



A T9 Mastered Virtual Workshop
Consent: Gathering the Essential Facts

COURSE MATERIAL

July 26, 2022



Presented by T9 Mastered, LLC
a joint venture of Public Interest Investigations, Inc. and
Sue Ann Van Dermynen, Esq. and Eli Makus, Esq.



A T9 Mastered Virtual Workshop:
**Consent: Gathering the
Essential Facts**

Course Materials

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Biographies

Liz Paris is a Partner with Van Dermyden Makus. She is licensed to practice law in the State of California, and is certified as a Senior Professional in Human Resources (SPHR).

Prior to joining Van Dermyden Makus, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.



Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

Nora Rohman has been an investigator at Public Interest Investigations, Inc., since 2013. Her cases have focused on campus investigations involving sexual misconduct allegations; workplace investigations into complaints of harassment, discrimination, and/or retaliation; and mitigation investigations for death penalty matters, both at the trial and appellate levels.



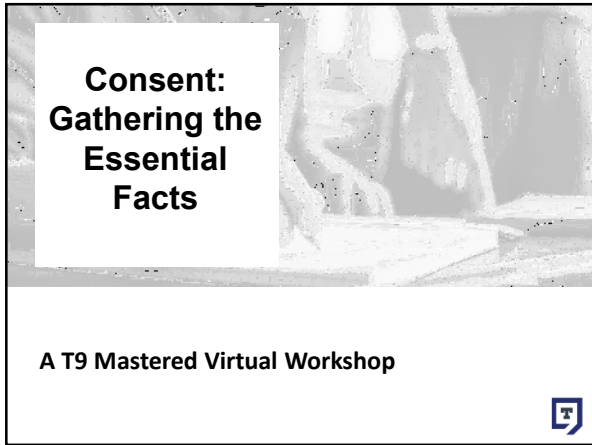
An engaging lecturer and trainer, Nora has been part of the faculty of T9 Mastered since 2017. She has also given presentations to numerous groups on conducting effective investigations. These presentations have included the annual conference of the Association of Workplace Investigators (AWI) in 2015 and 2018, and an annual training for the Title IX and Equity investigators for the California State University (CSU) system in 2019.

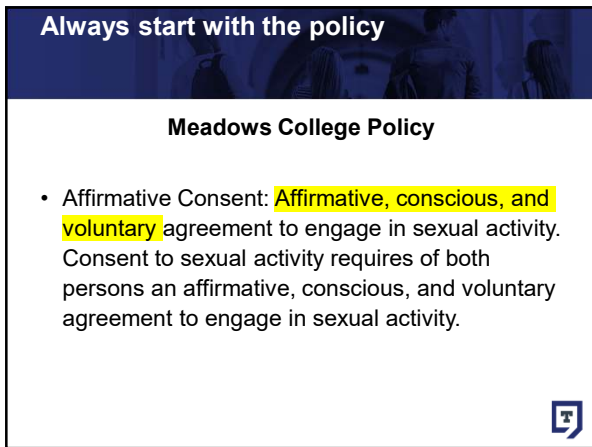
Nora also has specialized knowledge in the area of sexual assault prevention education. She completed an internship at Peace Over Violence, working on interpersonal violence prevention education, and trained as a Peer Counselor at Concordia University's 2110 Center for Gender Advocacy, including violence prevention and sex education. She also has extensive experience with education and activism in the LGBTQ community.

Nora frequently participates in workshops, conferences, and training programs to stay current on legal developments. She completed the Investigations Training Institute for AWI and has regularly attended the annual Capital Case Defense Seminar, held by California Attorneys for Criminal Justice. She has also received training on conducting interviews using trauma-informed approaches.

Nora earned her bachelor's degree in Interdisciplinary Gender Studies from Concordia University in Montreal. Following this, she pursued a master's degree in Gender Studies at New York University.







Biggest Challenges in Discussing Consent

- Inherent nature of most sexual interactions
- Understanding escalation
- Ongoing consensual relationships
- Incapacitation



What does consent look like?

**It varies in every circumstance.
There is no bright-line rule.**

- Verbal: “Yes,” “I like this,” “Can we...”
- Non-verbal: taking off own clothing, movements (hands, hips, etc.), nodding



Some Consensual Sexual Activity

- What specifically was consensual v. non-consensual?
- At what moment did things become non-consensual?
- When and how did things escalate? And what were the parties communicating through words and actions?



Some Consensual Sexual Activity

- How was consent communicated?
- Did either of you say anything?
- Non-verbal communication?

Remember policy language:

It is not anyone's burden to say "No" or "Stop" or "I don't want to do that."

The burden is to **establish consent before acting.**

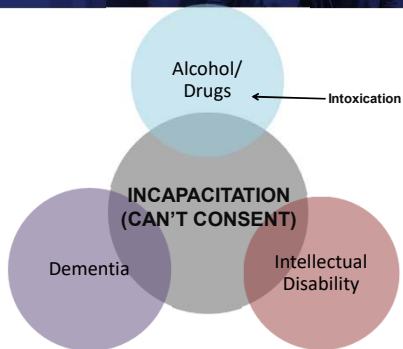


Incapacitation Due to Drugs and Alcohol

**INTOXICATION
≠
INCAPACITATION**



Incapacitation Due to Drugs and Alcohol



Incapacitation

- **Incapacitation** is a high bar.



- You can be very intoxicated, and still not be incapacitated.
- Investigator must collect sufficient facts to support a finding of capacity or incapacity.



Always start with the policy

Meadows College Policy

- **Incapacitation:** A person is unable to consent to sexual activity because of incapacitation, if:
 - The person was asleep or unconscious;
 - The person was incapacitated due to the influence of drugs, alcohol, or medication so that the person **could not understand the fact, nature, or extent of the sexual activity.**
 - Whether an intoxicated person (as a result of using alcohol or other drugs) is incapacitated depends on the extent to which the alcohol or other drugs **impact the person's decision-making ability, awareness of consequences, and ability to make informed judgments.**



Three Steps in Incapacitation Analysis

1. What is the evidence that the complainant was under the influence of alcohol or drugs?
2. Did the alcohol or drugs render the complainant incapacitated? If so, what is the evidence showing the incapacitation?
3. Did respondent know or should have known that complainant was incapacitated?



Incapacitation Questions

- Food in stomach is the key factor affecting rate of absorption.
– Ask: *What did they eat and when?*
- Peak BACs generally within 30 – 60 minutes of the cessation of drinking.
– Ask: *Timing of drinking relative to sex?*
- Size matters
– Ask: *Height and weight?*



Signs on Intoxication

- We are not chemists or physicians or police officers.
– *Strong caution:*
 - » *Avoid discussing rates of intoxication or anything related to human biology*
 - » *Focus on behaviors and actions.*



Signs of Intoxication

- Decreased inhibitions
- Psychomotor impairment
- Cognitive impairment

All of these items can be used in questioning.



Signs of Intoxication

Decreased inhibitions

- Doing or saying things not normally done when sober
- Boisterousness or bravado
- Argumentative or confrontational
- Obnoxious
- Hanging on to people or intruding on their personal space
- Animated or exaggerated actions
- Rapid drinking
- Acting silly or "cutesy"

Psychomotor impairment

- Slurred, mumbled, or slow speech
- Swaying while sitting, standing, or walking
- Staggering, stumbling, holding onto objects for balance
- Difficulty reaching for and picking up objects
- Inability to maintain eye contact
- Spilling food or drinks
- Falling down or loss of balance

Cognitive impairment

- Loss of concentration or train of thought
- Delayed response to questions
- Illogical comments
- Impaired short- or long-term memory
- Lighting the wrong end of a cigarette
- Excessively quiet, sullen
- Trouble counting money or doing basic math
- Difficulty following directions



Understanding the who/what/when/where why or how?

- Thoughts about what they did or did not want to do
- Thoughts about the consequences of the sexual activity
- Stops to use or request birth control
- Stops to do things to prepare for sexual activity
 - Brushes teeth, going to restroom, removing tampon



Decision-Making Abilities?

- **Not oriented to time, place and actions**
- **Unable to carry on a conversation?**
 - Delayed answers or illogical comments
 - Can't communicate
- **Unable to handle simple cognitive or motor tasks**
 - Counting out change
 - Unlocking a door
- **Risky or unusual behaviors**
 - Walking along edge of roof on a dare
- **Confused about where they are, or who they are with**



Always remember this final step in an incapacitation analysis:

If the complainant was incapacitated, investigator must also evaluate **respondent's knowledge** of the level of incapacitation.



Respondent's Knowledge

Potential evidence that respondent **knew**:

- Saw complainant ingest alcohol or drugs
- Saw complainant's physical and verbal behaviors
- Told about amount of alcohol or drugs used by complainant
- Respondent's actions, like assisting the complainant after she threw up
- Respondent's comments to others about the complainant's intoxication



Respondent's Knowledge

Was there a **failure by respondent to take reasonable steps** to determine the complainant was unable to consent due to complainant's incapacitation?

- Respondent's **own intoxication or recklessness** does not act as a valid excuse.



Review: Three steps in Incapacitation Analysis

1. What is the evidence that the complainant was under the influence of alcohol or drugs?
2. Did the alcohol or drugs render the complainant incapacitated? If so, what is the evidence showing the incapacitation?
3. What did the respondent know, or should have known, about the complainant's level of intoxication and/or incapacitation?

APPLY THE FACTS TO YOUR POLICY!



Is Complainant alleging incapacitation?

YES

NO

Is there evidence Complainant was under the influence of alcohol or drugs?

YES

NO

Did Complainant provide affirmative consent for sexual activity?

YES

NO

Could Complainant understand the fact, nature, and extent of the sexual activity?

NO

YES

NO POLICY VIOLATION

POLICY VIOLATION

Did Respondent know/should have known Complainant was incapacitated?

NO

YES

The elements of incapacitation have not been met.

The elements of incapacitation have been met.