



RELUCTANT WITNESSES AND THE NEW REGS:

Best Practices for Engaging Individuals in Challenging Title IX Investigations

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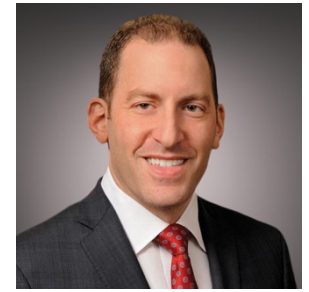
DAN SCHORR, LLC

OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
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DAN SCHORR

President
New York



Dan Schorr is a former criminal prosecutor and municipal inspector general with more than 20 years of legal and investigative experience. He manages a variety of complex assignments, including investigations into sexual misconduct, Civil Rights, and fraud allegations at educational institutions, corporations, and government entities. In addition to specializing in Title IX investigations, Dan assists higher education and K-12 schools by conducting policy and program reviews, training personnel on all aspects of Title IX and Civil Rights compliance, and serving in hearing officer and decision maker roles. Dan is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

ALYSSA-RAE MCGINN

Vice President, Investigations
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Alyssa-Rae McGinn has extensive experience leading a variety of complex investigations, with particular expertise in conducting investigations at educational institutions and corporations into allegations of sexual misconduct and identity-based harassment involving students, faculty, staff, and corporate leadership. Alyssa-Rae was previously a Senior Associate at Ankura, where she and Dan established the firm's Title IX and Civil Rights Investigations practice and grew it to assist institutions nationwide. Prior to Ankura, Alyssa-Rae was an Associate Director in Kroll's Business Investigations & Intelligence practice.

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REASONS FOR RELUCTANCE

- **Mistrust** of the organization, investigation process, interviewers, or social systems
- **Discomfort** with strangers/interviewers or subject matter
- **Fear** of retaliation, not being believed, retraumatization, getting in trouble
- **Concerns** about being cross-examined during an adversarial hearing

WHY INTERVIEW RELUCTANT COMPLAINANTS?

- Complainant may have important information related to their own or others' safety, even if they act difficult or hesitant in interview
- Complainant may have reasons for being reluctant that are significant to analyzing their report:
 - Discomfort or trauma
 - Pressure not to report
 - Wanting to protect the respondent
 - Concern that their report will not meet violation threshold
- Complainant's reluctance may be based on a misunderstanding of the investigative process, which can be addressed in the interview

DOE TITLE IX REGULATIONS

- New regulations provide option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss the investigation or may continue to investigate
- However, even if the process continues without complainant, regulations require that 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”
- Without a complainant, you must rely upon other evidence to “build” your case, which is often difficult

BEFORE THE INTERVIEW

- Make initial contact in a way that is professional, respectful, and equal for all involved
- Each party and witness may respond differently – choose your means of communication and how often you follow-up with unresponsive participants based on what you know about them
- Do your homework before each interview
- Choose an appropriate location/medium, or allow the participant to choose an appropriate location/medium in which they are comfortable
- For video interviews, ensure all technology works and is easily accessible for the interviewee at the time of the interview

CONTROL WHO IS IN THE (VIRTUAL) ROOM

- Who is in the “room” can impact the interview
- Videoconference technology can pose challenges to managing the room
- Two investigators
- Advisors should not be:
 - A witness
 - A significant other
 - A parent/guardian
 - Anyone who may impede the honest, full story
- Set ground rules with advisors, but be flexible

BE TRANSPARENT

- Clearly introduce yourself and your role as an independent investigator
- Explain how you will be conducting a comprehensive, prompt, and fair investigation
- Be clear that you are there to listen to everything they have to say, review their evidence, and speak with their witnesses
- Do not make promises you cannot keep and keep your promises
- Set realistic timelines and keep them apprised of the process as it progresses
- State upfront that you may need to follow up with them or re-interview them
- Be clear about policies regarding activities such as drug/alcohol use

BE KIND

- Treat the interviewee with **respect, empathy, and kindness**
- Recognize that this is difficult for all involved
- Offer services/resources to both parties, as well as witnesses if needed
- Be open-minded and non-judgmental
- Remember that many cases are in gray areas, and most people are telling you some version of their truth
- Make your body language reflect your listening stance
- If an interviewee becomes confrontational, don't mirror their demeanor – keep calm, take a break, redirect
- **ENSURE YOU ARE EQUALLY KIND TO ALL PARTICIPANTS**

BE COMFORTABLE

- Be/act comfortable with sexual terms, behaviors, and choices
- In video interviews, be/act comfortable with videoconferencing
- If you are uncomfortable, they will be uncomfortable
- Allow them to speak in their own language (crude language, etc.), but clarify
- If there is something that makes you uncomfortable:
 - Do research
 - Practice talking about it
 - Re-evaluate whether you are the right person for the interview
- Be aware of unconscious bias and the power positions & identities you bring into the room

HAVE A REAL CONVERSATION

- Bring your real personality into the interview and engage in a conversation: **listen** and **respond**
- Don't be afraid to be personal
- Be true to your own style of speaking
- Be flexible and let the conversation take its natural course
- Guide the conversation, but let them set their own pace and tell their story in their way
- Utilize silence, especially when you ask hard questions
- In cross-examination, make those questions part of the conversation

ASKING THE HARD QUESTIONS

- Wait to push back until they have finished telling their story
- **“Let’s go back through that slowly:”** Return to parts of their story that require clarification or questions or that are disputed by physical evidence
- Wait to confront with adverse evidence – may make an interviewee less willing to continue talking
- When asking the hard questions:
 - Phrase your questions so that they are respectful of the story you’ve heard
 - Don’t be accusatory
 - Explain the motivation for your question
- Let them know that as an investigator, you are trying to figure out what doesn’t track and why

AFTER THE INTERVIEW

- The **relationship** does not end after the interview is completed
- Parties and witnesses can become uncooperative and/or drop out of the process at any stage
- Parties and witnesses may need to testify at a hearing
- Be **accessible** and make them feel comfortable to reach out to you
- Pay **attention** to responses to interview summaries and reports

PREPARING FOR CROSS-EXAMINATION

- New regulations require cross-examination at a live hearing for higher education institutions
- Explain the cross-examination process and what types of questions they might expect
- Cross-examination can be conducted via video so respondent is in a separate room
- Respondent cannot conduct cross-examination of complainant
- Prepare party/witness to be truthful, complete, and non-combative in all answers, including with facts that may present witness in poor light
- Mock cross-examination

CONCLUSION

- Most important: **BE HUMAN**
- Treat interviewees as you would want to be interviewed
- Use these techniques equally for both parties

If you're using these techniques effectively, you will be more effective with potentially reluctant or challenging witnesses. The combination of these approaches builds trust and comfort, which can often head off the feelings that lead interviewees to become difficult.

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