


New Title IX Regulations: Investigators

July 28th & 29th

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. 

Today's Speakers



Chris Bayh
Partner – Litigation
Indianapolis
chris.bayh@btlaw.com
(317) 231-7449




Janilyn Daub
Partner – Labor & Employment
South Bend / Elkhart
janilyn.daub@btlaw.com
(574) 237-1139




Meagan Dimond
Summer Associate
Columbus
meagan.dimond@btlaw.com
(614) 626-1423

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. 


Today's Speakers




Taylor Hunter
Associate – Labor & Employment
Indianapolis
taylor.hunter@btlaw.com
(317) 231-7755



Benjamin Perry
Summer Associate
South Bend
benjamin.perry@btlaw.com
(574) 237-1125



Mark Scudder
Of Counsel – Labor & Employment
Ft. Wayne
mark.scudder@btlaw.com
(260) 425-4618

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. 

ACKNOWLEDGEMENT & DISCLAIMER

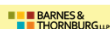
These materials were prepared by the attorneys at the law firm of Barnes & Thornburg LLP. These materials present general information about Indiana law and federal law, and they only serve as a beginning point for further investigation and study of the law relating to these topics. Although these materials present and discuss labor and employment law issues, they are not intended to provide legal advice. Legal advice may be given and relied upon only on the basis of specific facts presented by a client to an attorney. Barnes & Thornburg LLP and the authors of these materials hereby disclaim any liability which may result from reliance on the information contained in these materials.



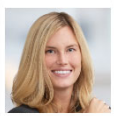
CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. #BTLive2020

Discussion Topics:

- Overview of Title IX and the New Regulations
- Investigation Process
- Hypothetical Scenario
 - Initial Investigation
 - Credibility & Relevance Determinations
 - Investigative Reports
- Key Takeaways
- **Next Up:** Decision Maker & Advisor Training



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. #BTLive2020



Presented by Taylor Hunter

TITLE IX OVERVIEW

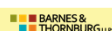


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. #BTLive2020

What is Title IX?

Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or **be subjected to discrimination** under any education program or activity receiving federal financial assistance.”

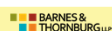


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
 - Effect of Coronavirus?
- Remember—the regulations are the law!

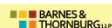


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



What's New?

- Mandatory Training
- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Actual Knowledge Standard
- Grievance & Hearing Procedures
- Retention of Records



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decision-maker(s)

Key Change: The Decision-maker **cannot be** the same person as the Title IX Coordinator or the Investigator.

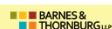


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Training Requirements

A [University] must ensure that Title IX Coordinators, **investigators**, decision-makers, and any person who facilitates an informal resolution process, receive training on the **definition of sexual harassment** in § 106.30, the **scope of the recipient's education program or activity**, **how to conduct an investigation** and grievance process including hearings, appeals, and informal resolution processes, as applicable, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias...**A [University] also must ensure that investigators receive training on **issues of relevance** to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

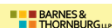


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Sexual Harassment Definition

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

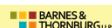


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Sexual Harassment Definition

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

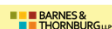


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Sexual Harassment Definition

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C.1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

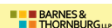


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Scope of Coverage

- Covers sexual harassment occurring "in the school's education program or activity, against a person in the United States."

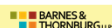


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Scope of Coverage

- Covers sexual harassment occurring “in the school’s education program or activity, against a person in the United States.”
- What is the school’s “education program or activity?”
 - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
 - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

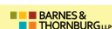


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP



Who can report?

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

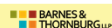


Who can report?

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)

How?

In person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP



Who can report?

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)

How?

In person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

When?

At any time (including during non-business hours)



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.

**When does a university have an obligation to respond?**

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment

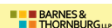


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.

**Actual Knowledge – Who?**

- Title IX Coordinator, AND
- A designated school official
 - Must have authority to institute corrective measures on the school's behalf

Is anyone a mandatory reporter?



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Grievance & Hearing Procedures

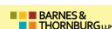
- “Single Investigator” Model is banned
- Live Hearings
- Advisors
- Cross-Examination



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. #BTLiveLearning

Guaranteeing a Fair & Impartial Process

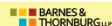
- Presumption of Innocence
- Conflicts of Interest
- Bias




CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. #BTLiveLearning

Does this situation cause bias?

A member of the Title IX department shares the following image on their personal social media page:



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. #BTLiveLearning



Presented by Mark Scudder

GRIEVANCE PROCEDURE: INVESTIGATIONS

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Investigation Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Big Picture Items

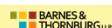
- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Roles Within School's Title IX Department

- Single investigator model is no longer allowed
 - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

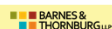


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Timeline

- Conduct the investigation
 - Interview witnesses, gather evidence, etc.
- Produce the evidence to both sides
- Finalize the report
- Conduct a hearing

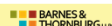


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Investigation Overview

- Coordinate with law enforcement as needed
 - Never force or discourage a complainant go to the police
- Gather as much evidence as possible
 - Texts, e-mails, pictures, etc.
- Strategically schedule interviews
 - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

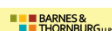


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Evidence Gathering

- Equal opportunities for both parties to have witnesses
- Can't restrict parties from discussing allegations or presenting evidence
- Access to have other people present, including advisors or attorneys
- Must provide written notice to all parties of date, time, location, participants, and purpose of all hearings, interviews, and other meetings with sufficient time for the party to prepare
- Equal opportunities for parties to inspect and review evidence obtained and a opportunity to respond to evidence

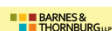


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Interview Basics

- Typical strategy for witness interviews:
 - Put the witness at ease
 - Explain the procedure and situation
 - Let the witness give a narrative
 - Ask questions based on the narrative as well as questions that may be outside the narrative
- Consider whether a specific interview requires a different approach

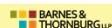


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Putting the Witness at Ease (or Not)

- Private location
- Comfortable
- Avoid displays of power
 - “Scary” office
 - Sitting across desk
 - High chair, etc.
- Have a note-taker so the interviewer can just have a conversation



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Explain the Procedure

- Set the tone for the interview
- Review the policy as necessary
 - Be clear about confidentiality
 - Explain what steps have been taken
 - Remind them of anti-retaliation provisions
- After the interview, explain the next steps



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Questioning

- The goal is an open-ended conversation
- The narrative – Just let the witness talk
 - Fill in the gaps and get specifics
- Questions outside the narrative are particularly helpful for third party witnesses
- Be non-judgmental
- Get more information than you give
- Listen carefully for witnesses and tangible evidence that would be helpful for the investigation

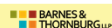


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Making Credibility Determinations

- Watch for witnesses changing their story – particularly after witnesses may have talked with one another
- Is the witness' story consistent with tangible evidence
- Does it make sense?
- A Respondent's statements are not inherently less valid than a Complainant's *and vice versa*



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Let's watch a few interview interactions...

These first three videos feature the complainant in an investigation, Sophia.

Keep an eye out for the good, the bad, and the ugly.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP





What are your thoughts?

Type your observations in the chat or unmute yourself and share!

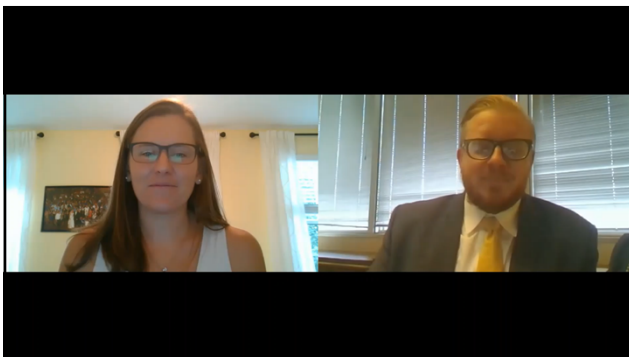


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP










What are your thoughts?

Type your observations in the chat or unmute yourself and share!



BARNES & THORNBURG LLP


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. 

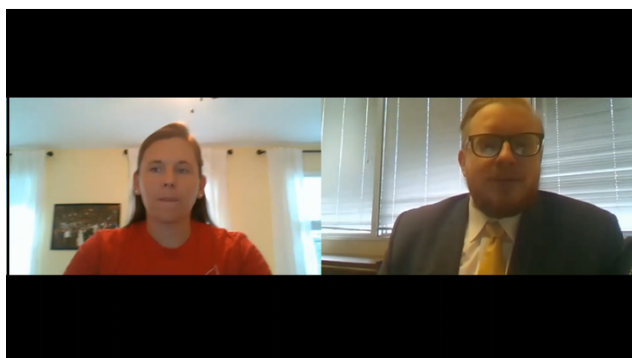
Let's watch a few interview interactions...

Last up is one final interview featuring a friend of the complainant, Olivia.

Any problems that you notice?

BARNES & THORNBURG LLP

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. 



What are your thoughts?

Type your observations in the chat or unmute yourself and share!



BARNES & THORNBURG LLP

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Production of All Evidence to Both Parties

- Universities are required to produce all evidence directly related to the allegations to both sides
- The parties get ten days to respond to this evidence before the investigative report can be finalized

What does this mean for the identity of any witnesses?

BARNES & THORNBURG LLP

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



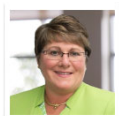
Investigative Report - Requirements

- Universities must prepare investigative report on the allegations of the formal complaint
- Must provide ten days after finalizing to circulate before hearing and determination of responsibility

BARNES & THORNBURG LLP

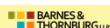
CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.





Presented by Janilyn Daub

HYPOTHETICAL SCENARIO

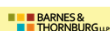


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Ready to give this a try?

Let's take a look at a hypothetical situation...



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Break-Out Session #1

In your group, discuss:

- ☐ Who should you interview?
- ☐ What's a reasonable timeline for the investigation?
- ☐ What types of things are you going to be looking for?
- ☐ Can you identify any areas of potential bias?



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion.



Some additional evidence for your case file...

- Summary of Interviews
- Additional Evidence:
 - Text messages
 - Snapchats

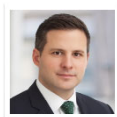


Take a few minutes to look over these documents and be prepared to discuss.



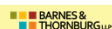
CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.





Presented by Chris Bayh

EVIDENTIARY ISSUES

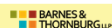


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



The University has a duty to...

Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.





Bias & Evidentiary Issues – Key Points

- Dispassionate, plain statement of the relevant facts
- Key: the “**relevant**” facts”
- Framework: chronological, reporting side, responding side
- If evidence is missing, explain why
- No credibility judgments
- Avoid opinions or conclusions
- Avoid words that subtly signal opinions or conclusions
 - Adjectives and adverbs – just the facts!
 - “However”

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Relevance & Cross-Examination

- All evidence must be “**relevant**”
- Looking ahead, any admitted “statement” must be subject to **cross-examination**

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for informational purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Relevance – how defined?

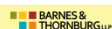
- “The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied.” Cmts. p. 811, fn 1018.
- A school “may **not** adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” Cmt. p. 812.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion or binding in any jurisdiction.

Relevance – any specifics?

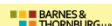
- A few – § 106.45(b)(6)(i):
 - Irrelevant: “the complainant’s sexual predisposition or prior sexual behavior”
 - Think: rape shield laws
 - Exceptions—where prior sexual behavior may be relevant:
 - Assailant identity: “to prove that **someone other than the respondent** committed the conduct alleged”
 - Prior complainant-respondent relations: evidence “concern[ing] specific incidents of the complainant’s prior sexual behavior **with respect to the respondent** and are offered to prove consent”



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion or binding in any jurisdiction.

Relevance – making the call

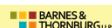
- What if we get a relevance call wrong?
 - Chance to reexamine it: “if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under § 106.45(b)(5)(vii).”
- This may suggest erring on the side of inclusion... or not.
 - Impact of changing the call
 - How to responsibly include close-call evidence, if you choose to do it



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion or binding in any jurisdiction.

Cross-Examination: how it bears on investigation

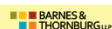
- Conduct your investigation with an eye toward the requirement of cross-examination.
- To be admitted, any “statement” must be subject to cross-examination.
- “Statement” is broad.
 - It “has its ordinary meaning.”
 - It “would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements.”
 - Includes “police reports, SANE reports, medical reports, and other documents and records... to the extent that they contain the statements of a party or witness.”
- Who makes the statement is important.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Hearsay – what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6)(i) “states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination” Cmt. p. 811 & fn. 1017.



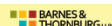
CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Let’s take a look at our investigative file...

Relevant or not?



In our investigation, two interviewees—both of whom are Complainant’s sorority sisters—stated that Complainant has had many sexual partners, including one-night stands with men she has met on the same night of their encounters.



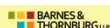
CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion. © 2020 Barnes & Thornburg LLP

Let's take a look at our investigative file...

Relevant or not?



Pictures from the night in question show Complainant at a bar with her friends. It was Halloween, and complainant is pictured wearing a very revealing costume. In our investigation, one of her friends who was out with her that night stated that Complainant referred to her costume as "sexy superhero."



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is provided for informational purposes only and shall not be construed as legal advice or a legal opinion.



Let's take a look at our investigative file...

Relevant or not?



We spoke to both Complainant and Respondent. They both agree that they have had consensual sex on two prior occasions. Complainant says that this latest encounter was not consensual; Respondent says that it was.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is provided for informational purposes only and shall not be construed as legal advice or a legal opinion.



Let's take a look at our investigative file...

Relevant or not?



Investigation shows that Respondent used campus computers to access and view pornographic videos on two occasions.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is provided for informational purposes only and shall not be construed as legal advice or a legal opinion.



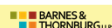
Let's take a look at our investigative file...

Relevant or not?



Two interviewees stated:

- They have heard rumors that Respondent has behaved in a sexually inappropriate way with women before, with no specifics;
- Respondent is generally thought of as a "creep."



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.

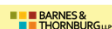


Let's take a look at our investigative file...

Relevant or not?



In the investigation, we interviewed Jennifer, a friend of the Complainant. Jennifer stated that her old roommate, Elizabeth, once confided in Jennifer that the Respondent had sex with her while she was unconscious during freshman orientation two years ago. Elizabeth never filed a Title IX complaint, never contacted law enforcement, and never told anyone else about the incident.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.

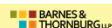


Let's take a look at our investigative file...

Relevant or not?



One of Complainant's friends stated that Complainant has a reputation for lying and exaggerating. The friend offered two examples.



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.

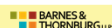


Let's take a look at our investigative file...

Relevant or not?



Respondent has some criminal history. Last year, he was arrested and charged with public intoxication and underage consumption when police found him staggering home alone late one night. He paid a fine and the charge was expunged. The year before, he was charged with credit card fraud. He pleaded to a Class A misdemeanor and received probation and a fine.

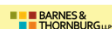


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Importance of the Investigative Report

- Foundation for the hearing
- Pre-hearing opportunity for Complainant and Respondent to "litigate" what, exactly, are the facts and what facts should come into evidence at the hearing
- Laying ground for eventual appeal

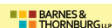


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Presented by Mark Scudder

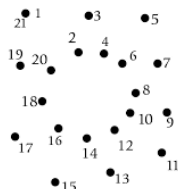
THE INVESTIGATIVE REPORT



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. This information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Writing a Strong Investigative Report

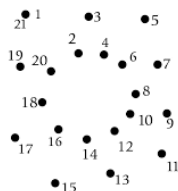


BARNES & THORNBURG LLP

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



Writing a Strong Investigative Report



BARNES & THORNBURG LLP

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.



It's important to connect ALL of the dots in order to paint a complete picture that fully supports any future conclusions.

Keep an eye out for gaps or missing connections in order to produce the strongest investigative report possible.

Writing a Strong Investigative Report

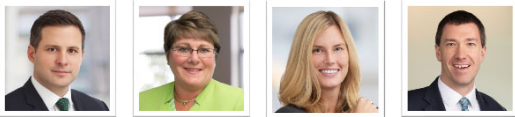
Remember:

- Don't forget to outline the procedural steps that have been followed
- Paint the complete picture with relevant, unbiased evidence
- Write from a point of neutrality
 - Avoid any implications of bias or conflicts
- Look to the template as a starting point

BARNES & THORNBURG LLP



CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.







Presented by Chris Bayh, Janilyn Daub, Taylor Hunter & Mark Scudder

KEY TAKEAWAYS & DISCUSSION

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.  

Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- We must do our best to provide an impartial, unbiased process for all parties involved.
- Always keep relevance in mind!
- Develop an investigative report that connects the dots and sets you up for success should there be a future appeal.


CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.  



Presented by Janilyn Daub

NEXT UP: DECISION MAKER/ADVISOR TRAINING

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential, proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed to any person or entity other than the intended recipient(s), and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for information purposes only and shall not be construed as legal advice or a legal opinion.  





**BARNES &
THORNBURG LLP**

QUESTIONS?

Submit through the chat window!

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed in any manner or under any other than the intended recipient, and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for the intended recipient only.





**BARNES &
THORNBURG LLP**

THANK YOU FOR ATTENDING!

CONFIDENTIAL © 2020 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is confidential proprietary and the property of Barnes & Thornburg LLP, which may not be disseminated or disclosed in any manner or under any other than the intended recipient, and may not be reproduced, in any form, without the express written consent of the author or presenter. The information on this page is intended for the intended recipient only.

