



**T9  
MASTERED**<sup>®</sup>  
Training for Title IX Professionals



**Title IX Consent: Two-Part Series on  
Affirmative Consent and Incapacitation**

**Part 1: A Close Look at Affirmative Consent  
Course Material  
May 10, 2023**

Presented by T9 Mastered LLC  
a venture of Van Dermyden Makus Law Corporation



# **Title IX Consent: Two-Part Series on Affirmative Consent and Incapacitation**

## **Part 1: A Close Look at Affirmative Consent**

### **Course Material**

May 10, 2023

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## Biographies

**Liz DeChellis** is a Partner with Van Dermyden Makus. She is licensed to practice law in the State of California, and is certified as a Senior Professional in Human Resources (SPHR).

Prior to joining Van Dermyden Makus, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.



Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

**Jennifer Doughty** is a Partner and Director of Associate Development with Van Dermyden Makus Law Corporation. Jennifer has worked as an investigator for Van Dermyden Makus since January 2012.

Jennifer's practice focuses on investigations involving the workplace, athletic teams, and Title IX complaints. Jennifer conducts investigations relating to harassment, discrimination, retaliation, and misconduct. She also conducts trainings for staff and management on how to conduct effective workplace investigations.



Trained in Trauma Informed Forensic Interviewing, Jennifer is an experienced investigator in Title IX sexual misconduct and harassment claims. She has investigated cases involving University faculty and administrators, underage complainants, multiple respondents, and complex issues involving incapacitation and consent. Jennifer also has experience serving as a Hearing Officer in Title IX cases. As a Hearing Officer, Jennifer has handled cases involving sexual assault, sexual harassment, dating violence, incapacitation, and consent.

Jennifer is admitted to practice before the courts of the State of California and the Federal District Courts of the Northern, Southern, and Eastern Districts of California. She has also been admitted to practice before the 11th Circuit Court of Appeal, the 5th Circuit Court of Appeal, and all state and federal courts of Alabama and Mississippi.

Jennifer graduated from Santa Clara University School of Law and earned an undergraduate degree from Duke University.



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### Analyzing Consent

Liz Paris & Jennifer Doughty  
May 10, 2023



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### Always start with the policy

#### California College Policy

- Affirmative Consent: **Affirmative, conscious, and voluntary** agreement to engage in sexual activity. Consent to sexual activity requires of both persons an affirmative, conscious, and voluntary agreement to engage in sexual activity.



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## Biggest Challenges in Discussing Consent

- Inherent nature of most sexual interactions
- Understanding escalation
- Ongoing consensual relationships
- Incapacitation (covered in Part II)



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## Inherent Nature of Sexual Activity

- How is consent communicated?
  - Verbally
  - Sounds (including moans)
  - Slight touches
  - Body movements
- How do we articulate consent for sexual activity?



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## Non-Verbal Indicators

- All body language cues and actions that don't involve speaking
- Examples:
  - Moaning
  - Writhing
  - Taking off own clothing
  - Movements (hands, hips, etc.)
  - Nodding



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### What does consent look like?

**It varies in every circumstance.  
There is no bright-line rule.**

- Verbal: “Yes,” “I like this,” “Can we...”
- Non-Verbal: While some interactions include speaking, all interactions involve non-verbal indicators
  - Crucial for consent analysis



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### Escalation

- What is escalation?
  - Moving from one sexual activity to a more intimate sexual activity
- How do we define escalation separate from our own personal definitions?
- How was consent to escalation communicated?



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### Some Consensual Sexual Activity

- How was consent communicated?
- Did either of you say anything?
- Non-verbal communication?

**Remember policy language:**

*It is not anyone’s burden to say “No” or “Stop” or “I don’t want to do that.”*

The burden is to **establish consent before acting.**



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### Ongoing Consensual Relationships

- Navigating establishing a precedent for how consent is communicated

Versus

- Implying/acting as though consent for some sexual activity is consent for ALL sexual activity



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### Questions to Ask the Parties

- Examples of questions:
  - Who initiated X activity?
  - What led you to believe they consented to X activity?
    - » Ask the person to be specific
  - At any point did they seem uncomfortable?
  - How did you express your discomfort?
  - Follow up with “How did you know?”
  - How do you define “Affirmative Consent?”



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### Some Consensual Sexual Activity

- What specifically was consensual v. non-consensual?
- At what moment did things become non-consensual?
- When and how did things escalate? And what were the parties communicating through words and actions?



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### Coercion vs. Pressure

- Times when people feel pressured to engage in sexual activity
  - This does not necessarily mean they were coerced (policy term) to participate
- Internal thought process (“I don’t want to do this”) versus outward actions (verbal agreement, indicating consent)
- Sample language for how to address in report



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### No One Indicator Is Dispositive

- Whether consent was given in any given situation is nuanced
- Same set of consent indicators could result in finding consent in one case and no consent in another case depending on context of the interaction
  - Example: Getting a condom



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### Notes on Credibility Findings

- Important Note:
    - Finding someone’s ACCOUNT not credible is not the same as finding the person is a “liar”
- Credibility assessments are about the statements/situation, not about the person



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