



**T9
MASTERED**[®]
Training for Title IX Professionals



**Title IX Consent: Two-Part Series on
Affirmative Consent and Incapacitation**

Part 2: A Close Look at Incapacitation
Course Material
May 17, 2023

Presented by T9 Mastered LLC
a venture of Van Dermyden Makus Law Corporation



Title IX Consent: Two-Part Series on Affirmative Consent and Incapacitation

Part 2: A Close Look at Incapacitation

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Biographies

Liz DeChellis 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.

Lexi Zuidema is an Associate Attorney with Van Dermyden Makus Law Corporation. Her practice focuses on discrimination and harassment complaints in both private and public- sector employment contexts and Title IX campus investigations. Lexi also serves as a Hearing Officer in Title IX and student conduct cases.



Trained in Trauma Informed Forensic Interviewing, Lexi is an experienced investigator in Title IX sexual misconduct and harassment claims. She has conducted investigations at the K-12 and university level. Lexi has experience in investigating University faculty and administrators, underage complainants, multiple respondents, and complex issues involving incapacitation and consent.

Prior to joining Van Dermyden Makus, Lexi completed an externship with Chief Justice Tani Cantil-Sakauye at the California Supreme Court. While completing her undergraduate degree, she worked for her school's legal counsel researching requirements and applications of Title VII and Title IX. She also worked as an intern for the Santa Barbara District Attorney's Office and the Kern County District Attorney's Office, aiding in the investigation of numerous sexual violence cases.

Lexi graduated from UC Davis School of Law in 2019 with business law and tax law certificates. She received her Bachelor of Arts from Westmont College in 2016 with a double major in Political Science and Economics & Business.





**Analyzing
Consent:
A Close Look At
Incapacitation**

Liz DeChellis & Lexi Zuidema
May 17, 2023





Always start with the policy

California College Policy

- Affirmative Consent: **Affirmative, conscious, and voluntary** agreement to engage in sexual activity. Consent to sexual activity requires of both persons an affirmative, conscious, and voluntary agreement to engage in sexual activity.

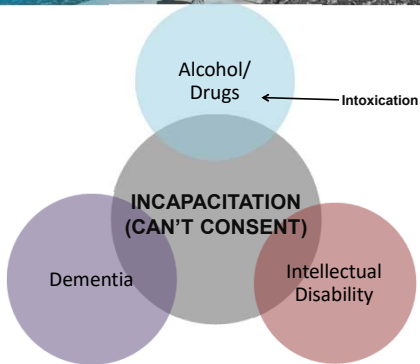


Incapacitation Due to Drugs and Alcohol

**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

Sample 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 an intoxicant?
2. Did the complainant's intoxication rise to the level of incapacitation?
3. Did respondent know or should have known that complainant was incapacitated?



Intoxicants Overview

- Majority of cases involve alcohol as the intoxicant.
- Not uncommon to see "cross-fade" cases.
- Other substances
 - Marijuana
 - Cocaine
 - Amphetamines (Adderall, Ritalin)
 - MDMA (Ecstasy/Molly)
 - Psilocybin (mushrooms)
 - LSD (acid)



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?*

These questions can help provide context to the investigator. But they are not the determiner in assessing incapacitation.



Signs on Intoxication

We are not chemists or physicians or police officers.

- *Avoid discussing rates of intoxication or anything related to human biology.*
- *Focus on behaviors and actions.*
- *We are looking at the totality of the circumstances, not lab values.*



Signs of Intoxication

- Decreased inhibitions
- Psychomotor impairment
- Cognitive impairment

All of these items can be used in questioning.



Signs of Intoxication

<p>Decreased inhibitions</p> <ul style="list-style-type: none"> • 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” 	<p>Psychomotor impairment</p> <ul style="list-style-type: none"> • 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 	<p>Cognitive impairment</p> <ul style="list-style-type: none"> • 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
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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**
 - Navigating to a dorm room
 - Unlocking a door
- **Risky or unusual behaviors**
 - Walking along edge of roof on a dare
 - Running around not fully clothed
- **Confused about where they are, or who they are with**

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 contraception
- Stops to do things to prepare for sexual activity

Lack of Consent vs. Incapacitation

- “I was too drunk to fight back.”
- “I didn’t want it to happen but I couldn’t find the words.”
- “I was so tired, I just laid there while they moved me around for sex.”



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!



Terms Used for Drunkenness:

3 sheets to the wind – 80 – act – annihilated – arseholed – ass out – battered – beer goggles – bender – bent – black out – blaze – blitzed – blotto – bombed – boozy – broken – busted – buttered – butt-toast – buzz – cabbaged – clocked out – crossfade – crunched – crunk — dead – drunk – faced – faded – fit-shaced – fizzucked – flap out – fly – forshnicked – full as a tick – gassed – gattered – hammed – hammered – hellafied – hosed – housed – hurt up – in the horrors – Jimmy's talkin – juiced – keyed – kootered – krunk – lagered up – lambasted – legless – lifted – lit – loaded – loose – lubricated – mangled – messed up – moellered – mounted – munted – on the razzle – out of (one's) tree – perve – perved – pickled – pie-eyed – piflicated – pissed – plastered – polluted – poo-pooed – rat-arsed – rat-assed – retarded – ripped – roasted – sassified – sauced – scarred – schammered – schnookered – schwacked – shellacked – shmacked – shnookered – shwasted – sideways – slaughtered – slizzard – sloppy – sloshed – smashed – smoked – snookered – soup sandwich – soused – spanked – spins – splifficated – spun – steaming – stewed – stick a fork in – stinky – strunk – stuck like chuck – swilled – tanked – three sheets to the wind – throwed – tight – tiltered – tipsy – toasted – toddy stricken – toes up/down – tore back– tore up from the floor up – tossed – trashed – troubled – twisted – wacked – wankered – wasted – wavey – waxed – wet – wrecked – zoned – zonked – zooted – zosted

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.