



TITLE IX: Practice Pointers for Compliance Perfection

Ashley R. Lynam

David I. Singh

Montgomery McCracken Walker & Rhoads LLP

June 12, 2023



Ashley R. Lynam

Co-Chair, Montgomery, McCracken, Walker & Rhoads

Chair, Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

(T): 215-772-7410

(E): alynam@mmwr.com

Ashley R. Lynam has considerable experience in the analysis, implementation and evaluation of written sexual assault and molestation policies and procedures, as well as the proactive investigation of alleged sexual assault and representation of corporate representatives, current and former employees and independent contractors, and other witnesses for deposition and trial.

She also provides wrap-around crisis management services to clients in the public, private, college and university setting, specializing in VAWA and Clery Act compliance as well as investigating, adjudicating, and advisory services under Title IX and student conduct policies. Ashley is certified by the SUNY Student Conduct Institute.

Ashley also has extensive experience in rapid-response investigations for catastrophic and high-exposure losses as well as intensive special investigations of fraudulent claims and misconduct.





David I. Singh

Associate, McCracken, Walker & Rhoads

Higher Education, Institutional Response and Sexual Misconduct Liability Practice Groups

(T): 215-772-7510

(E): dsingh@mmwr.com

David I. Singh is an associate in Montgomery McCracken's Higher Education, Institutional Response, and Sexual Misconduct Liability Practice Groups.

David's practice involves Title IX investigations and advising, institutional responses to sex and/or gender-based harassment and misconduct, and the adjudication of student, employee, and management disputes. He has experience in various aspects of Title IX and sexual misconduct liability from analyzing and implementing written policies to conducting proactive investigations of alleged sexual assault.



“San Jose State swimmers tell how they blew the whistle on trainer’s alleged sexual abuse”

The Mercury News

“Syracuse women’s basketball coach Quentin Hillsman accused of abuse, unwanted contact by players”

NEW YORK POST

“LSU mishandled sexual misconduct complaints against students, including top athletes”



“Betrayed: How Ohio failed hundreds of male athletes abused by OSU’s Dr. Richard Strauss”



“U.S. Department of Justice accuses Nebraska of misapplying Title IX laws”



“Alumni call on AG to investigate how University of Michigan dealt with abuse complaints”



OBJECTIVES

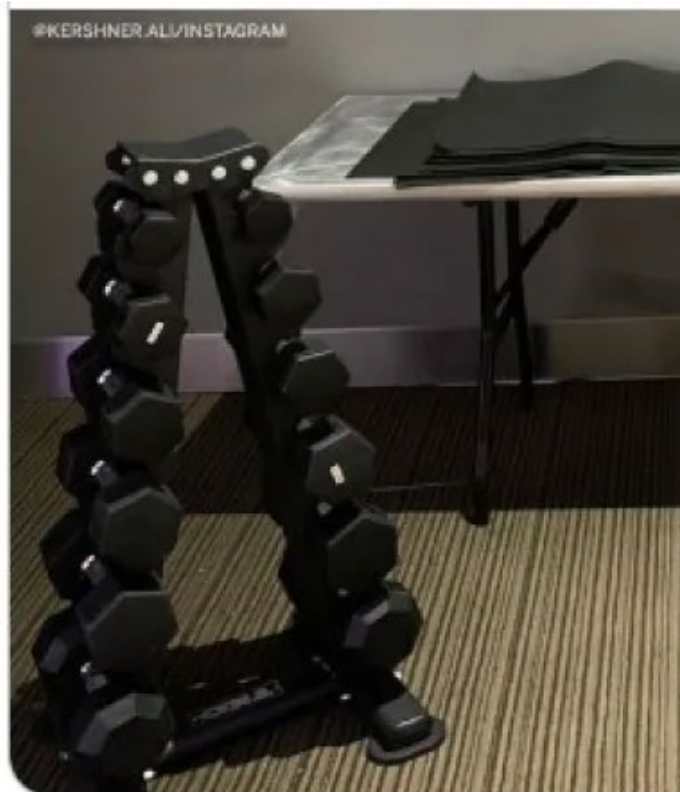
- Update on relevant anticipated Title IX changes
- Discuss how they apply to you
- Advice for compliance and best practices



Two Title IX Worlds: What It Is NOT vs. What It Is

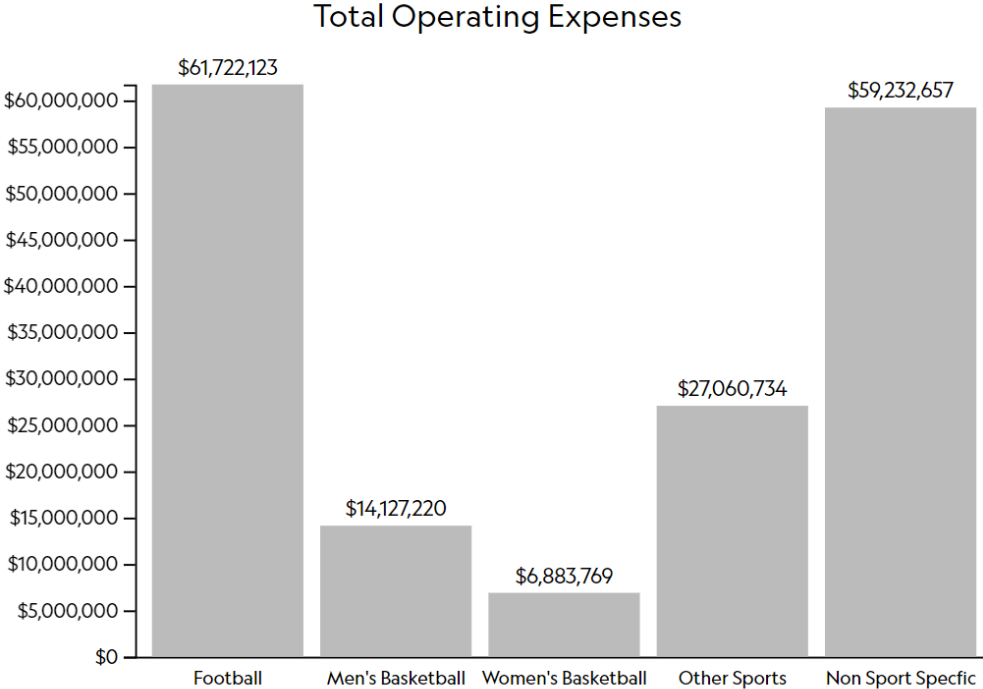


50th Anniversary



What Title IX is NOT

- Title IX **does not** require equal expenditure of funds on male and female athletes



What Title IX is NOT – Continued

- Title IX **does not** require equal expenditure of funds on male and female athletes
- Title IX **does not** mandate the creation of new women's (or men's) sports teams or their elimination.
- Title IX **does not** mandate all sports be treated equally



What Title IX Allows

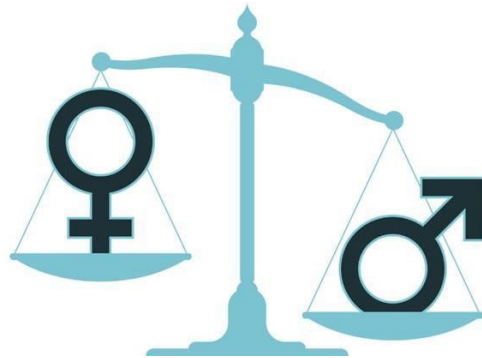
- An institution is in compliance with the requirements of Title IX if it meets **any one** of the following three prongs:
 - The number of male and female athletes is substantially proportionate to their respective enrollment;
 - The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
 - The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex



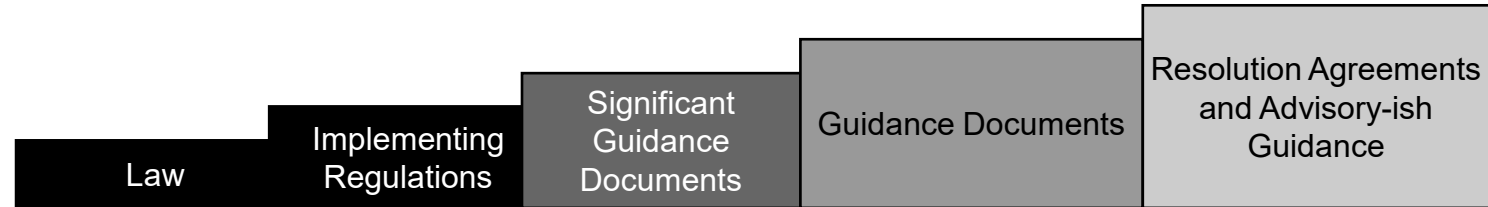
TITLE IX

Title IX of the Education Amendments Act of 1972

“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.”



THE HIERARCHY



- Title IX

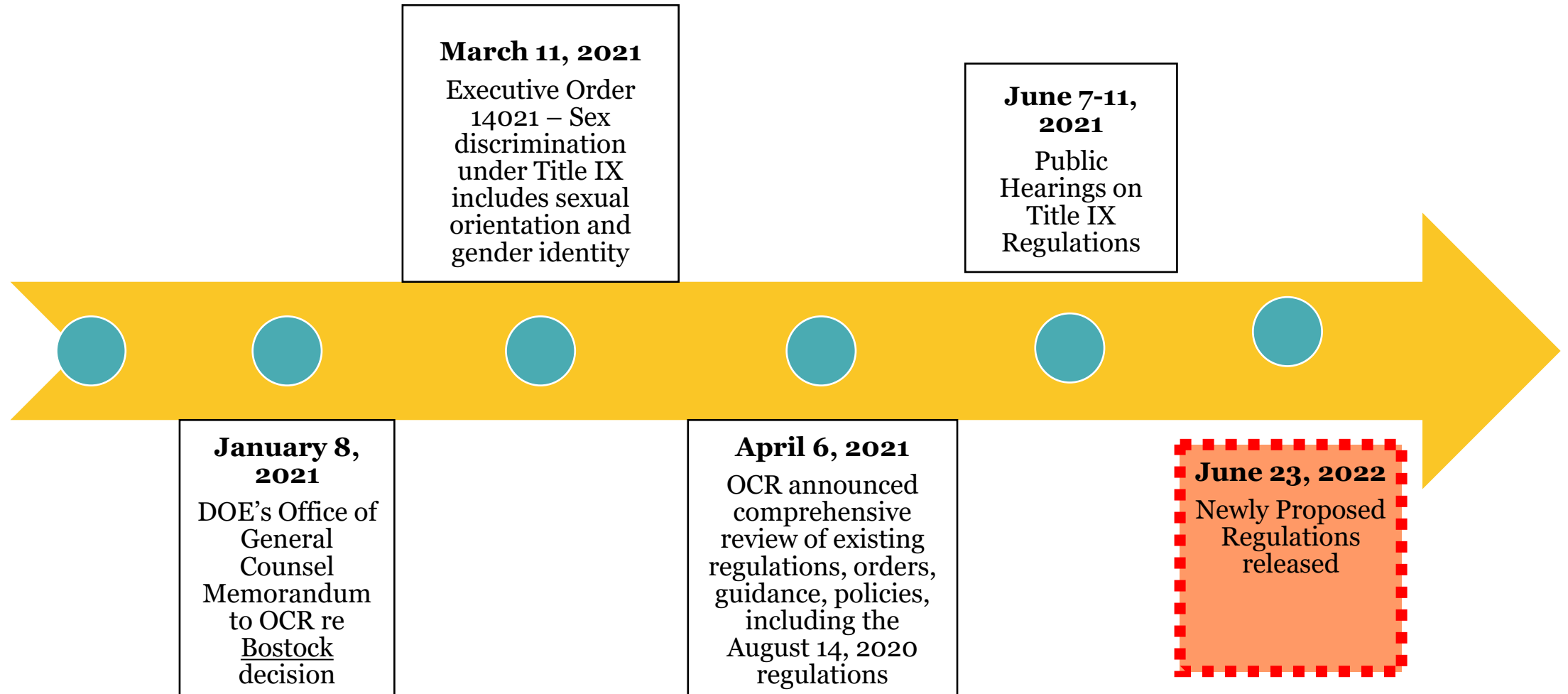
- Title IX Implementing Regulations (2020)

- 2011 Dear Colleague Letter (Rescinded)
- 2014 Q&A (Rescinded)
- 2017 Q&A
- Preamble to Title IX Implementing Regulations

- 1997 Sexual Harassment Guidance
- 2001 Revised Sexual Harassment Guidance
- Dear Colleague Letters
 - Bullying
 - Hazing
 - Title IX Coordinator
 - Retaliation

- Resolution Agreements
- OCR aids and tools
- OCR webinars
- OCR blog

WHERE ARE WE AND HOW DID WE GET HERE?



THEME OF NEWLY PROPOSED REGULATIONS



DISCRETION



AND



FLEXIBILITY

PRINCIPAL CHANGES OF THE NEWLY PROPOSED REGULATIONS

1. Jurisdiction
2. Consolidation of Title IX Office
3. Responsible Employees
4. Third-party Complainants
5. Complainant Without Written Req.
6. Sexual Harassment
7. Discretionary Dismissals
8. Supportive Measures
9. Informal Resolutions
10. Evidence Sharing & Analysis
11. Hearing Procedures
12. Retaliation
13. Pregnancy and LGBTQ+



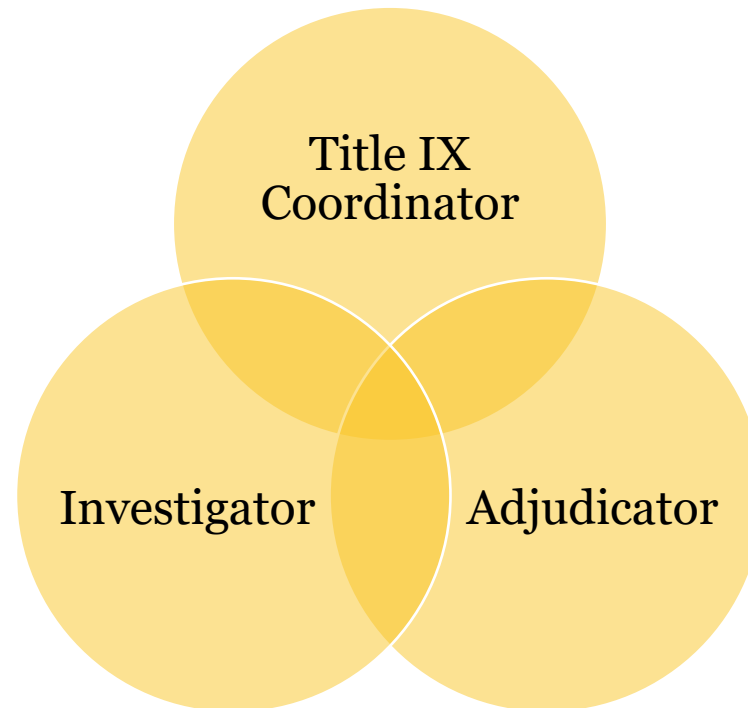
1. JURISDICTION

- Applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States
- Conduct that occurs under a recipient's education program or activity includes but is not limited to:
 - *conduct that occurs in a **building owned or controlled by a student organization that is officially recognized** by a postsecondary institution*
 - *conduct that is **subject to the recipient's disciplinary authority***
- Must address sex-based hostile environment **even if sex-based harassment contributing to hostile environment occurred outside the recipient's education program or activity or outside the United States**



2. CONSOLIDATION OF TITLE IX OFFICE

Allows for **single-investigator model**



3. RESPONSIBLE EMPLOYEE

- Employees required to notify the Title IX Coordinator are those who are **NOT** confidential and:
 - *Have authority to institute corrective measures on behalf of the recipient*
 - *Have responsibility for administrative leadership, teaching or advising*
 - *All other employees (**they may also provide contact information of Title IX Coordinator and information on how to report)*



4. THIRD-PARTY COMPLAINANTS

- A person other than a student or employee who was participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred
- Examples:
 - *Prospective student*
 - ***Visiting student-athlete***
 - *Guest speaker*



5. COMPLAINT WITHOUT WRITTEN REQUIREMENT

- Recipient may initiate Title IX proceedings without requiring formal written Complaint



6. SEXUAL HARASSMENT

- Sexual harassment, harassment on the bases 106.10, and other conduct on the basis of sex that is:
 - *Quid pro quo harassment*
 - “employee, agent, *or other person authorized by the recipient to provide an aid, benefit or service* under recipient’s education program or activity”
 - *Hostile environment harassment*
 - *Unwelcome sex-based conduct* that is *sufficiently severe or pervasive*, that, based on the totality of the circumstances and *evaluated subjectively and objectively*, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (i.e., creates a hostile environment)
 - *Fact-specific inquiry, considering five factors*



6. SEXUAL HARASSMENT - CONTINUED

- Factors:
 - *The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity*
 - *Type, frequency, and duration of conduct*
 - *The parties' ages, roles within the recipient's program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the alleged unwelcome conduct*
 - *The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent*
 - *Other sex-based harassment in the recipient's education program or activity*



7. DISCRETIONARY DISMISSALS

- A recipient is ***permitted, but not required***, to dismiss allegations in a complaint of sex discrimination in certain circumstances
 - *Unable to identify the respondent*
 - *The respondent is not participating in the recipient's education program or activity or not employed by recipient*
 - *The recipient determines that the conduct alleged, even if proven, would not constitute sex discrimination under Title IX*



8. SUPPORTIVE MEASURES

- “Upon being notified of conduct that **MAY** constitute sex discrimination under Title IX, the title IX Coordinator **MUST** offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party’s access to the recipient’s education program or activity.”
- Non-exhaustive list:
 - *Counseling*
 - *Extensions on deadlines and other course-related adjustments and leaves of absences*
 - *Campus escort services & increased monitoring of certain areas of campus*
 - *Voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative*
 - *Training and education programs related to sex-based harassment*



9. INFORMAL RESOLUTIONS

- A recipient *may* offer informal resolution process at any time prior to determining whether sex discrimination occurred, **unless** there are allegations that an employee engaged in sex discrimination toward a student
- Recipient has discretion to determine whether it is appropriate to offer an informal resolution process → ***not required for recipient to provide an informal process***
- Formal complaint no longer required to invoke informal resolution
- Facilitator for informal resolution process cannot be same as the investigator or decisionmaker involving the same complaint



10. EVIDENCE SHARING & ANALYSIS

- Recipient may provide parties an opportunity to review all relevant evidence in lieu of producing written investigative report
 - *Flexibility provided to ensure prompt result*
 - *Decision-making authority on report vs. no report unclear*
- Credibility analysis:
 - *“Process for evaluating allegations and assessing credibility”*



11. HEARING PROCEDURES

- Evaluating allegations and assessing credibility, one of two ways:
 - *Individual meetings with the parties*
 - *Each party can propose questions that they party wants asked of any party or witness*
 - *Live Hearing*
 - *Party's advisor can ask **any party** and any witnesses all relevant questions*
- **BUT** *Doe v. University of the Sciences*, 961 F.3d 203 (3d Cir. 2020)
 - We hold that USciences's contractual promises of "fair" and "equitable" treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.
- **Cross Examination:**
 - *Expanded scope to permit "direct" (inferred from "redirect")*



12. RETALIATION

Intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit or service under recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX because this person:

- Reported information*
- Made a complaint*
- Testified*
- Assisted*
- Participated or refused to participate in an informal resolution process*



13. PREGNANCY AND LGBTQ+

Proposed Title IX Transgender Rule Implications Sex-based discrimination covered by Title IX includes discrimination on the basis of:

- sex stereotypes;
- sex characteristics;
- pregnancy or related conditions,
- sexual orientation; and
- gender identity

*****Separate rulemaking for athletic eligibility standards*****

Proposed Title IX Transgender Rule:

- On April 6, 2023, Department of Education released notice of proposed rulemaking regarding the application of Title IX to transgender student athletes
- Prohibits blanket ban
- Over 130,000 public comments received showing sharp divide



13. PREGNANCY AND LGBTQ+ - CONTINUED

Implications of Proposed Title IX Transgender Rule

- *Requires a case-by-case, multi-factored analysis*
 - *sport-by-sport*
 - *institution-by-institution*
 - *age of the students*
- *DOE acknowledged NCAA's decision last year to adopt a sport-by-sport approach*
- *Will likely play out in the courts*



QUESTIONS?

Ashley Lynam

- **(T):** 215-772-7410
- **(E):** alynam@mmwr.com

