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Being an Effective Title IX Advisor: From Investigation to Hearing

October 2023

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Meet Your Facilitators



Tera Johnson

She/Her/Hers

Senior Solutions Specialist



Kevin Lineberger, J.D.

He/Him/His

Senior Solutions Specialist

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About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

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Agenda

1. Overview of Title IX and its Hearing Requirements
2. Advising Overview
3. Advisor's Role at the Hearing
4. Wrap-Up

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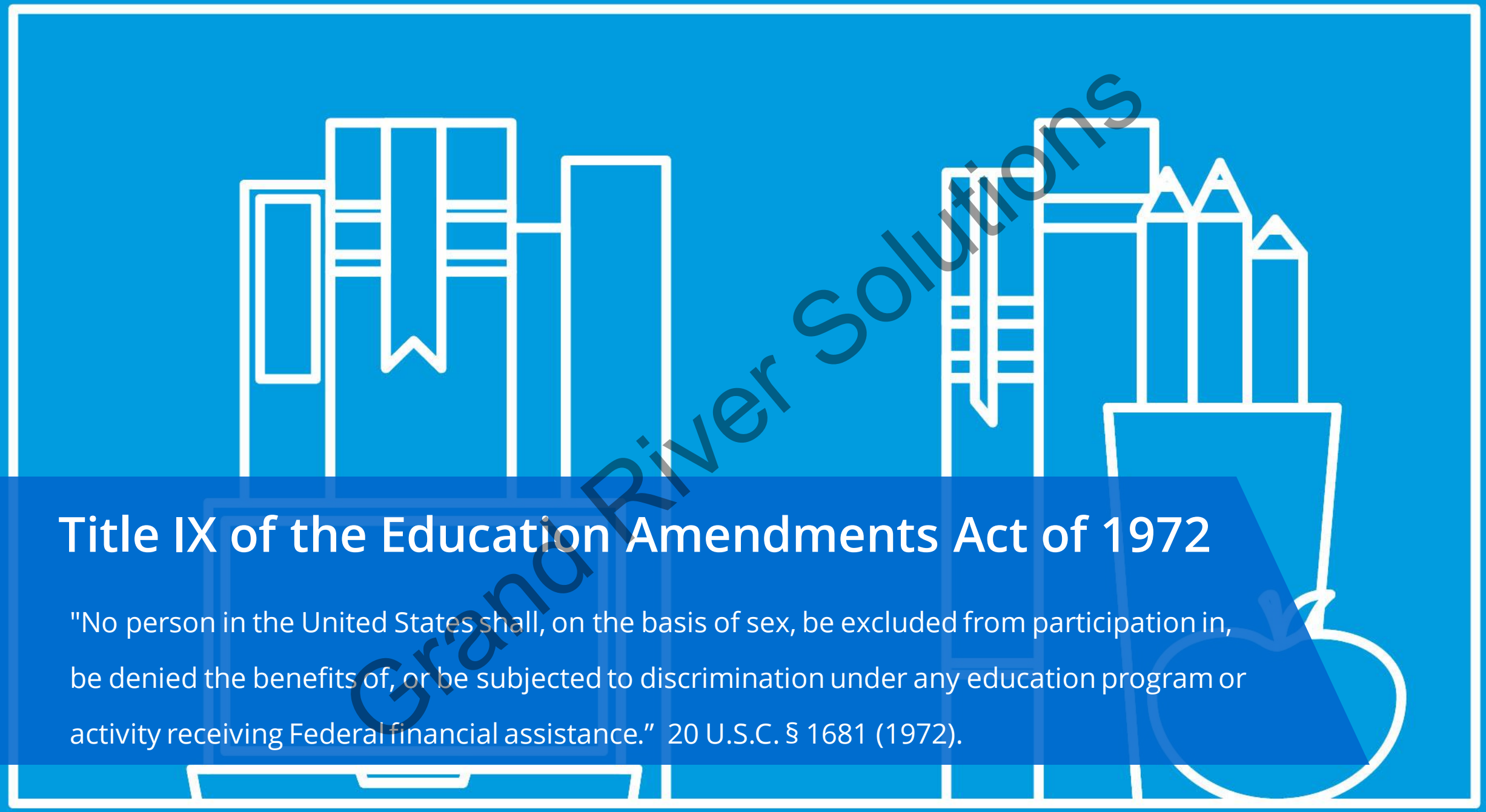
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Overview of Title IX and its Hearing Requirements

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Title IX of the Education Amendments Act of 1972

"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." 20 U.S.C. § 1681 (1972).

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On May 19, 2020 . . .

The Department of Education promulgated regulations that went into effect August 14, 2020.

These regulations included a new definition of sexual harassment and a more narrow set of jurisdictional requirements.

If a case meets all the required elements, then it will proceed under the Title IX grievance process, which includes a live hearing.

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Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(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

(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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Overview of the Title IX Requirements as of August 14, 2020

Type of Conduct Covered

- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence Based on Sex
- Stalking Based on Sex

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Places of Conduct Covered

- Campus Program, Activity, Building, and
- In the United States

+

Required Identity

- Complainant is a member of the community, and
- Control over Respondent

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Title IX Procedures

Required Response:

Title IX Procedures Including a Live Hearing

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Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



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Procedural Requirements for Investigations

- Notice to both parties
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc., and sufficient time to prepare
- Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing



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Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Written decision must be issued that includes finding and sanction

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Hearing Participants

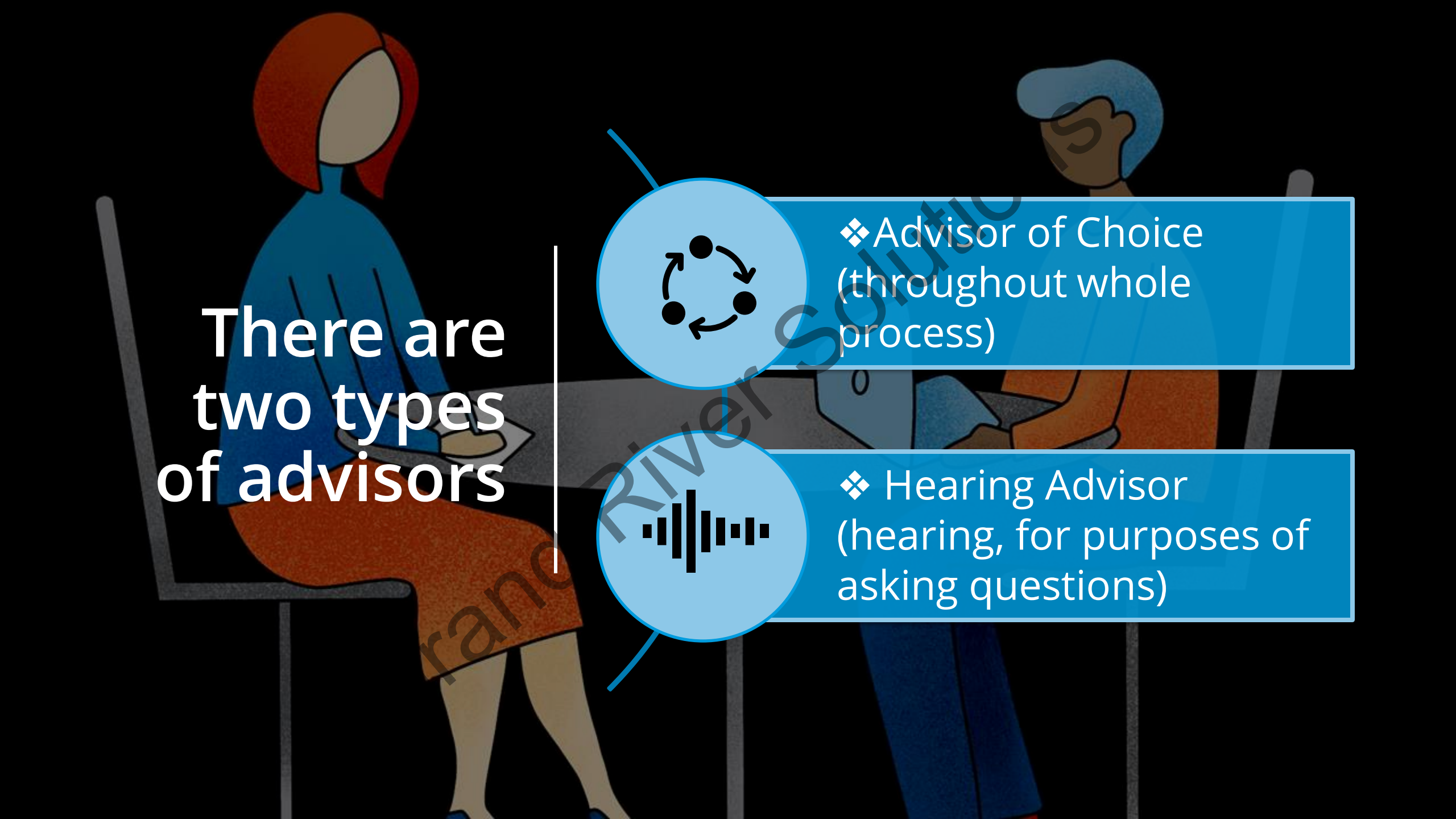
Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	will conduct cross examination; role varies depending on school
Investigator	may summaraize the investigation, answer fact-based questions
Witnesses	present in the room only when answering questions
Hearing Coordinator	coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants
Hearing Administrator	assists with the logistical coordination of the people, the space, technology, etc.
Decision Maker	facilitates the hearing, determines if policy violations occurred, may determine sanction

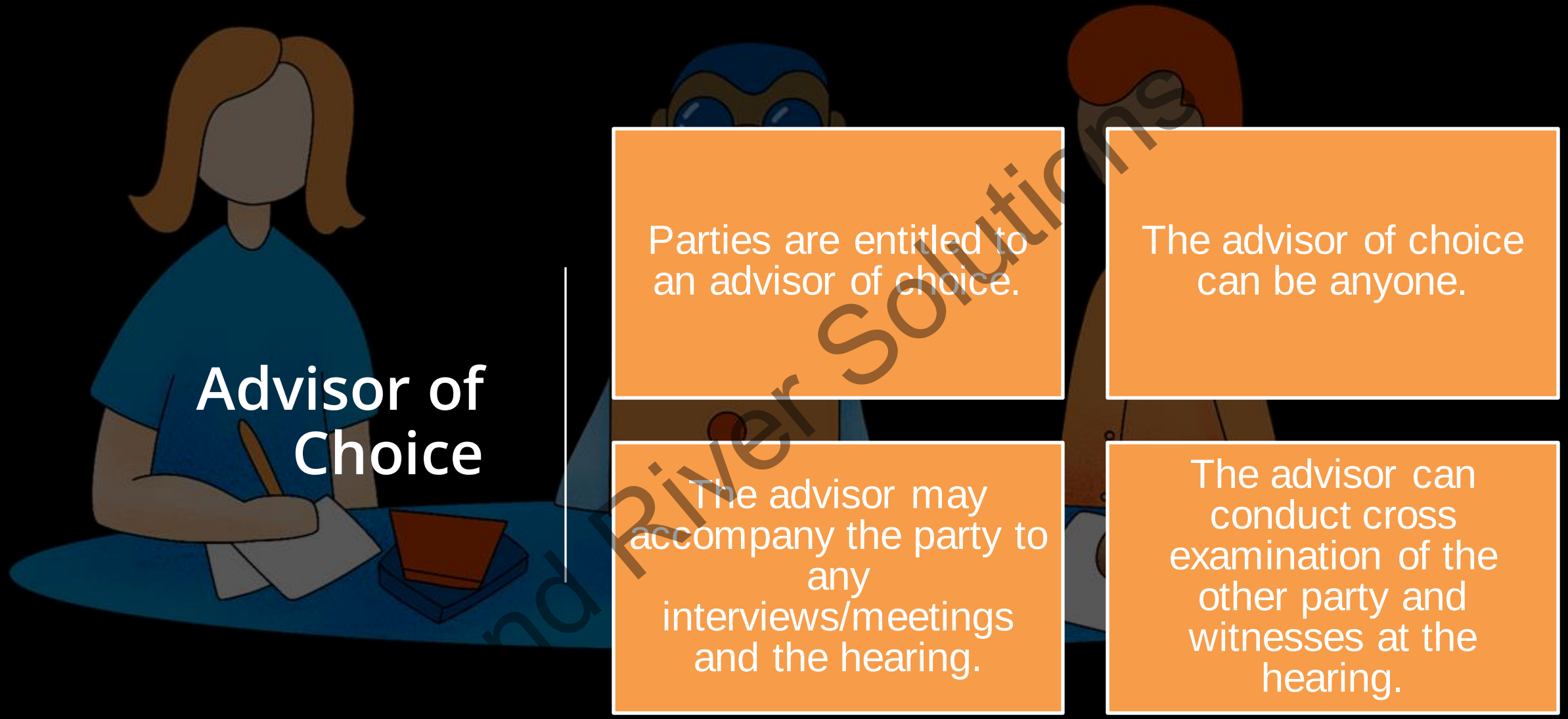
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Advising Overview

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There are two types of advisors
❖Advisor of Choice (throughout whole process)
❖ Hearing Advisor (hearing, for purposes of asking questions)



Advisor of Choice

Parties are entitled to an advisor of choice.

The advisor of choice can be anyone.

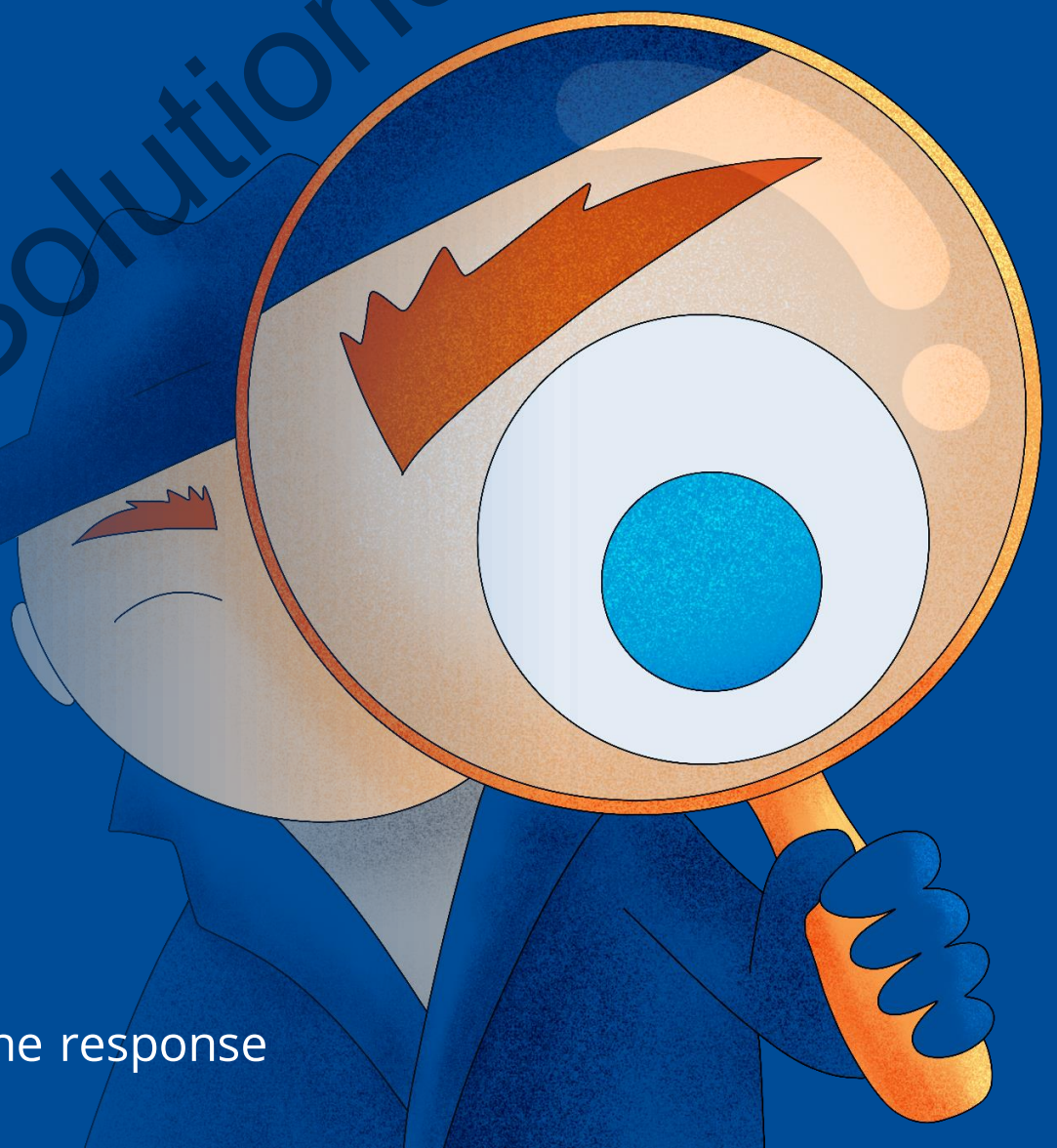
The advisor may accompany the party to any interviews/meetings and the hearing.

The advisor can conduct cross examination of the other party and witnesses at the hearing.

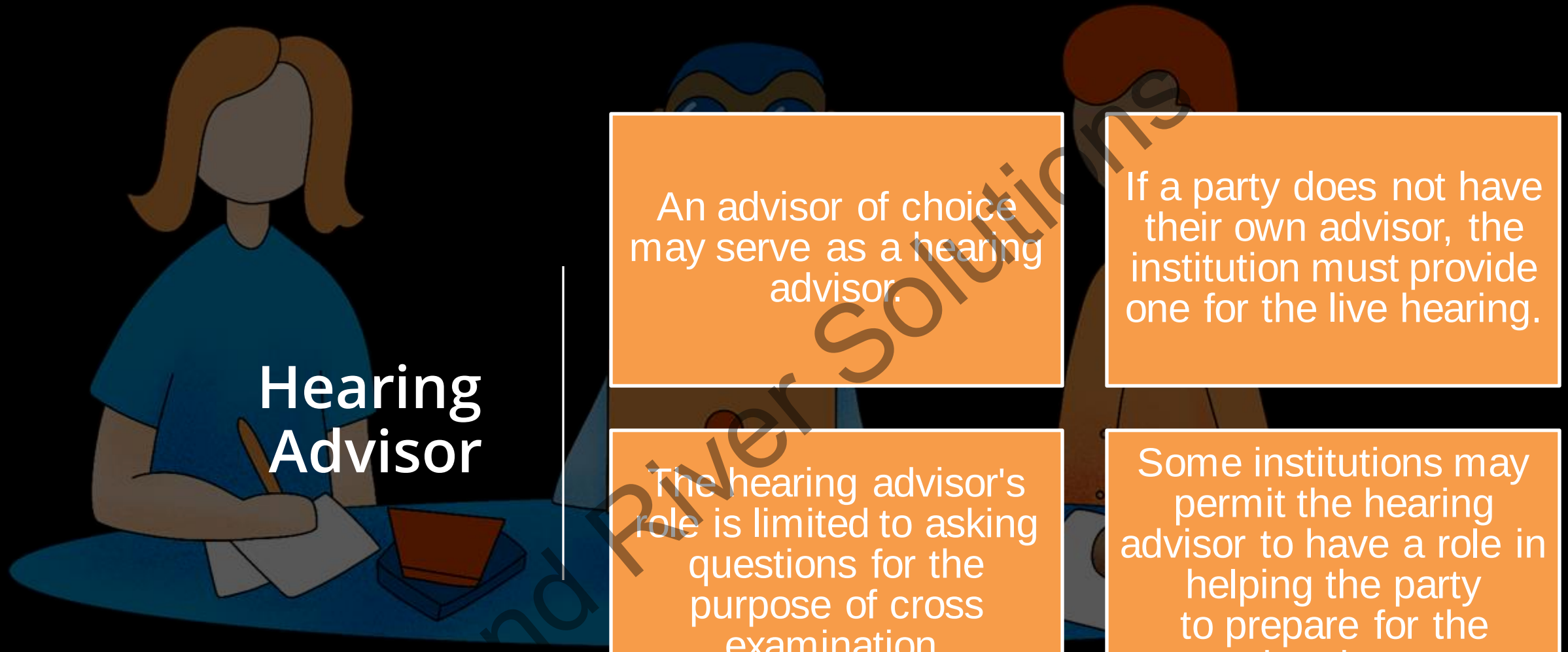
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During the Investigation: Advisor of Choice

- Assist the advisee in understanding the Policy
- Assist in the identification of witnesses
- Assist in the identification of evidence
- Assist in providing the investigator with information
- Assist in preparation for investigative interviews
- Accompany advisee to investigative interviews
- Advise during the interview
- Assist with document/evidence review and response
- Assist with review of the report and development of the response



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Hearing Advisor

An advisor of choice may serve as a hearing advisor.

If a party does not have their own advisor, the institution must provide one for the live hearing.

The hearing advisor's role is limited to asking questions for the purpose of cross examination.

Some institutions may permit the hearing advisor to have a role in helping the party to prepare for the hearing.

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Your Role as a Hearing Advisor

The limited role of conducting cross examination on behalf of your party*

Supporting your party

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After you are assigned a case as a Hearing Advisor…

- Review the policy
- Review the materials provided, if any
- Reach out to your advisee
- Schedule a meeting
- Do Your Homework

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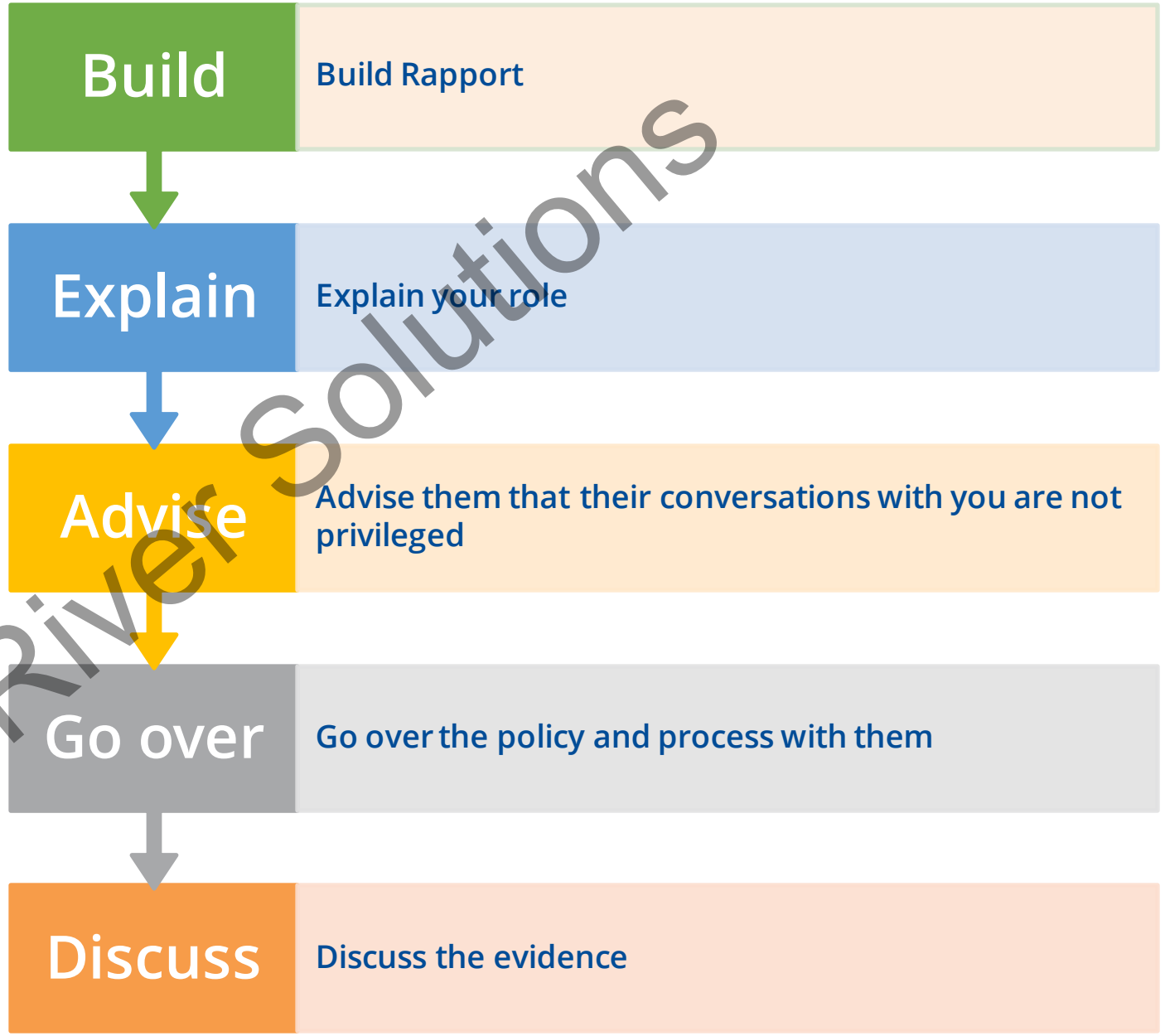
Do Your Homework

- Review applicable policy language/provisions
- Familiarize yourself with investigative report
- Understand the ins and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses
- Consult with your advisee
- Anticipate questions of others
- Consider impact of your decisions and develop a strategy

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Meeting with your advisee



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Identify the Claims, What Needs to be Proven

- Why are we here?
- What are the elements for the charge?
- What are the definitions of those elements?
  - Consent?
  - Incapacitation?

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Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or
Suffer substantial emotional distress.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
    1. Fear for their safety or the safety of others, or
    2. Suffer substantial emotional distress

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What do I Want to Show?

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?

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Rape. The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
    1. What is the ground for lack of consent
        1. Did respondent fail to seek and obtain Complainant's affirmative consent?
        2. Did Respondent force Complainant?
        3. Did Respondent coerce Complainant?
        4. Was Complainant incapacitated and therefore incapable of consent?

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Prepare Your Advisee for the Hearing

- How to answer questions
- Questions they can expect
- How to prep for the hearing day itself and self-care
- Communicating During the Hearing
- Selective Participation and Potential Impacts

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Advisor's Role at the Hearing

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Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

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Opening Statements



Assist advisee in developing their opening statement



Must adhere to the institution's rules or guidelines



Highlight evidence that the party wants the decision maker to focus on



Consider writing it out in advance



Cannot provide an opening on behalf of an absent party

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Testimony of the Parties & Witnesses

Possible Order

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The Decision Maker will determine the order of testimony

02

The Decision Maker will question first

03

Cross examination will occur next

04

Follow up by the Decision Maker

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Cross Examination

Who does it?

Must be conducted by the advisor

If party does not appear or does not participate, advisor can appear and cross

If party does not have an advisor, institution must provide one

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Preparing For Cross

- Review and evaluate the evidence
- Identify your narrative, or the version of events that you want to illustrate
- Identify the facts at issue and the findings of fact that you want the decision maker to make
- Plan to highlight the evidence that support the narrative and the findings of fact that you want the decision maker to make
- Prepare an outline of topics to explore

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Cross Examination
Permissible Questions

When a post-secondary institution holds a live hearing, is the questioning limited to certain subjects?

"The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask all relevant questions (including follow-up questions), and only relevant questions."*

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*September 4, 2020 Questions and Answers Regarding the Departments Final Title IX Rule

Cross Examination
Relevant Questions

The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

"Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action."

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When is evidence relevant?

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is "of consequence"
- Tends to make a fact more or less probable than it would be without that evidence



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Irrelevant and Impermissible Questions

- Information protected by an un-waived legal privilege
- Medical treatment and care
- Unduly repetitious or duplicative questions
- Information that otherwise irrelevant
- Complainant's prior sexual history, with limited exceptions.

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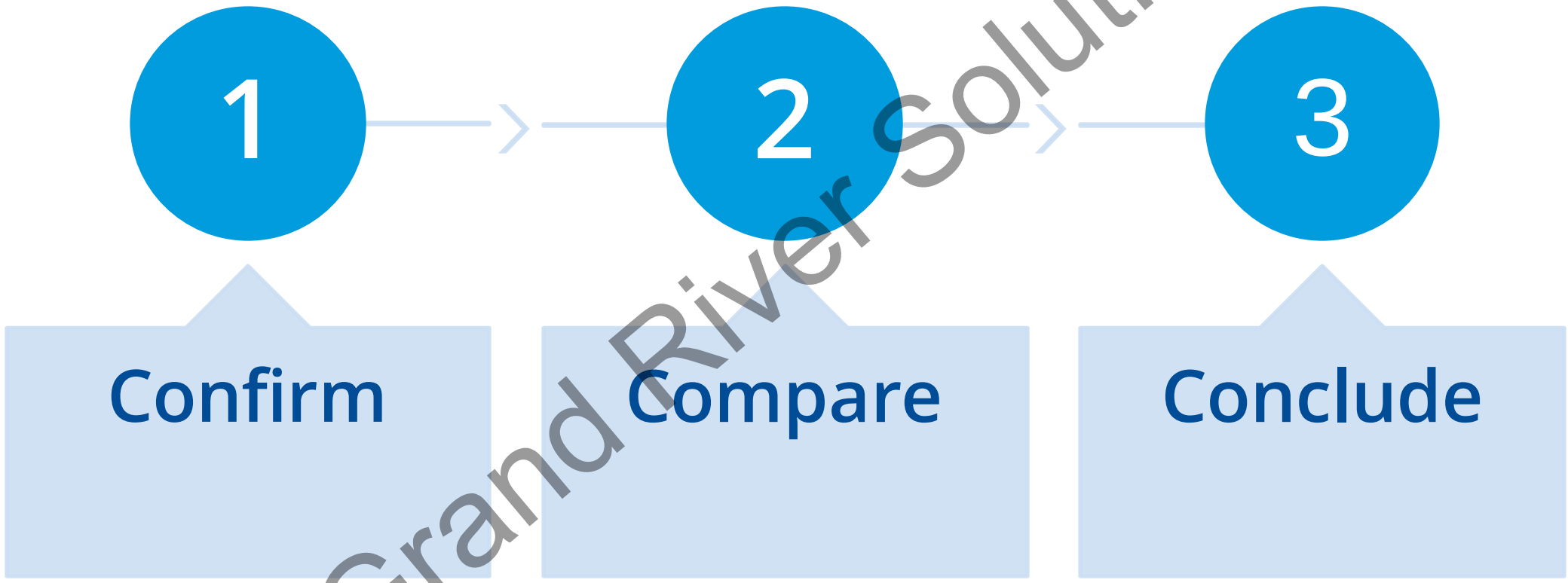
Cross Examination
Common Approaches

1. Obtain/Highlight helpful information
2. If a witness does not have information that is helpful, ask questions that illustrate that they are unimportant.
3. Highlight bias/lack of bias
4. Highlight credibility and reliability/lack of credibility or reliability
5. Discounting

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Questioning
How to Discount



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Discounting Example

Statement A:

During her interview with the investigator, Witness Y stated that she overheard Respondent and Complainant fighting inside of Complainant's bedroom. She stated that Complainant came out of the room crying and that their face was red and swollen. She stated that Respondent followed Complainant out of the room "looking angry" and grabbed Complainant by the arm "aggressively" and pulled them back into the room. The fighting then continued.

Statement B:

At the hearing, Witness Y tells the decision maker that while she heard loud voices, it might not have been fighting. She also stated that the parties came out of the room together, that Complainant looked upset, that Respondent looked concerned, and that they "calmly" went back in the room together.

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Confirm

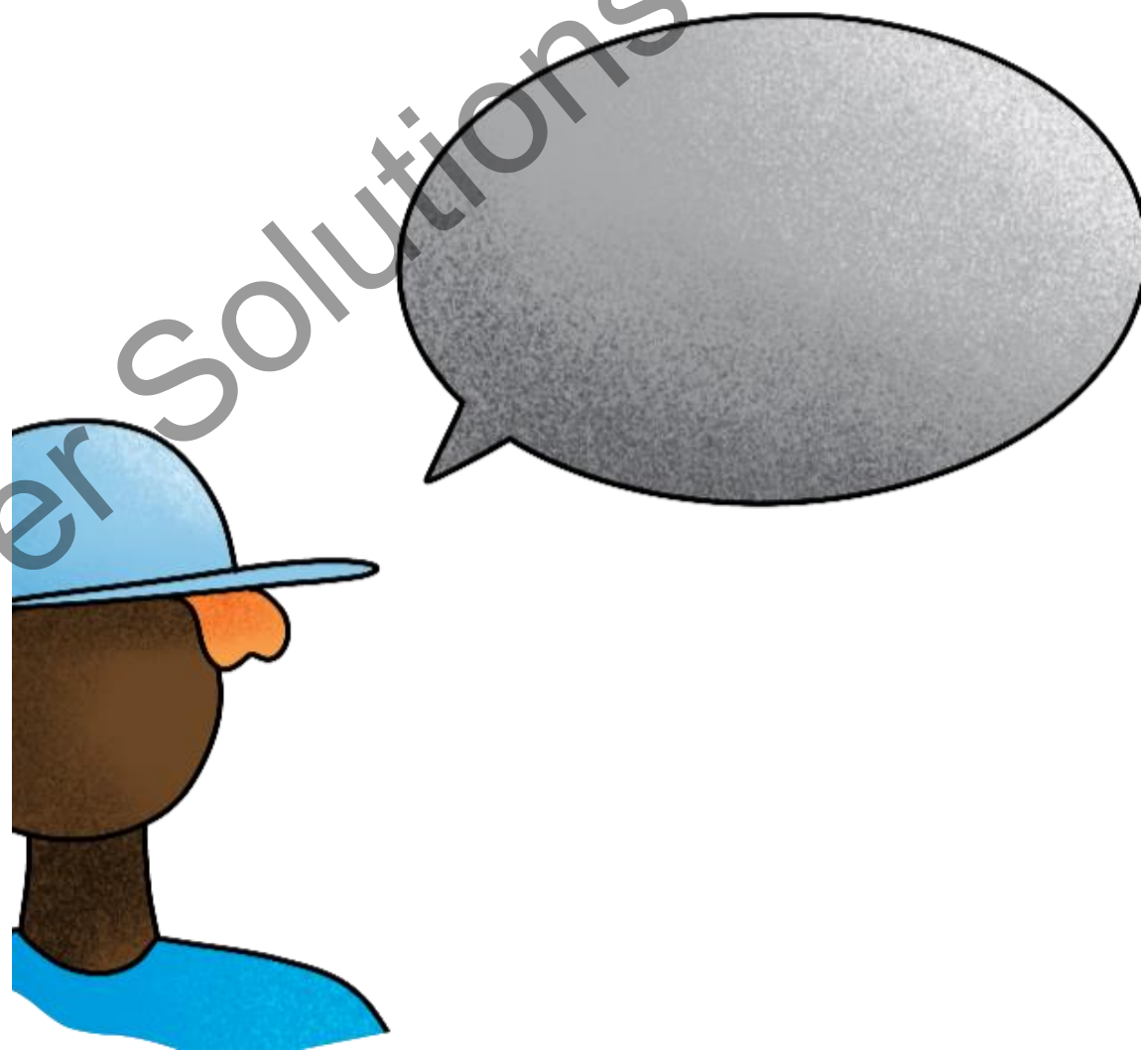
- Witness Y, earlier today you were asked about what you heard and saw on the night in question…
- And you indicated that you heard loud voices, but that you are not sure if it was fighting, is that correct?
- You also said that the parties came out together and then went back into the room, is that what you saw?
- And you are sure of this?



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Compare

- Witness Y, this isn't the first time you shared your observations of Complainant and Respondent that night, is it?
- Did you talk to the investigator about this?
- And that statement was provided just two days after the incident, correct?
- Do you recall what you said to the investigator?
- Did you tell the investigator the truth when you were interviewed?



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Conclude

- Witness Y, when you spoke to the investigator, you indicated that you heard fighting, correct?
- And that Complainant came out of the room crying, isn't that right?
- And that Respondent came out looking angry, correct?
- You also stated that you saw Respondent grab Complainant and drag them back into the room, isn't that true?
- Since speaking with the investigator, you and Complainant have had a falling out, haven't you?

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Cross Examination:

Do be efficient in your questioning – go event by event	Don't rehash everything a witness has said	Do focus on the information that is helpful	Don't call folks liars or attack them
Do raise concerns about credibility and reliability	Don't rant, rave, lose your temper	Do make your points through pointed and calm questioning	Don't forget to be prepared to pivot as testimony is given

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Observe and Listen

Be open to adjusting plans or strategy based on information presented at the hearing.

Make note of any issues that you think may be appropriate for appeal.

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Cross Examination

Role of the Decision Maker

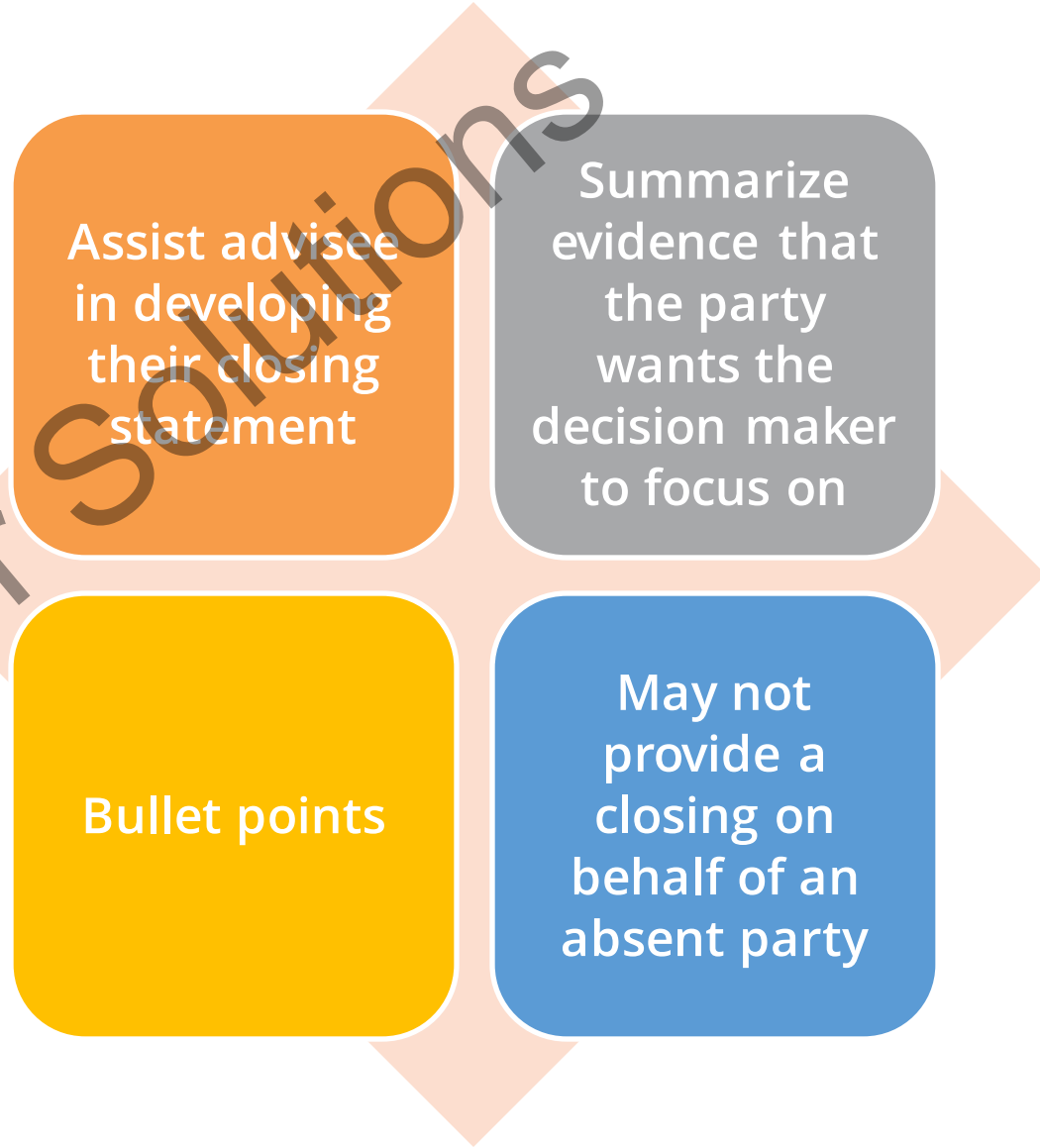
The decision maker will determine whether a question posed during cross examination is relevant and permissible.

When the decision maker determines that a question is relevant, the party/witness may answer it.

When the decision maker determines that a question is irrelevant, they must state their reason.

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Closing Statements: Advisor's Role



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After the Hearing

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DEBRIEF?



THE APPEAL

Lessons Learned

- Advisors arguing relevancy?
- Asking an ill-advised question?
- Case by case
- Observe and Listen

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Thank You!

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