During our webinar on *Investigating Sexual Assault Against People with Disabilities*, participants submitted a number of questions. We were able to respond to some of these questions during the webinar, but we have compiled responses here for the benefit of everyone who registered. We hope you find these responses helpful.

We also want to remind you that the webinar material was drawn from our newest OnLine Training Institute (OLTI) module, entitled *Successfully Investigating Sexual Assault Against Victims with Disabilities*. We encourage you to check out this resource.

**Note on Criminal Justice Perspective**

This webinar was funded with an award from the Office on Violence Against Women (OVW), U.S. Department of Justice to provide technical assistance specifically for frontline law enforcement professionals. We are grateful that we are allowed to invite other professionals to participate in these grant-funded events, as long as the additional costs are minimal to the grant. We believe this offers benefits for our field as a whole.

We also want to note that – as the title of the webinar and module suggest – this material was written from a law enforcement perspective, with the goal of providing information and guidance for first responders as well as investigators and even prosecutors. However, the material is intended to be equally helpful for others whose work intersects with the criminal justice system, to ensure that people with disabilities have equal access to information, programs, and services – and that they are treated with fairness, compassion, and respect. Everyone involved in the criminal justice and community response system plays a critical role in providing that access and fair treatment. For advocates in particular, we believe it is critical to understand this process in order to effectively advocate for clients within the context of the criminal justice system.

**Consent to Sexual Acts**

Now we turn to the chat questions. First, we received several questions during the webinar asking when a person can and cannot legally consent to sexual acts.

1. **Do individuals with obvious serious mental health disabilities fit in the legal category of those unable to give consent?**

When we originally read this question, we were not sure whether it referred to cognitive disabilities (that impair the way a person thinks and learns) or mental illnesses (which are generally understood as mental or behavioral patterns or anomalies). Either way, however, the answer is essentially the same: The primary determination is whether or not the person is capable of providing informed consent to sexual activity.
Webinar Chat Questions

Investigating Sexual Assault Against People with Disabilities

To better understand what the standard is for making this determination, it may be helpful to examine the definition of consent. As one example, Colorado law states that:

‘Consent’ means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. [Section 18-3-401 (1.5)]

If there is any reason to question whether a person is capable of providing this type of informed consent to sexual activity, the investigation of a suspected sexual assault will need to focus on documenting the victim’s capabilities as well as any limitations due to disabilities. Typically, this will be a severe cognitive disability such as intellectual disability (formerly called mental retardation). However, there are other examples of cognitive disabilities that impair a person’s ability to think and learn. These could result from brain injuries or neurodegenerative diseases like dementia. If they are severe enough, they could also prevent a person from being able to provide informed consent to sexual acts. There are also situations where victims have a severe mental illness that precludes their ability to provide informed consent to sexual acts.

Regardless of the specific cause, the criminal offense is based on the person’s inability to consent to sexual acts. Specifically, three legal elements must be established:

(1) The sexual acts committed by the suspect
(2) The victim’s lack of capacity to consent to sexual acts, due to a severe cognitive disability (or mental illness)
(3) The suspect’s knowledge of the victim’s severe cognitive disability (or mental illness)

Determining the severity of a victim’s cognitive disability (or mental illness) is no simple task, and we dedicate a significant portion of the module to providing guidance in this area. It is worth noting, however, that these determinations are not made during the preliminary response, or even by law enforcement investigators or prosecutors alone. Such decisions should be made with the assistance of clinical experts, because they have ramifications for the individual far beyond the criminal justice process in this case.

For more information on making these determinations, the module includes an appendix with detailed information about the various levels of severity for intellectual disability, as defined by the most recent version of the Diagnostic and Statistical Manual (DSM-5), published by the American Psychiatric Association (2013). Another appendix offers the legal test for determining capacity to consent to sexual acts in each U.S. state.
2. **Can consent be implied for non verbal individuals? If so, how?**

This is the second question that relates to an individual’s ability to consent to sexual acts. Interestingly, however, this question does not ask about the person’s inherent ability to consent, but rather addresses their ability to communicate consent (or non-consent). In many situations, these two factors will be logically indistinguishable. Some victims will be unable to effectively communicate consent for the same reason they are incapable of consenting to sexual acts in the first place – because of a severe cognitive disability or incapacitation as a result of drug or alcohol use. In these situations, the strategy for investigating and prosecuting the case will be the same as outlined above, in response to the first question.

On the other hand, some victims may be perfectly capable of consenting to sexual acts based on their cognitive abilities -- but unable to communicate that consent because of a physical disability. This situation is very different in many important ways from the one described above. However, the logic of the investigation and prosecution will be fundamentally similar. When investigating a sexual assault offense based on the victim’s inability to consent (or communicate consent) the legal elements are as follows:

(1) Sexual penetration (no matter how slight) or sexual contact depending on the offense code being used

(2) The victim was unable to consent to sexual acts – or unable to communicate that consent – because of a disability or incapacitation.

(3) The suspect knew or should have known the extent of the victim’s disability or incapacitation.

Once again, there is no clear legal standard for establishing how severe the victim’s disability or incapacitation must be to render an individual incapable of communicating consent, so this must be established with evidence gathered during a thorough law enforcement investigation. However, it is important to keep in mind that this communication of non-consent does not need to be verbal. Even when victims cannot speak words, they may be able to push the suspect away or resist in other ways (e.g., trying to hold their legs closed, clamping down to prevent anything from entering their mouth, etc.). Beyond resistance, victims also frequently express their non-consent to sexual acts using other non-verbal behaviors or body language (e.g., crying, indicators of fear). Evidence of these behaviors are critical for documenting the lack of consent among non-verbal victims. However, they should also be documented whenever they are present in any sexual assault case – because they can corroborate the victim’s statement that sexual acts have been committed without consent.
3. What about when both parties are above the legal limit and unable to give consent. How is that handled legally?

Being above the “legal limit” for alcohol consumption (to operate a vehicle) is irrelevant to the question of whether someone can consent to sexual acts. In most jurisdictions, the legal limit to drive a car is a blood alcohol content (BAC) of .08 or .10 percent. Someone with this level of alcohol consumption will typically be perfectly capable of consenting to sexual acts, unless there are other factors that are interacting with the alcohol to create incapacitation (e.g., prescription medications or other drugs).

When we are talking about drug or alcohol facilitated sexual assault, the threshold for a victim is incapacitation. This is not someone who is simply intoxicated, let alone “tipsy.” It is not a question of two people having sex after they’ve had a few drinks. Rather, someone who is incapacitated by alcohol or drugs is seen in the eyes of the law as being unable to consent to sexual acts because they cannot comprehend what is happening and they are unable to communicate their consent or resist unwanted acts. The threshold for incapacitation is high – far higher than the legal limit to drive a car.

Keep in mind that investigators and prosecutors must prove three legal elements for drug or alcohol facilitated sexual assault:

   (1) Sexual penetration (no matter how slight)
   (2) The victim was incapacitated to the point where she/he could not consent to sexual acts.
   (3) The suspect knew or should have known the extent of the victim’s incapacitation.

There is no clear legal standard for establishing how severe the incapacitation must be to render an individual incapable of consent. This can only be established with evidence gathered during a thorough law enforcement investigation.

Moreover, it is not just a question of how much alcohol or drugs were consumed by a person. Most of us know that the same level of alcohol can affect people very differently. The effects depend on a wide range of factors, including the person’s size and body fat, what the person ate recently, what their tolerance level is, and (for women) where they are in their menstrual cycle. The same type of variation can also be seen among different people consuming the same quantity of a particular drug.

Determining whether a person is incapacitated will therefore depend not only on the amount of alcohol or drugs consumed – it will also include a host of other factors. Most important, it will depend on the person’s behavior. Investigators will need to gather information from the victim, suspect, witnesses, and other sources to determine whether the victim was able to walk, talk (essentially care for their own safety) or if the victim was throwing up, being carried, stumbling, etc.
To counter the charge, the defense will typically argue that the person was not incapacitated and therefore could – and did – consent to the sexual acts.

To assist in the process of investigating and prosecuting these cases, we have provided a great deal of information, strategies, and tools throughout the various OLTI modules as well as other EVAWI resources. However, we are currently in the process of developing a new OLTI module specifically on the topic of investigating and prosecuting drug and alcohol facilitated sexual assault. We plan to launch it sometime in 2015.

**Criminal Codes**

4. *Can you prove a host parent is in a caregiver or supervisory role?*

The question was specifically asked in reference to a recent case the person handled where a host parent engaged in “grooming” behaviors against a foreign exchange student, yet they could not file charges. (The details do not matter for this purpose.)

The important point is to clarify that caregiver criminal codes typically do not relate to relationships such as those between a foreign exchange student and a host family. Caregiver codes pertain to people who depend on others for essential care, such as those with severe physical, mental, and emotional disabilities. Just as one example, California penal code defines a ‘caretaker’ as:

> Any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult [Section 368.2 (i)]

A ‘dependent adult’ is then defined as

> Any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. ‘Dependent adult’ includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code. [Section 368.2 (h)]

While the specific language will vary depending on state law, themes are often very similar throughout the country: caregivers are those who provide essential assistance with daily living for people who have severe physical or cognitive restrictions.

For more information, please consult with your county prosecutor’s office to discuss the relevant laws in your jurisdiction. This would be an excellent SARRT activity since we have found that there is a significant misunderstanding about these criminal offense codes.
5. In the California penal code section that was given as an example (Section 261), spouses are excluded. Does that mean marital rape isn’t illegal in California?

We appreciate this question because it allows us to make a point we might not otherwise be able to. The penal code section this person is referring to begins like this:

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances…

By looking at this penal code section alone, one might assume that spousal rape is not illegal in California. However, spousal rape is covered by another penal code section. In fact, spousal rape is now outlawed in all 50 states, but it was handled differently when this legislative reform was made. Some states revised their existing laws on sexual assault to include married partners, whereas others (like California) added a new law to create the criminal offense of sexual assault committed against spouses (Section 262).

This type of assumption is actually fairly common, so we want to take this opportunity to caution against it. Another typical example was offered in the webinar: The definition of rape used in some jurisdictions defines it as penile/vaginal intercourse (meaning that the crime has to involve a man and a woman). Some people have assumed just by looking at such a law that it is not illegal for a man to rape another man. However, once again this type of sexual assault has now been outlawed in all 50 states, but the criminal offense appears in different places in the various penal code sections. Some states like Montana have one broad law covering a range of sexual assault crimes, whereas others have separate penal code sections addressing each individual type (e.g., sodomy, penetration with a foreign object, or oral copulation). It is best to consult with law enforcement or your county attorney for information about the specific laws regarding sexual assault in your jurisdiction.

Forensic Interviewers

Finally, one participant offered her help as a resource for those considering the use of forensic interviewers. Please feel free to contact her directly for more information:

In Cincinnati Ohio, our Children’s Hospital Abuse Center allows us to have adults diagnosed with developmental disabilities be forensically interviewed at their center. This has been tremendously helpful in terms of prosecution and making the victim feel more comfortable during the process. Maybe suggest that others who have hospitals that care for children and might have abuse centers reach out to their local hospital and see if they can use them as a resource. I would be happy to consult if anyone has questions.
Holly Mott, Investigative Agent
Hamilton County Developmental Disabilities Services
(513) 373-6016

Increasing the use of forensic interviewers is another excellent goal for a community SARRT to pursue. One of the primary challenges will be to secure funding, but it is important to remember that there will probably not be a high number of these cases.

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