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## Perspectives on Title IX From a General Counsel's Office

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## PERSPECTIVES ON TITLE IX FROM A GENERAL COUNSEL'S OFFICE

*Featuring:*

LAURENCE PENDLETON\* AND JEFF FARRAR\*\*

*Moderated by Professor Jeffrey Omar Usman*

**Moderator.** Thank you both so much for being here today with us. Let's start with this—what exactly is the role of the Department of Education in providing recommendations and advice to universities? One of the things that's noted with some irregularities is that it is not generally recommended for a general counsel to be a Title IX Coordinator. What is the role of an attorney in the general counsel's office in interacting with Title IX?

**Jeff Farrar.** Laurence and I were actually talking about this just a minute ago, and it is puzzling to me which universities *did* have their general counsel acting as their Title IX Coordinator. He's been in this game a little bit longer than I have, and we don't know of anybody that's ever done that, so that's definitely not our role. Our role, as I see it, is more monitoring, supervision, keeping up with the current status of whatever the Office of Civil Rights (OCR) is telling us to do. That includes whatever you have in legislative or regulatory changes, keeping up with what the status of those are, making sure that our policies adequately reflect those, that guidance of those legal requirements, and then making sure that those policies are actually getting followed by the people who are on the ground doing the actual work. Everything runs through our office, but it's more of a monitoring and supervision role than an on the ground investigation role.

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**Laurence Pendleton.** When this first came in, you started creating Title IX Coordinators, for most institutions—that includes Middle Tennessee State University (MTSU) and Tennessee State University (TSU)—you had already in existence an office of equity and inclusion at our school. It's been called different things—Office of Affirmative Action, Office of Equal Opportunity. Those offices already existed to investigate and to take appropriate action related to discrimination claims involving gender, race, national origin, and disability anyway. So what happened in most of those situations, including at TSU and Colorado State University, where I was before, is that the Office of Equity and Inclusion also became your Title IX Coordinator, so there was never even a question or issue of whether or not the general counsel or someone in that office was going to serve as the Title IX Coordinator because institutions recognized years ago that if you were going to have an investigatory component to your institution through that office that really shouldn't be your lawyer's office because we are also not only reviewers and monitors as Jeff was speaking to, but we are an advocate for the institution.

We advocate, and we get sued, or we have an external administrative agency with which we may be arguing and asserting that the institution perhaps hasn't done anything wrong; or, if we did, then here is what you should take into consideration in terms of responding. This is versus a Title IX Coordinator who usually comes out of the equity inclusion office. They're really more of an arbiter, and so you never wanted to mix those positions anyway, and really, you shouldn't. There would have been legal and ethical situations to start with. Where it has been a problem is in smaller institutions where perhaps people are wearing multiple hats because of the fact that there aren't as many employees, you may have run into that. But, I think there has been an appreciation and recognition of the fact that is not something that you can do. Professor Usman was mentioning my participation in this one general counsel institution. I have talked about that at length last February in New Orleans concerning the entirety of general counsel and Title IX matters, and it was the clear consensus that general counsel should not be taking on that role. I don't see that being an issue even though they may raise it again, but it's something that, hopefully, institutions are avoiding.

**Moderator.** If the Department of Education's Office of Civil Rights determines that a university is out of compliance with Title IX, can you walk us through the process? How would it unfold, and what are the potential consequences for the universities if the Office of Civil Rights concludes that a university is out of compliance with Title IX?

**Laurence Pendleton.** First, the OCR folks call me. My experience has always been to try to establish as good of a relationship as you can. I always give the position of, "We have nothing to hide," and typically you will get a notice of a complaint and a request for information. They will request all

kinds of documentation and records and other information related to not only that particular complaint, but in general—the policies and procedures of how you investigate claims of discrimination. You will get that and then you will typically respond to that and provide that information to them.

From there they look at the information you provided, and hopefully there will be a dismissal and a letter issued saying, “We looked into it, and we find that there has been no violation or possible violation of the particular law that’s at issue.” Or, if they don’t necessarily see a violation, but they still have some concerns, they may enter into a resolution agreement. A resolution agreement basically says that, “You haven’t done anything wrong, but in responding to this, this is what we would like you to do moving forward regarding training or regarding how you keep records,” or something similar. Then, you negotiate and determine if you can come to a resolution that the institution will then sign off on. Or, in the alternate, the OCR can bring legal action against you related to this as well. Hopefully, you don’t have to go that far. I’ve seen at conferences, it seems like some people take on this adversarial role with respect to the OCR—“let’s dig in and let’s fight!” This hasn’t been my experience. I always recommend that if you can really establish a good relationship with the person who is calling the investigator, you should. Send the message from the get-go that you have nothing to hide and that you’ll work with them and cooperate with them. It really helps that investigator and their demeanor tends to change in terms of moving forward.

In addition, Jeff talked about the complaint process. OCR will periodically—I have no idea how they decide who the lucky institution is—but they’ll do compliance reviews. They’ll just pick a name out of a hat, and they’ll say, “Ok, we’re going to come do a compliance review of TSU,” and they’ll start looking around. Here, too, it is important to work with your investigators; everyone I’ve dealt with has been there to help. As long as they see that you want to do the right thing, they’re genuinely there to help you do the right thing. That’s why so many investigations do end up with resolution agreements with OCR because generally, everybody is on the same page. You all want to do the right thing: what the law requires and what’s right for your students. You may have some disagreements around the fringes about what that needs to look like, and that’s where the negotiation part comes in, but at the end of the day, everybody wants the same outcome: what’s best for your students, what complies with the law, and whatever OCR is wanting in that particular investigation.

**Moderator.** We heard first, this morning, from Title IX Coordinators at universities. How does the general counsel’s office at your respective institutions work with the Title IX Coordinator?

**Jeff Farrar.** It depends on who your Title IX Coordinator is, and what their strengths are. They have different strengths. I started working at MTSU in March of 2011. The “big event” that several people have already mentioned here today is that April 4, 2011, was the “Dear Colleague” Letter that was the watershed moment of the Obama administration in this whole area.<sup>1</sup> I hadn’t really done any higher education work, so I just kind of grew up with the 2011 “Dear Colleague” Letter, and that was just the norm for me, but our Title IX Coordinator had been there for a while, and so at that time, the “Dear Colleague” Letter hits, and it’s all hands on deck making sure we’re doing all the training we’re supposed to do, making sure all the investigations are happening the way they’re supposed to be happening, and getting all these pieces in place. Now, I’ve been through three Title IX Coordinators, and our current one is fantastic. She has a bigger staff. It’s not a one-man, one-woman shop like it used to be, so she’s got four or five people now working for her. She’s able to focus a lot more on the Title IX issues and a lot less on the other stuff she’s got other folks helping her with, so it requires a lot less involvement. There was a time in 2012 where we two lawyers got our PowerPoints together, and we went and trained every single faculty member on campus. We went to all 80-some-odd academic departments and trained everyone that showed up to the mandatory department meetings. It was “all hands on deck” at that time, and the one person serving as Title IX Coordinator just couldn’t do it all. That’s not the case anymore. We’ve got more people, more help. I don’t do nearly as much training as I used to.

**Laurence Pendleton.** Same here. We have gone through three Coordinators, so you look at their strengths and experience. The reality is, as the legal counsel office, the general counsel is responsible for the overall legal compliance of the institution. If things go awry, if there’s something that goes on with respect to a lawsuit, or something of that nature, especially if something gets press coverage, they’re going to be looking at two people really—the president and the general counsel. In that umbrella, if that person is charged with doing a whole bunch of different things related to Title IX compliance, that includes trainings and investigative complaints, you have to work with that office, not only overseeing and making sure we’re in legal compliance, but also as a support. I have been to meetings, I have gone and met with groups of people on campus with our Title IX folks if we felt like there were issues with people cooperating in order to add an additional voice of support and increase compliance. You want to be there and bolster them. It’s in your best interest to have a very strong and respected Title IX office. We have two people as well who are working on those, and that really helps, rather than having to diffuse and other folks handling some of this.

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1. *Dear Colleague*, U.S. DEP’T EDUC. OFF. OF CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (2011).

**Moderator.** If there is an accusation of sexual harassment made against a member of the faculty or staff at your institutions, at what point does the general counsel's office become involved? It seems like you have two different processes in terms of Title IX compliance, you also have issues of liability to the university. When does the general counsel's office become involved and in what way?

**Laurence Pendleton.** Well, if you're talking about internal—let's say there's an internal complaint. MTSU as well as TSU, we have a mechanism by which people can file an internal complaint saying, "I have been a victim of discrimination under Title IX or perhaps Title VI in relation to race or national origin or Title VII in an employment context." Essentially, they will go and say, "This is what has occurred to me." They typically may contact that office, or they may speak to someone at the institution. I've received calls regarding folks who have either had a complaint or someone reported something to them. Part of the role is to make sure from your perspective the complaint is getting to the right office that should be investigating it.

Sometimes you might receive information directly. I forward that information on to that office to make sure they have been conducting an investigation and following correct procedure. If it's an OCR matter, if someone goes to the OCR and files a complaint, then our office is involved. We are dealing with the OCR directly. It's an external administrative agency at that point in time. Obviously, if they file a lawsuit related to Title IX, then our office is involved in defending the lawsuit. But in most instances, when we're talking about Title IX issues, you're talking about an internal process, an internal complaint that a Title IX investigator is investigating, and from that standpoint, you're just making sure that it's getting to that office.

We do have some time limits issues in terms of the timing of how long the investigation occurs, and we want to monitor that and touch base to make sure those investigations are coming along because the OCR looks at that. OCR will come in and say, "How long does it take you to investigate these matters?" A typical time limit is 60 days. There might be a little flexibility now in terms of how long those investigations can occur. They still have to be reasonable and equitable under your policy. My role also involves trying to support the Title IX office, so there are very different ways you can help in terms of being a reviewer. We also review things for efficiency as well, so there are various roles you can play, and at the same time, you're deferring to the Title IX person to be the principal person who is handling this matter.

**Moderator.** If an attorney from the general counsel's office comes into contact with a student, faculty, or staff member—if it seems like there is a potential danger of somebody misunderstanding your role—how can you

communicate your role to a faculty member or student that you're not their attorney? What safeguards are there in process?

**Jeff Farrar.** For us, we're not going to typically come into contact with folks in that investigatory stage – that is the Title IX Coordinator's or Title IX investigator's job. They're going to be the ones doing the face-to-face interviews. They're going to be the ones actually going out, boots on the ground, and meeting with people— not us. We may say, "You need to go meet with that person, you might want to go interview that person," but we are not going to be the one actually doing the interviews. It's few and far between that we are getting factual information from folks in our general counsel capacity as part of one of these investigations. It has happened before, and it requires the *Upjohn* letter; you make sure they know exactly what your role is, and that you're counsel for the university, and you're not their personal counsel.<sup>2</sup> But, whatever they tell you, you're going to use to benefit your client or use on behalf of your client, and they can get their own counsel and encourage them to do so if they want to or if they think they need to, and make sure that they know and understand that. It can be hard to understand for a student sitting there with you, but most of our faculty and most of our administrators understand our role a little bit better.

**Laurence Pendleton.** We just had an issue of this nature. I was communicating within the last few weeks with a student who was going through our process, and they said, "Should I get a lawyer? What should I do?" I replied, "I'm the lawyer for the institution. I cannot give legal advice. You need to confer with your folks. You can get a lawyer if you want to, but it's up to you whether or not to get a lawyer, and I'm not here to advise you one way or another." You cannot simply say, "Get a lawyer," or, "You don't need to get at lawyer," because under the policy, they have the right to an advisor, so we just want to make sure they understand what their rights are and what they can't do without telling them, "This is what you should do."

**Jeff Farrar.** It always surprises me the number of particular students who call our office thinking we are the in-house legal counsel for anybody at the university—that we are the Legal Aid Society for everyone at the university. It takes a moment to explain to them what our role is because it's nothing they're familiar with for the most part.

**Laurence Pendleton.** We want to be of assistance to students at the institution just like everyone else, so if it's run-of-the-mill types of issues that don't involve them coming after the institution, then there are organizations like Legal Aid Society and places that we refer them to. Actually, at Colorado

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2. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981).

State University, we had a lawyer on campus that was hired to represent students that was paid by student fees to represent students in landlord-tenant and various other issues not affecting the institution, so they couldn't bring this attorney in to sue us. From that standpoint, you'd be amazed by the number of students that have or have domestic issues—trust and estates, criminal issues, landlord-tenant issues that they run into, and so we tried to offer that. We don't have that at TSU, but what we can do is at least try to get students' issues into the hands of attorneys that might be able to assist them on those things while at the same time telling them from the perspective of the institution, that they need to go out and find their own attorney.

**Moderator.** There has been some discussion this morning about the standards in terms of ultimate resolution—the finding of misconduct in the Obama administration's 2011 standard (preponderance of the evidence), 2017 evidence Trump administration (clear and convincing). What standards do your universities use and why? Are you using the preponderance of the evidence standard? Are you using the clear and convincing evidence standard? Why are you using that standard?

**Jeff Farrar.** For us, from day one, it has been in place that all student disciplinary matters were preponderance of the evidence. So, students drinking in their residence halls—preponderance of the evidence. So, when we received the 2011 “Dear Colleague” Letter that said, “Use the preponderance of the evidence standard,” we were already doing that. We get the additional liberty with the 2017 Letter to be flexible, adjust if you want to, make it clear and convincing if you want to, but we were already using preponderance, and we weren't going to change everything to clear and convincing.

**Laurence Pendleton.** It's just not an issue. For both MTSU and TSU, we're under the umbrella of the Tennessee Board of Regents. There were policies that the institutions followed including, with respect to student conduct and other areas, where we were both following the preponderance of the evidence standard. As such, Title IX again came around and started talking about and addressing that issue. I'm going to be recommending at this point in time that we won't need to do anything until they say we need to. The guidance that came out is not telling you that you have to change, obviously, it's giving you an option. There's no reason, in my opinion, to deviate from it. In fact, I think that you're going to have a problem if you have some things that are handled with the clear and convincing standard and other areas where it's preponderance of the evidence. I think from a consistency standpoint, you want to maintain one way or another whatever you're going to decide to do. If you decide to go to clear and convincing on Title IX, then you may want to look at doing that across the board for everything else.



The case in the guidance, *Doe v. Brandeis*, that speaks a little bit to the use of the standards of proof. In that case, they had a clear and convincing standard for most of their student misconduct issues, but for Title IX, they had preponderance of the evidence standard.<sup>3</sup> Now, it's cited in such a way that people thought that the court had ruled against them on that issue when, in fact, what really occurred was that they didn't follow the policy. More specifically, they didn't follow the preponderance of the evidence standard, but the court did note that it was troublesome that they had a different standard related to that. So, I would highly recommend that whatever an institution decides to do, whether or not it's utilizing clear and convincing or preponderance of the evidence, you do it across the board.

**Moderator.** Is having the choice between the two standards beneficial to universities, or is having the choice just really introducing an increased danger of liability for universities?

**Laurence Pendleton.** I think, from a liability standpoint, there is deference given to the university regarding the policies and what the policies say. So as long as you are following your policies consistently. It is easy to say, "This is what we are required to follow," but even if you say, "We are going to give you a choice," that choice needs to be manifested in a policy. And as long as you're not going back and forth, vacillating between different standards for different things, I think you're going to be fine. I would also recommend that you have the standard reflected in your written policy, so that folks are on notice about what that standard is.

**Moderator.** I wonder if you could walk us through a little bit of the mechanics of an investigation. So, if there is an accusation made, what are the mechanics of the investigative processes at your universities?

**Jeff Farrar.** We have trained our responsible employees that once that complaint comes in, once you learn of it, you kick that information over to one of your Title IX Coordinators or Deputy Coordinators, and that gets the process rolling. You give the warnings or the statements and say, "Whatever you tell me I have to tell the Title IX Coordinator and she may have to take some action." Once it gets to the Title IX Coordinator and she determines that an investigation is going to go forward, notice is given to both parties. There are some requirements in the 2017 Dear Colleague Letter for what needs to be in that notice—timing and things like that.<sup>4</sup> Notice is given to the complainant of his or her rights as you move forward. Then there is a meeting, written statements are gathered from the complainant, and evidence is gathered from the complainant, whatever he or she has, whoever their

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3. *Doe v. Brandeis*, 177 F.Supp.3d 561 (2016).

4. *Dear Colleague*, U.S. DEP'T EDUC. OFF. OF CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (2017).

witnesses are. This is not necessarily a linear process, because you are always circling back. People tend to come back through, or you learn new information that requires you to go back and talk to the complainant again. Throughout the course of the investigation, the complainant may be talked to two, three, four, five times, depending on how the investigation flows.

Based on the information that the investigator learns from that initial contact, if it looks like what the complainant says is true, if there is potential for a policy violation, you start moving forward, interviewing your other witnesses and interviewing the respondent. It is this evidence gathering that takes a kind of circular, amorphous shape, and at some point, you reach the end of the road where you have gathered all of the evidence that there is, or that you can find, or that you can actually get. At our University, the investigator is then charged with writing a report of their investigation, summarizing everything that they have learned, the documents they reviewed, what each party gave them, et cetera. Then, the investigator recommends a disposition, whether it is that the accused be found responsible or not responsible, and recommends a sanction. That is then approved at a higher level, typically by one of our vice presidents, and any party that doesn't like that decision gets to appeal it. The appeal goes to our president. Depending on what the outcome is, that's when the potential for a hearing kicks in. With Tennessee's Administrative Procedures Act, if you're dealing with a suspension or expulsion of a student or termination of an employee, the Act kicks in, and you have an Administrative Procedures Act hearing unless, of course, the student or employee requests an institutional hearing.<sup>5</sup> That's the 5,000-foot view.

**Laurence Pendleton.** We are very similar to that process as well.

**Moderator.** Some of what we're looking at here is a crime, so how does law enforcement become involved? At what point is the university contacting law enforcement? What is the communication with students who bring allegations to a Title IX Coordinator about law enforcement's potential involvement?

**Laurence Pendleton.** Often, we see that it starts with the criminal, so there might have been reported to the police, and then the police are already investigating it. The police then provide information to the institution and we look into it. The university has had situations where a student started off in the criminal process, and for whatever reason, was not comfortable moving forward with the criminal investigation, but was comfortable moving forward in the Title IX process and investigation. If the university gets the complaint first, then we have to look at it. It's up to the student in terms of moving

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5. Tenn. Code Ann. § 4-5-202.

forward with criminal prosecution. There is a lot of coordination that occurs between Title IX and the police, but that's typically flowing from the police to the Title IX person in terms of reporting what is going on. What you don't want to do is put the complainant in a position where they don't want to go forward with prosecution of something, but they feel like they are being pressured to do so. Our main goal under Title IX is for us to investigate complaints from a Title IX perspective that are brought to us in that manner.

**Jeff Farrar.** At MTSU, the Title IX coordinator reviews essentially all of the MTSU police reports—we have our own police department. The Title IX Coordinator will look those up when the police department releases the reports and if it effects Title IX, that will kick her into gear, and she will start going through the Title IX process. It is largely up to the complainant how far the university goes down the Title IX process, but we will at least get her started down the path. However, the information does not necessarily go the other direction, at least not without the consent of the complainant. Sometimes the complainant will come straight to the Title IX Coordinator and tell her what happened. We have trained the Title IX Coordinator and the responsible employees once the complainant comes to them, to say, “Just so you know, we can also file with law enforcement, if you want to. If you want to go file a police report, we'll help you do that. We'll call the police.” If the complainant says “Yes,” they do that. If the complainant says “No,” then they don't. And we don't override the complainant's wishes and file a police report where they don't want us to.

**Moderator.** Professor Penrose also touched briefly upon the interaction here with FERPA in terms of protections under the Family Educational Rights and Privacy Act. In thinking about the intersection of Title IX and FERPA, what are the issues on the table for the general counsel's office with regard to those two provisions and their intersection with allegations of sexual harassment and sexual assault on college campuses?

**Laurence Pendleton.** From a FERPA perspective, even beyond Title IX, one of the things that we continue to train and advise people on is that FERPA requires that these students' records remain confidential. That means even within the institution. Only people that are in a need-to-know position can maybe have access to a student's records. There are going to be records that you may be in a need-to-know position on, but other records of a student you wouldn't—you're not in a need-to-know position. So, as it relates to issues involving Title IX, there are certain need-to-know individuals on the campus in that position. There are others that aren't, and they shouldn't be involved, or seeking to get involved, or seeking to have access to those records. You want to make sure that you enforce FERPA and advise people on it, answering questions and about who is in a need-to-know position in relation to Title IX and who is not.

The general counsel is obviously in a need-to-know position relating to Title IX. So, in your coordination with the Title IX office you can look at and try to identify things, but there are probably things that we are really not in a position to know. It's really about the Title IX Coordinator investigating these matters and looking into the incident. As the investigation moves on, we get into the appeal process and review process, and that's something that we look at. So, our office tries to enforce Title IX and we try to enforce FERPA with regard to the confidentiality aspect of the information that's flowing. If someone reveals information to us, we have an obligation to move that information into the Title IX office for an investigation, where they are in a need-to-know position as it relates to educational records involving what may have occurred to a student under Title IX in the institution.

Again, it is trying to emphasize confidentiality and making sure that only certain people are aware of certain things within an investigation. We do run into issues also involving reports and what we want to put in reports. We sometimes use initials standing in for names, because the reports are given to the complainant and the respondent in our investigatory process. We want to honor the FERPA confidentiality rights of the students who are participating in our investigation, so those are some of the other things that we examine in each individual case about what we could potentially reveal in the context of the report.

**Jeff Farrar.** Once you get to the hearing coming out of the Title IX matter, your due process concerns become a whole lot more pronounced. Typically, when we have an APA hearing, our office gets involved and we become the actual advocate for the university. During the APA hearing, first thing, I subpoena MTSU's own records from MTSU. That way I can get into FERPA and have the exception where I give everyone notice of the subpoena. Now, if you're named in that record, you get notice that your record has been subpoenaed and you get the opportunity to object. Once you work through that process then the record can be used by the parties to that proceeding and that way everyone has the same information, everyone's singing from the same sheet of music.

**Audience.** I've had, on a number occasions, cases against school districts. I've witnessed the argument by defense counsel that ended up winning, the aggrieved party withstanding, to assert a protective order to block the production of the educational records under FERPA. Where sometimes the schools say that they're the party responsible to come forward and assert that motion—or in another case the school said, "It's not our responsibility to stand up for the citizen," and I had the motion intervened by that child and their father in federal court. If you look in the language of FERPA, it actually states that the Department of Education is responsible for bringing forth a motion to try to block the production of those records. Then, when we get

into the case law, there's actually a lot of ambiguity about who is proper authority to bring the motion forward. I've seen case law where it says it should be the student, then case law where it says that the school may be the party. Then, some of the language that says it shouldn't be the school. When you send out the notice, the notice should only be to put the student on notice. It should not even contain language to apprise the parties of their rights to a certain degree because the school can't advise the student. So, I am curious what your opinion is on that. Do you believe that you, as counsel for a school, have the right to intervene on behalf of a student to try to block that, or do you think it is up to the student, as a party?

**Laurence Pendleton.** Typically, we get all kinds of subpoenas for student educational records. Under FERPA, what you're required to do prior to releasing, unless it's the type that says you cannot let the student know, our obligation is just to notify the person whose records are affected. We say, "We've received a subpoena for your educational records. We are giving you a head's up, and our plan is to release them on 'X' date." This gives them an opportunity to go and to assert, "I don't want the school to release these records and here's why." And then, to go to the court and do the same. I've never been in a situation where we felt like we really had a dog in a fight with respect to the records. We get things involving divorces, involving all kinds of proceedings where they're seeking student educational records, and we're just there as a custodian of those educational records to then provide them pursuant to a subpoena. But prior to that time, to notify the party affected and give them a reasonable opportunity to object and to take whatever action they need to. And then to take action from the context of the court that has jurisdiction over them.

**Moderator.** I'm curious about the process in terms of attorneys' engagement in investigation outside of attorneys' engagement in hearings. Do your universities allow attorneys to be involved in hearings? If so, in what way are attorneys allowed to be involved in hearings, and why is that the approach with regards to attorney involvement in your investigations?

**Jeff Farrar.** I think at both of our institutions, any student, or employee for that matter, is allowed to have an advisor during each step throughout the process. That advisor can be the mom or the dad. That advisor can be a friend. Or, that advisor can be an attorney. That advisor's role is going to generally be limited to advising only.

**Laurence Pendleton.** Advising their client.

**Jeff Farrar.** Advising their client only, not speaking on their behalf. Until you get to an APA hearing. Once it goes into an APA hearing phase, the attorneys can assume an advocacy role. And because the attorneys can

assume an advocacy role, that's where Laurence or I will get involved, and we'll assume an advocacy role as well on behalf of the institution if necessary.

**Moderator.** What are the most significant challenges for an attorney with a college or university in a general counsel's office with regard to meeting the dictates of Title IX?

**Laurence Pendleton.** One of the things I've seen over the years is about supporting the Title IX office. Supporting the Title IX investigators, the coordinators, making sure that they are respected, and that people are following what they are doing and accomplishing on behalf of the institution. I think that's become a key thing on campus. Support the Title IX office—show people that your office supports that office and what they're doing, and I think that goes a long way toward helping.

Another thing is that you'll get people wanting to weigh in. It can be the Department of Athletics or other folks that want to weigh in or get involved or try to mediate or resolve things themselves. It's key to make sure that everyone understands they need to honor the process that the institution has established, whether it's the football coach or basketball coach or you have someone in some other office that's looking to jump in, that they understand that it's not their role. They need to understand the university's processes and policies. I look at the numbers in terms of the people attending the training sessions. Are we getting the level of cooperation, the level of attendance that we need? We know we are not going to get every single person to participate, but we should be at fairly high numbers, and when the OCR comes calling, we don't want them to look at the number of missing staff as low. You want to make sure the university is in a position where you can say, "You know, we have a reasonably high attendance at these training sessions," and that shows that we as an institution take Title IX compliance seriously.

**Jeff Farrar.** I think, for the most part, the folks on our campuses have good hearts, and they want to do what's right, and they want to help. And so, through training, you have to make sure you guard against them trying to help to resolve something and investigate something themselves, rather than getting it over to Title IX or to the folks who can actually help, or to counselling, or to student health services or a place like that and someone who can help. If people know what the whole process is, and they know what safeguards are built in there to make sure people get the help that they need, then they don't generally take that upon themselves. So, make getting the word out involve demonstrating exactly what you have built in, what the resources are that are there, and then people can feel good about getting the information over to the Title IX Coordinator.

**Laurence Pendleton.** This is something I saw more when we were doing more training. Now, the Title IX folks, are doing it, but there's always that balance. On one hand, you want to educate people and talk about sexual harassment and what constitutes sexual harassment. On the other hand, you're really trying to say to them, "We're not looking for you to make that call. If someone comes to you and says, 'I think I've been harassed,' or, 'This has occurred,' you're trying to act in good faith." So, they're trying to say, "I read the policy, and I don't think that constitutes sexual harassment." But that's not for them to decide. What they're required to do is to report that on to the parties that are responsible, that have the expertise to decide and to make sure that we are following our process as a campus community that is trying to come into compliance and trying to protect the campus community.

I always give one quick example that I had at Colorado State University. We had a student who was also an employee, and they were doing office shuffling, and her supervisor told her, "We are moving your office right here next to Bob's office." The student responded, "Well, I don't want my office next to Bob's office, because he raped me at a party last week. But I don't want you to do anything about it. I'm getting counseling. I'm dealing with it. And in fact, if you report this on, I'm going to drop out of school." Fortunately, the supervisor knew enough to go to our Title IX people. They came to me and said, "You know, here's what's happened, but she doesn't want us to do anything about it, and this person's already been victimized, and we can't really do anything about it, you know, and we just kind of wanted to give you a heads up." And so, I said, "Well no, we can't. You have to remember that Title IX is about the entire campus community." Now, while she had reported it and said she didn't want us to do anything about it. She had started a whisper campaign with respect to this person. So, everyone in the office is looking at this guy saying, "You're a rapist." He's wondering why people are looking at him strangely in the office. And so, we have an obligation not only to her, but to the accused, to the respondent, to investigate and determine what happened, and take appropriate action.

Also, if we hadn't done anything, and let's just say the accused had done something to her and he did something else to another student or someone on campus, it wouldn't be a legal defense for us to say, "Well, the original victim didn't want us to do anything about it." Because we have an obligation to the entire campus community. So, what we said was we'd work with her, we'd make sure she was in counseling, but we need to talk to her and tell her about her obligation because we care not only about her, but also about the entire campus community. From there, we moved forward with the investigation. Come to find out, unfortunately, she had been sexually assaulted, but not by Bob, by someone who didn't go to the school. That person ultimately was arrested. So, you see how that process plays itself out, for one, giving her some peace of mind and understanding about what occurred, but also clearing

this gentleman who had been accused—people were thinking he had engaged in the horrible conduct—addressing that. So that really lays out our responsibility and what we're seeking to achieve through this investigation.

**Moderator.** Please join me in thanking Mr. Pendleton and Mr. Farrar.