

**Consent and Incapacitation**

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**Consent (CRR 600.020)**

- Consent to sexual activity is knowing and voluntary. It requires of all involved persons a conscious and voluntary agreement to engage in sexual activity. Each person engaged in the sexual activity must have met the legal age of consent. It is the responsibility of each person to ensure they have the consent of all others engaged in the sexual activity. Consent must be obtained at the time of the specific activity and can be withdrawn at any time. Consent, lack of consent, or withdrawal of consent may be communicated by words or non-verbal acts.
- Someone who is incapacitated cannot consent. Silence or absence of resistance does not establish consent. The existence of a dating relationship or past sexual relations between the Parties involved should never by itself be assumed to be an indicator of consent. Further, consent to one form of sexual activity does not imply consent to other forms of sexual activity. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Coercion and force, or threat of either, invalidates consent.

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**Incapacitation (CRR 600.020)**

- A state in which rational decision-making or the ability to consent is rendered impossible because of a person's temporary or permanent physical or mental impairment, including but not limited to physical or mental impairment resulting from drugs or alcohol, disability, sleep, unconsciousness or illness. Consent does not exist when the Respondent knew or should have known of the other individual's incapacitation. Incapacitation is determined based on the totality of the circumstances. Incapacitation is more than intoxication, but intoxication can cause incapacitation.
- **Factors** to consider in determining incapacity include, but are not limited to, the following:
  - **Lack of awareness of circumstances or surroundings**
    - Examples: Inability to understand, either temporarily or permanently, the who, what, where, how, and/or why of the circumstances; blackout state
  - **Inability to physically or verbally communicate coherently, particularly with regard to consent**
    - Examples: Slurred or incoherent speech
  - **Lack of full control over physical movements**
    - Examples: Difficulty walking or standing without stumbling or assistance
  - **Physical symptoms**
    - Examples: Vomiting or incontinence

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**The bottom line is that someone who is incapacitated cannot consent.**

Consent does not exist when the Respondent **knew or should have known** of the other individual's incapacitation.

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**Evaluating Credibility/Corroborating Statements**

- Evidence collected may include:
  - Statements from the parties
    - Examples: Reporting that they had X number of drinks and didn't eat that day, they threw up that night or the next day, they fell when leaving the club, etc.
  - Electronic communications or text messages that didn't make sense
  - Photos or videos
  - Statements from witnesses
    - Examples: Friends state they have not seen the person so drunk before, statements about signs of intoxication they observed (slurred speech, difficulty walking, stumbling, etc.)

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**Scenario**

Brenda and Dylan meet at a party and start talking. They hit it off immediately and find a quiet corner to talk and make out. Over the course of the evening, Brenda consumes much more alcohol than Dylan does and is slurring her speech and having a hard time standing up. Dylan recognizes that Brenda is drunk but likes that she is being playful and flirtatious. Dylan suggests that they go back to his room. Brenda agrees but has to be physically steadied as they leave the party. When they get back to Dylan's place, Brenda flops on Dylan's bed and closes her eyes. Dylan is relieved that Brenda isn't getting sick after all that she's had to drink. Dylan asks Brenda if he can perform oral sex on her. Brenda mumbles something that Dylan can't understand but seems to cooperate as Dylan begins taking off her pants. So, Dylan proceeds to perform oral sex on Brenda.

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**POLL QUESTION:**

Was Brenda incapacitated?

- A. Yes
- B. No
- C. I don't know

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**Scenario**

Kelly and Donna are both drinking heavily at a party. While making their way back to Donna's room, they have trouble walking, stumble multiple times, and even exit the elevator on the wrong floor. Once in Donna's room, they begin to make out, touching each other's buttocks and genitals through their clothes. They fall back on the bed and pass out within minutes. When Donna wakes up an hour later, Kelly is on top of Donna, who is naked from the waist down. Donna shakes Kelly, who is clearly confused. Donna asks Kelly where they are and says, "What happened?" Kelly's eyes won't focus; Kelly says a few words to Donna that make no sense. Donna shifts in bed and is now on top of Kelly. Kelly pulls Donna close and the two kiss. Donna reaches down and tries to touch Kelly's genitals, but Donna struggles and lacks the physical coordination to do so. Kelly pushes Donna away and rolls off the bed, vomiting on the floor. Kelly and Donna pass out again.

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**POLL QUESTION:**

In a cross complaint, who could be found responsible for violating policy?

- A. Donna
- B. Kelly
- C. Both
- D. Neither
- E. I don't know

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**Scenario**

Andrea and Steve are friends who begin dancing and kissing at a party. They are both drunk, although not to the point of incapacitation. Together they decide to go to Steve's room. They undress each other and begin touching each other. Steve moves as if to engage in oral sex and looks up at Andrea, questioningly. Andrea nods in agreement and Steve proceeds. Subsequently, without pausing to check for further agreement, Steve begins to perform oral sex on Andrea. Andrea lies still for a few minutes, then moves away, saying it is late and they should sleep.

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**POLL QUESTION:**

Did Steve have consent to engage in sexual activity with Andrea?

- A. Yes
- B. No
- C. I don't know

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**Scenario**

Brenda and David are engaging in a consensual sexual encounter. David begins to intensify the level of contact and moves quickly from touching and kissing to penetration with fingers. Brenda responds by pulling away slightly, moving David's hands and saying, "Hey, hold on; I'm not sure." David cooperates briefly but then intensifies the contact once more. Brenda inches backwards and then becomes still. Nonetheless, David has sex with Brenda.

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**POLL QUESTION**

Did David have consent from Brenda?

- A. Yes
- B. No
- C. I don't know

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Effects of Alcohol: Differences Across Individuals and Situations

Bruce D. Bartholow, Ph.D

We'll be sending out a link for you to view his session from last year along with the slides.

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