



Association of
Title IX Administrators

CONSENT WORKSHOP

A Comprehensive Understanding of Consent Theory and
Practice



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

AGENDA

- 1 Consent Theory
- 2 Consent Practice
- 3 The ATIXA Consent Construct – Three Questions
- 4 Force and Coercion
- 5 Incapacity
- 6 Scenarios



CONSENT THEORY

CONSENT

- **Consent is:**
 - Informed, knowing, and voluntary
 - freely given, no duress, no fraud
 - Active
 - No means no, but nothing also means no.
 - Silence and passivity do not equal consent (as a default rule).
 - Yes means yes, but yes to what?
- Creates mutually understandable permission regarding the conditions of sexual activity (objective or subjective?)

CONSENT (CONT.)

- To be valid, consent must usually be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Are there exceptions to this?
 - Prior consent ≠ future consent, automatically
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally, and once that communication is understood, activity must stop reasonably immediately

CONSENT IN THEORY

- Consent is simply the communication of sexual permission
- Consent is an imperfect construct because human communication is imperfect
- Consent – by definition – is affirmative
 - But what if the parties allow passive communication to suffice?
 - Does affirmative consent shift the burden of proof?
- Institutions should use the pure consent construct, meaning that nothing more than proof of non-consent is necessary to establish a policy violation
 - Proof of force or resistance is not necessary

CONSENT IN THEORY (CONT.)

- Consent policies create a default for one-time hookups, new relationships, first-time sex, and other scenarios where the parties do not evolve other norms of communication
 - What if they do evolve other norms of communication?



CONSENT IN PRACTICE

CONSENT IN PRACTICE

- Consent in practice can be very different than consent in theory
- If parties evolve their own norms for communicating consent, and those norms can be proven, they should be held to their own norms, rather than the policy default
 - Patterns of non-verbal or other communication can often convey consent when it is mutually understood between the parties
- Institutions can adopt an approach of being a consent literalist, but if practitioners intend to apply the policy literally — do or die — then individuals need to be made aware of the institution's rigid application of policy

CONSENT IN PRACTICE (CONT.)

- Most practitioners are consent contextualists, not literalists. They want and need the details before, during, and after sexual interactions to inform the context in which they determine if consent was present
- Opt-in vs. Opt-out

CONSENT IN CONTEXT

- Contextualists accept that consent can involve both giving and taking, at once or by turns, by all participants in a sexual interaction, and that it can involve consent to touching and consent to being touched.
- As a default, it may be helpful to place the responsibility to obtain consent upon the initiator of a sexual interaction (there is no commensurate duty to give it), but that misses the reality that often, initiation is mutual, or that at one point in an interaction one party initiates, but at another point, another party initiates.
- Sometimes, people just come together, and it's not possible to assess who initiated what actions, or the parties disagree on who did what and when.

CONSENT PRINCIPLES TO UNDERSTAND

- Context often matters more than anything else
- People in longer-term relationships can often evolve their own consent rules.
 - Thus, the default assumptions of policy apply until there is reason to reasonably conclude that they should not.
- Consent can in fact be implied because reasonable reciprocation (without leveling-up) is consensual
 - Can there be times when reciprocation is not reasonable?
- Interactions that start in ways where consent is ambiguous can establish consent later in the interaction by ratification
 - What is ratification and how does it work?

CONSENT PRINCIPLES TO UNDERSTAND (CONT.)

- Individuals can put any conditions on consent that they want, and that are agreed to (even if unreasonable)
 - Stealthing example
- The reasonable person standard can be pertinent to consent analysis
- Consent analysis should not be impacted by rape myth adherence

CONSENT & KINK

- **Kink** refers to a variety of consensual, non-traditional sexual, sensual, and intimate behaviors.
- Kink can include role playing, objectification, breath play, fire play, BDSM, etc.
- Core principle = negotiating before anything happens between the parties
- “Consensual non-consent”
 - Consenting parties form a mutual agreement that at least one partner will pretend to not consent to sexual activity
 - Significant trust between the players is required
 - Full consent is established prior to any sexual activity

CONSENT & KINK (CONT.)

- Eroticizes powerlessness
- Some players will use a safe word; others believe that gives the sub too much control
- Kink may involve intentional, consensual pain/force/violence.
- Most kink practitioners spend a significant amount of time developing skills so that the intended outcome can be as safe and controlled as possible.
- Investigators and Decision-makers must thoroughly explore the planning and communication around consent to understand whether kink was involved in an incident or relationship

THREE CONCEPTS TO AID IN CONSENT ANALYSIS

- Sex isn't like the game of baseball, even though some people are socialized to run the bases
 - Consent to one form of sexual activity does not imply consent to other forms of sexual activity (as a default rule)
- Every sexual interaction is like a traffic signal at a four-way intersection.
 - What color was the light when the respondent proceeded through?
 - Green = Go
 - Yellow = Slow down, stop, and/or clarify
 - Red = policy violation
- Social constructs create unspoken boundaries that impact on consent (related to STDs, pregnancy, etc.), as do identities.



THE ATIXA CONSENT CONSTRUCT – THREE QUESTIONS

- Force
- Incapacity
- Consent

OVERVIEW OF THE THREE QUESTIONS

1. **FORCE:** Was force used by the Respondent to obtain sexual or intimate access?
2. **INCAPACITY:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, **or**
 - b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. **CONSENT:** What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

FORCE

- 1. Was force used by the Respondent to obtain sexual or intimate access?**
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
 - Consider the impact of power dynamics
 - Consider the implications of consented-to force, as in BDSM interactions/relationships

FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- **Threats:** A threat can be anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - Requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration
 - Important to differentiate coercion from seduction and coercion from negotiation

INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - Unable to understand who, what, when, where, why, or how
- 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 = working memory functional; short-term memory not retained, not stored long-term; long-term memory from before blackout can be accessed
 - Partial blackout must be assessed as well

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known Blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

SOME FACTS ABOUT ALCOHOL

- Most abused drug on college campuses
- Most commonly used “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

RISK 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
- Stress/Mood
- Fatigue
- Caffeine
- Genetics
- Ethnicity

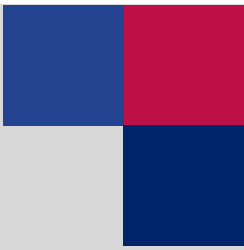
INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it** = policy violation Sanction accordingly
 - The Respondent **should have known it** = policy violation Sanction accordingly
 - The Respondent's own intoxication cannot be used as a defense because this is an objective standard – what would a reasonable person have known (a RP is sober and uses good judgment)?

CONSENT ANALYSIS

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place?

- Is there any RELEVANT sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical and context can be crucial



CONSENT SCENARIOS

LINH & GARRETT

Linh and Garrett meet at a party. They spend the evening dancing and getting to know each other. Garrett convinces Linh to come up to his room. From 11:00 p.m. until 3:00 a.m., Garrett uses every line he can think of to convince Linh to have sex with him, but she adamantly refuses.

Finally, it seems to Garrett that her resolve is weakening, and he convinces her to give him a “hand job” (hand-to-genital contact). Linh would never have done it but for Garrett’s incessant advances. He feels that he successfully seduced her, and that she wanted to do it all along, but was playing shy and hard to get. Why else would she have come up to his room alone after the party? If she really didn't want it, she could have left. Linh alleges it was sexual assault.

TARIK & VERONICA

Tarik and Veronica are best friends. Tarik has always been attracted to Veronica, but he was already in a relationship with Ruby.

Shortly after he broke up with Ruby, Tarik was despondent. He went to Veronica, telling her that what he really needed to get over his pain was some “rebound sex.” Veronica told Tarik that she did not want to have sex with him due to the problems it would cause in their friendship.

Tarik maneuvered Veronica into the corner, using his large body size to pin her against the wall, but he did not touch her. Tarik expressed his attraction to her, and Veronica felt he would never let her go if she didn't have sex with him, so she consented. She later reported it as a sexual assault.

LILA & BEN

When Lila and Ben first met, their relationship was tumultuous. At first, Lila didn't want to have sex with Ben because she felt like too many people would find out. He kept trying to convince her. He suggested that if Lila didn't have sex with him, he would break up with her. Lila finally gave in and had sex with Ben. Several months later, she realized what had happened and reported it as a sexual assault.

BIANCA & SHELDON

Bianca and Sheldon have been dating for several years. Over time they have come to know each other very well and have established non-verbal patterns of sexual communication that suit them well. For example, among other habits, Sheldon knows that if Bianca puts on her green nightgown before bed, she wants to have sex with him. If she wears her red nightgown, she does not want to have sex with him. For three years, they sexually communicate in this manner, which works just fine for them.

Late one night in the fourth year of their relationship, Bianca heads off to bed before Sheldon. Realizing that her red nightgown is in the laundry, she puts on her green nightgown. She knows that Sheldon might assume the wrong thing, but she has nothing else to wear, and she figures she'll be asleep by the time Sheldon goes to bed, so he'll know that she is not really interested (continued...)

BIANCA & SHELDON

Sheldon comes to bed, and sees that Bianca has on her green nightgown. He knows what this means. He thinks it will be romantic to wake Bianca up by beginning to have sex with her, as this has been the case with them in the past. When he does this, Bianca is so annoyed that she breaks up with him and kicks him out. She goes to the Title IX Coordinator and alleges sexual assault.

BLAIR & CARLOS

Blair and Carlos met at a movie. They started to date on and off. One night, Blair and Carlos went out drinking. After the bars closed, they went to Blair's room. Blair was very drunk, and engaged in sex with Carlos, despite Carlos's protests. Carlos was not as drunk as Blair. Blair argues that even if she might have had non-consensual sex with Carlos, it's not her fault because of how drunk she was. She believes she was so drunk that she didn't even know she was having sex with Carlos, let alone that it was something Carlos didn't want.

SETH & NEAL

Seth and Neal, two students at the College of Knowledge, have been dating for seven months. During that time, they have had mutually consensual intercourse on many occasions.

One night, Seth overhears that Neal is also sleeping with a friend of theirs. Enraged, Seth confronts Neal. Neal promises never to be unfaithful again, and Seth agrees to give Neal another chance. However, Seth withholds sex from Neal because he is still angry and hurt.

One night, feeling frustrated over Seth's reluctance to have sex with him, Neal physically forces himself on Seth, even though Seth tells Neal "no" repeatedly (continued...)

SETH & NEAL

Seth is hurt and confused. He continues to date Neal for two more months, and has consensual sex with him during that period, repeatedly.

Seth then discovers that Neal is cheating again. Seth breaks up with Neal and alleges that the previous incident of force has violated college policy.

CAMERON & ANA

Cameron has been dating Ana for three months. He is her first boyfriend, and she is a virgin. They have been engaging in fondling and fooling around, and Cameron thinks Ana is ready to have intercourse.

Cameron knows Ana is a virgin and has always been respectful about his advances. He knows that Ana is shy and embarrassed about talking about sex. He usually just keeps fondling and fooling around until Ana stops him.

On the night in question, Cameron and Ana are alone together. They kiss, and she pulls his hand to her breast. After fondling her for a while, Cameron wants to put his hand up Ana's skirt (continued...)

CAMERON & ANA

Not knowing whether this is OK with her or not, Cameron goes very slowly. He puts his hand on her knee, and slowly begins creeping up her leg. She continues to kiss him. He puts his hand on her underwear, and she allows him to caress her. He starts to penetrate her with his finger, and she slaps him and pushes him away. Crying, she tells him to leave. The next day, she alleges sexual assault.

NIGELLA & SOLO

Nigella and Solo had been dating, long-term, and were sexually active with each other. They had recently decided, as they were monogamous, that they would stop using condoms. The first time they had sex without a condom, it started off fine and consensual. But as Solo neared climax, Nigella panicked about the unprotected sex and said stop.

Solo testified that he heard Nigella and realized she wanted him to stop, but was at that moment climaxing, and was unable to stop at that second, but that he did remove his penis as soon as he possibly could thereafter. Nigella broke up with him and filed a complaint of sexual assault.

DANTE & QI

Dante and Qi met at a party. After, they hooked up on a couch in the lounge. Qi performed oral sex on Dante, to completion. Dante later filed a complaint that he had not consented to Qi performing oral sex on him, which was an act that is prohibited in his culture. Qi admitted that while they had not exchanged words of consent, Dante was fully cooperative during the oral sex, thrusting his penis into Qi's mouth, and climaxed in Qi's mouth.

BECKY & KAREN

Becky was queer and came on to Karen one day in the lab. Karen was unsure of her own orientation but was open to experimenting with Becky to see if she liked it. They consensually kissed and fondled each other's breasts. Then, Karen slid her hand into Becky's panties to stroke her vulva. Becky took this as a sign that Karen was also open to being stroked and began to stroke Karen's vulva. Karen stopped her right away, stated that she did not consent to anything below the waist, and later filed a complaint against Becky.

BONUS: SOFIA & THE HOCKEY PLAYERS

On Friday night, Sofia told her roommate Maya that she was going out. Maya asked her where she was going, and Sofia said, “I’m going out to get drunk enough to do the whole hockey team.”

Sofia went alone to the local pub where the college athletes liked to hang out. She polished off two pitchers of beer at the bar.

As it got later, and the bar became more crowded, Sofia flirted with many men, including a group of hockey players. Sofia and one of the hockey players snuck off into the back room of the bar, which was usually reserved for private parties but was not in use that night. They were soon having sex with each other on one of the tables.

SOFIA & THE HOCKEY PLAYERS

Suddenly, six other hockey players came into the room, and they joined their teammate in “pulling a train” on Sofia. She did not physically resist them, but she was pretty groggy and limp during the incident. Afterward, Sofia alleged that six of the men had sexually assaulted her. She did not allege sex with the first man with whom she went into the back of the bar was non-consensual.

At the hearing, Maya testified that earlier in the evening on the date of the reported incident, Sofia told her that she was going out to get drunk enough to have sex with the whole hockey team. Sofia admitted that she might have said that, but that it was only an expression.



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Questions?

Thanks for joining us today.



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