



November 12, 2021

**Marietta College  
Title IX Team Training  
(Day 2)**



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**Disclaimer #1**



- Change is constant in this field.
- Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations in light of the dynamic nature of requirements.

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**Disclaimer #2**



- As you recall from last time, the scenario we're using is entirely fiction.
- Your parties and witnesses have been obstructed to play the parts in certain ways, and under no circumstances are they to make it easy for you.
- You are not allowed to retaliate against your colleagues for participating in this mock hearing.  
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## Posting These Materials



- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

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## Aspirational Agenda



- 1:00-1:45 – Asking Good Hearing Questions
- 1:45-2:15 – Hearing prep in small groups
- 2:15-2:50 – Questioning of Complainant
- 2:50-3:00 – Break
- 3:00-3:35 – Questioning of Respondent
- 3:35-4:05 – Questioning of Sarah
- 4:05-4:30 – Making Good Decisions
- 4:30-5:00 – Deciding Our Case

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## The Big Picture: Where Do You Fit In?



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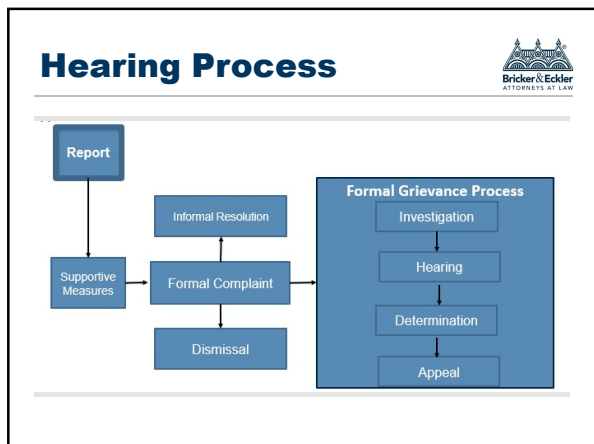
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- ### Foundations
- Respondent is presumed not responsible for a violation
  - The decision as to whether a Respondent is responsible for a violation will be based on a preponderance of the evidence
  - Knowingly submitting false statements is a violation of University policy
  - Both parties have access to supportive measures
  - Retaliation is prohibited

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**LIVE CROSS-EXAMINATION:  
Theory and Practice**

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## Cross Examination



Traditionally, cross examination questions are those that try to elicit "yes" or "no" answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

*There is no requirement that questions be asked in this manner.*

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## Cross Tools: What are the goals of cross-examination?



- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by **impeachment of witness** being questioned.
- Minimize the other party's case by **impeachment of other witnesses** through the witnesses being questioned.
- Reduce **confusion and seek truth**.

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## Cross Tools: Impeachment 1 of 5



- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

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**Cross Tools: Impeachment 2 of 5**



- Perception and Recall
  - What is the witness's perception of the facts?
    - Has Time impacted recall or ability to remember clearly?
    - How many times has the witnesses talked to the other party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Is the expert limited by the information provided to inform the expert's report?
  - Does the witness form a conclusion without knowing certain information?

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**Cross Tools: Impeachment 3 of 5**



- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by \_\_\_\_ at the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: Determine whether the person is not speaking from personal knowledge.

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**Cross Tools: Impeachment 4 of 5**



- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?

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### Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
  - Example: Missing receipts...
    - You testified that you were drinking with the Complainant on the night of the incident?
    - You testified that you paid for the alcohol?
    - You paid with your credit card?
    - But you did not provide the receipt to the investigator?
    - You didn't even provide access to your credit card statement?

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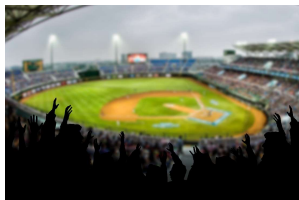
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### ISSUES OF RELEVANCY: Not Rules of Evidence




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### Relevancy 1 of 2



- Per 34 C.F.R. 106. 45(b)(6)(i):
  - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**” (30319)

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## Relevancy 2 of 2



Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

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## What is Relevant? 1 of 3



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**” (30343)

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## What is Relevant? 2 of 3



Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
  - **Preponderance of the evidence:** a fact is more likely than not to be true (30373 fn. 1409)

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### What is Relevant? 3 of 3



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

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### Relevancy



**Recipient** must ensure that "all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker)." (30331)

- A **recipient** may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

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### Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

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**Relevancy: Policy's Rape Shield for Complainants**



- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant **UNLESS**
  - Offered to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent

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**Relevancy: Rape Shield Law - Respondents**



- Rape shield protections **do not apply to Respondents**
- "The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be."

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**Relevancy: Treatment Records**



"[C]annot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent** to do so for a grievance process under this section."

Section 106.45(b)(5)(i) (see also 30317).

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**Relevancy: Legally Privileged Information 1 of 2**



Section 106.45(b)(1)(x):

A recipient's grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

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**Relevancy: Legally Privileged Information 2 of 2**



Other typical privileges recognized:

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

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**Relevancy: Improper Inference**



When parties do not participate:

- "If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions." 34 C.F.R. 106.45(b)(6)(i).

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**Relevancy: No Participation?**



When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- Regulatory prohibition on consideration of such statements is no longer being enforced by ED and has been vacated by a court in Massachusetts

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**Relevancy: No Reliance on Prior Statements - Theory**



If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

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**Relevancy: When Parties or Witnesses Do Not Participate**



The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

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**Relevancy: No Reliance on Prior Statements – SANE and Police Reports**



- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

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**Issues of Relevancy**



"[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties." (30294)

BUT

"[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient's training materials." (30293)

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**Advisors: Thought Process**

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**Advocating for your party in the Hearing 1 of 7**



Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

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**Advocating for your party in the Hearing 2 of 7**



Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

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**Advocating for your party in the Hearing 3 of 7**



Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

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**Advocating for your party in the Hearing 4 of 7**



Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

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**Advocating for your party in the Hearing 5 of 7**



The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

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**Advocating for your party in the Hearing 6 of 7**



The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

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### Advocating for your party in the Hearing 7 of 7



Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

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### How Do You Choose Questions?

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### What Don't You Know?



Decision-makers: If you need to know it to make a determination, you have the obligation to ask the question.

Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

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### What Do You Know?



Decision-makers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.

Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the decision-maker's mind.

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### Disputed Facts?



Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker where the other party's story doesn't make sense, by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

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### Small Groups



- Chairs for when Complainant testifies (+ Respondent Advisor)
  - Amanda, Jenn, Josh, Suzanne
- Chairs for when Respondent testifies (+ Complainant Advisor)
  - Ellen, Evan, Greg, KJ
- Chairs for when Sarah testifies
  - Andy, Caprice

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## Make Your Plans



- Decision-makers:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

It is OK for Decision-Makers and Advisors to compare in our groups.

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## Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
  - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
  - Etc.

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## Mock Hearing



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## Reaching a Decision

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## Reminders (1 of 3)

- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

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## Reminders (2 of 3)

- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

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### Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
  - Don't penalize a party for the questions no one asked them.

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### Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

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### Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
  - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly “50-50,” the tie goes to the Respondent.

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**Making credibility decisions**



The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

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**Resolving Disputes (1 of 4)**



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

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**Resolving Disputes (2 of 4)**



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

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### Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

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### Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

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### Making OUR Decision



- Three questions:
  - Did sexual intercourse occur?
  - Did Tessa give consent?
  - Was Tessa's consent valid?
- For each question:
  - List the evidence for and against
  - Which evidence do you weigh more heavily?
  - Which way do you rule, and why?

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### If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
  - Example: Michael brought Tessa a glass of punch and saw her drink it.
- Make a list of what facts are disputed.
  - Example: Michael says he did not see Tessa drink wine before the parties; Tessa said she was sipping it.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

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### Debrief!

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