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## Learning Outcomes

Examine	Examine the general definition of consent.
Understand	Understand the various ways in which a person can be incapacitated.
Identify	Identify the differences between impairment, intoxication, and incapacitation.
Recognize	Recognize the impact that alcohol can have on consent.
Understand	Understand that findings regarding incapacitation require a two-step process.
Reflect on	Reflect on policy and reporting implications as well as educational programming.

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## Consent

- ▶ When is touching ok?
- ▶ When is sexual touching ok?
- ▶ How do you know if you have consent to sexual touching?
- ▶ How do you know when consent is withdrawn?

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## Consent

- ▶ Consent is sexual permission. It is given through verbal communication. It can also be inferred through body movement and reciprocation. It is ongoing and can be revoked at any time.
- ▶ Consent is not present when there is a temporary or permanent mental or physical condition resulting in a lack of awareness that the sexual act is taking place.
- ▶ Consent is never present when someone is unconscious or in and out of consciousness due to sleep or the intake of alcohol or controlled substances.
- ▶ Consent is also not present if threats, coercion, or force are used.
- ▶ Consent cannot be present if a person cannot legally consent (age, cognitive ability).

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## Consent Can Be

- ▶ Communicating before you change the type or degree of sexual activity with phrases like "Is this OK?"
- ▶ Explicitly agreeing to certain activities, either by saying "yes" or another affirmative statement, like "I'm open to trying."
- ▶ Using physical cues to let the other person know you're comfortable taking things to the next level.

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## Consent is NOT

- ▶ Refusing to acknowledge “no,” or taking it as a challenge.
- ▶ Assuming that wearing certain clothes, flirting, or kissing are an invitation for anything more.
- ▶ Able to be provided by someone being under the legal age of consent, as defined by the state.
- ▶ Able to be provided by someone who is asleep.
- ▶ Able to be provided by someone being incapacitated because of drugs or alcohol.
- ▶ Pressuring someone into sexual activity by using fear, intimidation, coercion, or threats.
- ▶ Assuming you have permission to engage in a sexual act because you've done it in the past.

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## Incapacitation

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## Incapacitation

- ▶ “A state of being that prevents an individual from having the capacity to give consent. For example, incapacitation could result from the use of drugs or alcohol, a person being asleep or unconscious, or because of an intellectual or other disability.”
- ▶ “Incapacitation means a person cannot understand the fact, nature, or extent of the sexual activity. An incapacitated person lacks the physical and mental capacity to make informed, reasonable judgments about whether or not to engage in sexual activity. A person who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening.”
- ▶ “Incapacitation is when a person temporarily is incapable of appraising or controlling their conduct.”
- ▶ “... The inability to make rational, reasonable decisions, or judgments regarding one's well-being or welfare.”

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## Incapacitation

Incapacitation includes those who may be suffering from a temporary or permanent mental or physical condition, asleep, unconsciousness, or unaware of the sexual act is taking place.



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## Incapacitation and Alcohol

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## What's a drink?



**A Standard Drink**

12 fl oz of beer = 4-5 fl oz of wine = 1.5 fl oz of 80 proof liquor

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### What's a drink in college?

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### Impact of Alcohol Consumption Levels

- Cognition (blue brain)**
  - \* judgment
  - \* inhibition
  - \* personality
  - \* intellect
  - \* emotion
- Psychomotor functions**
  - \* muscular coordination
  - \* balance
  - \* eye focus
  - \* speech
- Motor functions**
  - \* vomiting
  - \* blackout
  - \* pass out
  - \* respiration

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### Levels of Impact for Alcohol Consumption

- Impairment
- Intoxication
- Incapacitation

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### Impairment

- ▶ The state of being diminished or weakened due to the consumption of alcohol.
- ▶ Alcohol is nervous system depressant.
- ▶ Impairment begins as soon as alcohol enters the bloodstream.
- ▶ Impairment increases with consumption of alcohol.

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### Intoxication

An act or instance of inebriation; drunkenness.

- ▶ Intoxication is legally met when an individual's blood alcohol level reaches .08 or greater.

**Question: Can two drunk (intoxicated) people legally have sexual intercourse?**

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### Incapacitation

- ▶ "A state of being that prevents an individual from having the capacity to give consent. For example, incapacitation could result from the use of drugs or alcohol, a person being asleep or unconscious, or because of an intellectual or other disability."
- ▶ "Incapacitation means a person cannot understand the fact, nature, or extent of the sexual activity. An incapacitated person lacks the physical and mental capacity to make informed, reasonable judgements about whether or not to engage in sexual activity. A person who is incapacitated may not be able to understand where they are, whom they are with, how they got there, or what is happening."
- ▶ "Incapacitation is when a person temporarily is incapable of appraising or controlling their conduct."

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## Incapacitation

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- ▶ Unable to understand the fact, nature, or extent of sexual activity. . .
- ▶ Unaware that sexual activity is occurring . . .
- ▶ States of incapacitation include, but are not limited to, unconsciousness, sleep, and blackouts. Incapacitation may result from the voluntary or involuntary consumption of alcohol and/or other drugs. Where alcohol or other substances are involved, incapacitation is determined by how the substance impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. For purposes of this Policy a person is not incapacitated merely because the person has been drinking or using drugs.

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## Incapacitation

WHAT DOES IT LOOK LIKE?

How can we determine this?

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## Incapacitation

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- ▶ Factors that influence an individual's Blood Alcohol Concentration (BAC):
  - Time
  - Amount of alcohol consumed
- ▶ Factors that impact presentation:
  - Amount:
    - Food
    - Sleep
  - Altitude
  - Menstruation
  - Consumption of drugs (prescription or illicit.)

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## Estimating BAC

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Number of Drinks		BLOOD ALCOHOL CONTENT (BAC) Table for Male (M) / Female (F)										Driving Condition
		Body Weight in Pounds										
		100	120	140	160	180	200	220	240			
0	M	.00	.00	.00	.00	.00	.00	.00	.00			Only Sane
	F	.00	.00	.00	.00	.00	.00	.00	.00			Driving License
1	M	.06	.06	.04	.04	.03	.03	.03	.03			Driving Skills Impaired
	F	.07	.06	.05	.04	.04	.03	.03	.03			
2	M	.12	.10	.09	.07	.07	.06	.05	.05			Legally Impaired
	F	.13	.11	.09	.08	.07	.07	.06	.06			
3	M	.18	.15	.13	.11	.10	.09	.08	.07			
	F	.20	.17	.14	.12	.11	.10	.09	.08			
4	M	.24	.20	.17	.15	.13	.12	.11	.10			
	F	.26	.22	.19	.17	.15	.13	.12	.11			
5	M	.30	.25	.21	.18	.17	.16	.14	.13			
	F	.33	.28	.24	.21	.18	.17	.15	.14			

Subtract .01% for each 40 minutes of drinking.  
 1 drink = 1.5 oz. 80 proof liquor; 12 oz. 5% beer; or 5 oz. 12% wine.  
**Fewer than 5 persons out of 100 will exceed these values.**

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## Estimating BAC

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BAC Level	Effects/Signs Observed
0.01 - 0.02 BAC	No loss of coordination, slight euphoria and loss of shyness. Mild, relaxed and makes a BMS light-headed.
0.03 - 0.04 BAC	Feeling of well-being, more confidence, and relaxation. Impaired in slight manner. Some impairment of memory and reaction, and less caution. Your behavior can become impulsive and uncharacteristic. Impaired in moderate to severe manner.
0.05 - 0.07 BAC	Impaired judgment to extreme. Talking often with an unsteady gait, poor planning and reaction time are impaired along with balance, speech, and hearing. Marking of face, redness, water, full control and caution are reduced. Motor impairment (slight), incoherence, nausea and vomiting occur. You are likely to believe that you are functioning better than you really are.
<b>0.08 BAC is legally impaired and it is illegal to drive at this level.</b>	
0.09 - 0.12 BAC	Significant impairment to some coordination and loss of good judgment. Speech may be slurred; balance, vision, reaction time, and hearing will be impaired. Instability, not thinking straight.
0.13 - 0.15 BAC	Some loss of balance, nausea, impairment to judgment, coordination, and motor motor skills. Very slow reaction time. Repeat signs, loss of balance and blurred speech. Feeling of well-being starting to be replaced by anxiety and confusion (disorientation). Vomiting/nausea.
<b>At 0.15 BAC you are 100 times more likely to be in a fatal crash than you are sober.</b>	
0.16 - 0.18 BAC	The ability for the operation of a motor vehicle, or to drink, need drivers begin to be incoordinated, eyes (total blindness) are dull, and movements are stiff and slow. The ability, hearing, or an object.
<b>The average BAC among fatally injured drivers is 0.17, which is close to the average BAC, extremely for purposes intended for drink driving.</b>	
0.20 BAC	Get off of control. 2000. Reaction time is slow or null. If signal may not feel the pain. Nausea and vomiting. The gas often is expelled and you will travel 100 to 2000. Blackouts are likely.
0.25 BAC	All mental, physical and sensory functions are severely impaired. Near total loss of motor function control. Increased risk of asphyxiation from choking on vomit and/or convulsions during a seizure. You are likely to be in a severe accident.
0.30 - 0.40 BAC	Extremely life threatening. You have little comprehension of where you are. You may pass out suddenly and be difficult to awaken. Complete unresponsiveness. Coma is possible. This is the level of legal offenders. Death may occur.
<b>Over 0.45 BAC death will occur in most people.</b>	

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## Incapacitation

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- Smell of alcohol about the person
- Slurred speech
- Bloodshot eyes
- Cannot stand
- Cannot walk without assistance
- In and out of consciousness
- Blackout
- Vomiting
- Out of control behavior

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## Incapacitation

- ▶ It does not always correlate to a specific BAC and could be a result of drug use (subjective).
- ▶ It is demonstrated in a variety of ways:
  - ❑ In an individual's ability to make informed decisions.
  - ❑ In an individual's ability to understand space, time, nature of the act, and other facts.
  - ❑ In an individual's ability to understand consequences.

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## Incapacitation

An individual is incapacitated for purposes of sexual misconduct policy when they lack the mental capability to understand:

1. Who is having sex with them? (Name, more than 1?)
2. When are they having sex? (What time is it?)
3. Where are they having sex? (What is my location?)
4. How am I having sex? (Is someone having sex with me in a way I do not like/am not aware of?)

**Consent must be informed. An individual who does not know even one of the above could be incapacitated.**

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## Additional Considerations

- ▶ Blacked out v. passed out
- ▶ Self-incapacitation
- ▶ Second step of incapacitation assessment:
  - ❑ Did the respondent know incapacitated, or would a reasonable person know?

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## Blackout vs. Pass Out

Fragmentary blackout

En bloc blackout

Pass out

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## Impact of Alcohol Consumption Levels

**Cognition (new brain)**

- \* judgment
- \* inhibition
- \* personality
- \* intellect
- \* emotion

**Psychomotor functions**

- \* muscular coordination
- \* balance
- \* eye focus
- \* speech

**Involuntary functions**

- \* vomiting
- \* blackout
- \* pass out
- \* respiration

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## Incapacitation

- ▶ Does it matter whether the complainant self-incapacitates, or the alleged student incapacitates the complainant?
  - ❑ If yes, when might it matter?
  - ❑ If no, why not?

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## Incapacitation

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- ▶ If we are trying to determine incapacitation, the investigation must also focus on:
  - ❑ Did the respondent know the other person was incapacitated?
  - ❑ Would a reasonable person know the other person was incapacitated?

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**Final  
Thoughts**

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