AT THE HEART OF HIGHER EDUCATION

August 18, 2021

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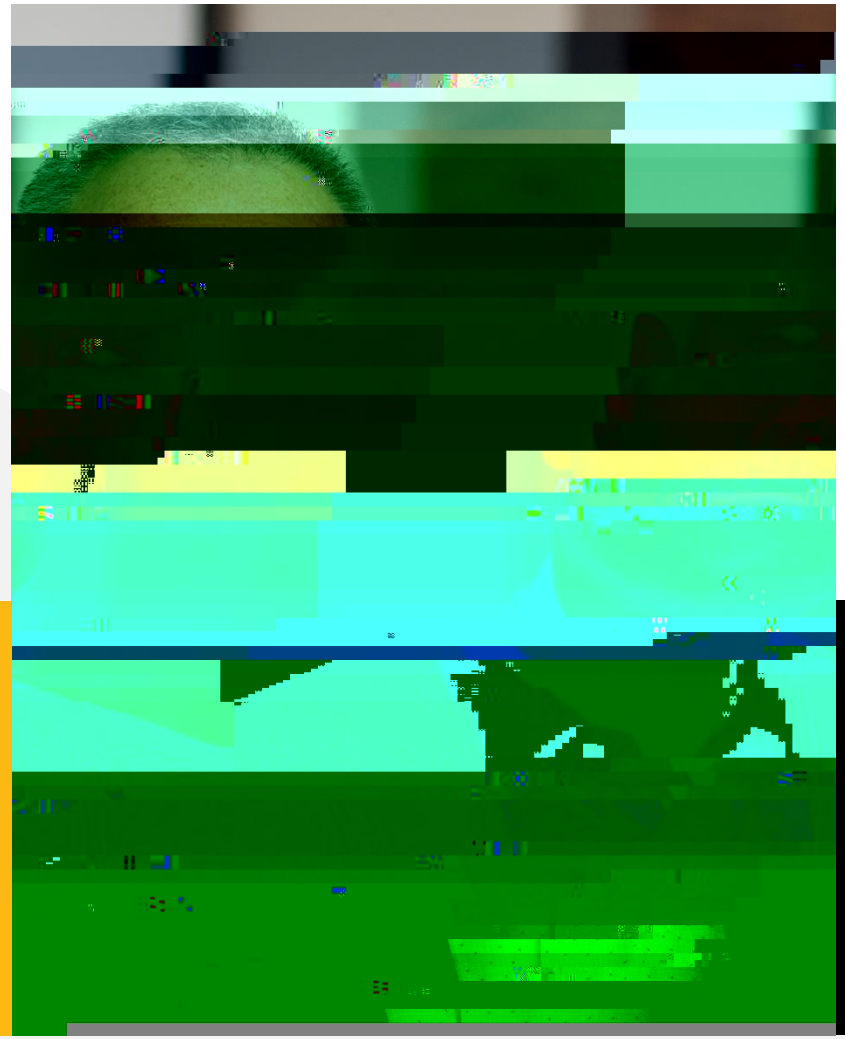

TEAM LEAD

Grand Rapids, MI

616-[illegible]-3994

A significant portion of Don' practice is devoted to representing college and university clients in Title IX and employment matters and student affairs [illegible] accessibility issues.

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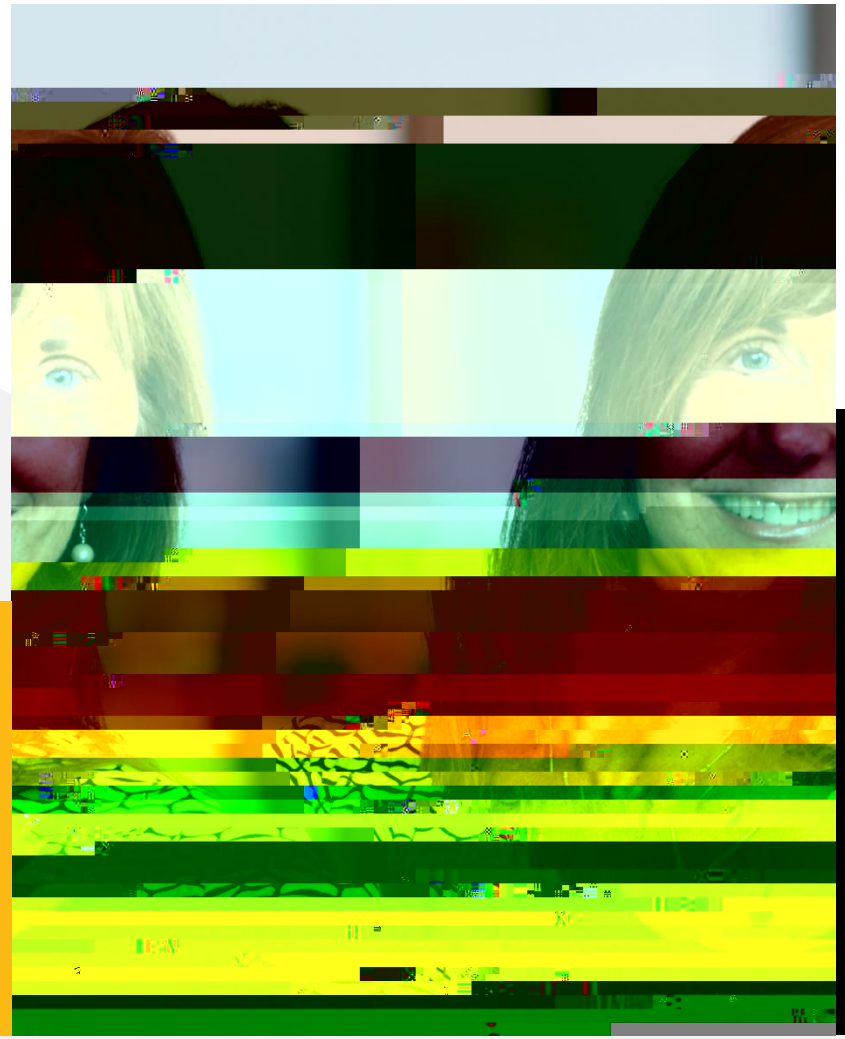
Tracy Maginn



teresa.maginn@btlaw.com
[redacted]172

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 claims, wage and hour issues, and disability management. She has extensive litigation experience. [redacted] personal injury defense. Clients include institutions of higher education as well as K[redacted]

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TEAM LEAD

[redacted]

[redacted]

[redacted]-425-4618

[redacted] -secondary public and [redacted] on matters pertaining to teacher and student discipline, discrimination complaints, sports and other extra-curricular issues, and civil litigation.

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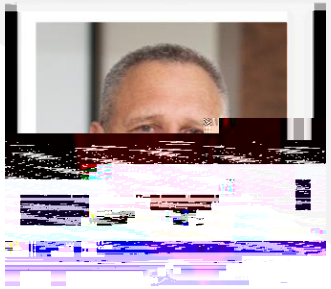
YOU ARE LISTENING TO: DON LAWLESS



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

"No [redacted]

financial assistance."

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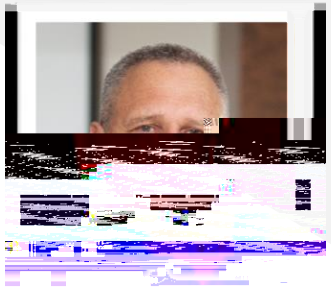

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‡

through a formal notice and-

‡

‡ Final regulations

‡ Effect of Coronavirus?

‡ Remember—the regulations are the law!

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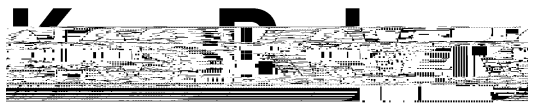
- [illegible]
- Roles (the same but different)
- [illegible]
- Scope of Coverage
- [illegible]
- [illegible]
- Retention of Records



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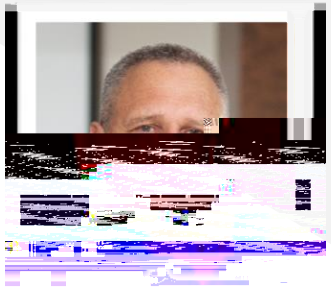

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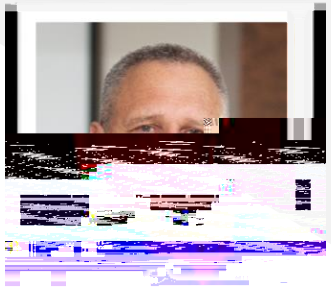

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[redacted]

(2) [redacted] **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

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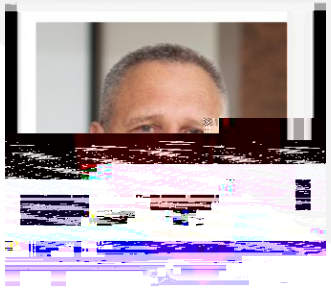

‡ [illegible] activity, against a person in the United States."

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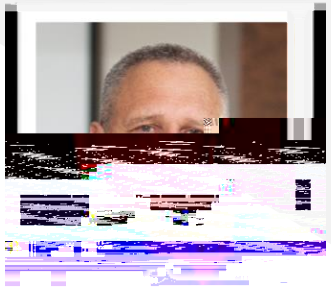

Reporting Who can

[redacted]

person reporting is the person alleged to be the victim of conduct that could constitute sexu

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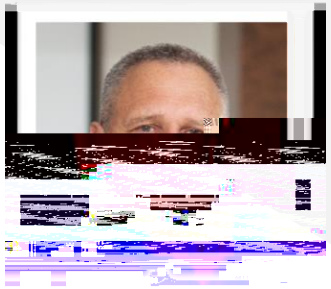

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Report? Who can

How?

When?

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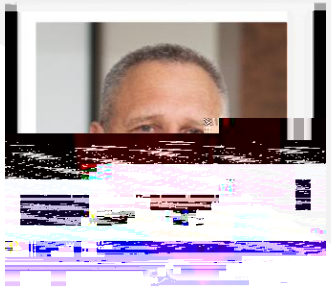

[redacted]

[redacted]

[redacted]

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[redacted] Who?

- [redacted]
- [redacted]

Procedural Mandates & Hearings

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

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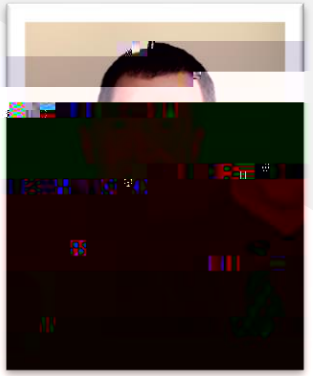
MARK SCUDDER



Big Picture Items

- [redacted]
- [redacted]

and respondents

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Big Picture Items

- Single investigator model is no longer allowed
  - [redacted]

‡ [illegible]
  ‡ [illegible]
‡ [illegible]
‡ [illegible]
‡ Conduct a hearing

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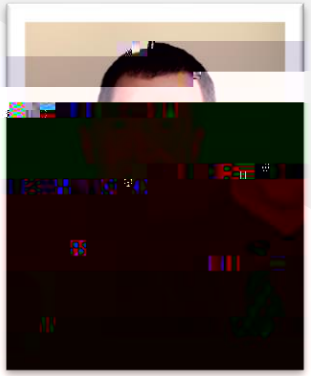

Jurisdiction Investigation

- [redacted]
  - [redacted]
- [redacted]
  - Texts, e-mails, pictures, etc.
- [redacted]
  - [redacted]
- [redacted]

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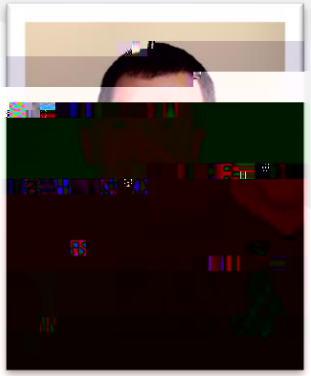

Evidence Gathering .

- [illegible]
- [illegible]
- [illegible]
- [illegible]

  for the party to prepare
- [illegible]

  opportunity to respond to evidence .

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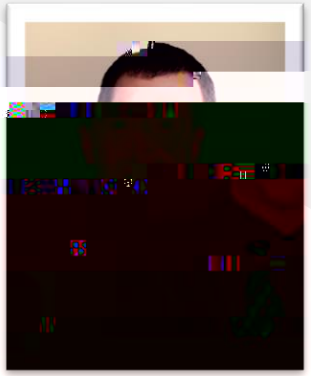

Interview Basics

- Typical strategy for witness interviews:
  - Put the witness at ease
  - Begin with open-ended questions
  - Let the witness give a narrative
  - Ask questions based on the narrative, all questions that proceed outside the narrative
- Begin by going over the basics of the process

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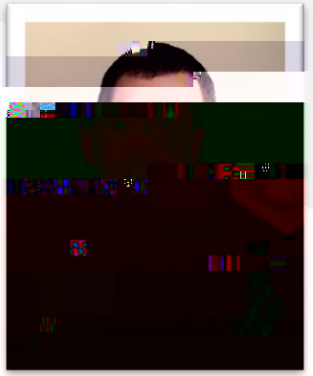

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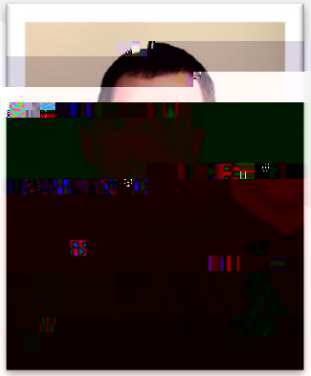

Questioning

- [redacted]ended conversation
- The narrative – [redacted]
  - Fill in the gaps and get specifics
- Questions outside the narrative are particularly helpful for third-party witnesses
- Beware Judgment
-
-
- [redacted]

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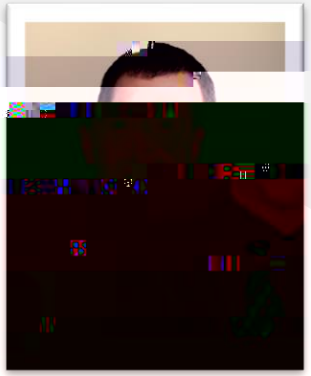

Making Credibility

- Watch for witnesses changing their story + particularly after witnesses may have talked with one another
- [redacted]
- Does it make sense?
- A Reasonable [redacted]

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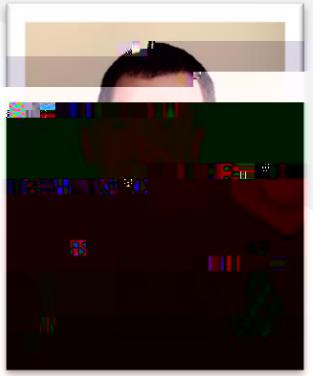

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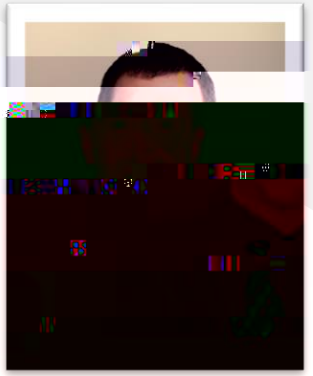

[redacted] with Complainant #3

Discuss: [redacted]

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interview

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

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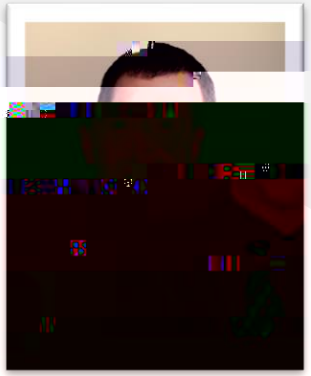

Discuss:

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Production of All Evidence to Both Parties

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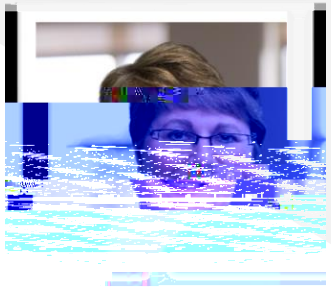
Hypothetical Scenario



YOU ARE LISTENING TO: JANILYN DAUR

[redacted]

[redacted] file

- ‡ Summary of Interviews
- ‡ Additional Evidence:
  - ‡ Text Messages
  - ‡ Snapchats

[redacted]

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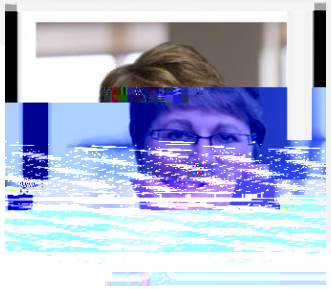
YOU ARE LISTENING TO: JANILYN DAUB



Discussion:

- [redacted]

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Issues

Two Overarching Issues to Watch In

Overarching Issue 1: The Evidence

§ 106.45(b)(5)(vi):

- ‡ [illegible]
  - ‡ [illegible] determination
  - ‡ [illegible]
- ‡

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[redacted] – Key Risks

- [redacted]
- Key [redacted] "relevant facts"
- [redacted]
- If evidence is missing, explain why
- [redacted]
- Avoid [redacted]
- [redacted]
  - Adjectives and adverbs
  - "However"

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[redacted]

- [redacted]
- [redacted]

examination

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Relevance – how defined?

- ordinary meaning of the words should be understood and applied." Cmts. p. 811 fn 1018
- not [redacted] " Cmt

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Relevance

- A few – §
  - [illegible] "the respondent" [illegible]
    behavior"
      -
- Exceptions—
  - Applicant identity "[illegible] **someone other than the respondent**
    [illegible]"
  - Prior complainant [illegible] "[illegible]ing] [illegible]
    [illegible] **with respect to the respondent** and are offered to prove consent"

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Relevance

- [illegible]
  - Change to necessary if “[illegible] in a petty offenses will not [illegible] examination about relevance in a petty offense may make investigators [illegible] [illegible] § 402, 45/LVEV.ii\”
- [illegible]
  - Impact of changing the call
  - How to responsibly include slang and idioms if you do it

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[illegible] [illegible]?

‡ [illegible]

‡ However, § [illegible] i) "states that the decision-maker must not [illegible] cross-[illegible] resulting in exclusion of statements that remain [illegible] protected by the [illegible] privilege." Cmt n. 811 & fn. 1017

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Relevant or not?

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Relevant or not?

Complainant and her friends
was Halloween and complainant is
In our investigation, one of her friends who
ec that I was out with her that night stat
Complainant referred to her costume as
"

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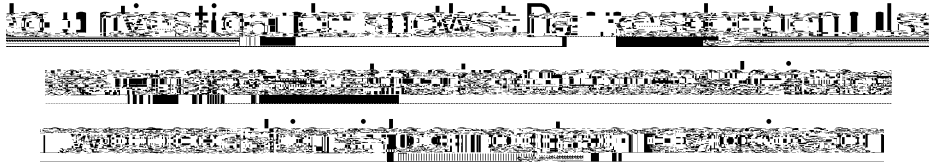
Relevant or not?



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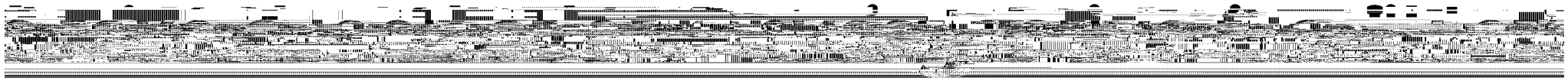

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Relevant or not?

exaggerating. The friend offered two examples.

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‡ Foundation for the hearing

‡ Pre-

‡ Laying ground for eventual appeal

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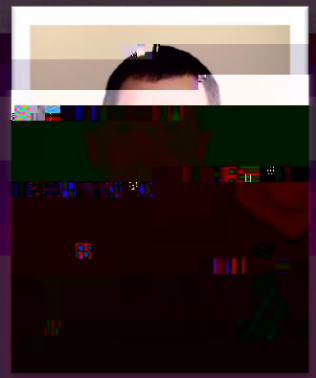
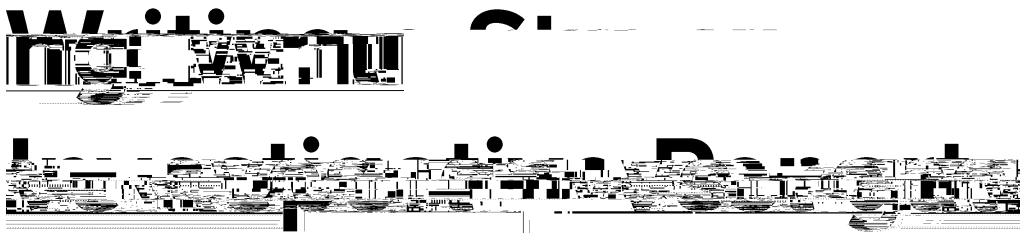
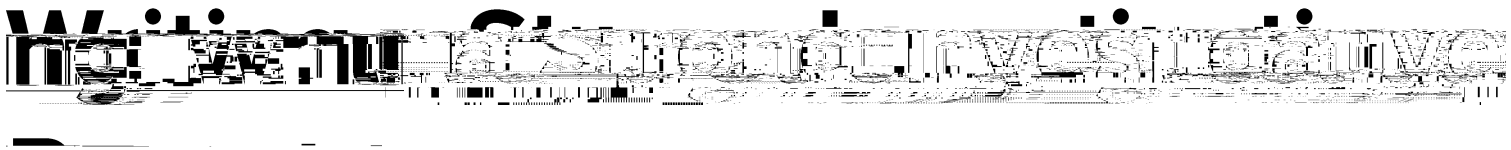
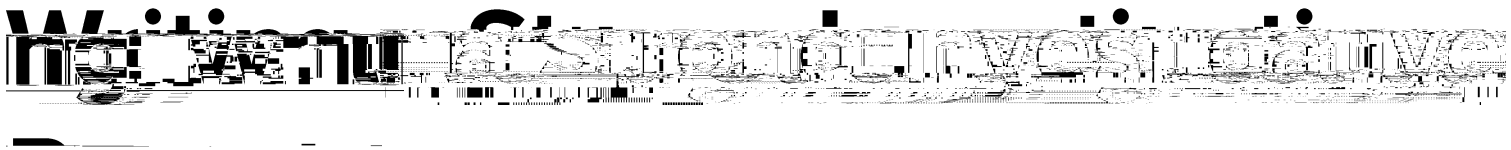
MARK SCUDDER



The Investigative Report







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[illegible] &

Discussion

f

AT THE HEART OF HIGHER EDUCATION

Title IX Regulations: [illegible] Decision Makers & Advisors

August 18, 2021

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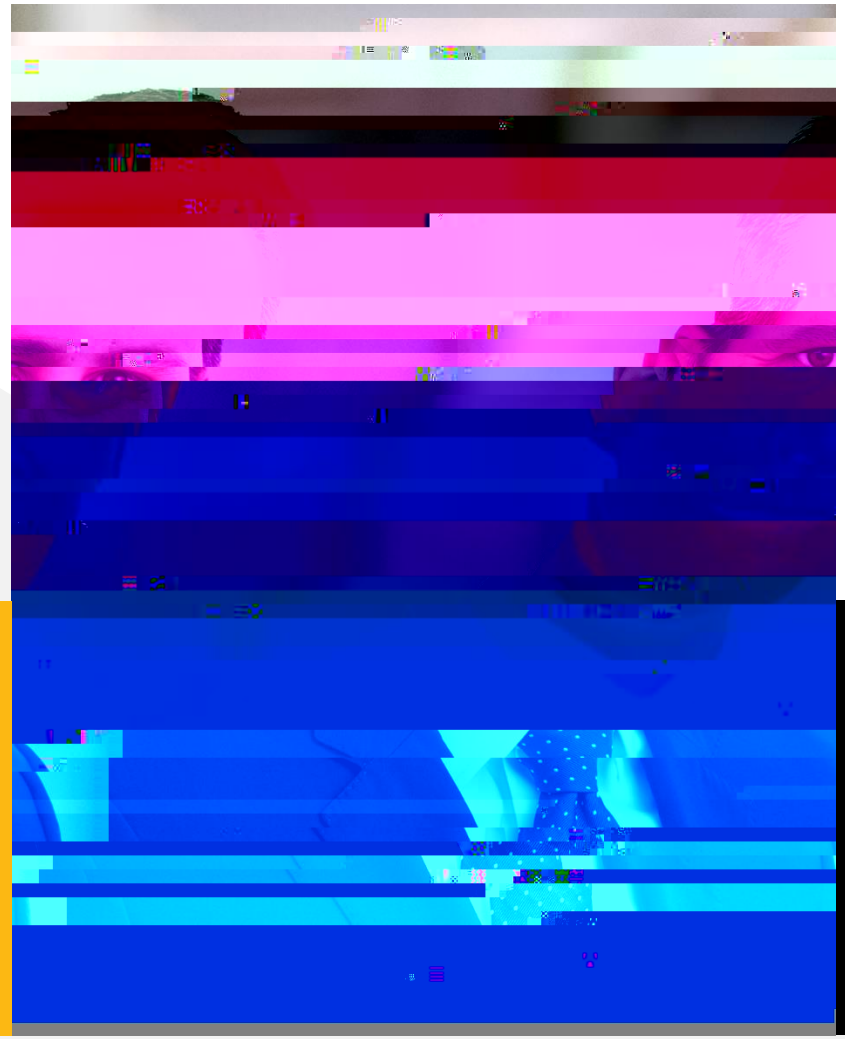
Today's Speakers



TEAM LEAD

[redacted]

Partner

Indianapolis

317-231-7449

Chris serves as vice chair of the firm's Higher Education [redacted] represents and counsels higher ed clients in diverse areas of law, including civil defense, investigations, enforcement actions, financial responsibility, Title IX student financial aid and Title IX litigation and [redacted]. A former Division I student-athlete, Chris also counsels colleges and [redacted]

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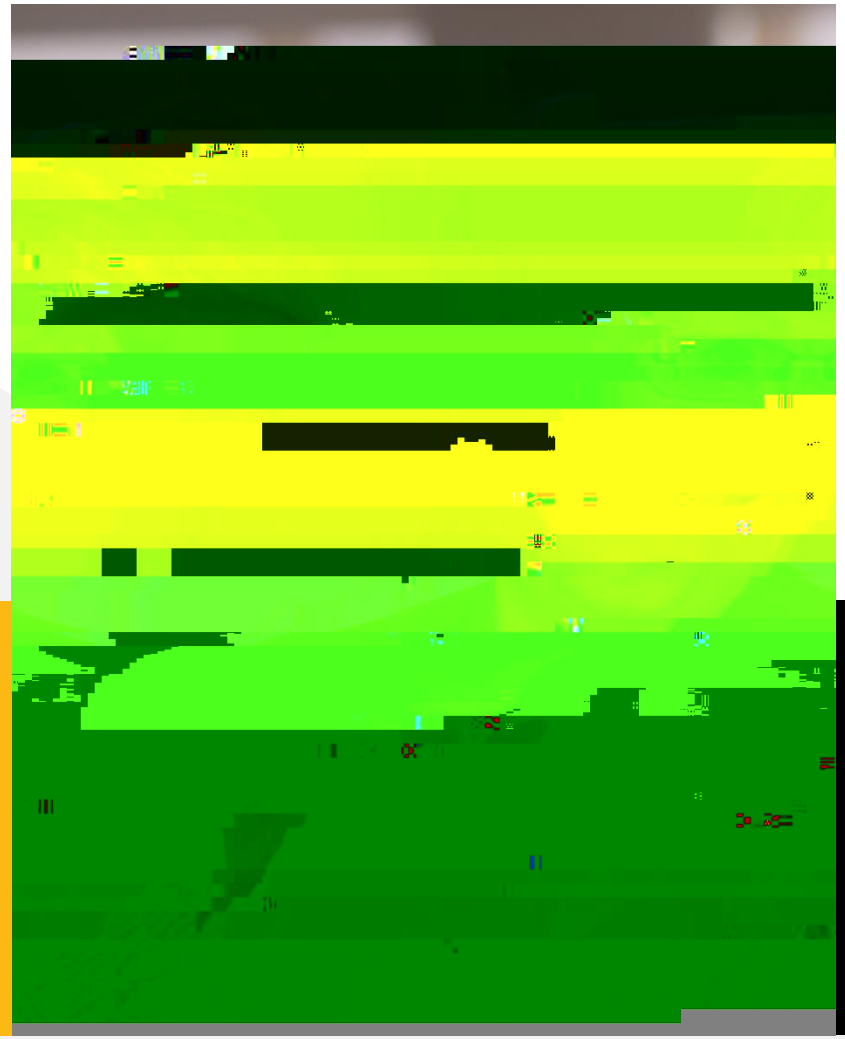

TEAM LEAD

Janilyn Daub

Partner

Janilyn represents
clients involved in higher education and K-12
to comply with Title IX issues related to race, gender and
accommodation matters.

TEAM LEAD

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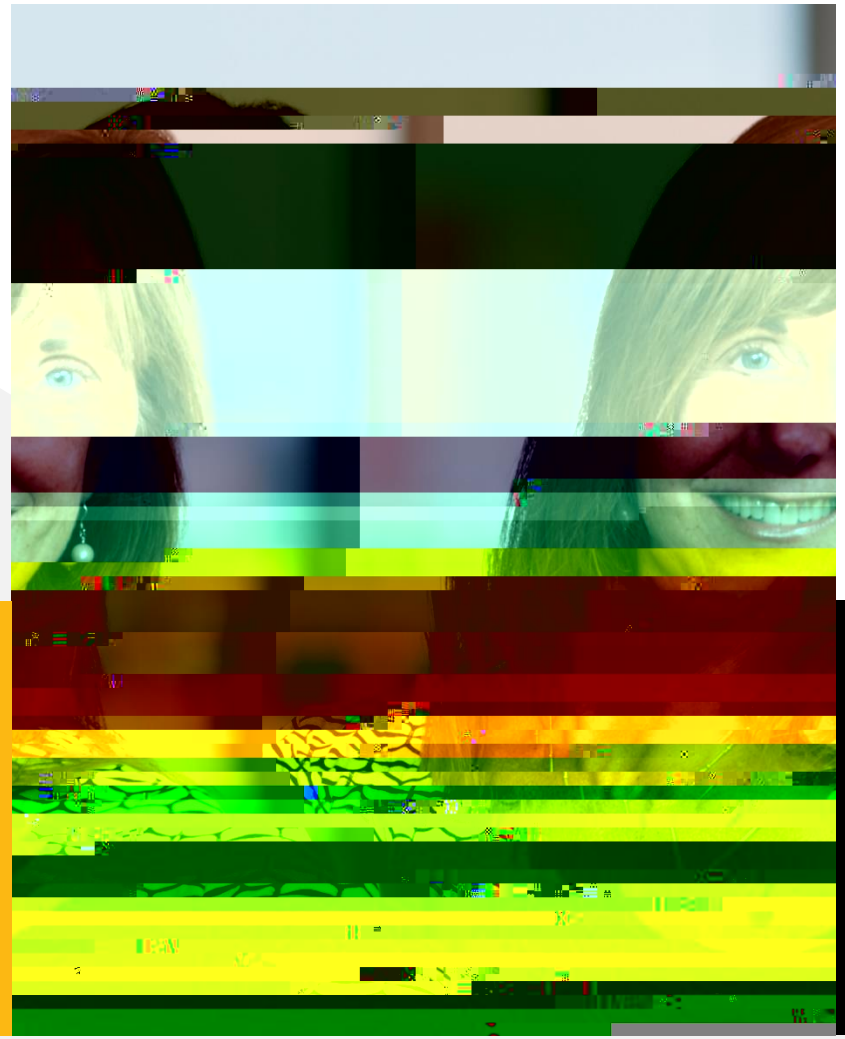
[illegible]



TEAM LEAD

Tracy Maginn

teresa.maginn@btlaw.com

[redacted]172

[redacted]2001, Teresa was the Assistant Vice [redacted]
President and Counsel for the University of Notre Dame [redacted]

employment discrimination and harassment [redacted]

and disability accommodation issues.

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TEAM LEAD

[redacted]

[redacted]

[redacted]-425-4618

[redacted]-secondary public and

on matters pertaining to teacher and student discipline, [redacted] curricular issues, and civil litigation.

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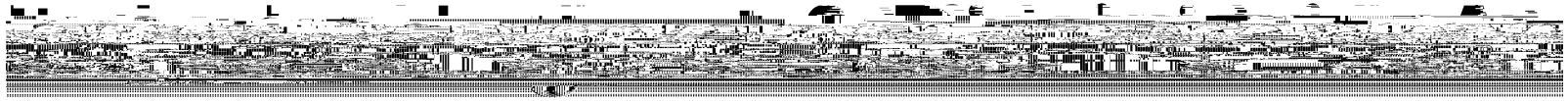

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Agenda

- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]

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[illegible]

- Big Picture Items
- [illegible]
- [illegible]
- [illegible]

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[redacted] IX Department

- [redacted]
  - [redacted]
- [redacted]

This [redacted]

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- Hearings are now *mandatory* for all post-secondary schools
-
  - each other
    -
    - Can also be done virtually

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- Audio
- Audiovisual
- [illegible]

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Hearing Procedure

- [illegible]
- [illegible]
- Questions for the hearing officer?
- [illegible]

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Advisors & Cross-Functional

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[illegible]

- [illegible]
- [illegible]

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Mock Hearing Scenarios/

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ƒ Scenario to illustrate some key concepts

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Key Issues We Tackled

- [illegible]
- Opportunity to be heard
- Relevance
- Leading questions
- Bias

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Key Issues We Tackled

- Relevance
- [illegible]
- Mistaken identity
- [illegible]
- [illegible]

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Relevance

- A few – § 106.45(b)(6)(i):
  - [redacted]
    - Think: rape shield laws
  - Exceptions—[redacted]
    - [redacted] alleged”
    - Prior complainant [redacted] consent”

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Reference – making the call

- *f*
- *f*

  investigative report under §

- *f* Discussion about [illegible]

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Cross-Examination

- -examination.
- “
  - ”
    - statements.”
- Who makes
  - Rule is limited to cross-

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Cross-Examination trouble spots

- Where someone started to say something
  - Emails and text messages
  - Hearsay—"I heard…"; "he told me…"; etc.
- Really last cross-examination? Look out
  - Which side is offering the statement into evidence? It's the other side that must have the chance to ask the speaker about it.
  - Third party witness who refuses to testify.

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Deciding what evident can

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Hearsay – [illegible]

- [illegible]
- However, § 106.45(b)(6)(i[illegible]-maker must not rely on the [illegible] statement of a party or witness who does not submit to cross-examination [illegible] examination" Cmts. p. 811 & fn. 1017
- Think:
  - [illegible]
  - Or is the original speaker the complainant or respondent?

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Key Issues We Tackled

- Relevance

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Cross Examination of Aidan

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Key Issues We Tackled

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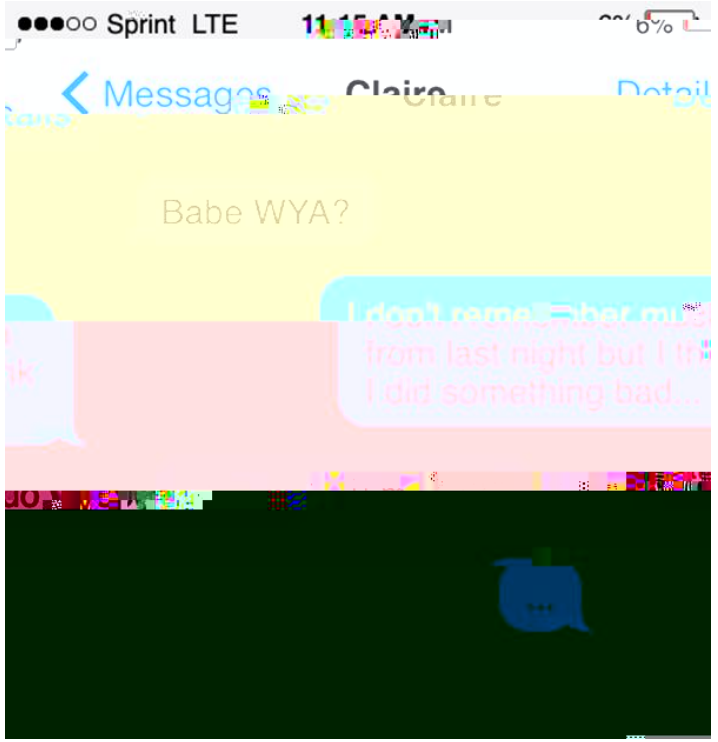
Deciding what evident can

[redacted]

refuses to testify.



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made?

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What is required in the complaint?

- Identification of the allegations
- Description of the procedural steps taken from the complaint through the determination
  - Must include:
    -
    -
    - Site visits
    - Methods used to gather evidence
    - Hearings held

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become final?

- [redacted]

  OR

- [redacted]

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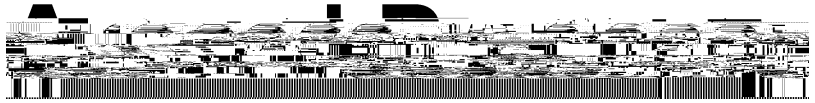

therein.

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Basis for Appeals

- Procedural irregularity that affected the outcome of the matter;
- New material evidence that was not available at the time of the hearing that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator(s), or decision-maker 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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- Notify the other party in writing when an appeal is filed;
- [illegible]
- Ensure that the decision-[illegible]
- [illegible]
- [illegible]
- [illegible]

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Records Maintained

- The following investigative records shall be maintained for seven years:
  - Records of investigation
  - [illegible]
  - Records of any informal resolution process
  - All materials used to train Title IX staff members, which must also be available to any party to facilitate inspection and review
  - resolution
  - [illegible]

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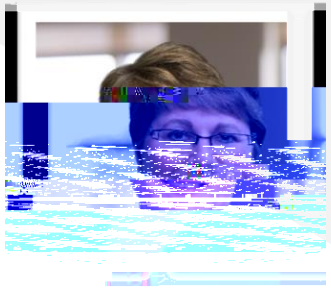
Discussion



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Key Takeaways

- [redacted]
- Hearings are now mandatory.
  - [redacted]
- Relevance is key!
- [redacted] future appeals.

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Title IX Coordinator Training: Making Informed Decisions

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