

Title IX: The Process of Deciding



Why do we have this process?

The purpose of the hearing is to ascertain truth through evidence and vet action through argument. We want to give the parties a chance to be heard.

Bias and Conflicts of Interest

- Am I biased?
- Do I have a conflict?
- Disclose potential conflicts to the District and the parties.

**Control, control, you
must learn control!**

Who's the Boss?

You control what comes in

You control the parties

You control the process

You make the decision

Do you have a conflict?



Ex Parte Communications

Occur when the decision maker communicates with one party, but not the other.

- Avoid ex parte communications
- If they do occur, promptly inform the other side
- Include the parties or their representatives on every communication

Write it down

- Take notes
- Keep track of the parties' submissions
- Keep track of your rulings
- Inform the parties of your orders, decisions, and rulings in writing

What does this look like?

- No in person hearing
- Conducted in writing
- Set by school policy
- Back and forth exchanges in writing between parties and you

Evidence

- Witnesses
- Documents
- Audio / Visual Materials



Excluding Evidence

- Not Evidence
- Irrelevant
- Inadmissible

We're going to learn about these legal-sounding things today:

- Evidence:
 - Relevance
 - Admissibility
- Witnesses:
 - Credibility
 - Testimony
- Due Process

Relevance



What is relevant?

- Utah Rule of Evidence 401 states:

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.



**Decision Makers
are required to
rule on the
relevance of
evidence.**

- Follow the rules set out by your institution in policy.
- Carefully read the description of the evidence being introduced.
- Ask yourself, does this evidence make a fact more or less probable?

An Example

- I built C-3PO.
- You know that lightsaber that was in your hand when I cut it off? Somehow, 30 years in the future, it will magically reappear in an unguarded chest in the downstairs of a bar that Han Solo apparently loves, but never visited once during any of the other movies.
- You stayed on your uncle's lame moisture farm that has the grave of your grandmother.

Allegation: No, I am your father.



Another Example

Allegation: Joe Exotic
hired a meth head to kill
Carol Baskin.

Evidence:

- I threatened to kill
Carol Baskin on my
show like 30 times.
- I think Carol Baskin
killed her husband.

An example from a hearing:

Issue s:

- Engineer was brutally mean to his coworkers, calling them incompetent or corrupt. He scrutinized all of their work, even if it wasn't his job. When dealing with his own clients, he was overly critical, obstructive, and antagonistic. The agency has a policy of cooperation and teaching with its clients.
- Did he engage in the conduct alleged?

Q uestio n:

- Am I a competent engineer?
- Was I ever wrong?
- Daniel is a liar and is known to be “untehred from the truth”.
- Just because I'm pompous, here's what the hearing officer said, and the Court of Appeals repeated:

The CSRO Decision noted that [employee] “did not provide, and has not yet provided, any evidence whatsoever in support of this remarkable accusation” but commented “that throughout th[e] proceeding, [Daniel] has acted as an honest, ethical, and capable member of the bar.”

Investigative Report

You can consider it, but you are not bound by it.
You may make up your own mind about its
reliability, credibility, and conclusions.



How do you announce your decision?

When you rule on relevance, you need to state your ruling on the record, especially if there is an objection.

- Make sure the parties have been heard. Sometimes, parties object to the same evidence or category of evidence multiple times. If the reason for the objection is already clear, you do not need to let the parties restate their positions. If you don't know, invite them to clarify.
- State your decision clearly, on the record, so there is no misunderstanding. "I rule that the evidence is relevant because ..."

Make a Record

Smile, you're on Candid Camera.

Rape Shield

Federal Rule of Evidence 412:

○ (a) **Prohibited Uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) **Exceptions.**

(1) **Omitted.**

(2) **Civil Cases.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) **Procedure to Determine Admissibility.**

(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.

Hearsay

I heard he r say...

What is hearsay?

An out of court
statement offered to
prove the truth of the
matter asserted.

Example of Hearsay

What is the statement?

“On the night of the incident, I heard Brad say he saw Respondent at the party and he was following Complainant up the stairs.”

Is it hearsay?

- Is it an out of court statement?

Yes. It was heard somewhere else.

- Is it offered to prove the truth of the matter asserted?

Yes. It is being offered to show the Respondent was alone with Complainant on the night the incident occurred.

But, is it
admissible?

Hearsay is almost
always inadmissible in
administrative
proceedings like this.

But...

- It cannot be the only basis for your decision, but it can be used to reinforce your decision.
- If a person is unwilling to testify in person, any evidence they offer cannot be considered.
- Hearsay is generally inadmissible in court because it is not reliable but is very persuasive.
- This means that when you admit or are presented with hearsay evidence, you can assign it evidentiary value based on its credibility.

Some things are not hearsay

- A party's own statement:

I heard the accused say, "No one can say 'no' to me!"

I heard the victim say, "Oh, I totally hooked up with him last night and it was amazing!"

- A statement being offered to show the effect on the listener.

"I heard the victim say that he was worried the accuser would hurt him."

"What did you do next?"

"I reported it to campus security and they opened an investigation."

Remember:

- A statement by a person who has refused to testify cannot be admitted into evidence
- Do not base your decision on hearsay alone
- Not all statements are hearsay

Prejudicial v. Probative Value

All evidence is subject to this rule.

Rule Against Prejudicial Evidence

If evidence is more prejudicial than probative, then it may be excluded.

This is a subset of relevance, if you're into nerdy law stuff.

Probative Value

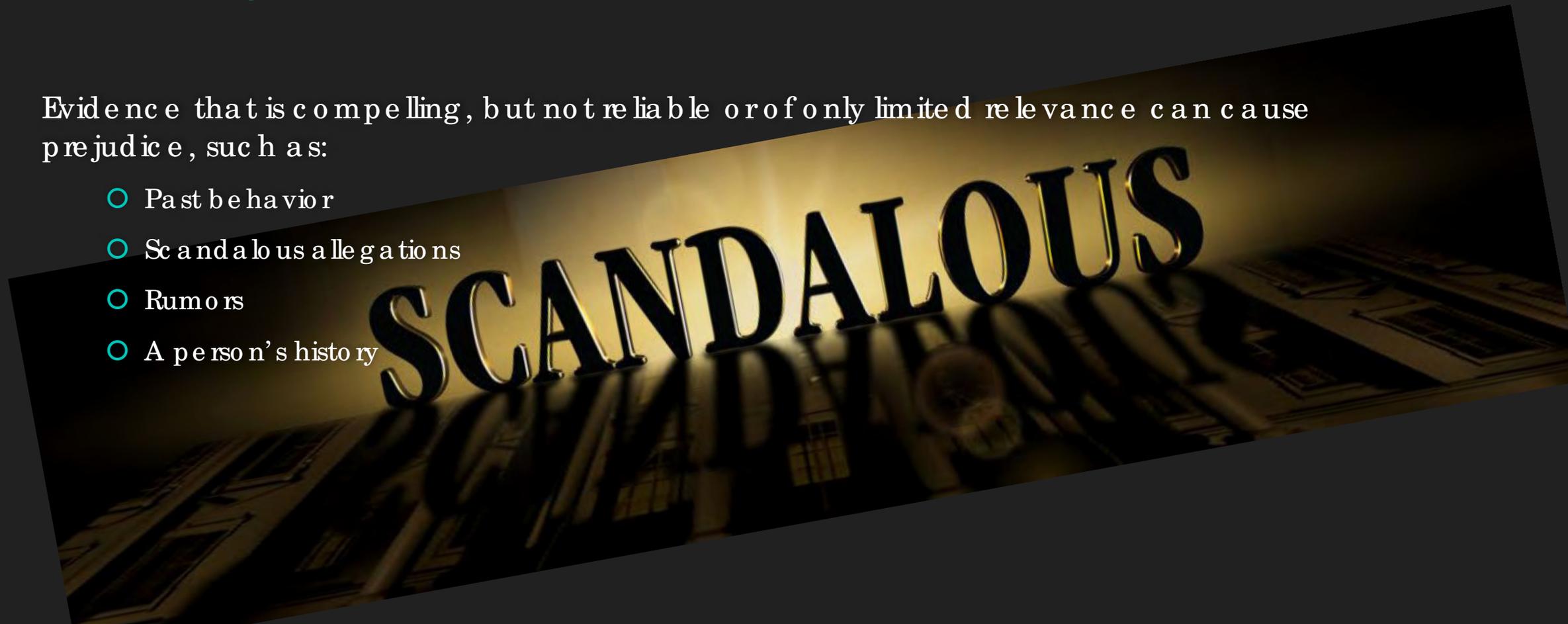
- Evidence is probative if it tends to prove a fact.
- The more reliable the evidence, the more it tends to prove a fact.
- Unreliable evidence does not tend to prove a fact.
- Example :

I saw the victim right after the incident and he was acting strange, worried, upset, and out of it.

Prejudicial Effect

Evidence that is compelling, but not reliable or of only limited relevance can cause prejudice, such as:

- Past behavior
- Scandalous allegations
- Rumors
- A person's history



SCANDALOUS

Other Evidence Stuff

There are like ...100 rules. Even a whole class on it in law school.

Other Categories of Basic Evidentiary Rules

- Personal Knowledge
- Foundation
- Expert Opinion
- Lay Opinion
- Exceptions to the Hearsay Rule
- Authentication

More Kinds of Objections:

- Argumentative
 - Isn't it true that you have always been a jerk?
- Duplicative
 - Did you know the victim?
 - But you knew the victim?
 - You knew the victim, right?
- Compound
 - You saw the victim at the party and at the dorm?
- Badgering the Witness
 - Did you order the Code Red?!
- Narrative
 - You want me on that wall, you need me on that wall.



Controlling the Process

- Announce your expectations at the start of the process.
- Have a hearing order (if the policy allows it).
- Try to resolve as many issues as you can before the first witness or presentation.
- Do not be afraid to assert your authority and chastise misbehavior.
- Be assertive and polite.
- Try not to hold it against the individual if their attorney is a jerk.

The End...

Or is it?

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