



**ATIXA Tip of the Week
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SEX AND BOOZE

Tip of the Week authored by Brett A. Sokolow, J.D., ATIXA Executive Director

Okay, so I'm all fired up again. In the last two weeks, I've worked on five cases all involving drunken hook-ups on college campuses. In each case, the male accused of sexual misconduct was found responsible. In each case, I thought the college got it completely wrong. My friends, these are challenging cases, no doubt. But, we have to get them right. We've written about this at length and talked about it forever, but some boards and panels still can't tell the difference between drunk sex and a policy violation. Perhaps the problem stems from weak policy, insufficient training or the futility of the panel model. Regardless, we need to fix it.

So, let me come at this from another angle. Finding each of the accused in violation of sexual misconduct is sex discrimination. We are making Title IX plaintiffs out of them. The customs and practices of the field of higher education have adopted, as a common policy formulation, that sexual actions with a person the respondent knows to be incapacitated, or should know to be incapacitated by alcohol, drugs, sleep, etc., is prohibited. This is the non-discriminatory way to frame policy. But, in a recent case, the campus policy stated that intoxication creates an inability to consent. Thus, in any situation in which a male student and a female student have sex, and both are intoxicated, this college will commit an act of gender discrimination by only charging one of them. If both are intoxicated, they both did the same thing to each other. Why should only the male be charged if both students behave in ways defined as prohibited by the policy? I'm not suggesting we charge both. Surely, every drunken sexual hook-up is not a punishable offense, especially if the parties know what they did and liked it.

A common policy problem comes from failing to distinguish between intoxicated and incapacitated. Yet, the most serious issue comes from failing to implement a *mens rea*, if you will, within the definition. Certainly, criminal concepts like *mens rea* are not strictly applicable to the campus conduct process, but if we agree as I stated above that having sex with a willing, yet intoxicated person is not an offense, there must be something that the respondent does, beyond having sex, that makes a lawful act (sex) into a policy violation.

In the common formulation I offered above, the key is that the respondent's culpability rests on two factors, the incapacitation of the victim and his knowledge of that incapacitation, whether actual or constructive. Thus, the respondent does something more than to have sex, which is lawful. The respondent takes advantage of the victim's incapacity, and the taking advantage is the harmful element. The taking advantage comes because the respondent knows the victim is weak, unable to make reasonable decisions and cannot have knowledge of the act. This cannot be proved by the victim's assertion of her own incapacity, blackout or lack of memory. This is shown by the totality of evidence composed of some or all of the following factors that the respondent knew or should have known:

1. The respondent knew that the complainant was drinking or using drugs and may know how much/what kind;
2. The victim was stumbling or otherwise exhibited loss of equilibrium;
3. Slurred speech or word confusion;
4. Bloodshot, glassy or unfocused eyes;
5. Any of the signs of alcohol poisoning;
6. Vomiting, especially repeatedly;
7. Being disoriented, or confused as to time, place, etc.; and/or
8. Loss of consciousness

A good policy cannot make it a violation simply for male students to have sex with an intoxicated person, if they are completely ignorant of that fact. Thus, they are just having sex. They do nothing that additionally transgresses, is wrongful or is intentional any more than they do every time they have sex. There is no need for an intent to rape, but there has to be something more than an intent to have sex to make this an offense. Otherwise, men are simply being punished for having sex, which is gender discrimination under Title IX, because their partners are having sex too and are not being subject to the code of conduct for doing so. Without a knowledge standard, a respondent will suffer an arbitrary and capricious application of the college's rules.