

Sexual Assault, Consent, and Incapacitation Scenarios Training

Sean Flammer, Assistant General Counsel
Krista Anderson, Systemwide Title IX Coordinator

Fall 2021



1

Agenda

- Introduction & Disclaimers
- Key Definitions in the UTS Model Policy for Sexual Misconduct
- Hypothetical Scenarios & Discussion



2

2

Why Attend This Training?



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3

Disclaimers & Notes about this Training

- **Content Warning:** The content of this training may contain sexually explicit hypothetical scenarios of sexual assault, sexual exploitation, non-consensual sexual contact, and/or other inappropriate sexual conduct.
- **Policy Differences:** For the purposes of this training, the UTS Model Policy for Sexual Misconduct will be the primary policy reference. UT Institutional policies may have some differences.
- **Gender/Sex:** Sexual assault may be committed by people of any gender category and victims of sexual assault may members of any gender category. Hypotheticals are gender neutral.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



Source:

UT System Model Policy for Sexual Misconduct (2021)

5

5

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



Source:

UT System Model Policy for Sexual Misconduct (2021)

6

6

Intimidation Definition

Unlawfully placing another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.



Source:

UT System Model Policy for Sexual Misconduct (2021)

7

7

Coercion Definition

The use of pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.

Examples of coercion include but are not limited to threatening to "out" someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone's highly personal images; threatening to disclose sensitive details about one's sexual preferences, habits, and/or experiences; and threatening to expose someone's prior sexual activity to another person.



Source:

UT System Model Policy for Sexual Misconduct (2021)

8

8

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



Source:

UT System Model Policy for Sexual Misconduct (2021)

9

9

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



Source:

UT System Model Policy for Sexual Misconduct (2021)

10

10

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

11

11

Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

12

12

Definition of “Sexual Exploitation”

Conduct where an individual takes non-consensual or abusive sexual advantage of another for their own benefit, or to benefit anyone other than the one being exploited.

Examples of sexual exploitation include, but are not limited to: Engaging in voyeurism; forwarding of pornographic or other sexually inappropriate material by email, text, or other channels to non-consenting students/groups; the intentional removal of a condom or other contraceptive barrier during sexual activity without the consent of a sexual partner; and any activity that goes beyond the boundaries of consent, such as recording of sexual activity, letting others watch consensual sex, or knowingly transmitting a sexually transmitted disease (STD) to another.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

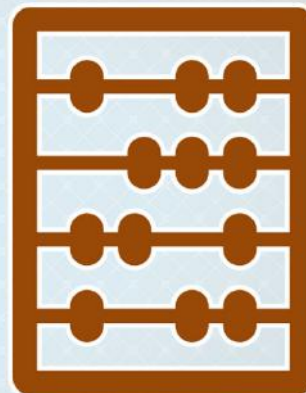
Source:

UT System Model Policy for Sexual Misconduct (2021)

13

13

Hypothetical Scenarios



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14

Participant Goals

- **Primary goal:** Based on the information provided in each hypothetical scenario, make a **determination** as to whether or not the preponderance of the evidence is met for a policy violation (if applicable).
- **Secondary goal:** Identify the types of **questions** you would ask during the investigation or in a live hearing to understand the situation further and/or seek clarity?



15

15

Hypothetical Scenario 1

Complainant and Respondent are both students and meet for the first time at an off-campus party. They both consume alcohol “heavily” throughout the evening.

CP & RP start kissing and “making out” at the party. Then, CP & RP walk to CP’s apartment. At the apartment, CP states “*I don’t want sex*” but says “*I’m fine ‘playing around’ a little.*” Then, CP & RP undress their own clothes and begin kissing and touching each other’s bodies on CP’s bed. RP penetrates CP with RP’s fingers. CP shakes head from side to side and whispers “*no no no*” in a quiet but audible voice. RP does not stop immediately.

CP files a Formal Complaint and states that RP “sexually assaulted” CP.



16

16

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

17

17

Hypothetical Scenario 2

Complainant and Respondent are both students in a sexual relationship for about 5 months and both describe the relationship as *"friends with benefits."* Generally each week, either the CP or RP will text the other person to see if the other wants to *"hook up."* *"Hooking up"* usually consists of (a) watching some television together and making small talk; and (b) at some point, one person initiates kissing and sex. Once during the first month, CP & RP had penetrative intercourse. Other than that, all of the sexual contact has been oral.

On the night of the incident, CP invites RP to CP's apartment. CP states that CP intended that they would each perform oral sex on each other just like they had multiple times. When RP arrives at CP's apartment, neither person exchanges any words. Instead, CP and RP begin kissing. CP begins performing oral sex on RP. RP then penetrates CP with RP's penis. CP states that when RP penetrated CP, CP *"froze"* and did not know what to do. CP states that the penetration was not consensual.

CP files a Formal Complaint and states that the penetration on that night lacked any *"consent."* CP cites materials from a campus advocacy organization that states that consent must be verbal and that there must be consent for each sexual act. The next day, RP files a Formal Complaint and states that if the penetration was *"not consensual,"* neither was the oral sex CP performed on RP. Therefore, RP asserts RP *"was the victim of sexual assault"* by CP.



THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

18

18

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



Source:

UT System Model Policy for Sexual Misconduct (2021)

19

19

Hypothetical Scenario 3

CP & RP meet at a party and realize they live in the same apartment complex. CP & RP each drink about 4-5 drinks over about 4 hours while at the party. When the party ends, RP offers to share an Uber-ride home from downtown. During the Uber-ride, CP & RP kiss. Then, CP texts a friend that CP met a "hot" person at a party and is "totally going to hook up."

Once at the apartment complex, RP asks CP if CP wants to have sex; CP shakes CP's head up and down and kisses RP. CP & RP walk to RP's apartment mutually holding hands, and immediately walk to RP's bedroom. When RP & CP get to the bed, they undress themselves and RP penetrates CP. At the same time, RP begins engaging in "rough sex" (slapping CP). CP was silent during the entire sexual activity, and leaves RP's apartment afterwards.

CP files a Formal Complaint and states that RP "sexually assaulted" CP, explaining that CP was scared once the "rough sex" began. CP states "I consented to sex, but **not** 'rough sex'."



20

20

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



Source:

UT System Model Policy for Sexual Misconduct (2021)

21

21

Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



Source:

UT System Model Policy for Sexual Misconduct (2021)

22

22

Hypothetical Scenario 4

Complainant and Respondent are both Ph.D. students in their early 30s, married to each other. CP does not want to have children. RP does want children. For years, RP has taken birth control pills and CP knows this. RP decides she wants to get pregnant even if CP does not want children; RP decides to stop taking birth control pills.

CP & RP engage in vaginal intercourse throughout the next two months. Each time, the two discuss whether to have sex and each says “Yes, *I want to have sex*” before any sexual activity occurs. Then, RP becomes pregnant. When CP finds out about the pregnancy, RP confesses that she intentionally stopped taking birth control pills to get pregnant and says that she assumed once she was pregnant CP would share the excitement and decide that he wants a child. CP initiates a separation and files for divorce.

CP files a Formal Complaint and says he was “sexual assaulted” because “*the sex was not consensual.*” He states that he verbally consented to “protected sex, **not unprotected sex.**”



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

23

23

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

24

24

Consent Definition

A **voluntary, mutually understandable agreement** that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.



Source:

UT System Model Policy for Sexual Misconduct (2021)

25

25

Definition of "Sexual Exploitation"

Conduct where an individual takes non-consensual or abusive sexual advantage of another for their own benefit, or to benefit anyone other than the one being exploited.

Examples of sexual exploitation include, but are not limited to: Engaging in voyeurism; forwarding of pornographic or other sexually inappropriate material by email, text, or other channels to non-consenting students/groups; the intentional removal of a condom or other contraceptive barrier during sexual activity without the consent of a sexual partner; and any activity that goes beyond the boundaries of consent, such as recording of sexual activity, letting others watch consensual sex, or knowingly transmitting a sexually transmitted disease (STD) to another.



Source:

UT System Model Policy for Sexual Misconduct (2021)

26

26

Hypothetical Scenario 5

Chorey has a date with Robbie. Chorey is sexually inexperienced and wants to have sex with Robbie. But Chorey is very nervous and does not feel confident in their own ability to “*do things right*.” Chorey has a few drinks at home before meeting Robbie at a restaurant. Chorey posts on social media that Chorey has a date and is nervous so Chorey is having a few drinks to “*take the edge off*” and “*relax*” before the date. Later that evening, they engage in penetration.

The next day, Robbie sees the social media posts and worries that perhaps Chorey was incapable of giving consent because Robbie knows that alcohol can sometimes lower a person’s inhibitions. Robbie also remembers the message from a presentation Robbie once attended: “*An intoxicated person cannot consent*.” Was Chorey incapacitated?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

27

27

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

28

28

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the Respondent knew or should have known that the person was incapacitated.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

29

29

Hypothetical Scenario 6

Complainant and Respondent meet at a party. CP & RP each drink 5-7 cups of “punch” throughout the evening and decide to go to RP’s apartment. On the way to RP’s apartment, CP stumbles and falls.

When CP & RP arrive at RP’s apartment, RP goes to the kitchen to fix a snack. When RP returns, CP is asleep on the couch. RP begins kissing CP. CP kisses back but then falls asleep again. RP penetrates CP while CP is asleep.

CP files a Formal Complaint and states that the penetration was “*not consensual.*”



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

30

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



Source:

UT System Model Policy for Sexual Misconduct (2021)

31

31

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



Source:

UT System Model Policy for Sexual Misconduct (2021)

32

32

Hypothetical Scenario 7

Complainant and Respondent meet at a party. They each drink 5-7 drinks throughout the evening. CP's friends state that CP was acting "drunk" and was "loud" and "laughing a lot." They decide to go to RP's apartment. On the way to RP's apartment, CP vomits.

When they arrive at the apartment, RP begins kissing CP while they sit on the couch, and CP kisses back. CP gets on top of RP and begins undressing RP while kissing. CP then asks RP if they can go to RP's bed. RP responds, "Yes." CP & RP have sex.

CP files a Formal Complaint and states that the sex was "not consensual." CP has "little memory of the event" but does remember asking RP to have sex and RP's response.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

34

34

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated? And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is “YES,” consent was absent and the conduct is likely a violation of this Policy.

Note: A Respondent will be found to have violated policy only if the Respondent knew or should have known that the person was incapacitated.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

35

35

Hypothetical Scenario 8

Complainant and Respondent meet at a party and spend a lot of time talking and laughing. CP recalls drinking 5 cups of “punch.” CP vomits at the party. When the party ends, CP orders an Uber-ride home. CP gets into the Uber car and the car begins its trip. While in the Uber car on the way to CP’s apartment, there is road construction that confuses the Uber driver. CP directs the driver around the construction to get home using an alternative route. Then, one mile away from CP’s apartment, CP receives a text from RP where RP invites CP to RP’s apartment and provides an address. RP states that RP “*really enjoyed talking with [CP] and would like to spend some more time together.*” When CP tells the Uber driver that CP wants to go to a different address, the driver tells the CP that CP must tell the Uber app what the new address is. CP does so and texts RP when the car gets close to the Main Street address, texting, “*In Uber, turning on Mains Street.*”

According to RP, at RP’s apartment, RP asked CP to have sex and CP said “Yes.” CP, however, does not remember anything after vomiting at the party. The next morning, CP dresses and leaves before RP wakes up. When CP gets home, CP texts RP, asking what happened. RP explained “*We had sex.*” CP states that “*if we had sex, it was not consensual.*” CP files a Formal Complaint.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

36

36

Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.



Source:

UT System Model Policy for Sexual Misconduct (2021)

37

37

Incapacitation Definition (Cont.)

After establishing that a person is in fact incapacitated,
the University asks:

1. Did the person initiating sexual activity know that the other party was incapacitated?
And if not...
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

*If the answer to either of these questions is “**YES**,” consent was absent and the conduct is likely a violation of this Policy.*

Note: A Respondent will be found to have violated policy only if the **Respondent** knew or should have known that the person was incapacitated.



Source:

UT System Model Policy for Sexual Misconduct (2021)

38

38

Hypothetical Scenario 9

Complainant and Respondent meet at a party and drink “heavily” throughout the evening. CP & RP talk about going back to RP’s apartment.

Once at RP’s apartment, RP asks if CP wants to have sex and CP says “No, I just want to go to bed. But let’s cuddle.” CP & RP go to sleep in RP’s bed, a twin mattress.

In the morning, CP awakes and finds an asleep RP “spooning” CP’s body. One of RP’s hands is touching CP’s breast and RP has an erection that is pressing against CP’s body.

CP believes CP is a victim of sexual assault and files a Formal Complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

39

39

Definition of “Sexual Assault”

An offense that meets the definition of Rape, Fondling, Incest, or Statutory Rape:

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

40

40

Hypothetical Scenario 10

Complainant and Respondent both identify as gay and have been in a dating/sexual relationship for 2 years. CP is a member of a religious group that does not approve of “homosexuality.” CP is not “out” to anyone and keeps the relationship with RP private.

CP wants to break up with RP. When CP tells RP, RP threatens to disclose the relationship to the religious group and to CP’s friends unless CP agrees to keep having sex with RP. Based on this threat, CP continues to have sex with RP.

Then the CP files a Formal Complaint.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

41

41

Coercion Definition

The use of pressure to compel another individual to initiate or continue sexual activity against an individual’s will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person’s words or conduct are sufficient to constitute coercion if they eliminate a reasonable person’s freedom of will and ability to choose whether or not to engage in sexual activity.

Examples of coercion include but are not limited to threatening to “out” someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone’s highly personal images; threatening to disclose sensitive details about one’s sexual preferences, habits, and/or experiences; and threatening to expose someone’s prior sexual activity to another person.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

42

42

Hypothetical Scenario 11

Complainant and Respondent have been in a romantic/sexual relationship for two years and live together off-campus. RP usually initiates sexual activity with CP and generally wants to have sex more frequently than CP. Recently, CP has not been feeling like having sex at all. One evening, RP suggests that CP & RP have sex. CP states a lack of desire. RP persists and states that CP's frequent rejections (especially as of late) "*hurt*" RP and RP states that RP wants to have sex because RP "*feels a deep connection through sex.*"

CP hears this and although CP later states "*I did not want to have sex,*" CP reluctantly agreed but only because CP says "*I was coerced*" by RP. In CP's Formal Complaint, CP writes, "*No' means 'no.' When I said 'no,' that was not an invitation to convince me.*"



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

43

43

Coercion Definition

The use of pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity.

A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.

Examples of coercion include but are not limited to threatening to "out" someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone's highly personal images; threatening to disclose sensitive details about one's sexual preferences, habits, and/or experiences; and threatening to expose someone's prior sexual activity to another person.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

44

44

Hypothetical Scenario 12

Complainant and Respondent have two classes together and each has been staring at the other during class. However, CP & RP first “meet” at a party. CP & RP each drink 3 drinks throughout the evening and spend most of the night talking to each other. After the party, CP & RP return to RP’s apartment.

CP and RP begin to kiss and “*make out*,” and RP quickly escalates things by undressing CP. CP does not want to have sex but is genuinely interested in perhaps having a relationship with RP. At that moment, if you asked CP if CP wanted to have sex of any kind with RP, CP would respond “No.” However, in RP’s apartment “*making out*” and unclothed, CP felt pressure to please RP and offered to perform oral sex on RP. CP stated that RP is “*larger*” than CP, and CP was afraid of what RP would do if CP did not “*give RP what RP wanted*.”

CP filed a Formal Complaint, stating “*I was too intoxicated to perform oral sex, and was coerced*.” RP is surprised by the complaint because RP believed the oral sex was consensual.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

45

45

Coercion Definition

The use of pressure to compel another individual to initiate or continue sexual activity against an individual’s will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person’s words or conduct are sufficient to constitute coercion if they eliminate a reasonable person’s freedom of will and ability to choose whether or not to engage in sexual activity.

Examples of coercion include but are not limited to threatening to “out” someone based on sexual orientation, gender identity, or gender expression; threatening to harm oneself if the other party does not engage in the sexual activity; threatening to disclose someone’s highly personal images; threatening to disclose sensitive details about one’s sexual preferences, habits, and/or experiences; and threatening to expose someone’s prior sexual activity to another person.



THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2021)

46

46



47

Contact Information

| Krista Anderson | Sean Flammer |
|---|---|
| Systemwide Title IX Coordinator | Assistant General Counsel |
| Office of Systemwide Compliance UT System (Austin, TX) | Office of General Counsel UT System (Austin, TX) |
| Phone: 512-664-9050 | Phone: 512-579-5106 |
| Email: kranderson@utsystem.edu | Email: sflammer@utsystem.edu |


48

48