

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

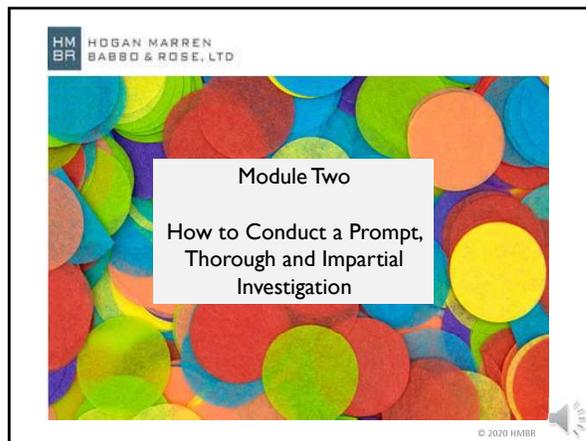


HM
BR HOGAN MARREN
BABBO & ROSE, LTD

**Title IX Sexual Harassment
Training
August 2020**

Presenter:
Debbie Osgood
Partner
Hogan Marren Babbo & Rose, Ltd.
dlo@hnbr.com
312-540-4427

© 2020 HMBR

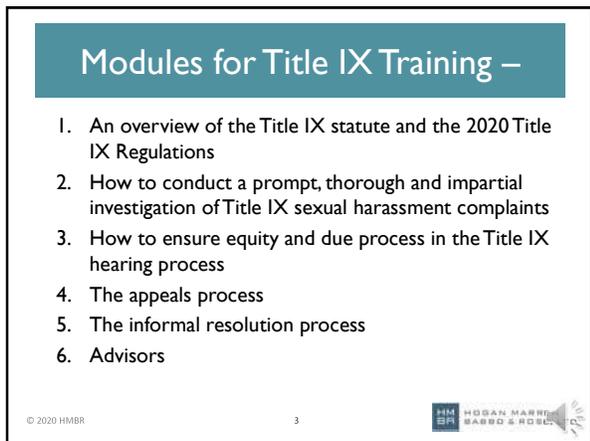


HM
BR HOGAN MARREN
BABBO & ROSE, LTD

Module Two

**How to Conduct a Prompt,
Thorough and Impartial
Investigation**

© 2020 HMBR

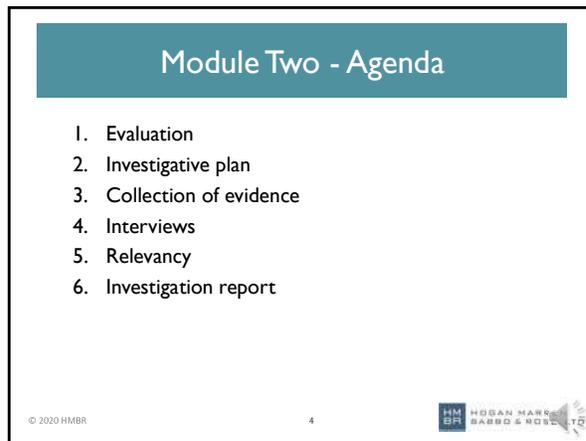


Modules for Title IX Training –

1. An overview of the Title IX statute and the 2020 Title IX Regulations
2. How to conduct a prompt, thorough and impartial investigation of Title IX sexual harassment complaints
3. How to ensure equity and due process in the Title IX hearing process
4. The appeals process
5. The informal resolution process
6. Advisors

© 2020 HMBR 3

HM
BR HOGAN MARREN
BABBO & ROSE, LTD

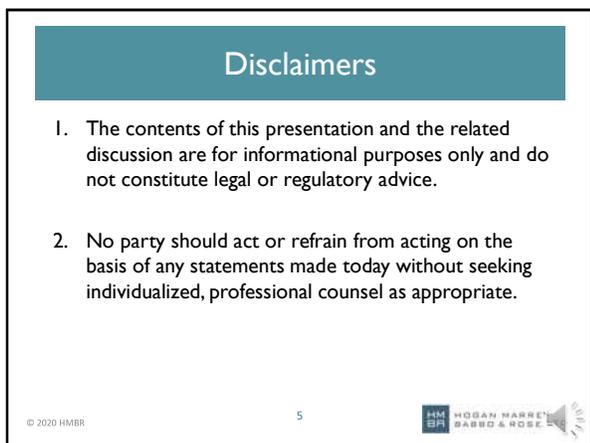


Module Two - Agenda

1. Evaluation
2. Investigative plan
3. Collection of evidence
4. Interviews
5. Relevancy
6. Investigation report

© 2020 HMBR 4

HM
BR HOGAN MARREN
BABBO & ROSE, LTD

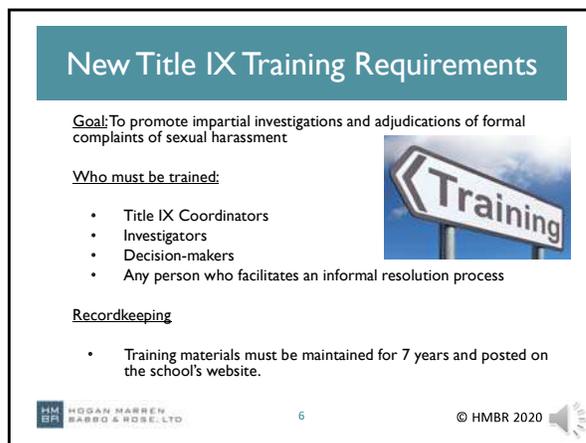


Disclaimers

1. The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice.
2. No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.

© 2020 HMBR 5

HM
BR HOGAN MARREN
BABBO & ROSE, LTD



New Title IX Training Requirements

Goal: To promote impartial investigations and adjudications of formal complaints of sexual harassment

Who must be trained:

- Title IX Coordinators
- Investigators
- Decision-makers
- Any person who facilitates an informal resolution process



Recordkeeping

- Training materials must be maintained for 7 years and posted on the school's website.

© 2020 HMBR 6

HM
BR HOGAN MARREN
BABBO & ROSE, LTD

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

New Title IX Training – Required Content

The training will address:

1. The definition of sexual harassment
2. The scope of the education program or activity
3. How to conduct an investigation and grievance process including investigations, informal resolutions, hearings, and appeals, as applicable
4. How to serve impartially
5. Technology to be used at a live hearing
6. Issues related to relevancy

© 2020 HMBR 7



To keep in mind ...

Grievance Process Requirements

The grievance process must:

1. Treat Complainants and Respondents equitably
2. Require an objective evaluation of all relevant evidence
3. Prohibit bias and conflict of interest
4. Include a presumption that the Respondent is not responsible
5. Include reasonably prompt timeframes, with extensions for good cause



© HMBR 2020

To keep in mind (cont.) ...

Grievance Process Requirements

6. Include a standard of evidence: *Preponderance* (more likely than not) or *Clear and Convincing* (highly probable)
7. List the possible disciplinary sanctions and remedies
8. Describe the appeal procedures (mandatory)
9. Describe the supportive measures available to both parties
10. Restrict the use of information protected by privilege



© HMBR 2020

To keep in mind (cont.) ...

Obligation to serve impartially

- Avoid prejudice of the facts at issue
- No bias or conflicts of interest
 - For the individual Complainant
 - For the individual Respondent
 - For Complainants or Respondents generally
- Apply the relevant facts to the appropriate policy

© 2020 HMBR 11

To keep in mind (cont.) ...

- Appeals may be filed of the dismissal decision or written determination
- Three possible bases:
 - Procedural irregularity that affects the outcome
 - New evidence that was not reasonably available at the time of the determination that affects the outcome
 - Bias or conflict of interest that affects the outcome



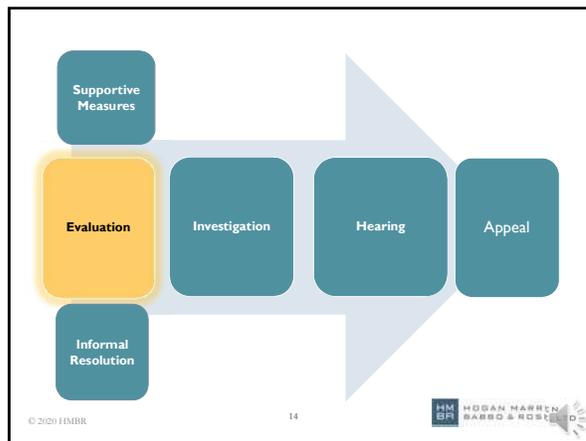
© HMBR 2020

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Part One

Evaluation

© 2020 HMBR 10



Individuals Involved in Evaluation

- Title IX Coordinator and/or the Investigator
- Complainant and/or reporter
- Respondent (maybe)

© HMBR 2020 15

Evaluation

Must determine whether the alleged misconduct is within the scope of Title IX:

1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
2. If yes, the school must respond in a manner that is not deliberately indifferent.
 - By providing supportive measures in all cases.
 - And, if a formal complaint was filed, by following the specific grievance process requirements.

© HMBR 2020 16

Evaluation

Is the alleged misconduct within the scope of Title IX?

YES

- In **all cases**,
 - Must not respond with deliberate indifference
 - Must offer supportive measures
- Was a **formal complaint** filed?
 - If **yes**, must also comply with Title IX grievance requirements

NO

- Must dismiss formal complaint as Title IX matter
- May address as a non-Title IX matter

© HMBR 2020 17

Dismissals – Mandatory

Must dismiss if the conduct alleged in the formal complaint:

1. Would not constitute sexual harassment as defined even if proved,
2. Did not occur in the school's education program or activity, or
3. Did not occur against a person in the United States

© HMBR 2020 18

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Dismissals – Permissive

May dismiss at any time if:

1. The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
2. The Respondent is no longer enrolled or employed by the school; or
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

HM HOGAN HARREN BARBO & ROSE, LTD. 19 © HMBR 2020

Dismissals – Notice and Recordkeeping

Notice

- Upon dismissal of allegation or complaint, must provide written notice to the parties of (1) the dismissal and (2) the rationale for the dismissal.
- Dismissal decision may be appealed by either party

Recordkeeping – recommended:

- Include records of any dismissal determination with other Title IX records for 7 years

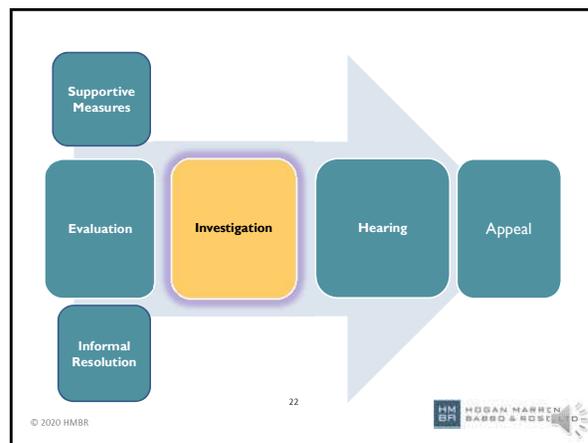


HM HOGAN HARREN BARBO & ROSE, LTD. 20 © HMBR 2020

Part Two

Investigative Plan

© 2020 HMBR 21 HM HOGAN HARREN BARBO & ROSE, LTD.



Individuals Involved in the Investigation

- Title IX Coordinator
- Investigator
- The parties
- Witnesses



HM HOGAN HARREN BARBO & ROSE, LTD. 23 © HMBR 2020

What's My Role?

- To conduct an *impartial* investigation as to whether a University policy or procedure was violated
- Not an advocate for the Complainant
- Not an advocate for the Respondent



© 2020 HMBR 24 HM HOGAN HARREN BARBO & ROSE, LTD.

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Specific Requirements for Investigation

In any investigation, the school must:

1. Provide written notice of the investigation and of hearings, interviews and other meetings
2. Ensure that the burden of proof and the burden of gathering evidence rest on the school, not the parties
3. Provide equal opportunity for the parties to present witnesses, including fact and expert witnesses
4. Not impose any gag-orders
5. Allow advisor of choice
6. Provide an equal opportunity for parties to inspect and review evidence
7. Use reasonably prompt timeframe for the investigation and notify the parties of any delays and the reasons for the delay

© 2020 HMBR

Written Notice of the Investigation

The written notice of the investigation to the parties must:

- Describe the grievance process including any informal resolution
- List the allegations, including sufficient details (the identities of the parties, the alleged misconduct, and the date and location of the misconduct).
- Include a statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the process
- Inform the parties that they may have an advisor of their choice and may inspect and review evidence
- Describe any provision that prohibits knowingly making false statements or knowingly submitting false information
- Be updated as necessary if new or different allegations arise

© 2020 HMBR

Investigator's To Do List

- Review complaint and supporting documents
- Interview the Complainant and the Respondent
- Identify and interview witnesses
- Gather relevant physical or documentary evidence
- Send evidence to parties for review and response
- Prepare draft investigation report that "fairly summarizes" the evidence collected and submit to parties for review and response
- Review any responses
- Prepare and issue final investigation report



© 2020 HMBR

Investigation Plan and Strategy

- Gathering Sufficient Relevant Information
- Have a roadmap!
- Identify requirements for violation of policy
 - Prohibited conduct
 - Consent
 - Incapacitation
- Identify Evidence
 - Documents and testimony
- What are you looking for?
 - Timelines work
 - Who, what, where, how, and when



© 2020 HMBR

Investigation Plan and Strategy

- Who should be interviewed?
- Conducting effective interviews
 - Asking "good questions"
 - Recording interviews?
- Obtaining relevant physical evidence – types?
- Documenting the investigation
 - Identification of evidence and records
 - Allowing review and input on investigative report



© 2020 HMBR

Investigation Plan and Strategy



QUIZ TIME

© 2020 HMBR

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Learning Exercise #1

Test your knowledge!



1. Go to:
<http://www.quiz-maker.com/QS8LBJID>

2. Answer Questions 1 - 3

© 2020 HMBR 31 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

Part Three

Collection of Evidence

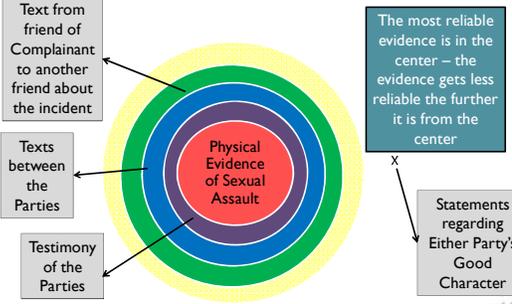
© 2020 HMBR 32 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

Preponderance of the Evidence



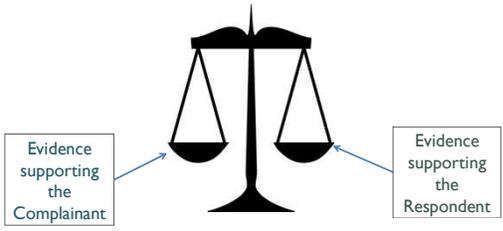
© 2020 HMBR 33 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

Evaluating the Evidence - Bulls Eye



© 2020 HMBR 34 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

Evaluating the Evidence



Which has the greater weight?
 "More likely than not?"

© 2020 HMBR 35 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

Collecting Evidence - Testimonial Evidence

- Interview all relevant witnesses
- To extent practicable, all witnesses identified by the parties
- Tiers of witnesses
 - Parties and all other individuals with "first-hand" knowledge
 - Individuals with "second-hand" knowledge
 - All other witnesses identified by parties

© 2020 HMBR 36 HOGAN, HARRIS, BARBO & ROBERTSON, P.C.

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Collecting Evidence - Physical Evidence

- Closely review complaint or report
- Obtain relevant physical evidence
 - Medical evidence
 - Emails
 - Phone records (text/voice-mail messages, photos, videos)
 - Snapchat, Instagram, Facebook, and other forms of social media
 - Surveillance videos (security cameras, residence halls); swipe card information
 - Security or police reports, if any
- Preserve physical evidence



© 2020 HMBR

37

HM HOGAN MARRE RABBO & ROSE, LLP

Documentation

Maintain Detailed Records

- Explanations for any delays in the investigation or witnesses not identified
- Circumstances of file documentation (include names and dates)
- Names of Complainant, accused student, and witnesses
- Names of individuals involved in handling complaint
- Date of complaint and how filed
- Statements or other evidence submitted or collected
- Source(s) of information collected
- Interview notes
- Student communications: text messages, social media (Instagram, Snapchat)
- Other evidence: videos

© 2020 HMBR

38

HM HOGAN MARRE RABBO & ROSE, LLP

Part Four

Interviews

© 2020 HMBR

39

HM HOGAN MARRE RABBO & ROSE, LLP

Interview Introduction

- ✓ If applicable, permission to record interview?
- ✓ Investigator name
- ✓ Applicable policy and procedures, preponderance of the evidence standard
- ✓ Investigator's role (to conduct prompt, thorough, fair and impartial investigations; do not represent any of the parties; neutral fact-gatherer)
- ✓ Note for the record whether advisor is present
- ✓ Allegation
- ✓ Equal opportunity to be heard, to submit information and corroborating evidence, to identify witnesses who may have relevant information, and to submit questions that they believe should be directed by the Investigator to each other or to any witness
- ✓ Information provided in the interview will be incorporated into investigation report

© 2020 HMBR

40

HM HOGAN MARRE RABBO & ROSE, LLP

Interview Introduction (cont.)

- ✓ Statements will be available to other party and advisor
- ✓ Confidentiality of statements cannot be guaranteed, but Investigator and University will treat information with care
- ✓ Encourage interviewee to share their perspective
- ✓ No gag order Prohibition against retaliation
- ✓ Availability of breaks during interview
- ✓ "I'm not sure" or "I don't know"
- ✓ Contact later if think of misstatement in interview or something else to add
- ✓ Do you have any questions?
- ✓ Do you agree to participate in this interview?

© 2020 HMBR

41

HM HOGAN MARRE RABBO & ROSE, LLP

Interview Questions

Basic Interview Questions

- Who committed the alleged act?
- Was anyone else involved?
- What exactly occurred?
- What was said and by whom?
- When did the act occur?
- Where did the act occur?
- How did you react? How did the incident affect you?
- Are there other individuals who may have relevant information?
- Did you talk to anyone of the incident?
- Ask for available evidence (e.g., social media)
- What else do you want to tell me about what happened?

© 2020 HMBR

42

HM HOGAN MARRE RABBO & ROSE, LLP

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Interview Techniques – Do’s and Don’ts		
	Do	• Don’t
General Principles	<ul style="list-style-type: none"> • Be empathetic • Ask open ended questions • Ask questions that address the five senses (sight, hearing, taste, touch, smell) • Listen • Give interviewee plenty of time to answer question • Clarify conflicting information 	<ul style="list-style-type: none"> • Ask leading questions • Ask negative questions • Ask questions that imply judgment • Ask multiple choice questions
Examples	<ul style="list-style-type: none"> • Tell me about ... • Can you explain ... • Tell me about your thought process when ... • Tell me what you were feeling when ... • Would you be willing to say more about ... • What did you mean when you said ... • What do you remember about ... 	<ul style="list-style-type: none"> • Why didn't you ...

Special Considerations for Virtual Investigations

- Need to be familiar with technology
- Ask for permission for audio or audiovisual recording
- Provide necessary accommodations to individuals with disabilities
- Checking who is in the room with the witness

Assessing Credibility

EEOC says to consider:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be lying or telling the truth?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:**
 - Witness testimony? (eye-witnesses, people who saw the person discussed the incident with the witness soon after or at around the time that the incident occurred)
 - Physical evidence? (such as written documentation)
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?





QUIZ TIME

Learning Exercise #2

Test your knowledge!



1. Go to: <http://www.quiz-maker.com/QS8LBJID>
2. Answer Questions 4 - 9

Part Five

Relevancy

2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Issues of Relevancy

- The Investigation Report must fairly summarize the relevant information.
- At the Hearing, only relevant cross-examination and other questions may be asked of a party or witness.

© 2020 HMBR 49



Issues of Relevancy

Evidence Law: The Rule of Relevance and Admissibility of Character Evidence



<https://lawshelf.com/shortvideoscontent/view/evidence-law-the-rule-of-relevance-and-admissibility-of-character-evidence/>

Used with permission of LawShelf Educational Media

© 2020 HMBR 50



Sexual Predisposition and Prior Sexual Behavior

Questions and evidence about the Complainant's sexual predisposition and prior sexual behavior are *not relevant*, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that:

- Someone other than the Respondent committed the conduct alleged by the Complainant, or
- If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

© 2020 HMBR 51



QUIZ TIME

© 2020 HMBR 52



Learning Exercise #3

Test your knowledge!



1. Go to:
<http://www.quiz-maker.com/QS8LBJID>

2. Answer Questions
10 - 11

© 2020 HMBR 53



Part Five

Investigation Report

© 2020 HMBR 54



2020 TITLE IX TRAINING DEVELOPED EXCLUSIVELY FOR TENNESSEE PUBLIC UNIVERSITIES

Investigation Report

- **Evidence:** Provide the evidence to the parties for review and response prior to the draft investigation report (10 days review period)
- **Draft Investigation Report:** Provide the draft investigation report to the parties for review and response prior to the hearing (at least 10 days before hearing)
- **Final Investigation Report:** Issue final investigation report to the parties – does not include findings of responsibility

© 2020 HMBR 55



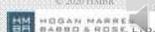
Access to Evidence

Throughout the process, must provide both parties an equal opportunity to inspect and review any evidence that is directly related to the allegations, including:

- The evidence upon which the school does not intend to rely in reaching a determination and
- Inculpatory or exculpatory evidence

EVIDENTIARY CONCEPTS

© 2020 HMBR



© 2020 HMBR 56

Investigation Report

Include:

- Allegations potentially constituting sexual harassment
- Applicable policy
- Procedural steps taken from complaint receipt through final investigation report, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence
- Accounts provided by parties and witnesses
- Description of relevant evidence obtained

Do not Include:

- Conclusions regarding the determination of responsibility

© 2020 HMBR 57



Presenter's Contact Information



Debbie Osgood
dlo@hmbrr.com
 312-540-4427

- Partner, Hogan Marren Babbo & Rose, Ltd., Chicago, Illinois
- Title IX Compliance Services
 - External Investigator
 - Hearing Officer
 - Appeal Decision-maker
 - Policies and procedures review
 - Compliance assessments and recommendations
 - Training
 - General Title IX advice and consultation
 - <https://www.hmbrr.com/news-insight/title-ix-compliance/>
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

© 2020 HMBR 10