INTOXICATION V. INCAPACITATION

A practical approach for identifying and gathering evidence to evaluate capacity

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ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

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MEET YOUR FACILITATOR

Pari Le Golchehreh (she/her)

Pari Le Golchehreh is a distinguished professional with a wealth of expertise in Title IX and Title VII investigations. She is a certified mediator and has skillfully facilitated alternative resolutions and mediated conversations. Pari has become a trusted authority in the field, renowned for her unwavering commitment to fairness and dedication to helping other practitioners navigate investigations efficiently and effectively.

As a seasoned Title IX and Title VII investigator, Pari has navigated complex cases with precision and integrity, ensuring that all parties involved are heard and respected throughout the investigative process. She possesses a deep understanding of the regulatory frameworks and nuances surrounding discrimination and harassment issues in education and workplace settings.

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AGENDA

- Understanding Capacity and Consent
- Effects and Perception
- Evidence
- Conducting fair, objective, and unbiased Interviews
- Reaching a Finding and How to Write it

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UNDERSTANDING CAPACITY AND CONSENT

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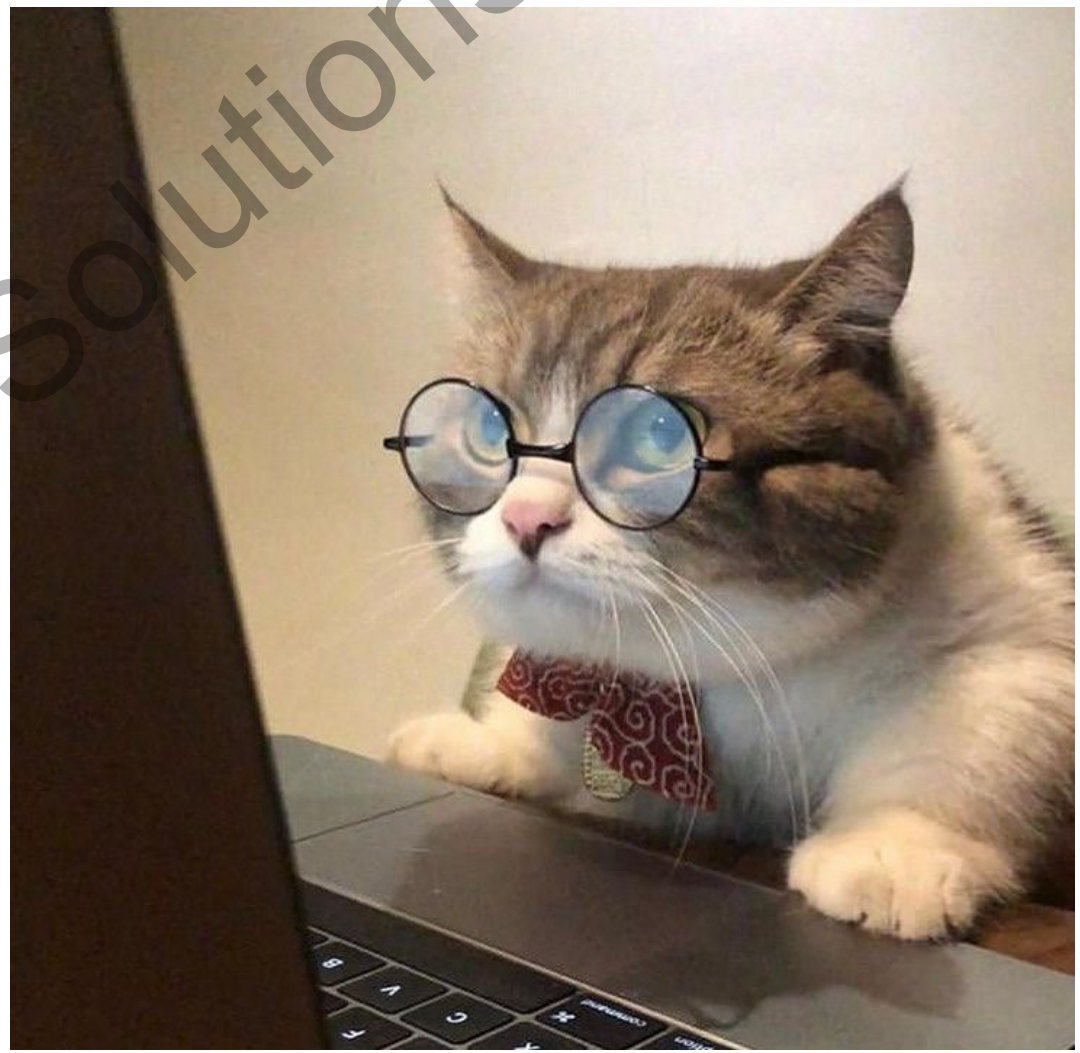
CONSENT THROUGH THE TITLE IX LENS

The statute does not define incapacitation, BUT Federal law and OCR guidance REQUIRE institutions to utilize a standard for assessing consent when capacity is at issue.



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CLERY ACT & FBI UCR

Sexual Assault & Consent defined

Sexual Assault is:

Sexual acts committed against a person without their consent.

Consent is possible if:

A person had the "capacity" to understand, decide, or control their sexual conduct.

A person lacks capacity when they are unable to understand the nature of the sexual conduct or to make a voluntary, informed decision about it.

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OCR GUIDELINES

OCR requires a functional analysis of an individual's condition at the time of the sexual acts.

We cannot:

- Treat all intoxication as incapacitation
- Skip a capacity analysis
- Presume incapacity because of vulnerability

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THE SPECTRUM

Intoxication

FBI Uniform Crime Reporting Program defines "drunkenness" as,

- *Drinking alcoholic beverages to the extent that one's mental faculties and physical coordination are substantially impaired.*

Incapacitation

Clery Act defines incapacitation as,

- *A state where a person is unable to give consent to sexual activity due to their temporary or permanent mental or physical condition.*

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WHAT ARE THE DIFFERENCES?

Intoxication

- Reduced coordination and inhibitions
- Impacts to vision
- Changes to one's eyes or physical appearance
- Reflex or behavior changes

Incapacitation

- Loss of coordination
- Vision impairment
- Speech and cognition impairment

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KEY ASPECTS OF INCAPACITATION

Beyond drunkenness

Impaired judgment

Observable signs

Physical resistance is NOT a requirement

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SEEKING AND GIVING CONSENT:

Clear communication

Silence ≠ Consent

Consent to one is not consent to all

Understand

Respect

Thoughtful

Balanced

Anything else?

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CONSENT CONSIDERATIONS

Physiological

- Reduced or complete loss of coordination
- Vision changes or complete loss of vision
- Changes in reflexes or response times

If a person is experiencing any of these physiological effects due to drug or alcohol use, their ability to understand and to give consent may be impacted.

Social

- Power differential
- Fear of rejection
- Awkward situation
- Peer pressure
- Lack of confidence
- Presumption on the part of the Respondent

Intoxication, although not considered incapacitation, may still result in a lack of consent.

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EFFECTS & PERCEPTION

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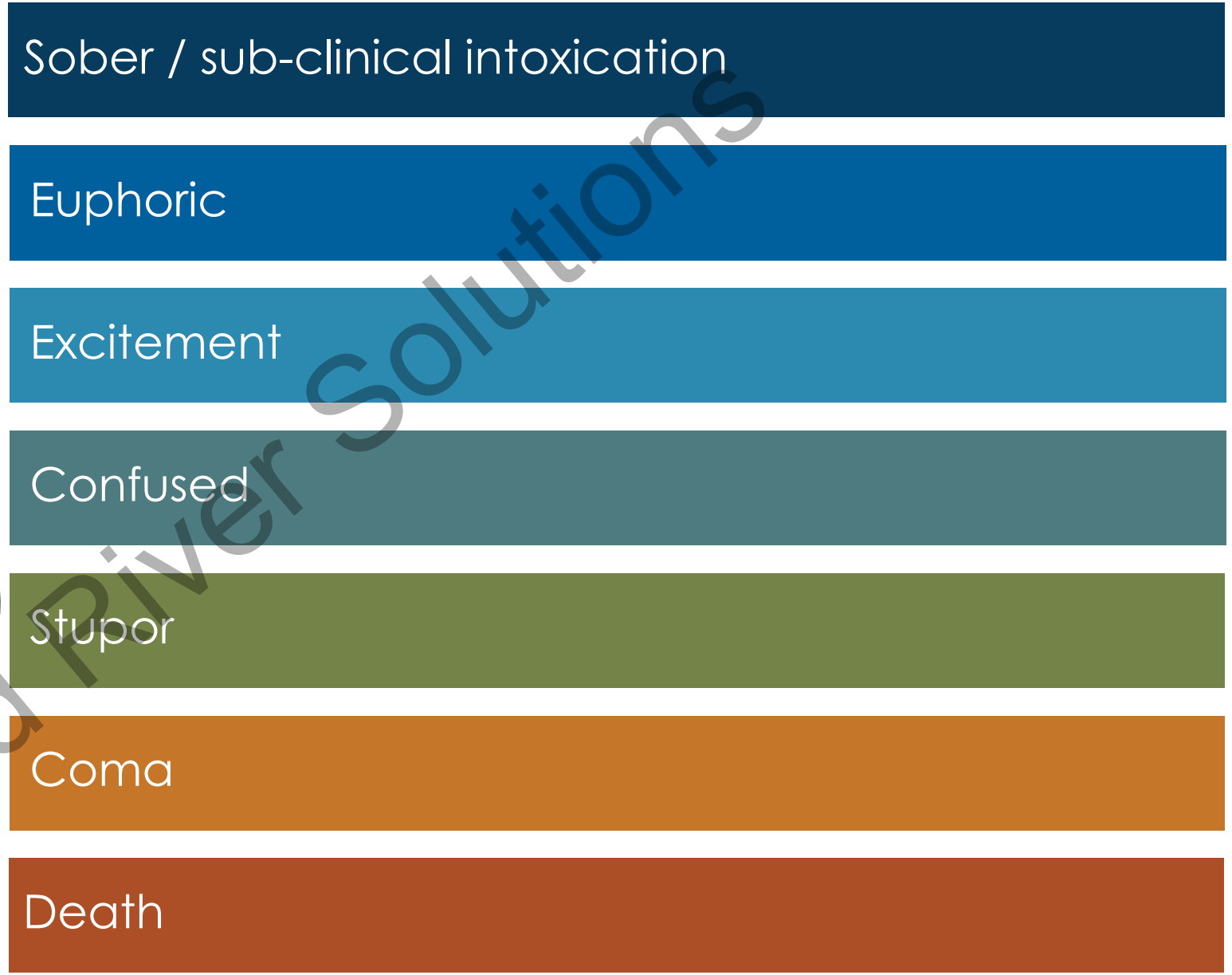
STAGES OF INTOXICATION

Keep in mind that tolerance has a significant impact on an individual's outward appearance, even to the most seasoned medical practitioners.



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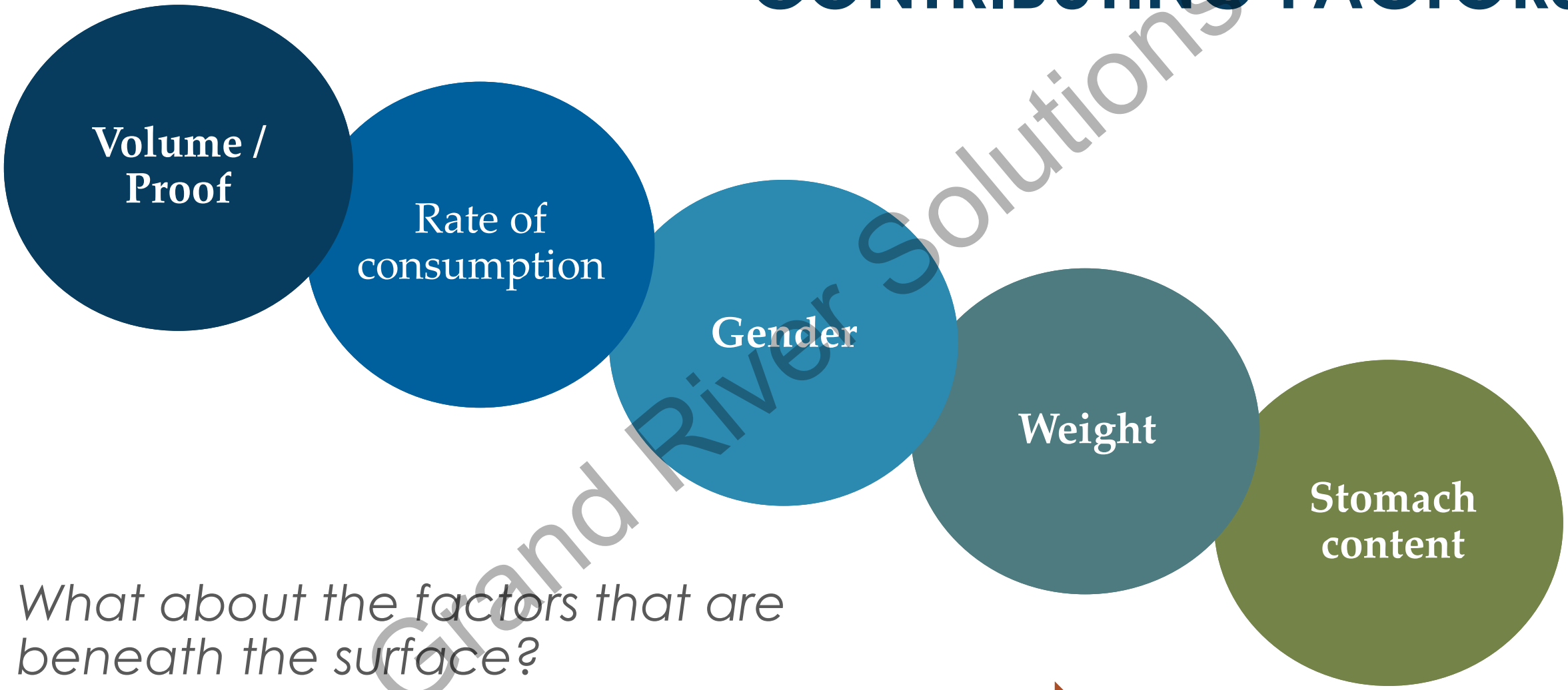
CONTRIBUTING FACTORS



What about the factors that are beneath the surface?

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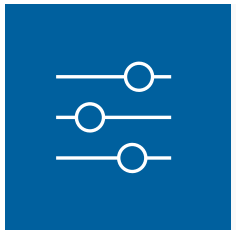
OTHER FACTORS TO CONSIDER

Prior history / habits



Compounding substances

Pre-existing conditions / prescription medication

Environmental

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HYPOTHETICAL A:

Given what we know about contributing factors and the stages of intoxication, what issues do you see in this fact pattern?

Complainant reported that they blacked out. He said his roommate had filled a gallon jug with "jungle juice" and gave it to him to drink throughout the day. He said he thinks his roommate mixed Gatorade, Hard Mountain Dew, tequila, Twisted Tea, and margarita mix in the juice. Complainant said they started drinking from the gallon around noon, and does not remember if he finished the jug by the time he arrived at Respondent's residence at 6 p.m. Complainant said when they arrived at Respondent's residence, Respondent gave him a beer can to "shotgun," which he did. He said this is when his memory is "fuzzy."

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EVIDENCE

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EVIDENCE: KEY SOURCES

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AVOIDING PITFALLS

Security footage:

Plan to assess availability and secure the evidence immediately

Witness accounts:

Be prepared and open-minded. Avoid prejudgment, bias, and presumption

Medical reports:

Remain compliant, be transparent, and review content closely

Text and social media:

Retrieve evidence from multiple sources, authenticate, and think outside of the box

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EVIDENCE:
CREDIBILITY & RELIABILITY CONSIDERATIONS

Sufficient and specific details

Consistent statements

Consistent evidence

Plausibility

Omissions

Motive to falsify

Prior conduct

Ability to recollect

Testimonial and evidentiary corroboration

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CONDUCTING FAIR, OBJECTIVE, AND UNBIASED INTERVIEWS

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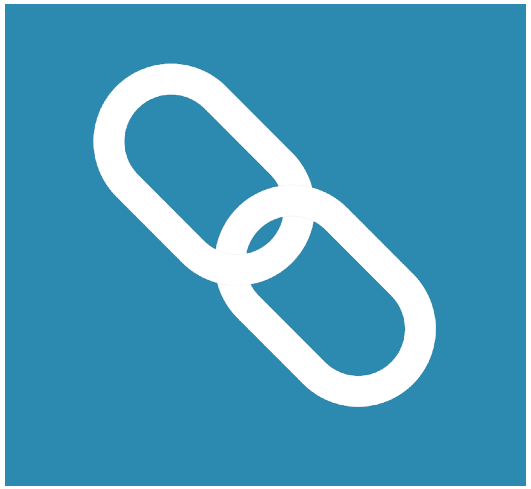
INTERVIEW OBJECTIVES



Listen

Allow interviewee to share their experience

Evidence Preservation

Text messages

Photographs

Names and contact info for witnesses

Connect

Build rapport

Build trust

Empower

Clarify

Understand what you have heard

Seek additional information

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INTERVIEW OBJECTIVE: CLARIFICATION

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency (internal and external)
- Background, experience, and training
- Coaching or bias

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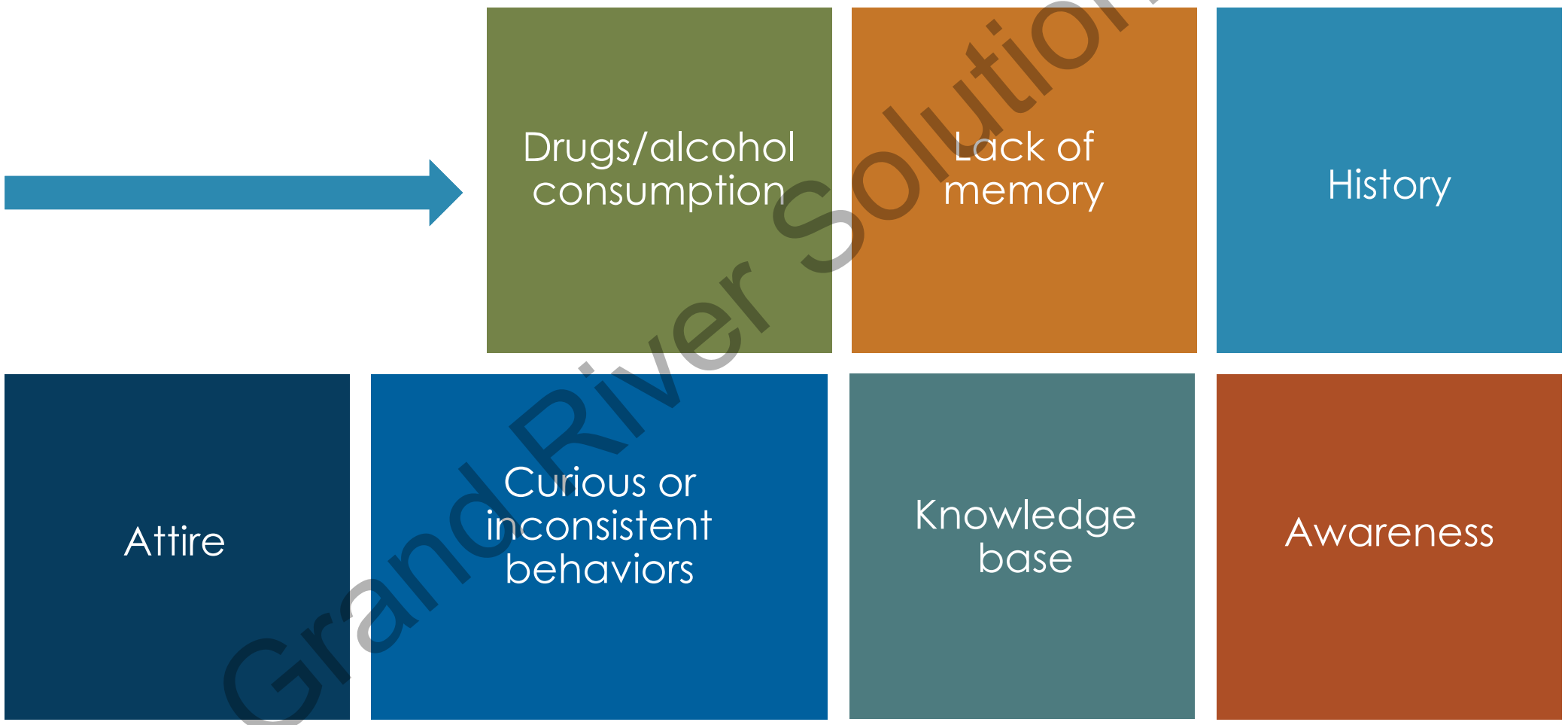
SENSITIVE QUESTIONS



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FRAMING THE SENSITIVE QUESTION

1. Identify the sensitive questions before the interview
2. Prepare the questions ahead of time, avoiding prejudgment, bias, and doubt
3. Lay the foundation for the importance of the information you are seeking

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WHICH QUESTION IS BETTER?

Sexual contact

Complainant said although they were "blacked out, "they knew they were touched inappropriately:

- How do you know this to be true?
- Why do you think that?
- Are you able to describe what led you to know this?

Inconsistent behavior

RS has stated that CP and RS continued to text after the incident:

- Why did you remain friends with RS?
- Can you help me understand why you continued contact with RS?
- Were you comfortable staying in touch with the RS?

Inconsistent evidence

Parties provided copies of the same text exchange and RS alleged CP altered their version:

- Why does your version of the text message look fake?
- Did you alter the text messages?
- Can you review these text messages I obtained from RS?

Let's try more

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WHICH QUESTION IS BETTER?

Attire

Complainant stated that Respondent touched the skin of Complainant's inner thigh:

- Were you wearing business attire?
- To help me understand how RS touched your inner thigh, can you describe your clothing?
- What were you wearing the day of the incident?

Consumption

Complainant described being highly intoxicated:

- Are you able to recall how many drinks you had?
- How many shots did you drink in total?
- Can you help me understand why you drank so much?

Lack of memory

Complainant stated they "blacked out" for a large part of the relevant timeframe:

- What was your last memory before blacking out?
- Why do you not remember parts of the night?
- Are you sure "blacked out" is the correct term?

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REACHING A FINDING AND HOW TO WRITE IT

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ASSESSING INCAPACITATION

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STEP ONE:
INFLUENCE OF DRUGS, ALCOHOL, MEDICATION

- What information is there regarding the amount of intoxicants C consumed, C's experience with the intoxicants, and C's tolerance/historical sensitivity to intoxicating effects?
- Is there information regarding whether and when C ate food or drank water or nonalcoholic liquids before and during the relevant timeframe?

TIP: Avoid speculation regarding whether amounts at issue should or would cause incapacitation-although authenticated expert evaluations of levels of intoxication may be considered, even if not dispositive.

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STEP TWO: TOTALITY OF THE CIRCUMSTANCES

Potential signs of incapacitation and the caveats to keep in mind

Physical Representations

- Psychomotor Impairment (Slurred speech, stumbling, falling, or loss of bodily control)
- Cognitive impairment
- Other physiological signs

Caveats & Considerations

- BAC unreliable
- Detailed and comprehensive narrative from Complainant
- Prior history with drugs/alcohol
- Prescription medication
- Compounding substances
- CP's usual behavior v. before and during sexual activity

Any others?

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STEP THREE

Respondent's Knowledge/

Disregard of Complainant's Incapacitation

- How long had the parties known each other?
- Were the parties together when Complainant consumed the intoxicants?
- How did parties and witnesses describe CP's behavior before/during/after the incident?
- How different was CP's behavior before and during the incident v. usual behavior?
- How does RS describe whether/how consent for sexual activity was obtained?
- Did any witnesses attempt to intervene before the incident?
- Any communication evidence speaking to CP's perceived level of intoxication/incapacitation?

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HYPOTHETICAL B: WHAT ARE SOME OF THE ISSUES YOU MAY ENCOUNTER IN DETERMINING WHETHER RESPONDENT KNEW OR SHOULD HAVE KNOWN HOW INTOXICATED COMPLAINANT WAS?

Witness A said they were with Complainant all day and described Complainant as, "Completely gone." She said Complainant was drinking tequila mostly but also mixing in White Claw throughout the day. Witness A said after an entire morning drinking out at the lake with friends, she and Complainant met with Respondent at a local bar. While there, Witness A said that Respondent bought them 2 rounds of whiskey shots. Witness A said that Complainant was "totally wasted" because Complainant knocked over a bottle of water and was "really loud" and "in everyone's face."

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QUESTIONS?

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