



Association of  
Title IX Administrators

# Understanding Consent

An ATIXA Best Practices Workshop

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# Introduction



This workshop highlights the nuances of consent, including communication, implied consent, ratification, incapacitation, conditional consent, and withdrawal.



Participants will apply their learning during this workshop to practice their analysis and navigation of this challenging and complex topic.



Our goal today is to provide an in-depth examination of consent and ATIXA's recommended best practices to guide participants' responses to allegations of nonconsensual behavior.

# Consent Theory

# Consent Defined

## 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
  - Yes means yes, but yes to what?
- Creates mutually understandable permission regarding sexual activity



# Additional Information

- Immediately prior to or contemporaneous
  - Exceptions
  - Prior consent ≠ future consent
- Consent can be withdrawn at any time
  - Withdrawal must be clearly communicated verbally or non-verbally
    - Activity must stop reasonably immediately

# Consent in Theory

- Consent is simply the communication of sexual permission
  - Human communication is imperfect
- Consent is affirmative
  - Parties permitting nonverbal communication
  - Affirmative consent and burden of proof
- Institutions should use the pure consent construct
  - Nothing more than proof of non-consent is necessary for a policy violation
  - Proof of force or resistance is not necessary

# Consent in Context

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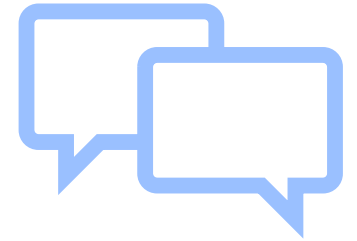
New relationships



Long-term relationships



First-time sex/hookups



Other scenarios without established communication norms between the parties

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# Consent in Practice

# Consent in Practice vs Theory

- Consent in practice can be very different than consent in theory
- If parties evolve their own norms for communicating consent, they should be held to their own norms
  - Assuming the norms are provable
  - Patterns of non-verbal or other communication can often convey consent when it is mutually understood between the parties
- Institutions may adopt a literalist consent approach or rigid application of policy
  - If they elect to do so, students and employees must be aware

# Consent in Practice Cont.

- Most practitioners are consent contextualists, not literalists
  - The details before, during, and after sexual interactions inform the context and consent determination
- Opt-in vs. Opt-out



# Contextual Consent

- Contextualists accept that consent can involving both giving and taking
  - At once or by turns
  - By all participants in a sexual interaction
  - 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
  - Often though, initiation is mutual
    - Or at one point in an interaction one party initiates, but at another point, another party initiates
  - Sometimes, it is not possible to assess who initiated which actions

# Consent Principles to Understand

- Context often matters more than anything else
- Consent can, in fact, be implied because reasonable **reciprocation** (without leveling up) is consensual
  - Unreasonable reciprocation
- Interactions that start in ways where consent is ambiguous can establish consent later in the interaction by **ratification**

# Consent Principles Cont.

- Individuals can put any conditions on consent that they want
  - Even if unreasonable
  - As long as there is agreement
  - Stealthing example
- Relevance of the reasonable person analysis to consent
- Do not permit rape myths to influence consent analysis

# Consent and Kink Considerations

- **Kink:** a variety of consensual, non-traditional sexual, sensual, and intimate behaviors
  - Role playing, objectification, breath play, fire play, BDSM, etc.
  - “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 parties is required
    - Full consent is established prior to any sexual activity
    - Kink may involve intentional, consensual pain/force/violence

# Consent and Kink

- Core principle for kinks is consent negotiation
  - Most kink practitioners prioritize making the intended outcome as safe and controlled as possible
- Planning and communication around consent important for Decision-makers (DM) and Investigators to explore and understand



# Three Consent Concepts

- 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 = Stop
  - Not like baseball and rounding the bases, which assumes “the next base”
- Consent to one form of sexual activity does not imply consent to other forms
- Social constructs and identities create unspoken boundaries that may impact consent

# The ATIXA Consent Construct

# 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 Complainant words or actions gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

# Force

## **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

# Types of Force: Physical

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
  - This may also involve alleged violations of other policies (e.g., harm to persons, violation of law)
- **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

# Types of Force: Non-Physical

- **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 Defined

## Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
  - Unable to understand who, what, when, where, why, or how
  - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
  - Situational awareness
  - Consequential awareness

# Incapacity Reason

- **What was the reason for incapacity?**
  - Alcohol or other drugs (prescription or non-prescription)
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious
- Blackouts are frequent issues
  - Blackout ≠ incapacitation (automatically)
    - Blackout = working memory functional; short-term memory not retained
    - Partial blackout must be assessed as well
  - Although memory is absent in a blackout, verbal and motor skills may still function

# Evidence of Incapacity: Potential Context Clues

- Slurred speech
- Odor of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)

Incapacitation determination is made contextually  
**in light of all the available relevant evidence**



# Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
  - The Respondent did not know, **AND**
  - The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
  - The Respondent **knew it or caused it** = policy violation
  - The Respondent **should have known it (reasonable person)** = policy violation
  - The Respondent's own intoxication cannot be used as a defense

# Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
  - If so, was the Complainant acting differently than previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming
  - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant

# Consent Analysis

**What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it 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 or portion of the encounter that the parties agree were consensual? Non-consensual?
  - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors

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# Consent Scenarios

# Linh & Garrett Introduction

- 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 Linh's 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.

# Linh & Garrett Scenario

- 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 Introduction

- 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 & Veronica Scenario

- 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.
- Veronica later reported it as a sexual assault.

# Lila & Ben Scenario

- 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.
- Ben 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 Introduction

- 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.

# Bianca & Sheldon Scenario

- Realizing that her red nightgown is in the laundry, Bianca 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.
- Sheldon comes to bed and sees that Bianca has on her green nightgown.
- He knows what this means.
- Sheldon 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.

# Bianca & Sheldon Report

- When he does this, Bianca is so upset that she breaks up with Sheldon and kicks him out.
- Bianca goes to the Title IX Coordinator (TIXC) and alleges sexual assault.

# Blair & Carlos Scenario

- 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 Introduction

- Seth and Neal, two students, 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.

# Seth & Neal Scenario

- One night, feeling frustrated over Seth's reluctance to have sex with him, Neal physically forces himself on Seth and penetrates Seth, even though Seth tells Neal "No" repeatedly.
- Seth is hurt and confused.
- He continues to date Neal for two more months, and has consensual sex with him during that period, multiple times.
- Seth then discovers that Neal is cheating again.
- Seth breaks up with Neal and alleges that the previous incident of force has violated institutional policy.

# Cameron & Ana Introduction

- Cameron has been dating Ana for three months. He is her first boyfriend, and she is a virgin.
- They have been engaging in consensual sexual touching and fooling around, and Cameron thinks Ana is ready to have intercourse.
- Cameron knows Ana is a virgin and he has always been respectful about his advances.
- He knows that Ana is shy and embarrassed about talking about sex.
- He usually just keeps touching her and fooling around until Ana stops him.

# Cameron & Ana Scenario

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

# Cameron & Ana Report

- Cameron puts his hand on Ana's underwear, and she allows him to caress her.
- He starts to penetrate her vagina with his finger, and she slaps him and pushes him away.
- Crying, she tells him to leave.
- The next day, she reports a sexual assault.

# Nigella & Solo Scenario

- 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 sexual assault complaint.

# Dante & Qi Scenario

- 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, thrust his penis into Qi's mouth, and climaxed in Qi's mouth.

# Sofia & The Hockey Players Introduction

- 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.

# Sofia & The Hockey Players Scenario

- They were soon having sex with each other on one of the tables.
- 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 the sex with the first man with whom she went into the back of the bar was non-consensual.

# Sofia & The Hockey Players Cont.

- 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?

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