Sex, Alcohol, and Clear Consent

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We assume that everyone reading this article has no plan to sexually assault anyone and would be horrified to think that sexual behavior in which he or she engaged could be considered over the line that divides good fun for all participants from sexual assault. Yet every year people engage in sexual assault at Cornell. Not all cases are reported, but the victims of the sexual assaults show up at Gannett’s Victim’s Advocate, or talk to doctors and RAs about what happened, or work with the counseling center, or take leaves to get away for a bit.

Based on the cases that come before the campus disciplinary system, we know that some students have not learned fundamental information about the line between fun and assault. They are shocked that hearing and review boards find their behavior to be sexual assault. When these students find out where the line is, it is too late to avoid suspension or expulsion, because sexual assault is in the category of violent cases for which the Code requires those penalties.

The University Review Board has asked the Judicial Administrator to spread the word about where the line is before another person crosses it. If there is better understanding among the people reading this article, you can spread the word, and there will be fewer students traumatized by unwanted sexual encounters and fewer students suspended or expelled for crossing the line.

Here are key points the Review Board has highlighted that our community members need to remember when engaging in sexual activities:

1. **Consent is required for all sexual contact.** As the Review Board has articulated, “the central element of the offense of sexual assault is lack of consent, whether procured by force, simply withheld, or by a person incapable of consent by reason of some incapacity.” While some cases that have come before the campus disciplinary system have involved force, the more common scenario is where consent is withheld or the recipient of the sexual advances does not have the capacity to consent because of intoxication.

   Consent may be withheld in a number of ways. The recipient of the advances may use words, such as saying “no” or “let’s just cuddle” or giving an excuse to stop an activity like “I am dating someone” or “I want to go to sleep.” Or, the actions of the recipient may demonstrate lack of consent, such as turning away, moving the other person’s hands, or stopping any participation in the activity. Indeed, silence may indicate nonconsent by, for example, not responding positively to a question about a sexual act. Stating “no” sets the barrier to the activity and is not an invitation to keep trying. But the absence of “no” should not be interpreted as “yes.”
2. **Consent may never be presumed.** Students come to Cornell with a range of experiences and expectations. For some, engaging in sexual activities has been routine for years; for others, exploring their sexuality is something that will wait for several years; others are somewhere in between. If a person in one of these categories “hooks up” with a person in another category, there can be misunderstandings. Communication is key to learning whether all parties to a sexual encounter are in agreement; it is not enough to act based on circumstances. The bottom line? If there is ambiguity – that is, if you are not sure what the other person is thinking – ASK! Review Board precedent requires that ambiguities be resolved in favor of the complaining student and against the sexual initiator.

3. **Consent for one activity does not mean consent for all activities.** Consent must be ongoing throughout a sexual encounter. Agreeing to go to someone’s room does not mean there is consent for sexual activity. Consent to kiss does not mean consent for other sexual activities. Consent to “petting” does not mean consent to intercourse. Consent to vaginal intercourse does not mean consent to anal intercourse. This goes back to communication: ask if you and the other person are on the same page rather than making assumptions based on circumstances. The Review Board, in explaining that each sexual act is different and needs consent, wrote, “the burden of making sure that [the complainant] consented to proceeding from the first [sexual act] to the second rested upon the defendant. In short, consent may never be presumed.”

4. **Inability to consent due to intoxication means “no.”** When a person is the recipient of sexual advances but is highly intoxicated, he or she may be unable to consent to any sexual conduct. In the words of the Review Board, “sexual interactions with another party who has been drinking heavily should . . . be undertaken . . . at one’s own risk.” A panel of the Hearing Board has also noted, “[N]o member of the community should be at risk of a sexual assault merely because [he or she] consumes too much alcohol at a party. Cornell aspires to be a community in which students come to the aid of others who find themselves in such a state [rather than seeing them] as someone [to] exploit.”

5. **The responsibility for misinterpretation when either party has been drinking falls on the initiator of further sexual activity.** If the person seeking sex is intoxicated, he or she has a decreased ability to discern the capacity of the other party to give consent. Under Cornell’s rules, the inability to perceive capacity does not excuse the behavior of the person who begins the sexual interaction or tries to take it to another level. The Review Board has held that “[i]ntoxication is neither a defense to sexual assault nor an exonerating circumstance, with the result that sexual interactions after periods of heavy drinking should be undertaken with caution” and, in another case, “failure to recognize that the victim was too drunk to consent is no defense to a charge of sexual assault as defined by the Cornell Code . . . . The responsibility for ascertaining [complainant’s] mental state rested upon [accused student], as did the risk of failing to do so.”
Readers of this article are the best resources for helping members of our community understand appropriate sexual boundaries. Talk to your friends, hallmates, teammates, classmates, members of your house! Get the word out that communicating is the only way to understand if there is consent for sexual encounters. Lack of communication can lead to disastrous results for everyone.