

Title IX Hearing Panel Refresher Training

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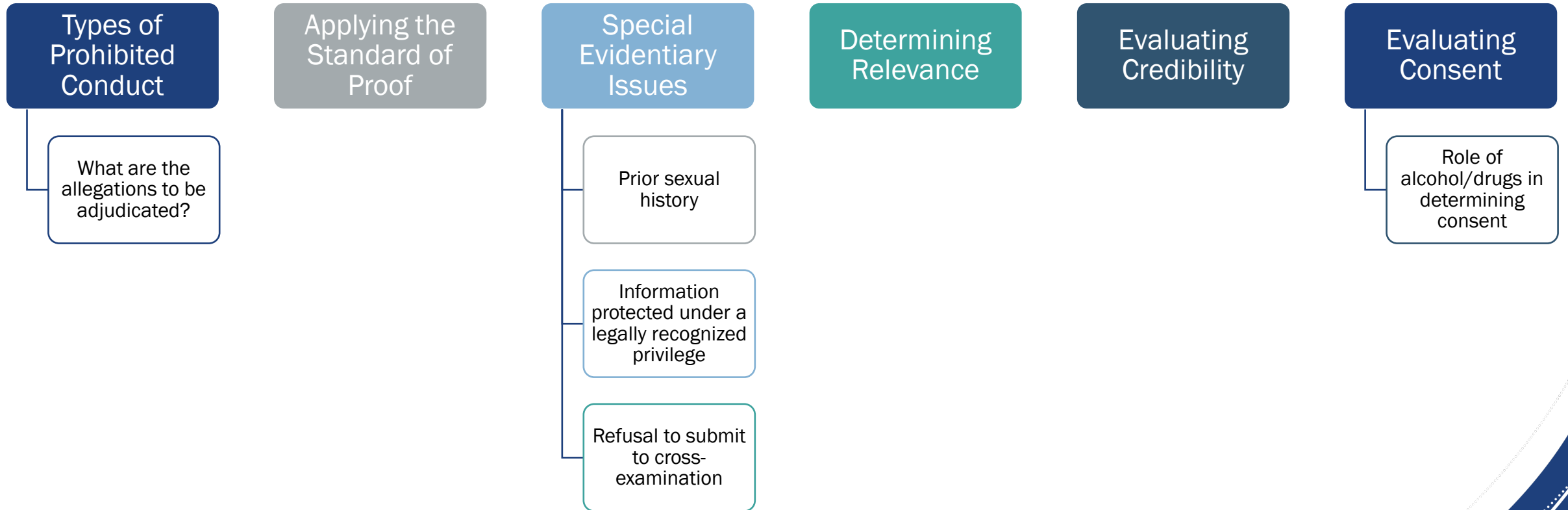


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Laying the Groundwork

Hearing Manual and Relevant Definitions

Walking Through the Hearing Manual: Part 1



Walking Through the Hearing Manual: Part 2

Types of Supporting Facts

- Direct Evidence
- Circumstantial Evidence
- Documentary Evidence
- Expert Witness Testimony
- Hearsay Evidence

Evaluating Information Presented

Weighing Information Presented

Trauma Informed Practices

- Evidentiary Issues
- Prior Sexual History (continued)
- Pattern Evidence
 - Establish factual finding



Walking Through the Hearing Manual: Part 3

Confidentiality of the Process

Rules of Decorum/Objections to Relevance

Limiting the Scope of the Opening Statement

Witness Introduction and Testimony

Closing Statements by Parties

Introduction of Additional Information/Documents by Parties



Walking Through the Hearing Manual: Part 4

- Deliberations and Decision
 - Elements of charge must be met
 - Severe and pervasive defined
 - Letter of Finding
 - Considered testimony and documentation
 - Decision
 - Responsible or not responsible
 - Rationale
 - Must be clear
 - Do not use “we feel,” “we think”



Prohibited Conduct: Sexual Harassment and Assault

Sexual Harassment

- Severe and pervasive

Sexual Assault

- Includes sexual contact or intercourse with an individual without that individual's consent, including sexual contact or intercourse against an individual's will or in a circumstance in which an individual is incapable of consenting to the contact or intercourse

Prohibited Conduct: Dating and Domestic Violence

Domestic Violence

Dating Violence

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and,
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) the length of the relationship;
 - (ii) the type of relationship; and,
 - (iii) the frequency of interaction between the persons involved in the relationship.



Prohibited Conduct: Stalking

Stalking Defined

- A course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress

“Reasonable Person” Standard

- Amount of care that an ordinary person would use in a given situation
- Objective, uniform evaluation of behavior that applies to people in society



Bias Defined

Oxford Languages defines bias as “prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”

The regulations hone in on both generalized bias against parties and specific bias against a particular, named party.



Anti-Bias Techniques

- Self-reflection
- Counterstereotype
- Negation
- Perspective-taking



Evidentiary Considerations

Standard of Proof

Grievance procedures must use the **preponderance of evidence** standard to resolve complaints, which must be more than 50% sure (51% or 50.1%).

If sufficient doubt remains after considering all information, give the Respondent the benefit of the doubt.



Requirement for Findings

- To establish a violation has occurred, the University must provide information which:
 - Constitutes a violation of AD85 or the Student Code of Conduct or other policy;
 - Corroborates the alleged behavior charged; and
 - Determines the accused party's responsibility for the behavior reported.



Requirement for Findings (continued)

If prior 3 criteria are met by a preponderance of evidence, then:

- Must find that a violation has occurred; and
- Must find Respondent responsible for the violation

Board members **MAY NOT** consider:

- Whether or not a party knew that they were violating a policy. Ignorance is not an excuse.
- If a party makes a claim of diminished capacity due to alcohol or other drugs.
- A claim that behavior was motivated by the unsubstantiated behavior of another as a legitimate defense.

Special Evidentiary Issues: Prior Sexual History

- Questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
 - Concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Special Evidentiary Issues: Legally Recognized Privilege

Information protected under a legally recognized privilege are not considered unless the information is relevant and the person holding the privilege has waived the privilege.

This includes privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity or privileged communications between a party and their attorney.



Special Evidentiary Issues: Refusal to Submit to Cross-Examination

- Hearing panel members will not draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Determining Relevance: Part 1

- Information is *relevant* when, if true, it supports/proves, or undermines/disproves, any disputed fact that is of consequence to the determination of the case.

Determining Relevance: Part 2

- Information can be:
 - Relevant to an actual issue or action
 - Relevant to credibility of a witness or information
- Important considerations:
 - Efficiency
 - Fairness

Determining Relevance:

Part 3

- Useful information in a hearing to help separate relevant from irrelevant information:
 - Motivation
 - Ability
 - Malice
 - Threats, expressions, or earlier similar acts implying or denoting intent
 - Other behavior that tends to shake belief in a person's testimony



Test for Relevance

- A) What facts are you trying to prove/determine?
- B) Does the information help prove or disprove a fact?
- C) Is the fact important in deciding a case?

Evaluating Credibility

- “Credibility determination is neither an exact science nor a purely rational process.”
- Even in a situation where it appears to be one person’s word against another’s, it is very rarely a “draw,” as one person usually comes across as more credible than the other, or there is some kind of corroborative information.
 - If it IS a complete draw, then need to fall back on the fact that the party is presumed not responsible unless proven “in violation,” and that the University has the burden of proof.

Evaluating Credibility: Part 2

- Don't jump to conclusions based on your expectations. The decision is not based on your experiences.
- Remember, the credibility of both parties and all witnesses is at issue, not just the reporting party.
 - Review the behavior and statements of the witnesses and respondent as well as those of the reporting party.

Evaluating Credibility: Part 3

- Inconsistency may or may not be important, depending on several factors:
 - Is there is a reasonable explanation?
 - Is the point significant or trivial?
- Just because a witness's statement may vary over time, that does not compel a conclusion that the witness is lying.
 - The variation might have resulted from memory lapse.
- On the flip side, too much consistency could mean the story is rehearsed or memorized.



Evaluating Credibility: Part 4



There are no “perfect” victims (or witnesses) who say all the right things, know all the right answers, or fulfill the stereotype of what a “victim” should be.

There are no “perfect” perpetrators who fulfill every stereotype of what a rapist or predator or “perpetrator” is.

General Guidelines for Evaluating Credibility



Weighing one person's word against another

- Barring other forms of evidence, the testimony of the unbiased person is given more weight.

When the party claims to have not known they were breaking a rule

- An attempt to get the Panel to accept the party's failure to assume responsibility for their role in the alleged violation
- Only in rare cases should this type of testimony be given any value

Multiple witnesses corroborating the same set of facts

- It is only in a very rare situation that the number of witnesses be considered as a factor in determining responsibility.

When the party introduces character witnesses

- The testimony of these witnesses will be of minimal value in determining responsibility
- Only exception would be if witness has information which suggests the party was physically unable to commit the violation



Evaluating Consent:

Consent Defined

- “Consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent must be informed, freely given and mutual. If intimidation, threats, or physical force are used there is no consent. If a person is mentally or physically incapacitated so that such person cannot understand the fact, nature or extent of the sexual situation, there is no consent. This includes incapacitation due to alcohol or drug consumption, or being asleep or unconscious, where the respondent knew or reasonably should have known that the person was incapacitated. Inducement of incapacitation of another with the intent to affect the ability of an individual to consent or refuse to consent to sexual contact almost always, if not always, negates consent.”

Evaluating Consent: Consent Defined (continued)

- “Silence, in and of itself, cannot be interpreted as consent. Consent can be given by words or actions, as long as those words or actions consist of an affirmative, unambiguous, conscious decision by each participant to engage in mutually agreed-upon sexual activity. Consent can be limited, meaning consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity. Consent is revocable, meaning consent can be withdrawn at any time. Thus, consent must be ongoing throughout a sexual encounter. Whether a person has taken advantage of a position of influence over an alleged victim may be a factor in determining consent.”



Evaluating Consent (continued)

Avoid misconceptions about responses to assault

- Why did they wait to report the assault?
- Why did they first say they did not want us to take action but now they do?
- Why do they describe events in a piecemeal fashion, rather than in a neat chronology?
- Why did they come forward and state that they now remember more about an event that they didn't tell in their first interview?

Reactions of those who experience sexual assault may appear counter-intuitive but in fact are quite common

- Reaction to trauma should not be misinterpreted as reflecting a lack of credibility about consent



Evaluating Consent: Role of Alcohol/Drugs

Evaluating intoxication vs. incapacitation and avoid bias related to alcohol consumption

Gauge the impact of alcohol consumption by asking questions such as:

- What type of alcohol did you consume?
- Over what period of time did you consume the alcohol?
- How quickly was the alcohol consumed?
- Did you consume any food? How much? When?
- Were you taking any medication that has any restrictions regarding consumption with alcohol?
- Can you describe the impact that the consumption of alcohol had on you?

Evaluating Consent: Incapacitation

- Was individual incapacitated? Important to help distinguish sexual assault from a consensual (albeit intoxicated) sexual encounter. Possible factors to consider:
 - Was the complainant conscious or unconscious? Did they regain consciousness during the incident? If so, what did the respondent do?
 - Did the complainant black out at any point?
 - Did the complainant vomit at any point?
 - What was the complainant's condition when last seen by reliable third-party witnesses?
 - Did the complainant seem to understand where they were and where they might be going?
 - Could the complainant walk, or did someone have to assist or carry the complainant?
 - Could the complainant speak or communicate clearly? Were they slurring?

Evaluating Consent: Incapacitation (continued)

- What physical tasks did the complainant perform, and how well did they perform them?
 - For example, was the complainant using a Smartphone and did their coordination seem impaired? If the complainant was smoking, could they light their own cigarette?
- Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove their own clothes?
- Is there anything to suggest that a complainant may have been less inclined to participate in consensual intercourse at the time of the incident?

Evaluating Consent (continued)

- In many sexual assaults, only the complainant and respondent were present. Pursue and evaluate other evidence to make an informed judgment call on the question of consent:
 - Witness accounts
 - Social Media postings
 - Student ID card swipes
 - Surveillance videos

Types of Evidence

Oral Statements

- Eyewitness, other witnesses, experts, investigators, character witnesses

Written statements

Physical objects and other kinds of records

- Text messages, voicemails, results of a medical exam

Documents

- Court or medical records, diagrams



Classifications of Evidence

Direct Evidence (based on personal observation or experience)

- Eyewitness testimony, photograph, other “direct” proof
- If credible, establishes the fact one is trying to prove

Circumstantial Evidence

- Requires an inference; one must infer the fact one is trying to prove

Documentary Evidence

- Any supportive writings or documents including statements, reports, etc. that support or deny a fact at issue

Hearsay or “secondhand” Evidence

- Permitted in conduct hearings
- Statements made by one person about statements they heard from someone else



Classifications of Evidence (part 2)

- Expert Witness Testimony: Qualified by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods;
 - (d) the expert has reliably applied the principles and methods to the facts of the case.

Classifications of Evidence (part 3)

- Pattern Evidence
 - Prior bad acts/pattern evidence
 - May be relevant and probative
 - Use at fact-finding
 - Consider relevance to determine:
 - Intent/state of mind/motive
 - Absence of mistake
 - Pattern
 - Identity



Evaluating Information

- To evaluate information, ask three questions:
 - Is the information relevant?
 - Is it related to the matter at issue and to what the party is trying to prove?
 - Is the information credible?
 - How believable is it?
 - Is the information convincing?
 - How strongly does it convince you of what the party is trying to prove?



Weighing Evidence Presented

Weighing one person's word against another's

- Unbiased party given more weight

When the party claims to have not known they were breaking a rule

- Should rarely be given value
 - Act occurred before it was prohibited

Multiple witnesses corroborating the same set of facts

- Single, unbiased, disinterested witness is worth more than biased testimonies



Weighing Evidence Presented (part 2)

When a person admits responsibility during the hearing

- Less need for questioning unless panel needs clarification on what happened

When the party introduces character witnesses

- Of minimal value in determining responsibility
- Exception:
 - Witness has information which suggests the respondent was physically unable to commit the violation



The background features a repeating pattern of speech bubbles in various colors (red, yellow, pink, grey, white) against a teal gradient. Each bubble contains a dark blue question mark. A solid blue horizontal bar is positioned at the bottom of the image.

Initial Questions?

Trauma-Informed Practices

Impacts of Trauma

Can result in disorganization of the person's mind

Can cause one to lose the ability to process information if not addressed

Can affect every aspect of one's life

Linked to depression, anxiety, poor health, and repeat victimization

Can lead to negative coping behavior

Difficulties of Processing Trauma

Response may vary
as a result of
accumulating
incidents or other
personal stress

Consider the
victim's age at the
time of assault



Trauma: Impacts on Memory



Stress affects how a brain establishes, stores, and retrieves memories



Major trauma may lead to fragmented recall



Differences in account over time may reflect memory processes rather than inattentiveness or deceit



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Trauma-Informed Practices: During the Hearing

- Recognize the impact of trauma on memory
- Allow the witness to give a narrative
- Use open-ended, free recall questions
- Build in an opportunity for follow-up
- Be transparent about how information will be used
- Develop rapport and allow for closure
- Allow sufficient time and space for thorough exploration of the issues

Trauma-Informed Practices: Evidentiary Issues

Always consider relevance

Admission of medical information

- Consider need for expert guidance in understanding and interpreting information

Admission of mental health records

Character evidence



Prior Sexual History Evidence

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are barred as **not relevant**, unless such questions and evidence about the complainant's prior sexual behavior are offered to *prove that someone other than the respondent committed the conduct alleged by the complainant*, or *if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent*.
- Questioning about the complainant's sexual history is not permitted if consent is not at issue.
 - This applies only to Complainants, unless the Respondent has made a counterclaim against the Complainant, such that the Respondent is also a complainant.



Additional Process Discussion

The Art of Questioning

Hearing Script

Confidentiality of the
Process

Rules of
Decorum/Objections to
Relevance

Limiting the scope of
the opening statement

Witness introduction
and testimony

Closing Statements by
the parties

Introduction of
additional
information/documents
by parties





General Hearing Preparation

- Report Review and Assessment
 - Determine the universe the case is situated in
 - Policy dissection and dissection
 - Determine what is known and what needs additional clarity
 - Prepare questions to gather on record relevant evidence



Preparation of Questions



Relevance: “Why do I want to know this information?”



Relevance: “How will it lead me to a greater understanding of the situation at hand?”



Neutrality: “What’s the best possible way to ask this question?”



Questioning Techniques

Use open-ended questions

- Who, what, how, etc.
- Will allow the party/witness to answer as they desire, sometimes yielding more information than requested

Close-ended questions often result in a “yes/no” response, not offering much information/exposition

- Did you?
- Were you?

Questioning Techniques (part 2)

Who was involved in the incident?

What was the violation?

- **What** were you doing when the police approached you? **What** would you do differently if you could do this again? **What** amount of alcohol had you consumed in how much time?

Where were you when this happened?
Where were you walking/driving to?

When did this happen?

Why were you approached by the police?
Why were you engaging in the behavior?





Questioning Techniques (part 3)

- Avoid multiple choice questions.
 - This type of question provides the individual with the answer the hearing panel members wish to hear and often does not bring out the most relevant information.
 - Example: “What were your feelings when you broke the window? It was around final exams; were you stressed, frustrated, or maybe letting off steam?”
- Ask the question and stop to allow a response.





Questioning Techniques (part 4)

- Technical or specific, directed questions should be saved for when open-ended questions are exhausted.
- If more information is needed about a response, good follow-ups include “tell me more about...” or “I’d like to go back to when you said...”



Questioning Techniques (part 5)

- Respond to inconsistencies with curiosity, rather than interrogation:
 - “What are you able to tell me about that?”
 - “Can you help me understand...”
 - “Can you tell me more about that?”



Questioning Techniques: Silence is Golden

- Do not be alarmed when a question is asked, and the person does not respond immediately.
- Allow the person ample time to think without undue pressure to respond quickly.
- If the person needs clarification, allow them to ask for it; don't assume that they do not understand the question.



Tips for the Hearing

- Carefully listen to everything that is said.
- Watch for non-verbal behaviors which may indicate attitudes, true feelings, or emotions.
- Carefully examine the time/date sequence of the incident.
- Follow-up on contradictions when questioning.
- Continue to ask questions until all necessary facts regarding the incident are obtained.
- Clarify any conflicting information before heading into deliberation. Do not wait until deliberation and then start guessing at reasons for conflicting information.

Tips for the Hearing (part 2)

Never utilize an accusatory or blaming tone with any individual in the hearing. Maintain your composure even if others do not.

Carefully prepare questions in advance. Do not prepare or ask questions that are not relevant to the hearing.



Deliberations and Decision-Making

Conclusion of Hearing: Deliberations and Decision

- Elements of charge must be met
- Letter of Finding should contain:
 - Considered testimony and documentation
 - Decision
 - Responsible or not responsible
 - Rationale
 - Must be clear
 - Avoid subjective language



Decision-Making Process

- During deliberation, it is the responsibility of all Panel members to:
 - Encourage every other member's contributions without embarrassing the other members or putting them on the spot.
 - Help the group make full use of everyone's contributions.
 - Express your own opinions.
 - Listen to everyone else's opinions.
 - Recognize and practice the qualities of effective *consensus-seeking groups*.





Qualities of Effective Consensus Seeking Groups

- Use synergistic thinking as opposed to either/or thinking.
- Generate more ideas collectively than individuals generate alone.
- Have a high level of engagement and participation.
- Develop a climate in which members can be relaxed, open and direct, and task oriented.



Attitudes that Support Consensus During Deliberation

Cooperation (NOT competition)

Common ownership of ideas (NOT individually owning ideas)

Value conflict and constructive discussion as a cooperative effort to bring out all perspectives (NOT suppressing feelings and avoiding conflict)

Value the contributions of all members (NOT allowing social prejudices or other implicit bias to reflect in the group's dynamics)

Make an effort to equalize power (NOT relying on authority status)





**Additional
Questions?**

Case Studies





Final Discussion and Questions



Final Overarching Concepts



Utilize the space for consultation between the Panel and counsel for decisions, discussions of relevance, questioning, etc.



Take whatever time is necessary to deliberate and get things right.



Allow adequate time for the hearing, including breaks for the Panel and for the individuals involved in the hearing.





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