

Complaints of Sex Discrimination

Thompson Coburn LLP

Title IX Training Series | Session 2 | July 2024



Thompson Coburn LLP

- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, Birmingham, and Washington, D.C.
- **Higher education practice** provides legal counsel, compliance, policy and training services to colleges and universities.
- Our attorneys routinely assist institutions to understand and comply with Title IX and other non-discrimination laws.



Purpose of Training Series

- The new Title IX rule, effective August 1, 2024, creates new standards by which postsecondary institutions must address potential Sex Discrimination.
- This Title IX Training Series is designed to provide foundational training to those individuals who will help to administer this required process, including Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.
- TC's Title IX Training Series on the 2020 Title IX rule is available here: [Title IX Training Series – YouTube](#)



Use of Training Series

- Institutions of higher education are welcome to use this foundational training series at their discretion.
- TC also is available to prepare custom Title IX training sessions, hearing simulations, and other assistance with Title IX matters (contact [Aaron Lacey](#) or [Scott Goldschmidt](#)).
- Custom training will be important to cover institutional policies, and to accommodate state and municipal requirements, as well as the impact of litigation.



Curriculum for Training Series

The foundational training series includes the following four sessions:

An Introduction to the 2024 Title IX Rule

Complaints of Sex Discrimination

Complaints of Sex-Based Harassment w/Students

Pregnancy and Related Conditions



The Big Picture

Sex Discrimination Policies and Procedures: Institutions are generally obligated to designate a Title IX coordinator, adopt a nondiscrimination policy, publish grievance procedures for the resolution of complaints alleging sex discrimination, train employees, and develop recordkeeping policies. 34 CFR 106.8.

Responding to Complaints of Sex Discrimination: In response to complaint of possible sex discrimination (excluding alleged sex-based harassment involving a student party), institutions must follow grievance procedures that comply with 34 CFR 106.45.

Responding to Complaints of Sex-Based Harassment Involving a Student: In response to complaint of possible sex-based harassment involving a student, institutions must follow grievance procedures that comply with 34 CFR 106.45 and 106.46.



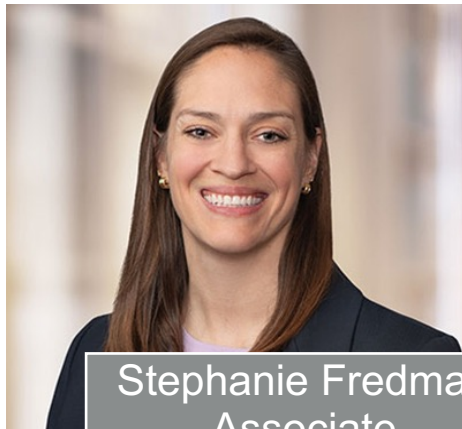
Session Presenters



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Syllabus for this Session

The Complaint

The Grievance Process

Appeals

Serving Impartially





The Complaint

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The Complaint

- **Complaint** means an **oral** or **written** request to the school that objectively can be understood as a request for the school to investigate and make a determination about alleged discrimination under Title IX.



The Complaint

- **Who can make a complaint of sex-based harassment?**
 - A complainant;
 - An authorized legal representative with the legal right to act on behalf of a complainant; or
 - The Title IX coordinator.
- **Who can make a complaint of sex discrimination other than sex-based harassment?**
 - The individuals listed above;
 - Any student or employee of the school; or
 - Any person other than a student or employee who was participating or attempting to participate in the school's education program or activity at the time of the alleged sex discrimination.



Complaint by Title IX Coordinator

- The Title IX coordinator must make a fact specific determination about whether to initiate a complaint in the:
 - Absence of a complaint;
 - Withdrawal of any or all of the allegations in a complaint; **or**
 - Absence or termination of informal resolution.



Complaint by Title IX Coordinator

- In making this determination, the Title IX coordinator must consider, at minimum, the following eight factors:
 1. the complainant's desires;
 2. the complainant's reasonable safety concerns;
 3. the risk of additional acts of sex discrimination or retaliation if a complaint is not initiated;
 4. the severity of the alleged sex discrimination or retaliation;
 5. the age and relationship of the parties;
 6. the scope of the alleged sex discrimination or retaliation;
 7. the availability of evidence; and
 8. whether the school could end the conduct and prevent its recurrence without initiating its grievance procedures.



Complaint by Title IX Coordinator

- After considering the eight factors, the Title IX coordinator may initiate a complaint if they determine that the conduct as alleged:
 1. Presents an imminent and serious threat to the health or safety of the complainant or other person, or
 2. That the conduct as alleged prevents the school from ensuring equal access on the basis of sex to its education program or activity.
- The Title IX coordinator must notify the complainant prior to initiating a complaint and address reasonable concerns about the complainant's safety or the safety of others.



Dismissing a Complaint

Basis for
optional
dismissal



The school is unable to identify the respondent following reasonable efforts to do so.

The respondent is not participating in the school's education program or activity and is not employed by the school.

The complainant voluntarily withdraws some or all allegations and the school determines that without the withdrawn allegations, the conduct that remains alleged would not constitute sex discrimination even if proven.

The school determines the conduct alleged in the complaint, even if proven, and after making reasonable efforts to clarify with the complainant, would not constitute sex discrimination under Title IX.



Dismissing a Complaint

Notification

Following a dismissal, a school must promptly notify the complainant of the dismissal and, if the respondent has been notified of the complaint, the respondent.

Appeal

A school must provide the parties with an opportunity to appeal a dismissal.

Supportive Measures

In connection with a dismissal, a school must offer supportive measures to the complainant and, if the respondent has been notified of the allegations, to the respondent, as well.

Remediation

Schools must ensure that the Title IX coordinator takes other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.



Consolidating Complaints

- Schools can consolidate complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances.
- If one of the complaints to be consolidated is a complaint of sex-based harassment involving a **student** complainant or **student** respondent, the school would be required to follow additional grievance procedures.



Special Considerations

- **Who is the respondent when the complaint alleges discrimination by the school?**
 - There is no respondent.
 - Continue with the grievance process in all other respects.
- **Do institutions have to change their policies as a supportive measure while the grievance process plays out?**
 - No. Changing your policies is not required as a supportive measure but may be necessary at the conclusion of the grievance process, depending on the determination.





The Grievance Process

TITLE X
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Grievance Process Requirements

Equitable Treatment	Treat complainants and respondents equitably.
Conflicts of Interest	Require that any person designated as a Title IX coordinator, investigator, or decisionmaker not have a conflict of interest or bias; however, the decisionmaker may be the same person as the Title IX coordinator or investigator.
Presumption Against Responsibility	Include a presumption that the respondent is not responsible for the alleged conduct until a determination is reached.
Reasonable Timeframes	Establish reasonably prompt timeframes for the major stages of the grievance procedures.
Protection of Privacy	Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a school's grievance procedures.
Relevancy & Credibility	Require an objective evaluation of all relevant evidence and provide that credibility determinations not be based on status as a complainant, respondent, or witness.
Exclusion of Impermissible Evidence	Exclude specific categories of evidence, and questions seeking that evidence.



Major Stages

“Reasonably Prompt”

Evaluation

Investigation

Determination

Appeal



Notice of Allegations

- The notice must include:
 - The school's grievance procedures, as well as any informal resolution process;
 - Sufficient information to allow the parties to respond to the allegations, including the identities of the parties, the alleged sex discrimination, and the date and location of the alleged conduct, to the extent that information is available;
 - A statement that retaliation is prohibited; and
 - A statement regarding access to the relevant and not otherwise impermissible evidence.
- If, during the investigation, the school decides to investigate additional allegations, it must provide the parties an updated notice.



Investigations

Burden of investigation

Ensure that the burden is on the school - not the parties - to gather sufficient evidence for a determination.

Equal opportunity

Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence.

Evidentiary determinations

Review all evidence and to determine what evidence is relevant and what evidence is impermissible regardless of relevance.

Review of evidence

Provide each party with the relevant evidence that is not impermissible (or a description) and a reasonable opportunity to respond.

Credibility determinations

Provide a process that enables the decisionmaker to adequately assess credibility of parties and witnesses.



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Single Investigator Model

- The rules allow for a single individual to serve as the Title IX coordinator, investigator, and decisionmaker or any combination of the three.



Issues of Relevance

- **Relevance** – related to the allegations of sex discrimination under investigation as part of the grievance procedures.
 - Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred.
 - Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.



Issues of Relevance

- **How can an investigator summarize relevant evidence?**
 - Have a clear record of steps taken during the investigation.
 - Consider summarizing:
 - The alleged incident;
 - Parties involved and witnesses identified;
 - Key factual findings;
 - Relevant evidence; and
 - Specific policy alleged to be violated.



Impermissible Evidence

Privileged
Evidence

Treatment
Records

Sexual
Interests or
Prior Conduct



Privileged Evidence

- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the school's jurisdiction.



Treatment Records

- A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent for use in the school's grievance procedures.



Sexual Interests or Prior Conduct

- Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove:
 1. that someone other than the respondent committed the alleged conduct; **OR**
 2. consent to the alleged sex-based harassment based on specific incidents of the complainant's prior sexual conduct with the respondent.
- The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.



Party Access to the Evidence

- The school can provide the parties:
 1. Access to the relevant and not otherwise impermissible evidence; **OR**
 2. An accurate description of this evidence with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.
- In either scenario, parties must be given the opportunity to respond.



Determinations

Evidentiary standard

Use the preponderance of evidence standard, unless the school uses the clear and convincing standard in all other comparable proceedings.

Notification of Determination

Notify the parties of the outcome of the complaint and the process and basis for appeal, if applicable.

Remediation

As appropriate, require the Title IX coordinator to implement remedies for complainants or other impacted persons and to take other appropriate steps to ensure that sex discrimination does not continue or recur.

Procedural Protection

Follow the school's grievance process before the imposition of any disciplinary sanctions against a respondent.

Discipline

Not discipline a party, witness, or others participating in a grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the school's determination of whether sex discrimination occurred.



When Credibility is at Issue

- Schools must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess their credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.



Appeals



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Appeals of Dismissals

- Dismissals may be appealed on the following bases:
 - Procedural irregularity that would change the outcome;
 - New evidence that would change the outcome and that was not reasonably available when the dismissal was made; and
 - The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.
- Parties must be provided a reasonable and equal opportunity to make a statement in support of or challenging the outcome.



Appeals of Dismissals

When a complaint is dismissed, a school must, at a minimum:

- Offer supportive measures to the complainant as appropriate;
- If the respondent has been notified of the allegations, offer supportive measures to the respondent as appropriate; and
- Take other prompt and effective steps, as appropriate, through the Title IX Coordinator to ensure that sex discrimination does not continue or recur within the school's education program or activity.



Appeals of Determinations

- Schools must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.





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Key Concepts

- Treat complainants and respondents equitably.
- Understand the presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of grievance procedures.
- Understand the standard of evidence.
- Do not allow, rely upon, or otherwise use impermissible evidence.



Serving Impartially

- The **Title IX Coordinator, investigators, and decisionmakers** must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.



Serving Impartially

- **Decisionmakers** must objectively evaluate all relevant evidence—including both **inculpatory** and **exculpatory** evidence.
- They must also ensure that credibility determinations are not based on a person's status as a complainant, respondent, or witness.



Serving Impartially

- **What is inculpatory and exculpatory evidence?**
 - Inculpatory evidence shows or tends to show respondent's responsibility.
 - Exculpatory evidence shows or tends to show the respondent is not responsible.



Serving Impartially

- **How can someone serve without bias or a conflict of interest?**
 - Avoid prejudgment of facts at issue, parties, or witnesses.
 - Avoid inferences based on party status.
 - Avoid sex stereotypes.



Serving Impartially

- **How can a school ensure that its Title IX team remains free of bias and conflict of interest?**
 - Ensure adequate training and understanding of bias and conflict of interest.
 - Encourage/do not penalize for disclosing bias or conflict of interest.
 - Establish a process to review and evaluate potential bias or conflict of interest.



OCR Resources



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OCR Resources

- Fact Sheet
 - <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf>
- Summary of Key Provisions
 - <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>
- Resource for Drafting Policies
 - <https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>
- Policy Guidance Portal
 - <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>





TC Extra Credit

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Higher Education Resources Page

HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

COMPLIANCE RESOURCES



COMPLIANCE RESOURCE: FINANCIAL RESPONSIBILITY GUIDE

We provide a guide to the reporting obligations under ED's new Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit Rule.



COMPLIANCE RESOURCE: TCPA AND OTHER TELEMARKETING RULES

This guide helps colleges and universities understand TCPA regulations for text messages and calls to students, ensuring permission is obtained for promotional messages.



COMPLIANCE RESOURCE: A DESK GUIDE FOR THE 2023 FINAL FINANCIAL VALUE TRANSPARENCY & GAINFUL EMPLOYMENT RULE

We have developed this Desk Guide to assist institutions as they contemplate compliance with the final version of the GE rule.



Webinars and Training Series

HigherEdReg Rundown
ED's New Financial Responsibility Reporting Requirements

Higher Education
Thompson Coburn LLP
75 videos 854 views Last updated on Jun 17, 2024

Play all Shuffle

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- Responding to Student Borrower Defense to Repayment (BDR) Claims: 2023 Edition**
Thompson Coburn LLP • 3.9K views • 9 months ago



Compliance Materials



Financial Responsibility Reporting Guide (2024)

Last Updated: May 27, 2024

On July 1, 2024, the U.S. Department of Education's new *Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit* rule takes effect (the "2024 Rule").¹ The 2024 Rule implements a wide range of changes relating to financial responsibility, including the significant revision and expansion of the reporting obligations at 34 CFR § 668.171, which require institutions to report certain "triggering events" to the Department.² These reporting requirements are meant to alert the agency that an institution "may not be able to meet its financial responsibilities."³ If an institution fails to report a triggering event within the requisite timeframe, the Department may take administrative action, to include determining that the institution is not financially responsible, or initiating a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs (the "Title IV Programs").⁴ If an institution reports a triggering event (or the Department otherwise becomes aware that an event has occurred), the Department may determine that the institution is not financially responsible and take various administrative actions, depending on the nature and significance of the event reported. Institutions should review the 2024 Rule carefully for additional information regarding the consequences of reporting triggering events and the opportunities to mitigate such consequences.

Below, we provide a guide to the reporting obligations under the 2024 Rule, as set forth in the regulatory text. Because the 2024 Rule, like the existing financial responsibility reporting framework, distinguishes between a Mandatory Triggering Event and a Discretionary Triggering Event, we have divided the chart to identify which triggering events fall into each category. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to PSAF@npsd.gov.⁵ The Department has not specified any required form or content for the notices. However, in a dated [Q&A document](#) issued by the prior administration, the Department offered recommendations.⁶

On May 17, 2024, the current administration posted a [Q&A website](#) that addresses certain aspects of the new reporting requirements implemented by the 2024 Rule. We strongly encourage institutions to review the Department's Q&A website and any other relevant guidance to determine, among other things, whether the agency is interpreting the regulatory text in a manner that may expand or otherwise modify the reporting obligations as described in the 2024 Rule (and detailed in the chart below).

- 1 The final 2024 Rule was published in the Federal Register on October 31, 2023. See 88 Fed. Reg. 74568 (Oct. 31, 2023). It revises the financial responsibility regulations at 34 CFR §§ 668.23, 668.171, 668.174, 668.175, and 668.176. The 2024 Rule also revises the financial responsibility factors applicable to institutional changes in ownership, currently in § 668.15, moving them to § 668.176.
- 2 Triggering events, as explained by the Department, are external events or financial circumstances that may not appear in an institution's annual financial statements and are not yet reflected in the institution's calculated composite score. See 88 Fed. Reg. 74569 (Oct. 31, 2023).
- 3 88 Fed. Reg. 74568 (Oct. 31, 2023).
- 4 34 CFR § 668.171(f)(2) (July 1, 2024).
- 5 The Department established this email address for reporting purposes in guidance issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the rule (the "2016 Rule"). As of May 27, 2024, the Department has not issued any further guidance concerning how to report triggering events.
- 6 As of May 27, 2024, the Department has not issued any further guidance concerning the form or content of notices of triggering events.

A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule

Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the final rule

November 2023



REGucation (our blog)



Title IX (Joe's Version) Dropped This Morning

👤 Scott Goldschmidt 👤 Stephanie Fredman 📅 April 19, 2024



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CONTRIBUTORS

We interrupt your Tortured Poets Department** listening party to inform you that the Biden administration has released its long awaited [Title IX rules](#). The new rules, published this morning in unofficial form, will be formally published in the Federal Register shortly.

In its [press release](#) announcing the new rules, the Department also published a [fact sheet](#), a [summary](#) of the major provisions of the final regulations, and a [resource](#) for drafting Title IX nondiscrimination policies, notices of nondiscrimination, and grievance procedures.

Thompson Coburn's Higher Education team is currently in the process of reviewing the final rules*, including the preamble which provides the Department's response to the significant, relevant issues raised in public comments and a statement providing the basis and the purpose of the rule. We will be providing additional information about the rule and resources for institutions of higher education in the coming weeks.



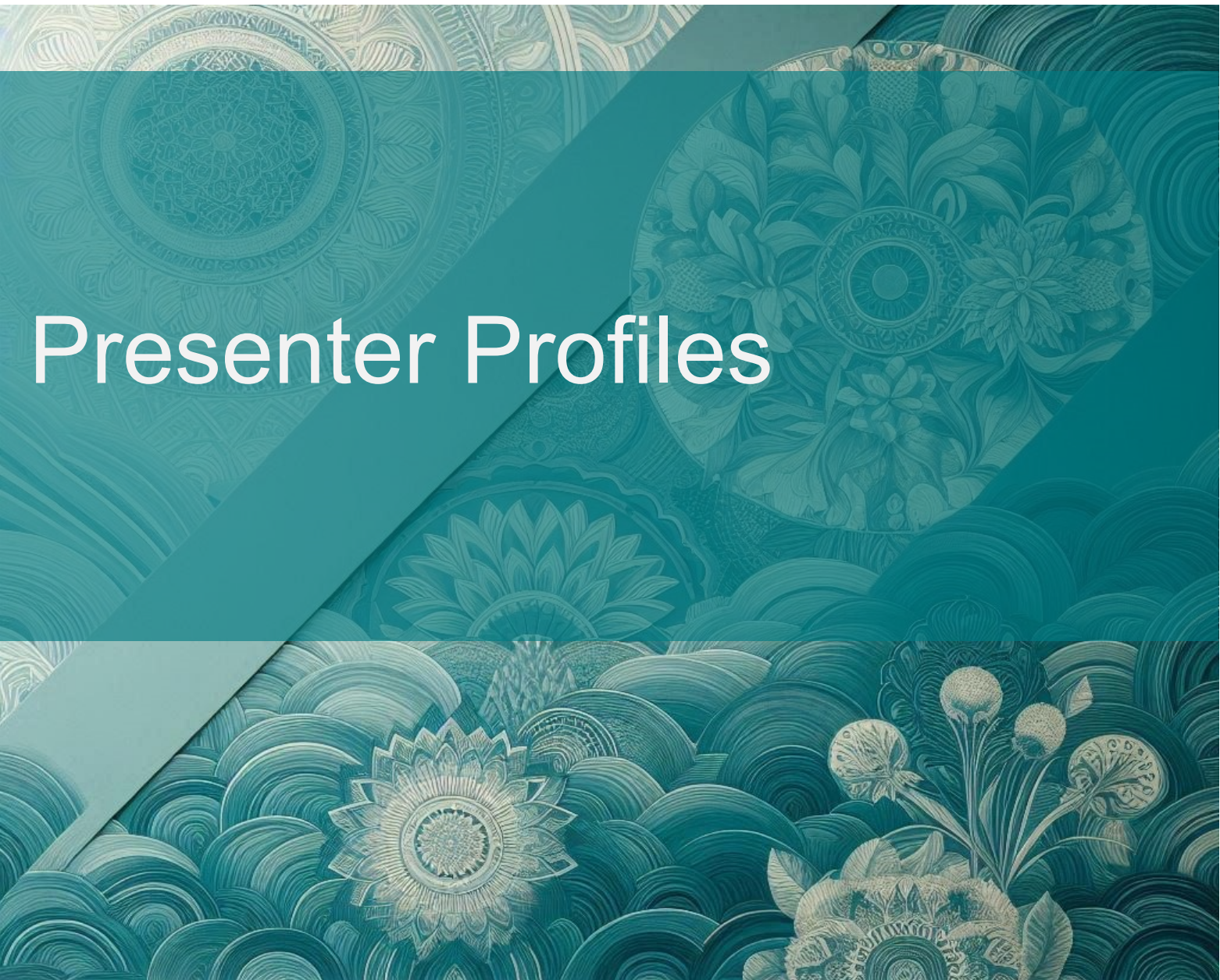
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- If you desire legal advice for a particular situation, you should consult an attorney.





Presenter Profiles



Presenter Profile

- Practice and Experience
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