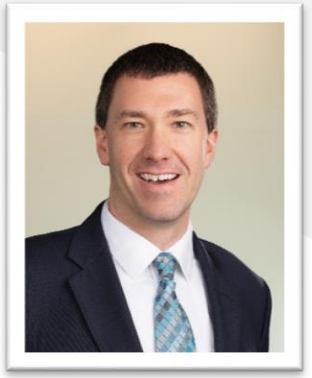

What must be included?

- Procedures and permissible bases for an appeal (available to both parties)

The written determination must be provided to the parties **simultaneously.**

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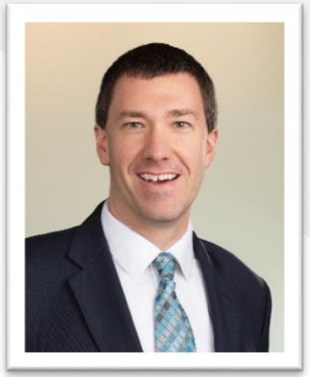

When does the written determination become final?

- Either the date on which an appeal would no longer be considered timely; OR
- On the date that the parties are provided the written determination of the result of the appeal.

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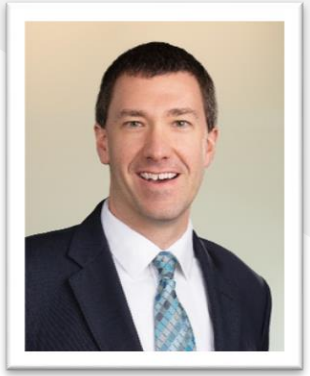

Appeal Process

Both parties must be offered an appeal from a determination regarding responsibility or from a dismissal of a formal complaint or any allegations therein.

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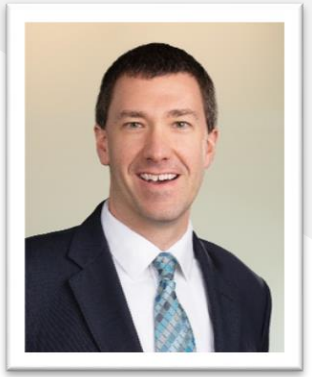

Basis for Appeals

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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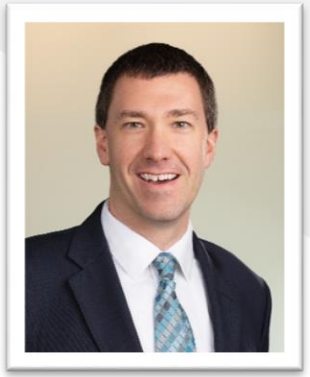

Appeal Procedure (mandatory)

- Notify the other party in writing when an appeal is filed;
- Implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

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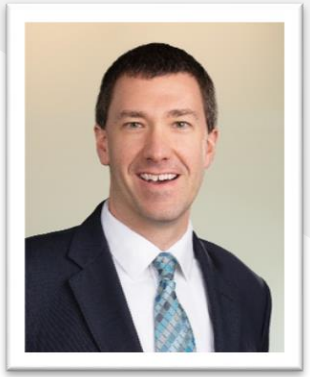

Record Retention

- The following must be retained on file for seven years:
  - Records of investigation
  - Records of appeals and associated materials
  - Records of any informal resolution process
  - All materials used to train Title IX staff and any person who facilitates an informal resolution
  - Records of supportive measures taken in response to a complaint

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Key Takeaways & Discussion

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Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- Hearings are now mandatory.
  - Both parties must have an advisor for cross-examination
- Relevance is key!
- Develop a final determination report that both adequately supports the determination of the decision maker and covers your bases for potential future appeals.

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Questions & Answers

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THANK YOU

Title IX Coordinator Training:
Michigan Independent Colleges & Universities

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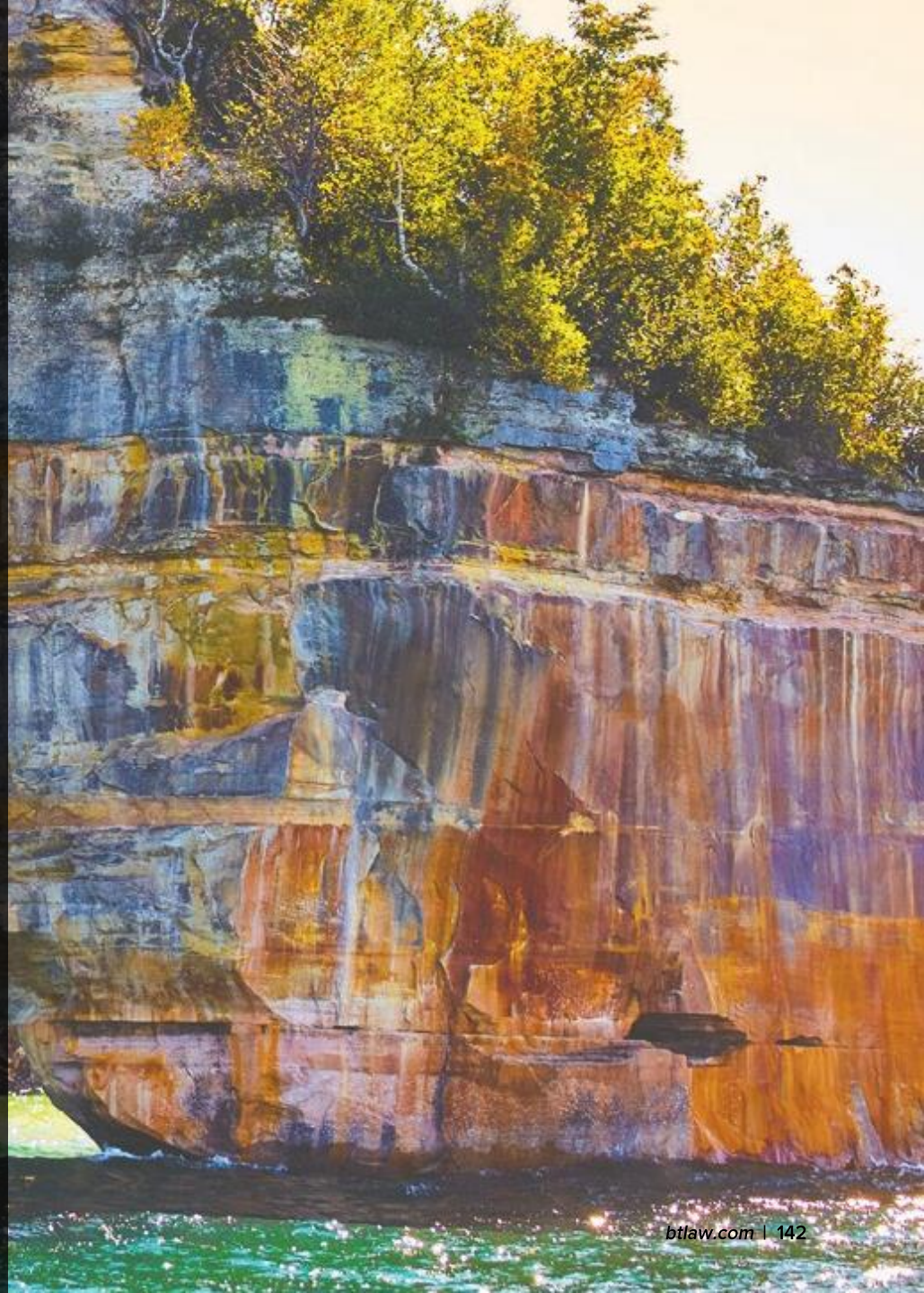
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