



# CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL TWO COURSE

## COURSE SLIDE PACKET

*This training manual is intended to provide assistance for achieving best practices with respect to campus sexual misconduct, but is not given and should not be taken as legal advice.*

*Before acting on any of the ideas, opinions or suggestions in this publication, participants should check first with a licensed attorney in their own jurisdiction.*




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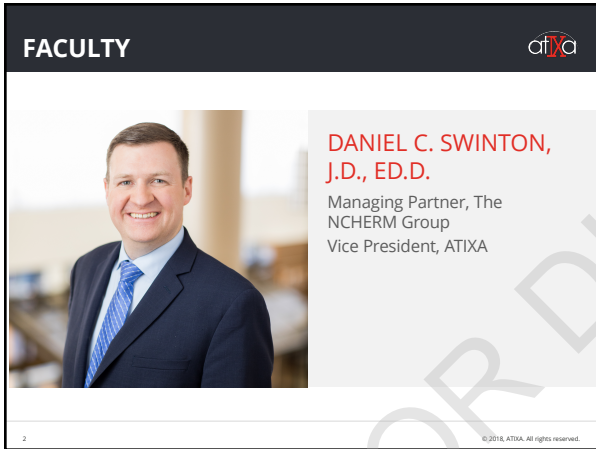
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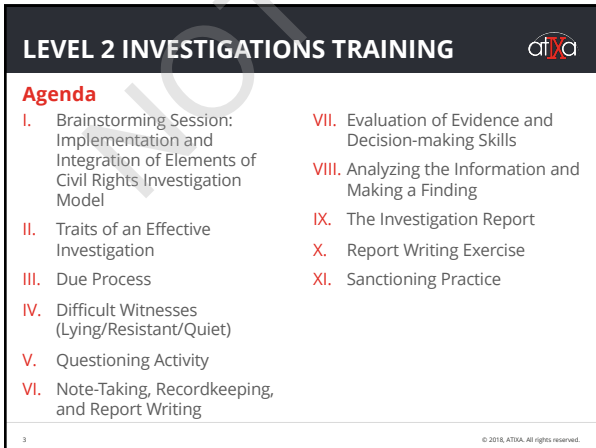
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**LEVEL 2 INVESTIGATIONS TRAINING** 

**Agenda**

I. Inclusive Investigations	J. Discrimination
II. Policy Overview	K. Retaliation
A. Sexual Harassment	III. Analytic for Sexual Misconduct: Force/Incapacity/Consent
B. Sexual Misconduct	IV. Case Studies
C. Non-Consensual Sexual Contact	A. Sexual Assault without Alcohol
D. Non-Consensual Sexual Intercourse	B. Sexual Assault with Alcohol
E. Sexual Exploitation	C. Sexual Harassment
F. Stalking	D. Stalking
G. Relationship Violence	E. Relationship Violence
H. Bullying	
I. Hazing	

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**ELEMENTS OF CIVIL RIGHTS INVESTIGATION MODEL**

- Civil Rights Investigation Model Hallmarks
- Brainstorming Session

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**CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS** 

- Active identification and strategic gathering of evidence.
- Investigation is the center of the procedure for resolution.
- Grounded in the concepts of neutrality and equity.
- Most effective for victim-based violations.

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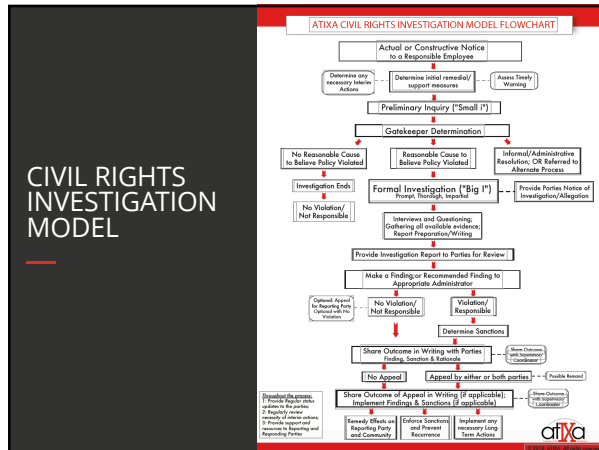
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### BRAINSTORMING SESSION

- Work with other attendees from your campus, or in groups of four to five.
- On your own, write a list of the three most attractive aspects of the civil rights investigation model for your campus.
- On your own, write a list of the three biggest impediments or challenges your campus may face in implementing or perfecting this model.
- Take turns sharing, and brainstorm as a group on ways to overcome the challenges. Share one challenge and one solution per group with the whole group.

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### TRAITS OF AN EFFECTIVE INVESTIGATION

- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial

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**DUE PROCESS**

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

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**WHAT IS DUE PROCESS?**

- The set of rights-based protections that accompany disciplinary action by a college or university.
- Dictated by system and campus policies and procedures.
- Evolution of Due Process in education
  - Dean Wormer; Principal Strickland (1950's)
  - *Dixon v. Alabama* (1961)
  - Constituency-based policies and procedures
  - Castles of Due Process & Student Judicial
  - Student Conduct Administration
  - Civil Rights Investigation Model

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**DUE PROCESS IN PROCEDURE**

- A school's process should include (at a minimum):
  - Notice of Allegation and/or Investigation.
  - Notice of Hearing.
  - Right to present witnesses.
  - Right to present evidence.
  - Opportunity to be heard and address the allegations and evidence.
  - Right to appeal. (recommended).

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**DUE PROCESS IN DECISION** 

- A decision must:
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e., without malice, ill-will, or bias).
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
  - Not be arbitrary or capricious.
- Sanctions must be reasonable and constitutionally permissible.

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**QUESTIONING WITNESSES**

- Challenging/Difficult Witnesses
- Lying Witnesses
- Remember to conduct your interviews of the parties as if they are a hearing, because they are.

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**CHALLENGING/DIFFICULT WITNESSES** 

- Set the tone:
  - Thank them.
  - Review your role as a neutral fact-finder.
  - Put them at ease - ask about them without being phony.
  - Acknowledge their hesitation.
  - Review retaliation against a witness.
  - Review immunity.
  - Review confidentiality.
  - Review expectation of truthfulness.

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**LYING WITNESSES**



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open to follow up.

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**RESISTANT AND QUIET WITNESSES**



- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate.
- Advance preparation will help when open-ended questions don't work.

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**OTHER CONSIDERATIONS**



- Consider who should conduct the interview.
- Ask open-ended questions first.
- Allow time.
- Utilize breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.

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**QUESTIONING MODEL**

Using a case study, the presenters will model questioning techniques for challenging witnesses.



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**QUESTIONING ACTIVITY WITH PARTICIPANTS**



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**SCENARIO** 

- Tanya and Mark are students. Tanya has alleged that Mark had sex with her without her consent. She had been drinking before they met up at a party on a Saturday, and thinks he had been drinking, too. Mark asked her to come over to watch a sporting event and she thought others would be there. Some things happened she was OK with, but then it got to a point where she wasn't OK with what was happening. When it was over, she went back to her residence hall and met up with her friend, Amy.

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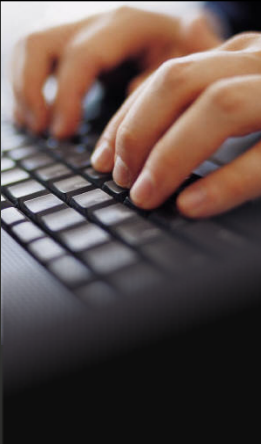
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## NOTE-TAKING, RECORDKEEPING AND REPORT WRITING

- What Kinds Of Notes Should Be Kept?
- Note-Taking

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### WHAT KINDS OF NOTES SHOULD BE KEPT?



- Assemble an investigative file and keep it in a secure location.
- Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- Interviews – notes vs. recording.
- Notes – handwritten vs. computer.
- Interviewee verification.
- Records of all contacts, including emails and phone calls with all parties.

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### NOTE-TAKING



- Taking notes may slow down the interview in a good way – may help detect deception.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the responding party makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

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**NOTE-TAKING (CONT.)**



- Notes should be complete and detailed.
  - Important for assessing credibility.
  - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the reporting party, responding party, and witnesses.
- Summarize perceptions of credibility, honesty, etc.

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**NOTE-TAKING (CONT.)**



- Remember that “sole possession” FERPA exception is very limited.
- Date all records and include who was present at any meetings; number pages.
- Review your notes before the interview concludes.
- Clarify anything you are unclear about.
- Document any refusal to answer, evasion, or refusal to participate.
- Capture key quotes.
- Review and finalize notes immediately upon completion of interview.

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**EVALUATION OF EVIDENCE AND DECISION-MAKING SKILLS**

- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Finding

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### UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered.
  - Evidence is any kind of information presented with the intent to prove what took place.
  - Certain types of evidence may be relevant to the credibility of the witness, but not to the charges.
- Consider if drugs or alcohol played a role.
  - If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - Look for evidence of prior planning.

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### CREDIBILITY



- Credible is not synonymous with truthful.
- Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading.
- Refrain from focusing on irrelevant inaccuracies and inconsistencies.
- Pay attention to the following factors...

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### FACTORS TO CONSIDER FOR CREDIBILITY



- Demeanor.
  - Nonverbal language.
  - Demeanor issues should be cue to ask more questions.
- Non-cooperation.
  - Look for short, abrupt answers or refusal to answer.
  - OK to ask, "You seem reluctant to answer these questions –can you tell me why?"
- Logic/consistency.
  - Ask yourself, "Does this make sense?"
- Corroborating evidence.
- Inherent plausibility – is the evidence more likely than the alternative?

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### MAKING CREDIBILITY DETERMINATIONS

- Look at consistency of story – substance and chronology of statements.
- Consider inherent plausibility of all information given.
- Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses, or denials that have no supporting detail.
- Pay attention to non-verbal behavior, but don't read too much into it...this isn't Lie to Me.

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### ANALYZING THE INFORMATION

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Explore motivation, attitude, and behavior of reporting party, responding party, and witnesses.
- Apply relevant standards:
  - Force, incapacity, and consent.
  - Unwelcomeness, reasonable person, and discriminatory effect.
- Analyze the broadest, most serious violations first and make a determination of each and every violation alleged, element by element.

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### ANALYZING THE INFORMATION (CONT.)

- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?

**! Withhold judgment until all the evidence has been considered.**

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### FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO



- Find an opportunity to let your subconscious work on the gaps in information (e.g., yoga, meditation, etc.).
- If you are too busy analyzing what you know, you won't focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

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### MAKING A FINDING



- Review the institutional policies in play.
- Parse the policy.
  - Specific findings for each policy and each responding party.
- Pose key questions.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for your conclusions.

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### THE INVESTIGATION REPORT



#### SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

**Executive Summary:**

*(Summarize findings here.)*

**Procedural History:**

*Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.*

On Month XX, 200X, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 200X. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to investigators Name Here and Name Here on Month XX, 200X. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 200X.

**Involved Parties:**

- Reporting Party is (e.g., a first-year undergraduate female residing in the residence halls).
- Responding Party is (e.g., a male graduate student and a residence advisor in the residence halls).
- Witness 1 is (e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
- Witness 2 is (e.g., a male undergraduate living off-campus and a classmate and friend of Reporting Party).
- Witness 3 is (e.g., an employee of Nearest Star; employee is not affiliated with the university).

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**THE INVESTIGATION REPORT**



- Helpful to have a “skeleton” outline of what report will include.
- The report should:
  - Detail the allegations and how they were brought forward.
  - Explain the role of the parties and witnesses, and any relations between them.
  - Summarize information collected.
  - Address evidence collected (e.g., direct, circumstantial, documentary, and expert).

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**THE INVESTIGATION REPORT (CONT.)**



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Results of interviews with experts.
  - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

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**THE INVESTIGATION REPORT (CONT.)**



- Assess weight, relevance, and credibility of information gathered.
- Assess credibility of parties.
- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

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**THE INVESTIGATION REPORT (CONT.)**



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Recommend a finding on whether the policy has been violated, or make the finding, depending on your process.

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**ELEMENTS OF AN INVESTIGATION REPORT**



- Case identification information:
  - Case number, investigator(s), date of notice, date assigned to investigator, and date investigation closed.
- Source of initial complaint/allegation:
  - Source of complaint, name and contact information of the reporting party, and status; same for responding party.
- Details from initial report/complaint:
  - Nature of incident.
  - How report was received (e.g., security incident report, hotline, face-to-face, web form, etc.).

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**ELEMENTS OF AN INVESTIGATION REPORT (CONT.)**



- Document the purpose (scope) of the investigation.
  - This section must paint a clear picture of the investigation for the person reading the report.
  - Identify clearly which policies are in play.
- Document each of the tasks assigned and actions taken throughout the investigation, particularly if there are multiple investigators.
- Index all documentation relevant to the complaint.
  - E.g.: research, notes, medical records, police reports, prior complaints, etc.

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### ELEMENTS OF AN INVESTIGATION REPORT (CONT.)



- Investigation interview:
  - Name/title of the interviewer(s).
  - Name of the persons interviewed and their role in the investigation – reporting party, responding party, witness, etc.
  - Names of any other people who sat in on the interview and their roles.
  - Location of the interview.
  - Interview date.
  - Detailed notes of interview.
- Incident log.
- Finding and action taken.

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### REVIEWING TEMPLATES FOR RECORDKEEPING AND REPORT-WRITING



- Format.
- Form.
- Flow.
- Style.
- Use of appendices.
- Contents/Index.
- Tabs.
- Exhibits/physical evidence.

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### SANCTIONING IN SEXUAL MISCONDUCT CASES

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### SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- Title IX and case law require:
  - Bring an end to the discriminatory conduct (Stop).
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
  - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

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### WHAT SANCTIONS?



- A student is found responsible for non-consensual sexual intercourse involving another student; the panel determined the reporting party was incapacitated and the responding party should have known of this incapacity.
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication.
  - The responding party is an excellent student and is well-liked by campus community; he will graduate in a month.
  - The reporting party indicates that she does not want the responding party to be suspended or expelled.

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### WHAT SANCTIONS?



- A male tenured faculty member is found responsible for non-consensual sexual intercourse involving a female student who is not in any of the professor's classes.
  - The investigator determines that the student was incapacitated and the responding faculty member should have known of that incapacity.
  - The faculty member is a full professor holding a prestigious endowed chair position.
  - The student and the professor had consensual sex five times after the non-consensual incident.
  - The student brought the allegation shortly after the faculty member began sleeping with the student's friend.

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# NEUROBIOLOGY OF TRAUMA

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Considerations for Interviewing

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## WHAT IS TRAUMA?



Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.

May result from:

- War.
- Natural disasters.
- Severely distressing events
- Violence
  - Including Intimate Partner Violence, Sexual Violence, Stalking, etc.

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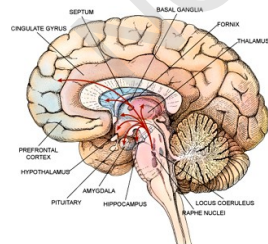
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## HOW THE BRAIN AND BODY RESPOND TO TRAUMA



- Hypothalamus
- Pituitary
- Hippocampus
- Amygdala

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### PERCEIVED THREAT



- When the amygdala senses a threat in the form of sexual assault, it signals to the hypothalamus, which signals to the pituitary gland, which signals to the adrenal gland, which releases hormones or chemicals throughout the body to help react to the threat and likely trauma.
- The amygdala does not distinguish between "types" of sexual assault,
  - E.g., stranger or acquaintance, but interprets them equally as threats to survival.
- The amygdala also does not typically differentiate between an actual threat and a perceived or subjective threat.
  - Sometimes also a function of prior experiences, rather than the immediate situation.

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### HORMONAL FLOOD



- A release of a number hormones into the body to prompt survival and coping – can occur during an event perceived as traumatic
  - Catecholamine (adrenaline): responsible for fight or flight; creates mobilization, but impairs rational thought and decision-making.
  - Opioids: to deal with pain; creates flattening affect.
  - Cortisol: increases energy production during stressful situations; impairs blood sugar levels, immune system, and other bodily systems.
  - Oxytocin: promotes good feelings to counterbalance sensation of pain.

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### HORMONAL FLOOD



- The hormonal flood may last for 96 hours (four days) and may be reactivated by a triggering event.
  - Physical toll on body: headaches, body ache, and GI issues.
  - Compromised decision-making.
  - Emotional swings.
  - Self-medicating behaviors.
- Yet we sometimes expect reporting parties to make major decisions and recount the incident during this time.

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### EFFECTS OF FLOODING



Hormones are released in varying amounts and may result in behavioral differences among reporting parties:

- Fight, Flight, Freeze – not a choice.
- Also impacted by chemical surge into prefrontal cortex, impairing ability to think rationally.
- May present to you as confused, laughing, crying, flat, angry, irritable, or variable.

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### TONIC IMMOBILITY



*Some reporting parties may also experience tonic immobility; like being awake during surgery.*

- Hormonal flood and dysregulation of the autonomic nervous system can cause the body to shut down.
- "Rape-induced paralysis."
- Know what is happening, but can't fight.
- Biological response based on survival; think of the animal world.

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### MEMORY AND TRAUMA



- Memory is formed in two steps:
  - Encoding: organizing sensory information coming into brain.
  - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slow and difficult.
- Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly

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**RESPONSES TO TRAUMA ALSO IMPACTED BY:** 

- Personality.
- Coping strategies.
- Available support systems and resources.
- General resilience.
- Past history of traumatic experiences.
- Cultural differences in the perception and expression of trauma.
- Normalization/adaptation.

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**TRAUMA & INTERVIEWING** 

- Expecting a reporting party to give a linear account in the days after an incident, or after having been triggered, is not always realistic.
- Memory fragmentation can occur.
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma.
- Considerations for credibility assessment?

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**ADDITIONAL IMPACTS DURING THE 96 HOURS** 

- Physical toll on body: headaches, body ache, and GI issues.
- Compromised decision-making.
- Emotional swings.
- Self-medicating behaviors.

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**INTERVIEWING CONSIDERATIONS** 

- Allowance for sleep cycles prior to interviews (if within 96-120 hrs).
  - One to two sleep cycles makes a big difference in ability to connect memories.
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.

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**QUESTIONING AND TRAUMA** 

- Empathy is critical.
  - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
  - 5 senses
- What were your reactions to this experience?
  - Physically
  - Emotionally
- What, if anything, can't you forget about this experience?

Source: Partially drawn from Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

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**TRAUMA & CREDIBILITY** 

- Trauma can negatively impact a reporting party's credibility.
- Trauma may help explain:
  - Inconsistencies in a reporting party's statement.
  - Lack of linearity in a reporting party's account or statement.
  - Reporting party's lack of memory about an incident.
  - Memory errors by the reporting party.
  - Reporting party's demeanor or affect.
  - Reporting party's brief answers, or answers lacking in detail.

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### TRAUMA & CREDIBILITY



- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
  - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
  - If, for example, a reporting party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
  - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

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### INCLUSIVE INVESTIGATIONS

- Working with Gender Non-Conforming Individuals
- Working with LGBTQ Individuals
- Same-Sex Sexual Violence
- Hate-Based Misconduct

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### TERMINOLOGY



- **Biological Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.

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**TERMINOLOGY (CONT.)** 

- **Sexual Orientation:** Who a person is attracted to sexually or romantically, on a continuum (e.g., gay, lesbian, bisexual, heterosexual, asexual, and pansexual).
- **Queer:** An umbrella term referring to all LGBT persons.
- Transgender people may have any sexual orientation.

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**VIOLENCE AND SEXUAL ORIENTATION** 

**Sexual Violence and Intimate Partner Violence Can Happen to Anyone...**

- regardless of gender identity and expression, and
- regardless of sexual orientation.

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**VIOLENCE AND SEXUAL ORIENTATION** 

- Lesbians and gay men reported IPV and sexual violence over their lifetimes at levels equal to or higher than heterosexuals:
- 44% of lesbian women, 61% of bisexual women, and 35% of heterosexual women experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.
- 26% of gay men, 37% of bisexual men, and 29% of heterosexual men experienced rape, physical violence, and/or stalking by an intimate partner at some point.
- Approximately one in five bisexual women (22%) and nearly one in 10 heterosexual women (9%) have been raped by an intimate partner in their lifetime.

Source: The Centers for Disease Control and Prevention's (CDC) National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation.

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### RELUCTANCE TO REPORT



- Concern about a homophobic response.
- Concern about preconception that sexual assault cannot occur between same sex partners.
- Fear of exposing LGBT community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community on campus.
- Fear of being outed and implications for medical treatment.
- Concern about how "systems" will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to "boys being boys."

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### CONSIDERATIONS FOR INVESTIGATIONS



- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.
- A visible reaction may negatively impact rapport.
- Use inclusive language; reflect language used by the parties during interviews and in all communication.
- Be mindful of how power dynamics and targeting can come into play.
- Don't expect parties to "educate you." Stick to the facts.
- Anticipate heightened confidentiality concerns.
- Use your campus or community-based experts.
- Ask for additional education or training if needed.
- Be aware of your biases.

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### HATE-BASED MISCONDUCT



Targeting persons based on their real or perceived membership in an historically oppressed group.

- When sex or gender is the basis, it's a TIX.
- Be aware that trauma may be especially severe for the reporting party.
- Reporting party may have heightened concerns about safety and retaliation.
- Investigations may focus on identification of responding party or parties.

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**EXAMPLE** 

Joe is a student who is gay and a member of the school cheer team. A group of football players repeatedly ridicules Joe about his effeminate mannerisms and clothing, and threatens to harm him if they run into him off campus. Joe starts skipping cheer practice and eventually quits the team rather than face the continued harassment.

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**EXAMPLE** 

Ty, a student and RA who is biologically female but dresses and lives as a male, repeatedly catches a group of three students writing comments on the whiteboard on his door referring to him as "it." The same group of students drunkenly confronts Ty in the hallway one night and starts pulling at his pajamas to "see what's under there." Ty moves off campus and gives up his job as an RA as a result.

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**UNDERSTANDING THE POLICIES**

- Sexual Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Sexual Exploitation
- Stalking
- Relationship Violence
- Bullying
- Hazing
- Other Misconduct Offenses

**Policies**




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**SEXUAL HARASSMENT** 

Sexual harassment is:

- Unwelcome,
- Sexual, sex-based, and/or gender-based verbal, written, online, and/or physical conduct.

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**SEXUAL HARASSMENT DISCIPLINARY STANDARD** 

- Sexual harassment may be subject to discipline when it takes the form of:
  - Quid Pro Quo harassment;
  - Retaliatory harassment; and/or
  - Creates a hostile environment.

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 **Types of Sexual Harassment** 

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### QUID PRO QUO SEXUAL HARASSMENT



- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another, when
- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.

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### RETLIATORY HARASSMENT



- Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

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### HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - Sufficiently severe, or
  - Persistent or pervasive, and
  - Objectively offensive that it:
    - Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school's educational [and/or employment], social and/or residential program.

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**TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT** 

- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was physically threatening.
- Whether the conduct was humiliating.
- The effect on reporting party's mental or emotional state.
- Whether conduct was directed at more than one person.
- Whether the conduct unreasonably interfered with the reporting party's educational or work performance.
- Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

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**NON-CONSENSUAL SEXUAL CONTACT** 

- Non-consensual sexual contact is:
  - Any intentional sexual touching,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force.

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**SEXUAL CONTACT DEFINED** 

- Sexual contact includes:
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; **OR** any other intentional bodily contact in a sexual manner.

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### NON-CONSENSUAL SEXUAL INTERCOURSE



- Non-consensual sexual intercourse is:
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force.

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### INTERCOURSE DEFINED



- Non-consensual sexual intercourse includes:
  - Vaginal or anal penetration by a penis, object, tongue or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

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### SEXUAL EXPLOITATION



- Occurs when individuals take non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of the other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to...

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**SEXUAL EXPLOITATION (CONT.)** 

- Invasion of sexual privacy.
- Prostituting another person.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond boundaries of consent (e.g., letting friends hide in the closet to watch you having consensual sex).

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**SEXUAL EXPLOITATION (CONT.)** 

- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally/recklessly exposing one's genitals in non-consensual circumstances; inducing others to expose theirs.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

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**STALKING** 

- Stalking:
  - Repetitive and menacing,
  - Pursuit, following, harassing, and/or interfering with the peace and/or safety of another.
- This definition of stalking also allows campuses to distinguish stalking from lurking, which is often fixation without menacing or harmful intent, and which is often steady state, whereas stalking often becomes more intrusive over time.

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### STALKING (CONT.)



- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions.
- Can be a form of sexual harassment, too.
- We distinguish the ATIXA model definition of stalking (as we do with Domestic Violence/Dating Violence) from the VAWA definitions which do not reflect best practices, and are used only for the reporting of crime statistics.

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### INTIMATE PARTNER VIOLENCE (IPV)



- Violence or emotional abuse between those who are in or have been in an intimate or romantic relationship to each other.
  - Examples include:
    - Physical abuse by a spouse or partner such as hitting, slapping, pushing, or strangling.
    - Sexual violence by a spouse or partner.
    - Extreme verbal abuse by a spouse or partner.
- Other terms include interpersonal violence, relationship violence, dating violence, and domestic violence.
- Typically involves another code violation.
- If based on gender/sex, would fall within Title IX.
- Combines the VAWA offenses of domestic and dating violence.

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### BULLYING



- Defined as:
  - Repeated and/or severe,
  - Aggressive behavior,
  - Likely to intimidate or intentionally hurt, control, or diminish another person, physically or mentally,
  - That is not speech or conduct otherwise protected by the First Amendment.

*Bullying falls within Title IX when gender-based.*

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### BULLYING (CONT.)



- Often includes comments about race, color, national origin, sex, sexual orientation, or disability.
- Often involves an imbalance of power, aggression, and a negative, repeated behavior.

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### HAZING



- Acts likely to cause physical or psychological harm or social ostracism to any person within the school community, when related to the admission, initiation, pledging, joining, or any other group-affiliation activity (as defined further in the hazing policy).
- When sexual in nature (sex or gender-based is not applicable here because of the fraternity/sorority exception under Title IX)

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### OTHER MISCONDUCT OFFENSES



- Threatening or causing physical harm, extreme verbal abuse, or other conduct which threatens or endangers the health or safety of any person.
- Discrimination: actions that deprive other members of the community of educational or employment access, benefits, or opportunities on the basis of sex or gender.
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another.
- Any rule violated on the basis of the reporting party's sex/gender, which is severe enough to cause a discriminatory effect.

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## VAWA SEC. 304 & THE CLERY ACT

- Overview of the Clery Act and VAWA
- VAWA 2013's "Big Four" Crimes
- Procedures for Victims
- Procedures Institutions Will Follow
- Institutional Disciplinary Policies and Procedures

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## THE CLERY ACT



### Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (1990)

- Crime reporting.
- Campus crime log.
- Campus Sexual Assault Victims Bill of Rights (1992)
- Primary crimes (7+3).
- Hate crimes (8 categories).
- Policy and procedure disclosures.
- Timely Warnings & Emergency Notifications.
- Sex offender information dissemination.
- Enforcement and fines.
- Violence Against Women Reauthorization Act of 2013 (VAWA) – Section 304.



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## THE CLERY ACT & APPLICABILITY



- The Clery Act applies only to Post-Secondary Schools, Colleges, and Universities.
  - There is, however, is increasing traction within Congress to developing a similar mechanism within K-12.
- Most of the principles of The Clery Act/VAWA Sec. 304, are universal and instructive for all educational institutions, such as:
  - Policy best practices
  - Reporting
  - Transparency
  - Equitable resolution mechanisms
  - Due Process
  - Support for victims, etc.

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**RECENT CLERY AMENDMENT:  
VAWA REAUTHORIZATION & SECTION 304** 

**Section 304: "Campus SaVE"**

- Section 304 significantly amended the Clery Act.
- Final Regulations released Oct. 15, 2014.
- Effective date of the law was July 2015.
- Created **extensive** new policy, procedure, training, education, and prevention requirements for:
  - Sexual assault.
  - Stalking.
  - Dating violence.
  - Domestic violence.
- Prohibits retaliation.

**The "Big 4"**

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**VAWA  
"BIG FOUR" CRIMES**

- Dating Violence
- Domestic Violence
- Sexual Assault
- Stalking

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**VAWA 2013 – SEC. 304  
DATING VIOLENCE** 

- *Violence committed by a person:*
  - *Who is or has been in a social relationship of a romantic or intimate nature with the victim; and*
  - *Where the existence of such a relationship shall be determined based on a consideration of the following factors:*
    - *Length of the relationship*
    - *Type of relationship*
    - *Frequency of interaction between the persons involved in the relationship*
  - *Includes sexual or physical abuse or the threat of such abuse*
  - *Does not include acts covered under definition of domestic violence*
  - *Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.*

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**VAWA 2013 – SEC. 304 DOMESTIC VIOLENCE** 

- *Felony or misdemeanor crimes of violence committed by:*
  - A current or former spouse or intimate partner of the victim
  - A person with whom the victim shares a child in common
  - A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
  - A person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction
- Any incident meeting this definition is considered a crime for purposes of Clery Act reporting.

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**VAWA 2013 – SEC. 304 SEXUAL ASSAULT** 

*“Sexual assault” means an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the FBI.”*

- **Forcible sex offense** – is defined as any sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent.”
- **Non-forcible sex offense** – is defined as unlawful, non-forcible sexual intercourse. (Sex with a minor or incest.)

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**VAWA 2013 – SEC. 304 STALKING** 

- *Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:*
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress

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## PROCEDURES FOR VICTIMS UNDER VAWA SEC. 304

- Written Information for Victims
- Reporting
- Involvement of Law Enforcement
- Orders of Protection etc.

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### VAWA: PROCEDURES FOR VICTIMS



- Your ASR statement must include “the procedures victims should follow if a crime of dating violence, domestic violence, sexual assault or stalking has occurred”
  - “Including **written** information about the importance of preserving evidence that:
    - May assist in proving that the alleged criminal offense occurred, or
    - May be helpful in obtaining a protection order”
  - Additionally, the Clery Handbook recommends that institutions:
    - “provide information about where to obtain forensic examinations,” that such exams do not require filing a police report, and are helpful to preserve evidence

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### VAWA: PROCEDURES FOR VICTIMS



- “How and to whom the alleged offense should be reported”
  - This includes any person or organization that can assist a victim
  - The Clery Handbook recommends providing a listing of local victim services organizations
    - It also tacitly recommends the institution develop a relationship with local victim services resources

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**VAWA: PROCEDURES FOR VICTIMS** 

- “Options about the involvement of law enforcement and campus authorities, including notification of the victim’s option to:
  - Notify proper law enforcement authorities, including on-campus and local police
  - Be assisted by campus authorities in notifying law enforcement authorities if the victim chooses, and
  - Decline to notify such authorities”
  - Clarifications from The Clery Handbook:
    - An institution’s ASR statement must provide specific contact information for the authorities
    - An institution’s ASR statement must also explain what is involved in making a police report

*Note: The Clery Handbook adds: “The statement that your institution will comply with a student’s request for assistance in notifying authorities is **mandatory**”*

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**VAWA: PROCEDURES FOR VICTIMS** 

- “Where applicable, the rights of victims and the institution’s responsibilities for orders of protection, “no contact” orders, restraining orders, or similar lawful orders issued by a criminal, civil or tribal court, or by the institution”:
  - This must include “all rights that a victim may have to obtain” such an order
  - The Clery Handbook adds that institutions must:
    - Let students know what legal options are available to them and under what circumstances
    - Tell students how to request information about the available options and provide specific contact information
    - Provide instructions and specific contact information for how to file a request for each of the options
    - Disclose the institution’s responsibilities for honoring such requests and complying with these orders
    - Provide clear information about what the victim should do to enforce an order of protection

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**PROCEDURES INSTITUTIONS WILL FOLLOW...**

- Confidentiality and Reporting
- Written Notification: Resources
- Accommodations
- Procedures for Disciplinary Action
- Standard of Evidence
- Sanctions
- Protective Measures

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- Information about how confidentiality of victims and other necessary parties will be protected, including:
  - How publicly available recordkeeping will be accomplished without including identifying information about the victim, to the extent permissible by law
  - Maintain confidentiality of accommodations or protective measures provided to the victim (unless confidentiality would impair institution's ability to provide these measures)

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- "Identifying information" includes:
  - First and last name
  - Home or other physical address contact information
  - Social security number, driver's license number, passport number, or student ID number
  - Any other information...that would serve to identify any individual, including:
    - Date of birth
    - Racial or ethnic background
    - Religious affiliation

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- However, CSA crime reports should include sufficient detail to avoid under- or double-counting. Examples:
  - Dates
  - Locations
  - Where appropriate, personally identifying information
- The ASR, however, "must not include any personally identifying information about the individuals involved."
  - The same applies for the Daily Crime Log

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- “In some cases, an institution may need to disclose some information about a victim to a third party to provide necessary accommodations or protective measures”
  - Should only disclose what is necessary to provide the accommodations or protective measures in a timely manner
  - Policy should also state:
    - Who determines what and to whom information about a victim should be disclosed
    - How the disclosure decision will be made
  - The Clery Handbook recommends informing victim of disclosure prior to disclosing
    - Institution should tell the victim what information, with whom, and why the identifying information will be shared

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- Institution will provide written notification to students and employees about existing resources:
  - Counseling
  - Health
  - Mental health
  - Victim advocacy
  - Legal assistance
  - Visa and immigration assistance
  - Student financial aid
  - Other services available for victims
  - Both within the institution and in the community

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**VAWA 2013 SEC. 304  
PROCEDURES INSTITUTION WILL FOLLOW...** 

- Written notification of existing on- and off-campus resources should also provide:
  - Information about how to access these resources
  - How to request information from or about these resources
  - Specific contact information
  - Should be updated at least annually
- The Clery Handbook:
  - Recommends “institutions reach out to [local] organizations that assist victims of dating violence, domestic violence, sexual assault and stalking” to prepare a detailed list of resources
  - Indicates (in bold) that “if there are no on- or off-campus services, you must state this fact in your policy statement”

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**VAWA 2013 SEC. 304  
AVAILABLE ACCOMMODATIONS**



- Policy statements to include:
  - Written notification to victims about options for, and available assistance in, and how to request changes to:
    - Academic
    - Living
    - Transportation
    - Working situations, or
    - Protective measures
  - The institution must make such accommodations if the victim requests them and they are reasonably available

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**VAWA 2013 SEC. 304  
ACCOMMODATIONS FOR VICTIMS**



- Accommodations must be available regardless of whether victim chooses to report to campus or local law enforcement
- Protective measures should minimize the burden on the victim – consider on a case-by-case basis
- Additionally, the statement should “state that the institution is **obligated** to comply with a student’s reasonable request for a living and/or academic situation change following an **alleged** sex offense”
  - Clarify all available options
  - Identify how and who will determine what measures to take

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**VAWA 2013 SEC. 304  
REASONABLE ACCOMMODATIONS**



- Considerations for reasonableness include, but are not limited to:
  - The specific need expressed by the complainant
  - The age of the students involved
  - The severity or pervasiveness of the allegations
  - Any continuing effects on the complainant
  - Whether the complainant and the alleged perpetrator share the same residence hall, dining hall, transportation or job location
  - Whether other judicial measures have been take to protect the complainant (e.g.: civil protection orders)

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**VAWA 2013 SEC. 304  
PROCEDURES FOR DISCIPLINARY ACTION**



- ASR Policy statements must also include:
  - “A clear statement of policy that addresses the procedures for institutional disciplinary action in cases of alleged” VAWA offenses AND that
  - “Describes **each type** of disciplinary proceeding used by the institution” including:
    - The steps
    - Anticipated timelines
    - Decision-making process
    - How to file a disciplinary complaint (including contact information for the person or office to whom a report should be made)
    - How the institution determines which type of proceeding to use based on the circumstances of an allegation of a VAWA offense

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**VAWA 2013 SEC. 304  
“PROCEEDING”**



- “Proceeding” is defined broadly as:
  - “all activities related to a non-criminal resolution of an institutional disciplinary complaint, including, but not limited to, **fact-finding investigations, formal or informal meetings, and hearings**”
  - “Proceeding does not include communications and meetings between officials and victims concerning accommodations or protective measures to be provided to a victim”
- This disclosure is required for **any and all** faculty, student, and staff disciplinary procedures
- “You must follow the procedures described in your statement regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred (i.e., on or off your institution’s Clery Act geography)”

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**VAWA 2013 SEC. 304  
STANDARD OF EVIDENCE**



- ASR Policy statement of disciplinary procedures must also include a description of the “standard of evidence that will be used during any institutional disciplinary proceeding arising from an allegation of” the four VAWA offenses
  - **No specific standard required**
- However, the institution must use the standard of evidence described in the statement in all such proceedings

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**VAWA 2013 SEC. 304  
SANCTIONS**



- ASR Policy statement of disciplinary procedures must also "list **all** the possible sanctions that the institution may impose following the results of any institutional disciplinary proceeding for an allegation of" the four VAWA offenses
- No specific sanctions are required
- "Must list **ALL** of the possible sanctions...for each VAWA offense"
  - Must be specific: e.g. type and length of a suspension, including requirements for reinstatement
  - If you use a sanction not in this list, it must be added in the next ASR

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**VAWA 2013 SEC. 304  
PROTECTIVE MEASURES**



- ASR Policy statement of disciplinary procedures must also "describe the range of protective measures that the institution may offer to the victim following an allegation of" a VAWA offense
- Unlike sanctions, institutions must not list all protective measures, "but they must describe the range of protective measures they may offer"
- Examples include:
  - Orders of protection, no contact orders, etc.
  - Transportation assistance or security escorts
  - Academic accommodations
  - Changes in living and work situations

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**INSTITUTIONAL DISCIPLINARY  
POLICIES & PROCEDURES:  
ASR DISCLOSURES**

- Disciplinary Procedures
- Annual Training for Officials
- Advisors
- Simultaneous Notification

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**VAWA 2013 SEC. 304  
DISCIPLINARY PROCEDURES** 

- Prompt, Fair, and Impartial Process
  - Prompt, designated timeframes (can be extended for good cause with notice to parties)
  - Conducted by officials free from conflict of interest or bias for either party
  - Consistent with institutions' policies
  - Transparent to accuser and accused
  - Timely and equal access to parties "and appropriate officials to any information that will be used during informal and formal disciplinary meetings and hearings"

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**VAWA 2013 SEC. 304  
DISCIPLINARY PROCEDURES** 

- Proceedings must "be conducted by officials who, at a minimum, receive **annual** training on:
  - Issues related to the four VAWA offenses
  - How to conduct an investigation and a hearing process that:
    - Protects the safety of victims
    - Promotes accountability
    - Caution: this does not mean the training should be biased or slanted in favor the reporting party
      - Ensure training is equitable and covers not just victim-based issues, but also those pertaining to a responding party

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**VAWA 2013 SEC. 304  
ANNUAL TRAINING FOR OFFICIALS** 

- Institutions must describe the annual training
- The training should be "updated regularly to address the latest issues and techniques for conducting proceedings on these topics from beginning to end"
- Training "should include, but not be limited to:
  - Relevant evidence and how it should be used during a proceeding
  - Proper techniques for questioning witnesses
  - Basic procedural rules for conducting a proceeding
  - Avoiding actual and perceived conflicts of interest"

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**VAWA 2013 SEC. 304  
ADVISORS**



- Provide accuser and accused with the same opportunity to have others present including an advisor of their choice for “any institutional disciplinary proceedings” and “any related meetings”
  - An advisor is “any individual who provides the accuser or accused support, guidance or advice”
  - An advisor is optional and can be **anyone** (including an attorney or a parent)
  - Institutions can restrict role of advisors in proceedings as long as both parties’ advisors have the same restrictions
  - Institutions should notify parties of these restrictions prior to proceedings
  - Institutions can train a pool of advisors the parties can use, but cannot restrict advisors to just the pool
  - Advisors can serve as proxies if an institution so chooses

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**VAWA 2013 SEC. 304  
SIMULTANEOUS NOTIFICATION**



- Require simultaneous notification, in writing, to both accuser and accused, of:
  - The result of any institutional proceeding arising from allegations of VAWA offenses
    - Result “defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution”
    - Result = Finding, Sanction, and Rationale
  - Note: The Cley Handbook contains an explicit FERPA exclusion*
  - Procedures for appeal (if any)
  - Any change to results
  - When such results become final

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**VAWA 2013 SEC. 304  
SIMULTANEOUS NOTIFICATION**



- What must be included in the rationale?
  - How evidence and information presented was weighed
  - How the evidence and information support the result and the sanctions (if applicable)
  - How the institution’s standard of evidence was applied
    - Simply stating the evidence did or did not meet the threshold is insufficient
- Simultaneous: “means that there can be no substantive discussion of the findings or conclusion of the decision maker, or discussion of the sanctions imposed, with either the accuser or the accused prior to simultaneous notification to both of the result”

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**VAWA 2013 SEC. 304  
SIMULTANEOUS NOTIFICATION** 

- The ASR statement must include “a statement that when a student or employee reports they have been a victim of any of the VAWA offenses (either on or off campus) the institution “will provide the student or employee a written explanation of the [their] rights and options”
  - “Must be a prepared, standardized and written set of materials, including detailed information regarding a victim’s rights and options
  - “This does not mean that you hand the student a copy of the [ASR] or the policy statements contained in the [ASR]

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**INVESTIGATING  
RETALIATION CLAIMS**

- Basic Legal Principles
- Investigating Retaliation Claims




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**RETALIATION  
BASIC LEGAL PRINCIPLES** 

*The Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.*

- Protected activity under Title IX:
  - Reporting sex discrimination, including sexual harassment and assault.
  - Filing a discrimination complaint.
  - Assisting someone in reporting discrimination or filing a complaint.
  - Participating in any manner in an investigation of discrimination, for example as a witness.
  - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

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**INVESTIGATING RETALIATION CLAIMS:  
KEYS TO UNDERSTANDING**



- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Since someone’s intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

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**PRELIMINARY ELEMENTS  
OF A RETALIATION CLAIM**



- The following elements establish an *inference of retaliation*:
  - Did the reporting party engage in protected activity?
    - Usually straightforward,
    - Unless there is a question of reasonableness of belief or manner.
  - Was reporting party subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
    - Did individual accused of retaliation know about activity?
    - How soon after the protected activity did the adverse action occur?
  - If these three elements are not shown, the claim fails.

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**RETALIATION AND ADVERSE ACTION**



- Common definition of **adverse action**:
  - Significantly disadvantages or restricts the reporting parties as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
  - Precluded from their discrimination claims; or
  - Reasonably acted or could act as a deterrent to further protected activity.
  - The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

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**INVESTIGATING RETALIATION CLAIMS:  
REBUTTING THE INFERENCE**



- What is the stated non-retaliatory reason for the adverse action?
  - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - This is the heart of the case - is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.

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**INVESTIGATING RETALIATION CLAIMS:  
IS THE EXPLANATION LEGITIMATE?**



- Factors to consider:
  - The explanation makes sense.
  - The action was consistent with established policy or practice.
  - No adverse action was taken against others who engaged in protected activity.
  - Reporting party was treated the same as other individuals.

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**INVESTIGATING RETALIATION CLAIMS  
IS THERE EVIDENCE OF PRETEXT?**



- Factors to consider:
  - The explanation given is not credible.
  - Other actions by the same individual are inconsistent with the explanation.
  - The explanation is not consistent with past policy or practice.
  - There is evidence of other individuals treated differently in similar situations.

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# CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study

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## CONSENT IS...

- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

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## OVERVIEW OF THE 3 QUESTIONS

1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know, or
  - b. Should s/he have known that the alleged victim was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

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**FORCE** 

- Was force used by the individual to obtain sexual access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
  - Physical violence: hitting, restraint, pushing, kicking, etc.
  - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.

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**FORCE** 

- Types of force to consider (cont.)
  - Intimidation: an implied threat that menaces and/or causes reasonable fear.
  - Coercion: the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency.
      - Intensity.
      - Duration.
      - Isolation.

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**INCAPACITY** 

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
  - Blackout ≠ incapacitation, automatically.
  - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how.
  - Partial blackout must be assessed as well.
- What if the responding party was drunk too?

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**INCAPACITY** 

- What was the form of incapacity?
  - Alcohol or other drugs.
    - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
    - Incapacity = an extreme form of intoxication.
  - Administered voluntarily or without reporting party's knowledge.
  - Rape drugs.
- Mental/cognitive impairment.
- Injury.
- Asleep or unconscious.

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**INCAPACITY (CONT.)** 

- First, **was the reporting party incapacitated** at the time of sex?
  - Could the person make rational, reasonable decisions?
  - Could the reporting party appreciate the situation and address it consciously such that any consent was informed -
    - **Knowing who, what, when, where, why, and how.**
- Second, **did the responding party know** of the incapacity (fact)?
- Or, **should the responding party have known** from all the circumstances (reasonable person)?

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**SOME FACTS ABOUT ALCOHOL** 

- Most abused drug on college campuses.
- Most commonly used date rape drug.
- Time - the **only** sobering tool.
  - One "drink" per hour.
  - "Myth of puking."
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

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**COMMON INTOXICATION FACTORS** 

- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender:
  - E.g.: enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

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**BAC/BAL** 

- One “drink” ≈ .025 BAL.
  - 12 oz.
  - 5 oz. wine.
  - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
  - .015/hr. (avg.).
  - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.

12 oz    1 1/2 oz    5 oz

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**BAC/BAL (CONT.)** 

- .05-.07: Buzzed; feeling of well-being; minor memory and coordination impairment.
- .07-.09: Slight impairment of coordination, vision, reaction time; judgment and self-control reduced.
- .10 -.125: Significant impairment of coordination, reaction times, and judgment; possible slurred speech.
- .13-.15: Severe motor impairment; blurred vision, loss of balance; judgment and perception severely impaired.

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### BAC/BAL (CONT.)



- .16-.19: "Sloppy drunk;" increased negative feelings; possible nausea; blackout possible.
- .20: Dazed and disoriented; possible difficulty standing or walking; possible nausea and vomiting; blackouts possible.
- .25: Severe mental, physical, and sensory impairment; nausea and vomiting – asphyxiation concerns; blackouts possible.
- .35: Possible coma; level of surgical anesthesia.
- .40: Coma possible; death possible due to respiratory arrest.

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### INCAPACITY ANALYSIS



- If the reporting party **was not** incapacitated, move on to the Consent analysis.
- If the reporting party **was** incapacitated, but:
  - The responding party did not know it, **AND**
  - The responding party would not have reasonably known it = policy not violated. Move to Consent analysis.
- If the reporting party **was** incapacitated, and:
  - The responding party **knew it or caused it** = policy violation. Sanction accordingly.
  - The responding party **should have known it** = policy violation. Sanction accordingly.

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### CREATE A TIMELINE



- First must determine by a "more likely than not" standard if the reporting party was incapacitated.
  - This inquiry will likely be triggered by statements such as: "The next thing I remembered was....."
  - "I woke up and....."
  - "I don't remember anything after....."
- That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the reporting party was incapacitated (using a preponderance of the evidence standard).

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**TIMELINE CONSTRUCT**



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
  - What were you drinking (e.g., wine, beer, or hard liquor)?
  - How much were you drinking (e.g., shot, 12 oz., or large cup)?
  - How many drinks did you have?
  - Were you using any recreational drugs?
  - When did you eat? What did you eat?
  - Are you on any personal medications?

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**TIMELINE CONSTRUCT (CONT.)**



- Continue the first five questions up until the point in time that reporting party indicates he/she cannot remember anything.
- **Note:** If reporting party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
  - Where were you when you were drinking?
  - Did you leave your drink at any time then resume consuming?
  - Did anyone provide drinks for you?

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**TIMELINE CONSTRUCT (CONT.)**



- You will need to make an assessment if, based on the preponderance of the evidence, the reporting party was more likely than not incapacitated.
- If the answer is "No," then you would proceed to the Consent analysis.
- If the answer is "Yes," then go to part two of your analysis.
- Conduct the same timeline for the responding party, superimposed on the reporting party's timeline.

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### TIMELINE CONSTRUCT (CONT.)



- Ask the responding party if reporting party was:
  - Slurring words?
  - Stumbling?
  - Acting unusual (e.g., not making sense, appearing drunk, etc.)?
  - Falling asleep?
  - Throwing up?
  - Disoriented?
  - And, if responding party knows reporting party, was s/he acting different from the way s/he usually acts?

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### TIMELINE EXAMPLE

- Creating a Timeline
- Timeline Construct
- Some Facts About Alcohol
- Incapacity Analysis
- Consent
- Rules to Remember
- Case Studies

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### CREATING A TIMELINE




Use the preponderance of evidence standard.

Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?



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### CREATING A TIMELINE (CONT.)

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### TIMELINE CONSTRUCT (CONT.)

*You need to determine whether it was reasonable that the responding party knew the reporting party was incapacitated.*

- Determine if responding party knew reporting party previously.
- If so, ask if reporting party was acting differently from previous similar situations.
- Review what the responding party observed the reporting party consuming (via your timeline).
- Determine if responding party provided any of the alcohol / drugs for the reporting party.

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### CONSENT

- Question 3 is the Consent question: What clear words or actions by the reporting party gave the responding party permission for the specific sexual activity that took place?
- Equity demands a "pure" consent-based policy, defining what consent is rather than defining it by what it is not (e.g., force, resistance, against someone's will, unwanted, someone unable to consent, etc.).

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**RULES TO REMEMBER** 

- No means no, but nothing also means no. Silence and passivity do not equal permission.
- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.

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**CASE STUDIES** 

- Sexual assault without alcohol.
- Sexual assault with alcohol.
- Sexual harassment.
- Stalking.
- Relationship violence.



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**QUESTIONS?**



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**CONTACT  
INFORMATION**

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DANIEL C. SWINTON, J.D., ED.D.  
*daniel@atixa.org*

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