

# 2020 Annual Title IX Training Series Sexual Harassment October 14, 2020

Systemwide Title IX Compliance  
Office of the Chancellor  
The California State University

# Sexual Harassment

## 1096/1097

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

## Addendum B

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

# Quid Pro Quo - Definitions

## Addendum B

- An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in **unwelcome sexual conduct**

## EO 1096/1097

- **Unwelcome verbal, nonverbal or physical conduct of a sexual nature** where:
  - Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for:
    - (Students) for any decision affecting a CP's academic status or progress, or access to benefits and services etc...  
**or**
    - (Employees) any decision affecting a term or condition of the CPs employment, or an employment decision

## Quid Pro Quo - Addendum B

- Should be interpreted broadly (FR 30147, fn. 644)
- Applies whether the “bargain” proposed is communicated “expressly or impliedly” and does not require that harassment be severe and pervasive (FR 30147)
- “Consent” to conduct does not necessarily mean that the conduct is not “unwelcome,” especially where the conduct is “consented to” for purposes of avoiding negative consequences (FR 30148)
- Where the speech is, by definition, designed to compel sexual conduct it generally does not violate the 1<sup>st</sup> Amendment (FR 30142, fn. 625)

# Affecting Terms and Conditions of Employment – EO

- The test is not whether work has been impaired, but whether working **conditions** have been discriminatorily altered.
- [T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with ... work performance. To show such interference, “[one] need not prove that his or her tangible productivity has declined as a result of the harassment.” ...[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to “ma[k]e it more difficult to do the job.”

# “Hostile Environment” - Definition

## Addendum B

## EO 1096/1097

- Unwelcome conduct “on the basis of sex” determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to an education program or activity
- Unwelcome verbal, nonverbal or physical conduct of a sexual nature where:
  - Sufficiently severe, persistent or pervasive that its effect could be considered by a Reas. P, and is, considered by the CP, to:
    - (students only) limit their ability to participate...
    - create an intimidating, hostile, or offensive environment

# Elements of Hostile Environment

## Addendum B

- Was there **conduct on the basis of sex**?
- Was the alleged conduct **unwelcome**?

### Then, evaluating from the perspective of

- Reasonable person
- Was the conduct so **severe, and pervasive, and objectively offensive** as to **effectively deny** Complainant equal access to an Education Program or Activity?

## EO 1096/1097

- Was there conduct of a **sexual nature**?
- Was the alleged conduct **unwelcome**?

### Then, evaluating from the perspective of

- Reasonable person in the Complainant's shoes, and
- Complainant themselves
- Was the conduct:
  - Students - sufficiently severe, **or** persistent **or** pervasive to **limit their ability to participate** in or benefit from... or creates an **intimidating, hostile, or offensive environment**?
  - Employees – Creates an **intimidating, hostile, or offensive environment**?

# On the Basis of Sex vs. Of a Sexual Nature

## Addendum B - Conduct

- For QPQ:
  - Sexual Conduct may be verbal, visual, or physical
- For Hostile Environment:
  - The phrase “unwelcome conduct on the basis of sex,” is broader than “unwelcome conduct of a sexual nature” phrase used in Department guidance. (FR 30152)
    - Ex: direct comparative evidence that only men, and not women, are groped and hazed
    - Ex: rumor was that a female employee had sex with her male superior to obtain promotion

## EO 1096/1097 - Conduct

- For QPQ and Hostile Environment:
  - **Visual conduct:** leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters.
  - **Verbal conduct:** making or using derogatory comments, epithets, slurs and jokes. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, sexually degrading words used to describe an individual.
  - **Physical conduct:** touching, assault, impeding or blocking movements.



## What about conduct that is not sexual in nature but is based on sex or gender?

*As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase “sexual harassment” to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct “on the basis of sex.” § 106.30 (defining “sexual harassment”).*

(Preamble fn 670)

## “Unwelcome” – Add. B and EO

- EEOC - When welcome-ness is at issue, the investigation should determine whether the CP's conduct is consistent, or inconsistent, with the assertion that the sexual conduct is unwelcome. Acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual.
- OCR – The Department interprets “unwelcome” as a “subjective element”. Therefore even if a CP “pretended to welcome the conduct,” the complainant’s subjective statement that they found the conduct to be unwelcome suffices to meet the “unwelcome” element.
- 2001 OCR Guidance (Rescinded) - Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”

## Who is the Reasonable Person?

- The severe, pervasive, and objective elements “must be evaluated in light of the known circumstances and depend on the facts of each situation but must be determined from the perspective of a reasonable person **standing in the shoes of the complainant.**” (FR 30156)
- The burden is on the educational institution to evaluate complaints by considering the totality of the circumstances, which “includes taking into account the complainant’s age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.” (FR 30156)

# What is Severe **and** Pervasive under Addendum B?

- Disseminating “revenge porn,” or conspiring to sexually harass people (such as fraternity members telling new pledges to “score”), ...particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. (FR 30166)
- A single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment. (FR 30166)

# Evaluating Effective Denial – Addendum B

- This element:
  - does *not* require that a complainant has already suffered loss of education (FR 30169)
  - Does require that a person’s “equal” access to education has been denied, not that a person’s total or entire educational access has been denied (FR 30169)
- Signs of enduring *unequal* educational access may include:
  - skipping class to avoid a harasser,
  - a decline in a student’s grade point average,
  - having difficulty concentrating in class
- No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access their education on an equal basis with persons who are not suffering such harassment. (FR 30170)

# **“Effectively denied Complainant equal access to an Education Program or Activity” – Addendum B**

- The definition “has the advantage of being adopted from the Supreme Court’s interpretation of Title IX, yet does not act as a more stringent element than the “interferes with or limits a student’s ability to participate in or benefit from the school’s programs” language found in Department guidance.” (FR 30152)

# What is Objectively Offensive under Addendum B?

- EEOC - Unwelcome, intentional touching of a party's intimate body areas is sufficiently offensive to alter the condition of their working environment and constitute a violation

# Evaluating Severe Or Pervasive – EO 2001 OCR Guidance (Rescinded)

- Factors to Consider:
  - The degree to which the conduct affected one or more students' education.
  - The type, frequency, and duration of the conduct.
  - The number of individuals involved.
  - The age and sex of the alleged harasser and the subject or subjects of the harassment.
  - The size of the school, location of the incidents, and context in which they occurred.



# Additional Guidance on Severe Or Pervasive In Employment Context

- Cal. Prac. Guide – Can look to whether it is physically threatening or humiliating or a mere offensive utterance;
- Cal. Prac. Guide - Whether it unreasonably interferes with an employee's work performance.
- EEOC - A single, unusually severe incident of harassment may be sufficient to constitute a violation
- CA SB 1300 - **A single incident** of harassing conduct is sufficient regarding the existence of a hostile work environment if the harassing conduct has **unreasonably** interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. (January, 2019)

## **Limited the Complainant's ability to participate in or benefit from the services, activities or opportunities offered by the University – EO – 2001 OCR Guidance (Rescinded)**

- A student's grades going down or the student being forced to withdraw from school
- A student may also suffer physical injuries or mental or emotional distress.
- However, a student may have been able to keep up their grades and continue to attend school even though it was very difficult for them.
  - Are they avoiding the library, not attending sports events or somehow restricting their movement and participation in order to avoid the respondent?

# Intimidating, Hostile, or Offensive Environment

- “Does not need to be a descent into the Inferno”
- SB 1300 - It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, [one] should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.
- Look at totality of circumstances, including:
  - Power differential between complainant and respondent
  - Frequency of conduct
  - Severity of conduct
  - Whether it is physically threatening or humiliating and
  - It alters the conditions of the work or educational environment<sup>19</sup>

# Questions

# Scenarios

## Scenario #1

- Employee (Tracy) says they have been harassed for several months by a donor to the university who is also an alumni. Tracy says that the donor comes by at least once a week. Tracy says that the donor has attempted to solicit biographical information (address and telephone number) from the employee, complimented their appearance (in ways that made the complainant uncomfortable), and requested dates. Tracy also says there was some physical touching (e.g. touches on the wrist and cheek and attempted hugs).
- This is not the first time that you have spoken with Tracy. They came to you several months ago and asked for a “no-contact” order against the donor for similar behavior because Tracy did not want an investigation at the time as it could have upset the donor’s relationship with university. The donor agreed to the no-contact order. The talking and touching took place in violation of the “no contact” order that you had put in place at the time.

## Scenario #2

- According to Devan, shortly after starting at CSU West, Devan noticed the environment in the residence hall was at times sexually charged. Male students were often referred to by offensive nicknames such as “Bitchy Ritchie” and “Nips.” Students also openly discussed the sexual activities of the Fed Ex delivery person and disparaged the female women that the Fed Ex delivery person associated with. The RA was present for many of the incidents and attempted to pretend these conversations were not happening, putting fingers in their ears to demonstrate blocking it out. Devan overheard students talk about how one female student dressed inappropriately.
- The RA stated that they were aware of the offensive nicknames and may have used them on occasion. Devan did not tell anyone that they were offended, nor did they make any formal or informal complaints for six months. Devan did tell the RA that the environment was not overly sexualized, but it was aggressive, disrespectful, and rude, and that they were surprised at the disrespect the students directed at the RA.

## Scenario #3

- Drew wants to file a complaint claiming that Jordan made three crude sexual references. Drew is a resident advisor and tells you that on Drew's first day, Jordan, also a resident advisor, told Drew that they were "really attractive." Drew said that they were not offended by this comment.
- One time, as they were meeting to discuss issues that occurred in the residence hall. Jordan told Drew that they had a body like their ex, but better. The first or second time Drew and Jordan worked together, a song came on the radio containing the lyrics "eating booty like groceries." Jordan asked Drew, "[D]oes your boyfriend eat that thang?" Drew replied that their boyfriend did not and did not know how to do so. Jordan answered, "I could teach him." Another time, while taking a walk around the campus, Drew recommended chocolate milk to help Jordan with muscle soreness. A few hours later, Jordan texted Drew that he loved chocolate milk, along with images of "tongue" emojis. This happened the same day as the comment Jordan made about his ex-girlfriend.
- When working out together at the gym on another occasion, Jordan pointed out Drew's groin area, which was wet with sweat, and commented, "Damn, that thing get wet like that."



## Scenario #4

- About two weeks after Parker assumed a position as a supervisor, they learned that “certain employees were circulating within the division...an unfounded, sexually-explicit rumor about them.” The rumor was that Parker “[had] a sexual relationship” with a higher-ranking manager, in order to obtain the management position. The rumor originated with another employee (Smith), who began working at the university at the same time as Parker and in the same position. Because of Parker’s promotions, however, Parker soon became Smith’s superior.
- According to Parker, the AVP over the department, Moppins, participated in spreading the rumor. In a conversation with another employee Parker heard that Moppins speculated that Parker’s recent divorce may have been due to the alleged affair. As the rumor spread, Parker says that they “were treated with open resentment and disrespect” from many coworkers, including employees that Parker was responsible for supervising.
- As evidence of the hostility being directed against them, Parker tells you that Smith recently told Parker that they had a sexually explicit photograph of Parker and planned to send it to everyone in the department. Parker tells you that there no way that Smith could have an image like that because it simply does not exist. Parker is concerned that their image has been superimposed on a pornographic image.

## Scenario #5

- Farley has filed a complaint because he believes he is being harassed by his supervisor (Alex). Farley identifies as a straight male and claims that he has been placed on a performance improvement plan and is being given different assignments than his colleagues. Farley's colleagues are predominantly female. Farley tells you that Alex never invites him to staff lunches, does not talk to him about his weekend, and teases him about his manner of dress. He admits that he wears shorts on zoom meetings but says that others are not keeping up with dress codes requirements either.
- Farley says that the other employees are being hostile to him and he is convinced that all of this stems from how Alex is treating him. Farley explains that Alex has never been friendly towards him and believes that it is because Alex is a gay male who prefers female employees based on rumors that have been swirling around for years. Farley adds that he also has excellent "gaydar."

# Questions



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# 2020 Annual Title IX Training Series

**Dating & Domestic Violence, and Stalking  
under EO 1096/1097 and Addendum B  
October 21, 2020**

Systemwide Title IX Compliance  
Office of the Chancellor  
The California State University

# Dating Violence

## EO 1096/1097

Abuse committed by a person who is or has been in a social or dating relationship of a romantic or intimate nature with the victim.

This may include someone the victim just met; i.e., at a party, introduced through a friend, or on a social networking website.

For purposes of this definition, **"abuse"** means **intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable apprehension of imminent serious bodily injury to self or another.** Abuse does not include non-physical, emotional distress or injury.

## Addendum B

**Physical violence or threat of physical violence** committed by a person—

- a) who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- b) where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - The length of the relationship.
  - The type of relationship.
  - The frequency of interaction between the persons involved in the relationship.

# Elements of Dating Violence - EO 1096/1097 and Addendum A

1. Did Respondent intentionally or recklessly cause bodily injury to Complainant?

OR

2. Did Respondent attempt to cause bodily injury to Complainant?

OR

3. Did Respondent place Complainant in reasonable apprehension of imminent serious bodily injury to self or another?

**Note:** Abuse under this definition does not include non-physical, emotional<sub>4</sub> distress or injury.



# Elements of Dating Violence - EO 1096/1097 and Addendum A

**AND (required for 1, 2 and 3 on previous slide)**

Are Complainant and Respondent in or have they been in a social or dating relationship of a romantic or intimate nature?

This may include Complainant and Respondent having just met; i.e., at a party, introduced through a friend, or on a social networking website. Abuse does not include non-physical, emotional distress or injury.

# Intentional vs. Reckless

## Intentional

*Done on purpose; deliberate*

Example: During an argument, Respondent punches Complainant in the face, breaking their nose

## Reckless

*(Of a person or their actions) without thinking or caring about the consequences of an action*

During an argument, Respondent throws their cell phone in the direction of the Complainant. The cellphone hits the Complainant's cheek leaving a bruise.

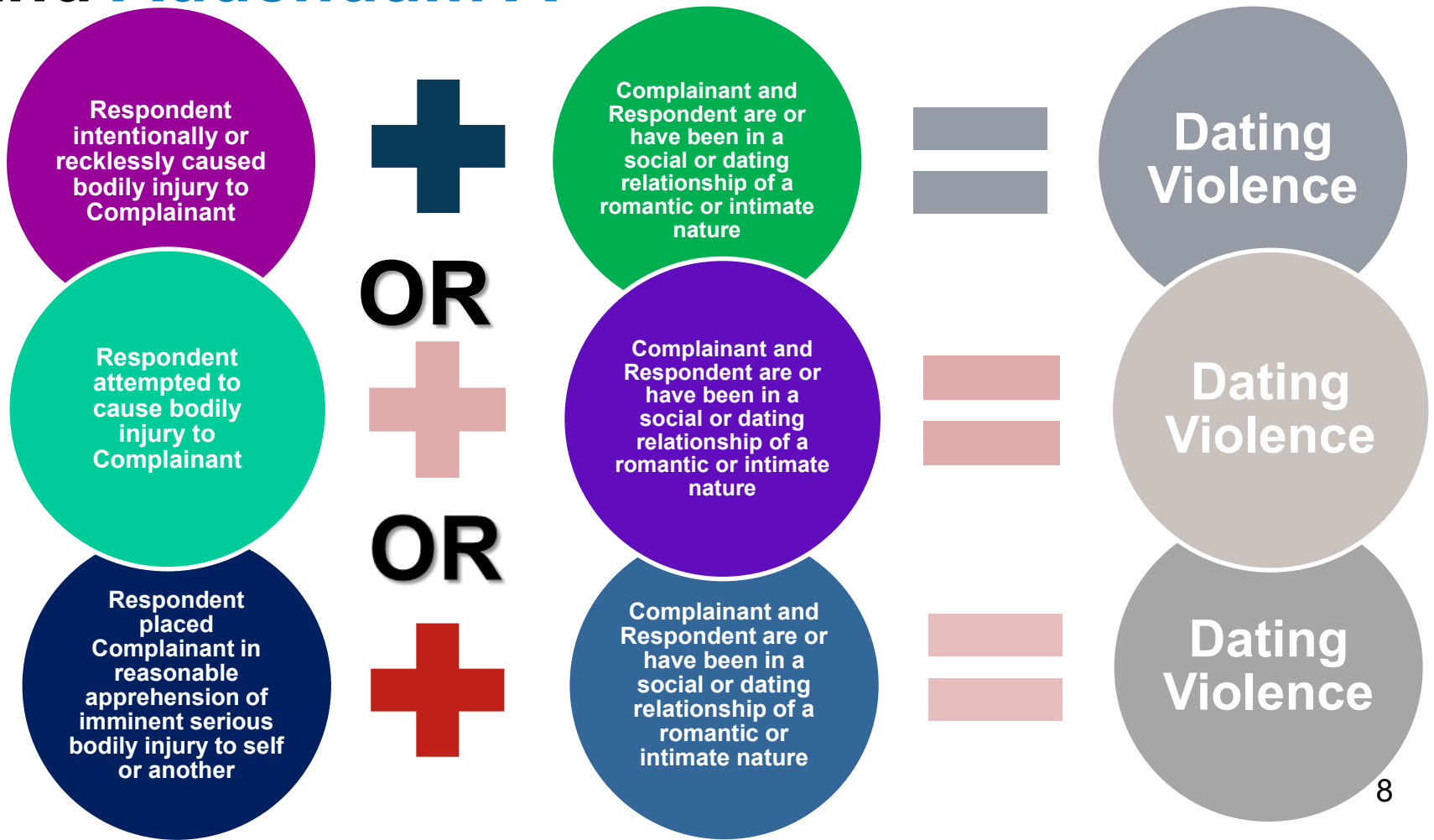
## Bodily Injury

*Any damage to a person's physical condition including pain or illness* <sup>6</sup>

# Elements of Dating Violence – Addendum B

1. Did Respondent engage in physical violence or threat of physical violence against Complainant?  
**AND**
2. Are Complainant and Respondent in or have they been in a social relationship of a romantic or intimate nature? The existence of such a relationship shall be determined based on a consideration of the following factors:
  - The length of the relationship
  - The type of relationship
  - The frequency of interaction between the persons involved in the relationship

# Elements of Dating Violence - EO 1096/1097 and Addendum A



# Elements of Dating Violence - Addendum B



# Domestic Violence

## EO 1096/1097

Abuse committed against someone who is:

- a current or former spouse;
- current or former cohabitant;
- someone with whom the Respondent has a child;
- someone with whom the Respondent has or had a dating or engagement relationship; or
- a person similarly situated under California domestic or family violence law.

Cohabitant means two unrelated persons living together for a substantial period of time, resulting in some permanency of relationship. It does not include roommates who do not have a romantic, intimate, or sexual relationship. Factors that may determine whether persons are cohabiting include, but are not limited to:

(1) sexual relations between the Parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the Parties hold themselves out as spouses; (5) the continuity of the relationship; and, (6) the length of the relationship.

For purposes of this definition, "abuse" means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable apprehension of imminent serious bodily injury to self, or another. Abuse does not include non-physical, emotional distress or injury.

## Addendum B

Physical violence or threat of physical violence committed by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the Complainant.

# Elements of Domestic Violence - EO 1096/1097 and Addendum A

1. Did Respondent intentionally or recklessly cause bodily injury to Complainant?

**OR**

2. Did Respondent attempt to cause bodily injury to Complainant?

**OR**

3. Did Respondent place Complainant in reasonable apprehension of imminent serious bodily injury to self or another?

**Note:** Abuse under this definition does not include non-physical, emotional distress or injury.



# Elements of Domestic Violence - EO 1096/1097 and Addendum A

AND (required for 1, 2 and 3 on previous slide)

Is the Complainant:

- a current or former spouse (of the Respondent); or
- current or former cohabitant (of the Respondent); or
- someone with whom the Respondent has a child; or
- someone with whom the Respondent has or had a dating or engagement relationship; or
- a person similarly situated under California domestic or family violence law

# Elements of Domestic Violence - EO 1096/1097 and Addendum A

**Cohabitant** means two unrelated persons living together for a substantial period of time, resulting in some permanency of relationship. It does not include roommates who do not have a romantic, intimate, or sexual relationship.

Factors that may determine whether persons are cohabiting include, but are not limited to:

- (1) sexual relations between the Parties while sharing the same living quarters
- (2) sharing of income or expenses
- (3) joint use or ownership of property
- (4) whether the Parties hold themselves out as spouses
- (5) the continuity of the relationship
- (6) the length of the relationship

# Elements of Domestic Violence – Addendum B

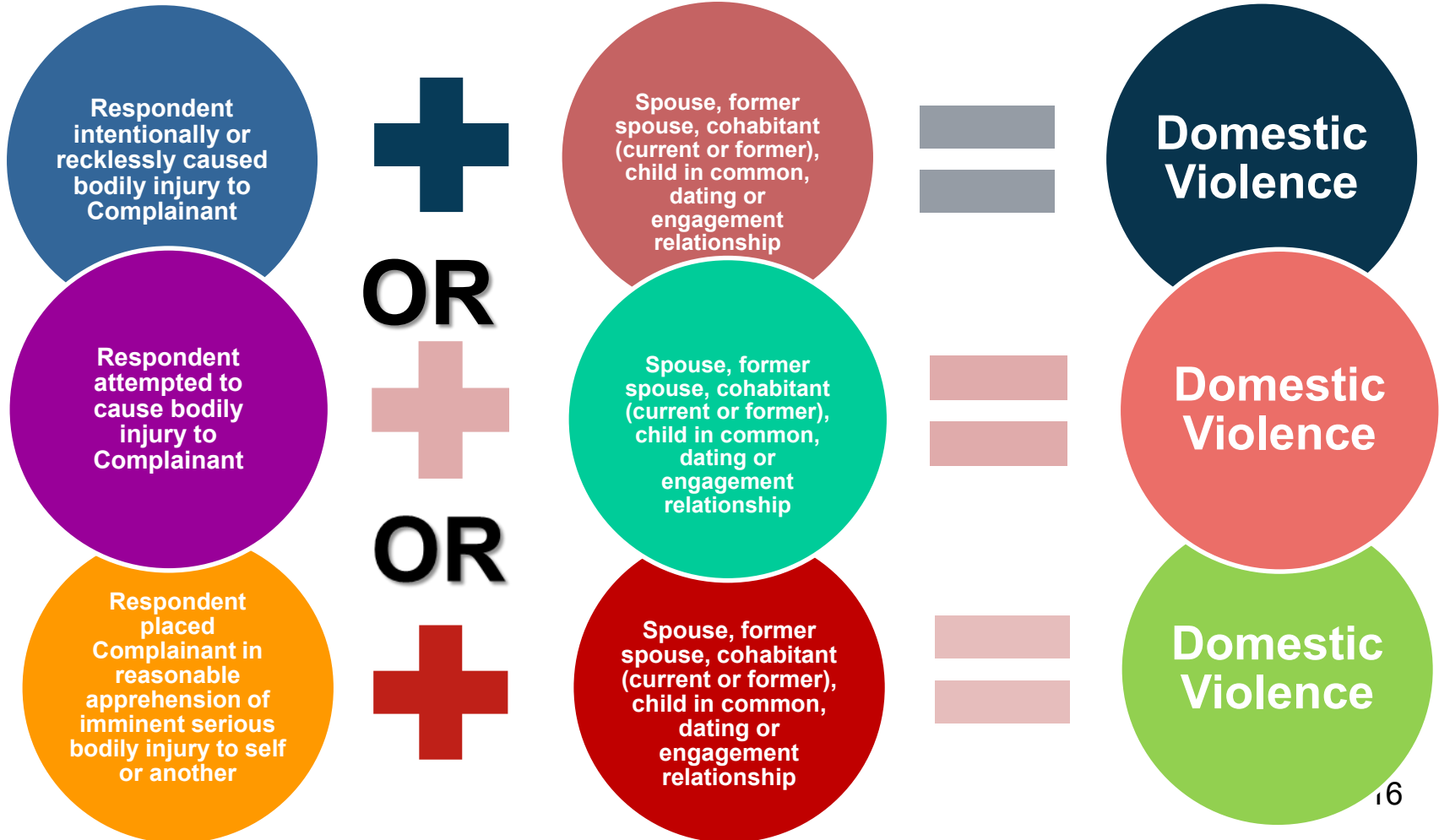
1. Did Respondent engage in **physical violence** or **threaten physical violence** against Complainant?

**AND**

2. Is Respondent:

- a current or former spouse or intimate partner of the Complainant; or
- a person with whom the Complainant shares a child in common; or
- a person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner; or
- a person similarly situated to a spouse of the Complainant

# Elements of Domestic Violence - EO 1096/1097 and Addendum A



# Elements of Domestic Violence - Addendum B



# Stalking

## EO 1096/1097

Engaging in a repeated Course of Conduct directed at a specific person that would cause a Reasonable Person to fear for the safety of self or others' safety or to suffer Substantial Emotional Distress.

## Addendum B

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- a) fear for his or her safety or the safety of others; or
- b) suffer substantial emotional distress

## Elements of Stalking – EO 1096/1097

1. Did Respondent engage in a repeated course of conduct directed at a specific person (Complainant)?  
**AND**
2. Would Respondent's alleged course of conduct cause a reasonable person to fear for their safety or the safety of others **or** suffer substantial emotional distress?



# Examples of Stalking Conduct



**Following**



**Watching**



**Waiting (outside a residence, car, class, etc.)**



**Unwanted communication – in-person, phone calls, text messages, social media, emails, paper notes**

**Unwanted gifts**



**Threats against the Complainant or someone else (e.g. family/friends, or the Respondent themselves)**



**Property damage**

**Attempting to ruin someone's reputation (e.g. spreading rumors about them or contacting their employer)**



**Engaging in the above behaviors via a third party**



# Elements of Stalking – EO 1096/1097

## Course of conduct

- Not a single incident – two or more
- Over what period of time?
- Does the behavior or conduct have to be the same each time or can it be different?

**Example:** Calling multiple times one day and sending an unwanted gift the following day.

- Some conduct in the context of an education program or activity and other conduct not?

## Elements of Stalking – EO 1096/1097

**Reasonable Person** – reasonable person under similar circumstances and with the same Protected Status(es) as the Complainant

**Substantial Emotional Distress** – significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling

- Context is important

## Elements of Stalking – Addendum B

1. Did Respondent engage in a course of conduct directed at Complainant?

**AND**

2. Would Respondent's alleged course of conduct cause a reasonable person to fear for their safety or the safety of others **or** suffer substantial emotional distress?

**Note:** Definition almost identical to EO 1096/1097 – except no reference to “repeated” course of conduct

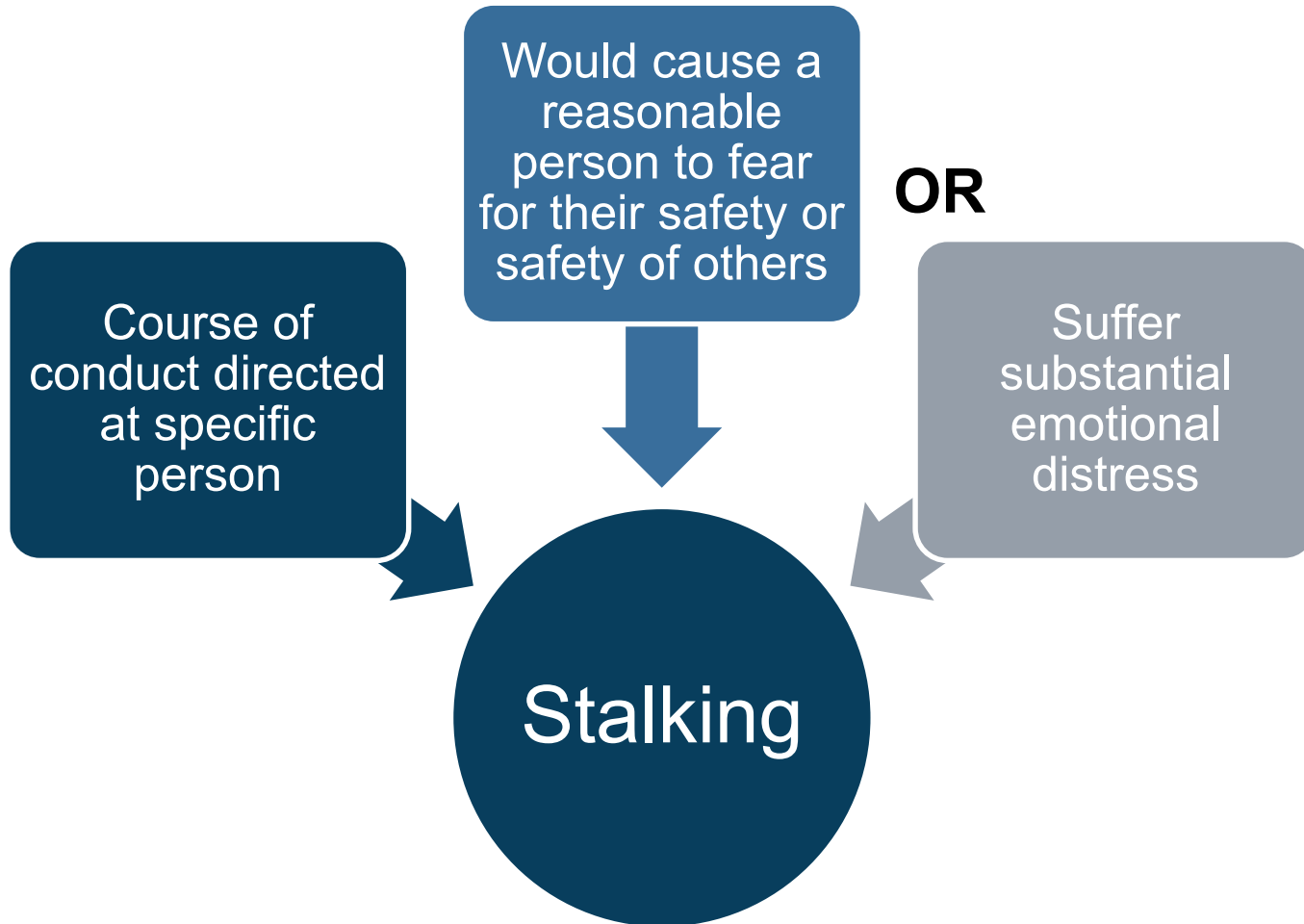
## **Stalking “on the basis of sex”**

“Stalking may not always be ‘on the basis of sex’ (for example when a student stalks an athlete due to celebrity worship rather than sex), but when stalking is ‘on the basis of sex’ (for example, when the student desires to date the victim) stalking constitutes ‘sexual harassment’ under §106.30.

Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”

(FR 30172, fn 772)

# Elements of Stalking



# Scenarios

## **Scenario #1 – Reese and Elliott:**

Reese, a student, alleges that their spouse Elliott (also a student), with whom they live in an on-campus graduate student apartment, recently strangled them during an argument about Reese’s friendship with another student. Residential life staff have previously expressed concern to you about Reese and Elliott, who appear to have what has been described to you as “a volatile relationship.”

During the intake meeting with Reese, you observe bruising on their neck. Reese tells you they have moved out of their apartment and are staying with a family member indefinitely. Reese requests a mutual No Contact Order, which your office implements. Reese does not want an investigation. Within one hour of you issuing the NCO to both parties by email, Reese calls the office and asks for it to be removed. Reese will not say why they are making this request other than that they changed their mind.



## Scenario #1 – Reese and Elliott:

1

Using the definition sheet you were provided with, would the conduct described in the scenario meet the elements of prohibited conduct in EO 1096/1097 or Addendum B? Please explain why.

2

What would your next steps be in this case?

## **Scenario #2 – Rowan and London**

Rowan, a student, contacts the Title IX office and alleges the following:

Rowan and London, also a student, dated during their Sophomore year (last year), and the relationship ended badly. London wanted to get back together with Rowan and spent all summer texting them, even though Rowan did not respond. London is now on a year abroad to Germany, while Rowan is on a year abroad to Chile. Shortly after they both leave the U.S., London texts Rowan that they want to fly to visit them in Chile soon. Rowan does not respond.

One week later, London sends Rowan a message saying that they have had enough of being ignored and will kill Rowan if they do not text London back. Rowan tells you they are very afraid that London means what they say and is going to hurt them.

## Scenario #2 – Rowan and London:

- 1** Using the definition sheet you were provided with, would the conduct described in the scenario meet the elements of prohibited conduct in EO 1096/1097 or Addendum B? Please explain why.
- 2** Is there any other information that would help you in determining your response to the above?

## Scenario #3 – Stevie and Harper:

Stevie, an employee in the math department tells you that they recently broke up with their dating partner, Harper, who works in the history department. Stevie alleges that once during an argument, Harper shoved them against a wall, causing bruising down the side of Stevie's torso.

Stevie also makes the following further allegations: Harper has been text messaging Stevie constantly, asking that they get back together. Harper has also started waiting outside Stevie's office and following them to their car at the end of the day. Harper also calls Stevie incessantly in the early hours of the morning and has shown up outside Stevie's apartment twice. Yesterday, Stevie found that one of their car tires had been slashed in the campus parking lot and later received a text from a number they did not recognize, which read, "You better watch yourself." Stevie thinks Harper damaged their car and sent the message

Stevie tells you that they cannot concentrate at work and that they feel constantly on edge. They are worried about what Harper might do next.

## Scenario #3 – Stevie and Harper:

- 1** Using the definition sheet you were provided with, would the conduct described in the scenario meet the elements of prohibited conduct in EO 1096/1097 or Addendum B? Please explain why.
- 2** What are some initial questions you would ask Stevie?

## **Scenario #4 – Sam and Ainslie**

A student, Ainslie, recently contacted you to make the following allegations against another student, Sam:

Sam is romantically interested in student Bradbury, who recently began dating Ainslie. Sam is jealous of the relationship and has started following Ainslie around campus, appearing outside Ainslie's classes, staring intently at Ainslie, and leaving threatening notes on Ainslie's car. One of the notes reads, "Back off or you'll regret it." Yesterday evening, Sam followed Bradbury and Ainslie who were in Ainslie's car and continued to follow Ainslie to their on-campus residence hall after they dropped Bradbury at their house. Sam pulled their car up next to Ainslie's and watched Ainslie as they went inside the residence hall.

Ainslie tells you that they are very fearful of Sam and are too scared to go to class.

## Scenario #4 – Sam and Ainslie:

- 1** Using the definition sheet you were provided with, would the conduct described in the scenario meet the elements of prohibited conduct in EO 1096/1097 or Addendum B? Please explain why.
- 2** What are some initial questions you would ask Ainslie?

## Scenario #5 – Jordan and Parker

At their request and as a Supportive Measure, Jordan moves to a different residence hall after reporting that Parker (an acquaintance from their previous residence hall) had been following them to and from class for several weeks. Jordan says that this was after Jordan rejected Parker's multiple requests for a date and Jordan told Parker, "Please do not speak to me again. Leave me alone." A No Contact Directive was also implemented between Jordan and Parker.

Since the No Contact Directive was implemented, Jordan alleges that the following has occurred: Parker has shown up at the gym where Jordan works and left chocolates for Jordan. Parker has also started using internet-based messaging services to send text messages to Jordan, who blocked Parker's phone number.

Jordan reports that this morning they found flowers outside their door with a note reading, "I hope you like your new room. P x" Jordan believed that Parker did not know where their new room is.



## Scenario #5 – Jordan and Parker

- 1** Using the definition sheet you were provided with, would the conduct described in the scenario meet the elements of prohibited conduct in EO 1096/1097 or Addendum B? Please explain why.
- 2** What are some initial questions you would ask Jordan?

# Questions?





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# **2020 Annual Title IX Training Series**

## **Sexual Misconduct and Sexual Assault**

**October 26, 2020**

Systemwide Title IX Compliance  
Office of the Chancellor  
The California State University

# Sexual Misconduct vs. Sexual Assault

# Sexual Misconduct/Sexual Assault

## 1096/1097 Addendum A

- Sexual Misconduct
  - Sexual activity
  - No affirmative consent
  - Incapacitation

## Addendum B

- Sexual Assault
  - Rape
    - No affirmative consent
    - Incapacitation
  - Fondling
    - No affirmative consent
    - Incapacitation
  - Incest
  - Statutory Rape

# Sexual Misconduct Under EO 1096/1097/Addendum A

What is “Sexual Misconduct”?

- Engaging in any sexual activity without first obtaining Affirmative Consent to the specific activity is Sexual Misconduct, whether or not the conduct violates any civil or criminal law
- Sexual activity includes, but is not limited to, kissing, touching intimate body parts, fondling, intercourse, penetration of any body part, and oral sex. It also includes any unwelcome physical sexual acts, such as unwelcome sexual touching, Sexual Assault, Sexual Battery, Rape, and Dating Violence

# Sexual Assault Under Addendum B

## What is “Sexual Assault”?

- Rape
- Fondling
- Incest
- Statutory Rape



# The Elements of Rape (Theory 1)



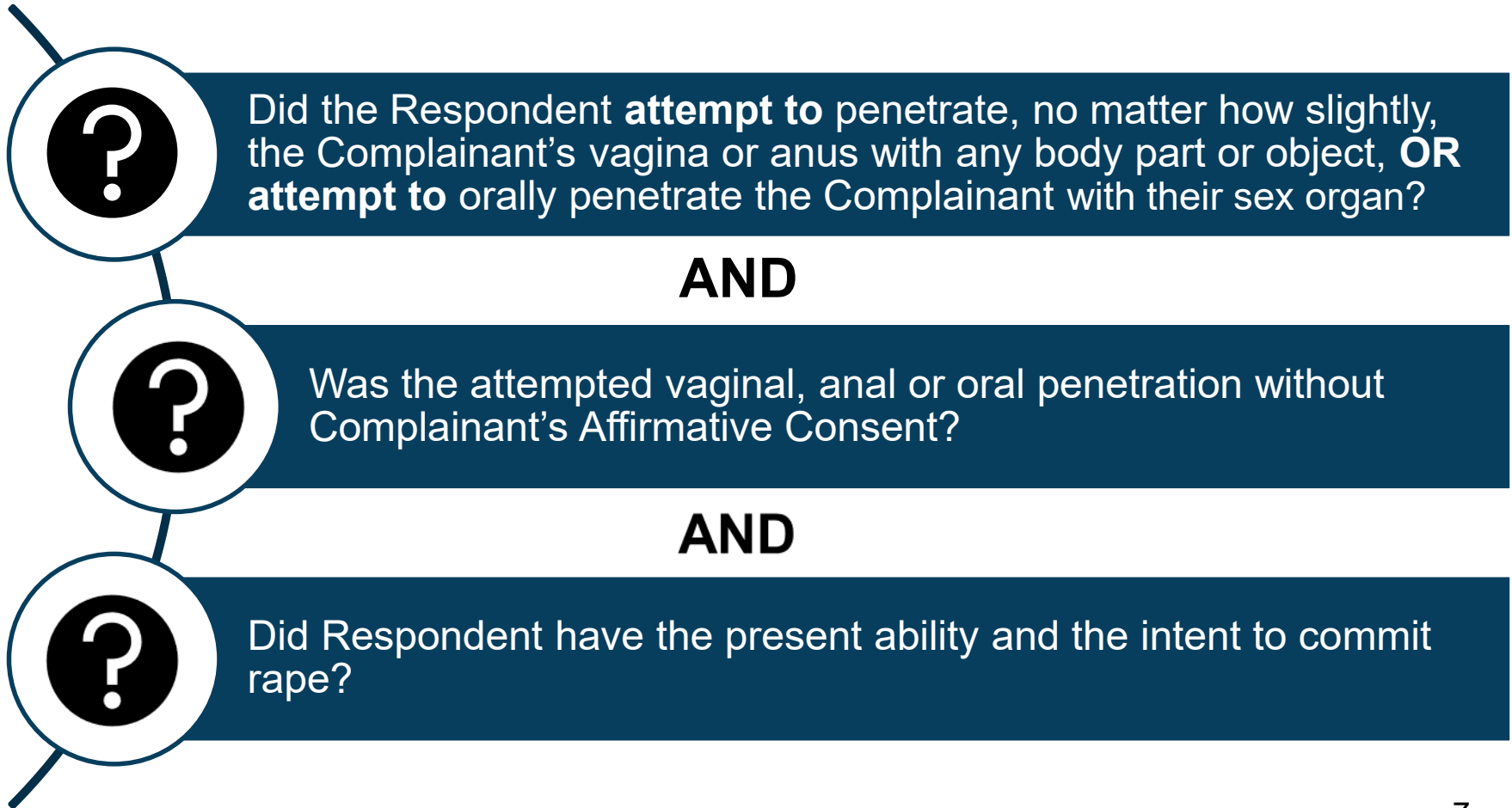
**Did the Respondent penetrate, no matter how slightly, the Complainant's vagina or anus with any body part or object, OR orally penetrate the Complainant with their sex organ?**

**AND**

**Was the vaginal, anal or oral penetration without Complainant's Affirmative Consent?**



## The Elements of Rape (Theory 2)



# Elements of Fondling



Did Respondent touch the private body parts of Complainant? **And**



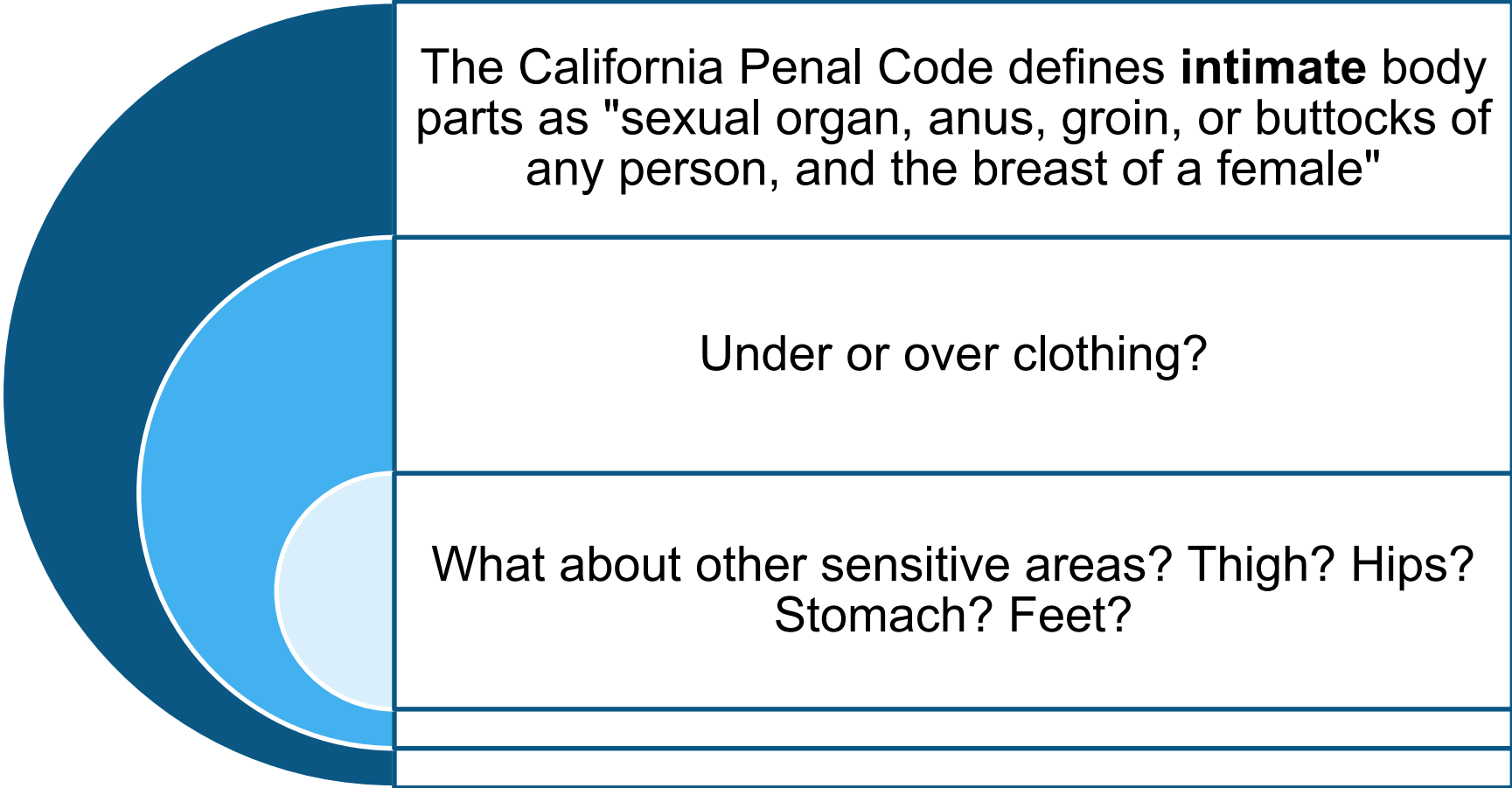
Was the touching for the purpose of sexual gratification? **And**



Was the touching without the affirmative consent of Complainant?



# What is a private body part?



The California Penal Code defines **intimate** body parts as "sexual organ, anus, groin, or buttocks of any person, and the breast of a female"

Under or over clothing?

What about other sensitive areas? Thigh? Hips?  
Stomach? Feet?

## **For the purpose of sexual gratification**

- An individual says that they accidentally contacted another individual's buttocks in a busy elevator as they move to allow another person to enter the elevator. **For the purpose of sexual gratification?**

**(How do we know it was accidental touching?)**

# Elements of Statutory Rape

Did Respondent have sexual intercourse with Complainant? **And**

Was Complainant under the age of 18 years, when Respondent had sexual intercourse with Complainant?

## Elements of Incest

Was there sexual intercourse between Complainant and Respondent? **And**

Are Complainant and Respondent related to each other within the degrees wherein marriage is prohibited by law?

# Degrees wherein marriage is prohibited by law

1. Parents and children
2. Grandparents and grandchildren, or anyone else with an ancestor-descendant relationship (like great-grandparents and their great-grandchildren)
3. Siblings
4. Half-siblings; and
5. Uncles/aunts and nieces/nephews

CA Family Code 2200 – marriages between parents and children, ancestors and descendants of every degree, and between siblings of the half as well as the whole blood, and between uncles or aunts and nieces or nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.



## Likely Not Covered under Addendum B

“With respect to violative acts such as commenters’ examples of administration of a date rape drug, touching a non-private body part with the perpetrator’s body part, and so forth, such acts constitute criminal acts and/or torts under State laws and likely constitute separate offenses under recipient’s own codes of conduct.”

(FR 30174)

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1. Kissing without consent
2. Respondent forces the Complainant to touch Respondent's genitalia with Complainant's hand
3. Respondent touches Complainant's cheek with Respondent's genitalia without consent
4. Respondent adds Rohypnol to Complainant's drink (with no further conduct)

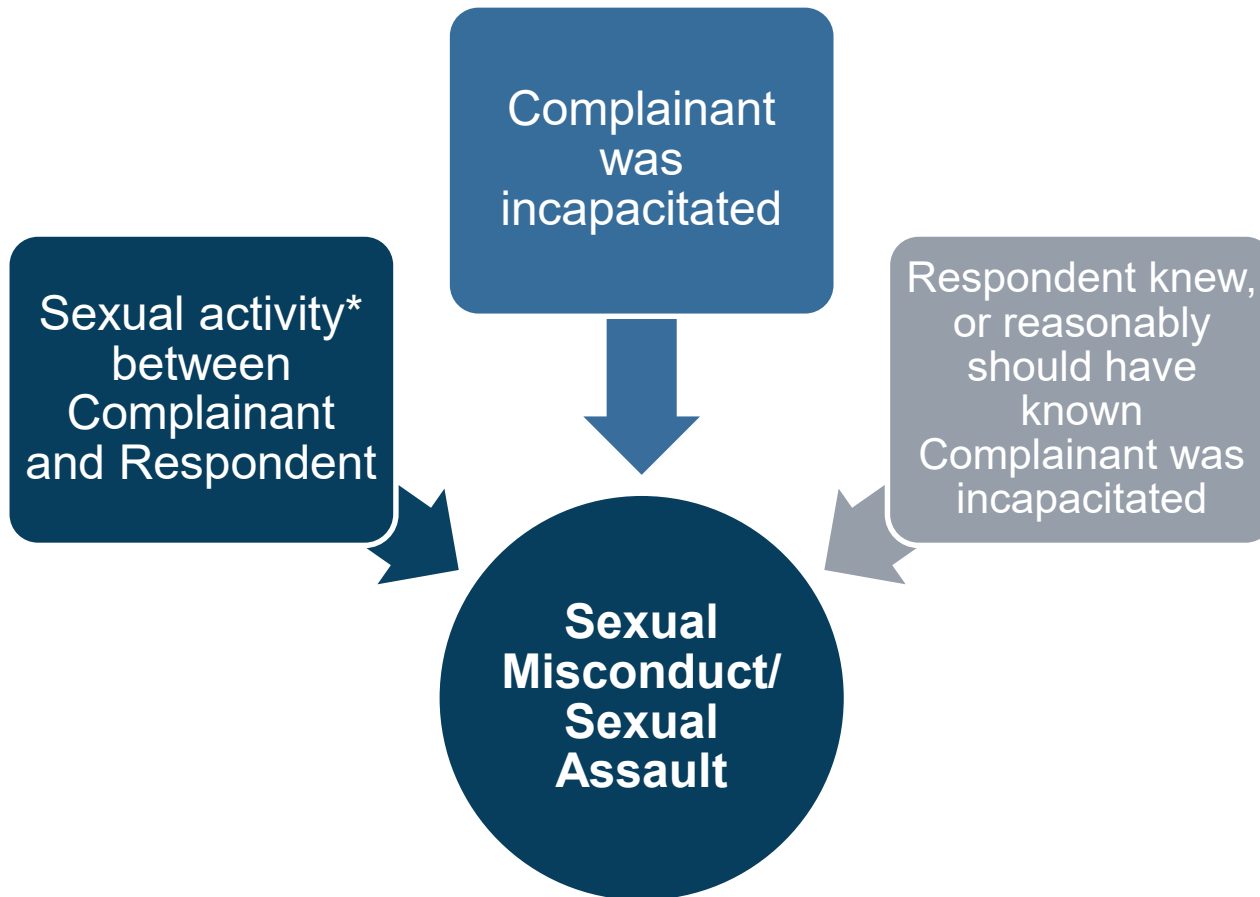
# Affirmative Consent and Incapacitation

# Affirmative Consent for 1096/1097 and Addendum A and Addendum B

What is “Affirmative Consent”?

- Informed, affirmative, conscious, voluntary, and mutual agreement to engage in sexual activity
- Consent must be ongoing throughout a sexual activity and can be revoked at any time, including after penetration
- Consent to one form of sexual activity (or one sexual act) does not constitute consent to other forms of sexual activity
- Consent given to sexual activity on one occasion does not constitute consent on another occasion
- **Affirmative Consent can never be given by a person who is determined under CSU policy to be “Incapacitated”**

# Incapacitation for 1096/1097 and Addendum A and Addendum B



# Incapacitation for 1096/1097 and Addendum A and Addendum B

**Affirmative Consent cannot be given by a person who is incapacitated.**

- Was the Complainant under the influence of drugs, alcohol or medication?
- Was the Complainant asleep or unconscious (regardless of drug, alcohol or medication consumption)?
- Could the Complainant understand the fact, nature or extent of the sexual activity?
- Did the Complainant have the physical and/or mental ability to make informed, rational decisions?
- To what extent was the Complainant's **decision-making ability** and **ability to make informed judgments affected**?
- To what extent was the Complainant's **awareness of consequences** affected?

**A person's own intoxication or incapacitation from drugs or alcohol does not diminish that person's responsibility to obtain Affirmative Consent before engaging in sexual activity.**

## Potential Evidence Beyond Statements

Text messages,  
DMs, SnapChat

Pictures/videos  
that the parties  
or witnesses  
may have taken

Police report  
(preferable that  
officer  
participates)

Video footage –  
depending on facts as  
alleged – for example, did  
C and R walk back to the  
dorms – if so, can UPD  
search for video footage?

SART Report  
(limitations because  
SANE will likely not  
testify)

Receipts, for  
example from a  
ride sharing  
app



**If you know it's out there, ask for it. If you are not able to obtain the evidence for some reason, document this in the investigation report.**

# Breakout Room Scenarios



## Scenario #1 – Jerry and Nicky

Jerry, an employee at CSU Sunnydale, makes the following allegations to the Title IX office:

Nicky and Jerry both work in the Development office. During a recent staff meeting, Nicky reached under the table and placed their hand on Jerry's inner thigh and then on Jerry's lower stomach.



**Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**



**What other questions do you need to ask in order to have enough information to make your determination?**

## Scenario #2 – Jordan and Taylor

A faculty member reports the following to the Title IX office: Two students at CSU Gotham, Taylor and Jordan, recently got into a physical fight in a hallway of the biology building, during which Taylor pushed Jordan against the wall, grabbed Jordan’s genitalia and threatened to “knock them out” if they come anywhere near them again.

1

**Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B? Please explain why.**

2

**What questions will you ask to determine if the touching was for the purpose of sexual gratification?**

## Scenario #3 – Ash and Kai

A student at CSU Springfield, Kai, is sexually aroused by looking at and touching other people's feet. Kai is open about this with their friends. One day while Kai and their friend Ash are studying together, Kai suddenly grabs Ash's bare foot and begins massaging it. Ash reported this to the Title IX office and is requesting that the office investigate.



**1 Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**



**2 What questions do you need to ask in order to have enough information to make your determination?**

## Scenario #4 – Andy and Evan

A student, Andy, makes the following allegations to the Title IX office at CSU Hawkins:

On arrival at a party held at a fraternity house, Andy took a shot of whisky from a bottle that their friend, Mal, had brought with them. Andy then had a full solo cup of juice mixed with alcohol that was available for all party attendees in the kitchen. Andy says that they have been diagnosed with anxiety and that it was particularly severe that day, so they were hoping that having a few drinks would relax them. Andy recalls taking two more shots of whisky. Andy thinks that they then passed out in a bedroom. They recall waking up to find that another party attendee, Evan has put Andy's hand on Evan's penis. Evan then puts Andy's penis in their mouth.

1

**Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?**

2

**What initial questions would you want to ask Andy?**

## Scenario #5 – Hayden and Rory

Rory and Hayden, both students at CSU Metropolis, are watching a movie together in Rory's on-campus dorm room. Rory begins kissing Hayden without Hayden's affirmative consent. Rory asks Hayden to give them oral sex. Hayden says they are not sure if they want to. Rory forcibly puts their penis in Hayden's mouth.

- 1** Would the alleged conduct fall under EO 1096/EO 1097 or Addendum B?
- 2** Please explain why

# Questions?





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# 2020 Annual Title IX Training Series

## Sexual Misconduct and Sexual Assault

October 26, 2020

Systemwide Title IX Compliance  
Office of the Chancellor  
The California State University



# Sexual Misconduct vs. Sexual Assault

# Sexual Misconduct/Sexual Assault

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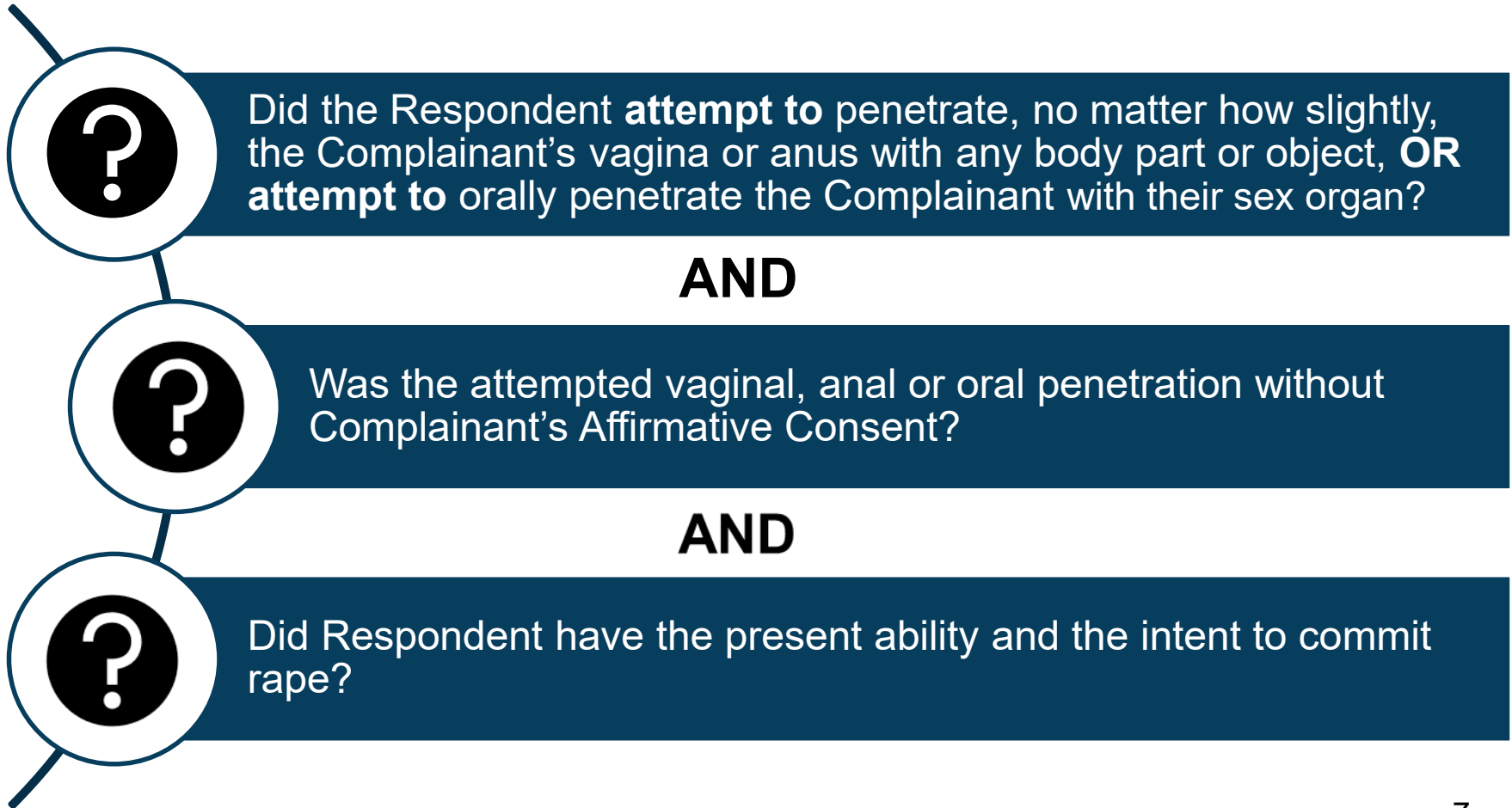
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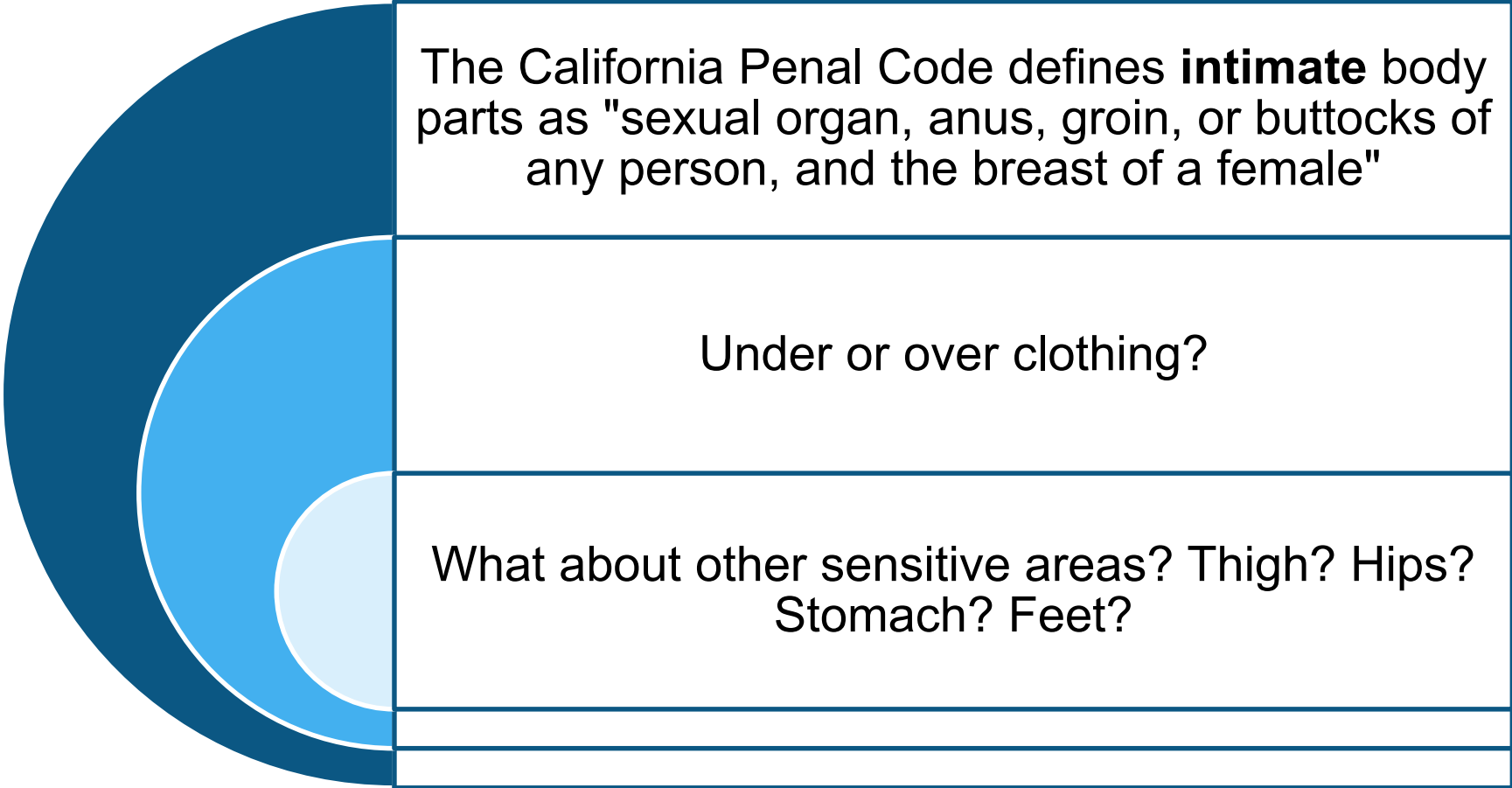
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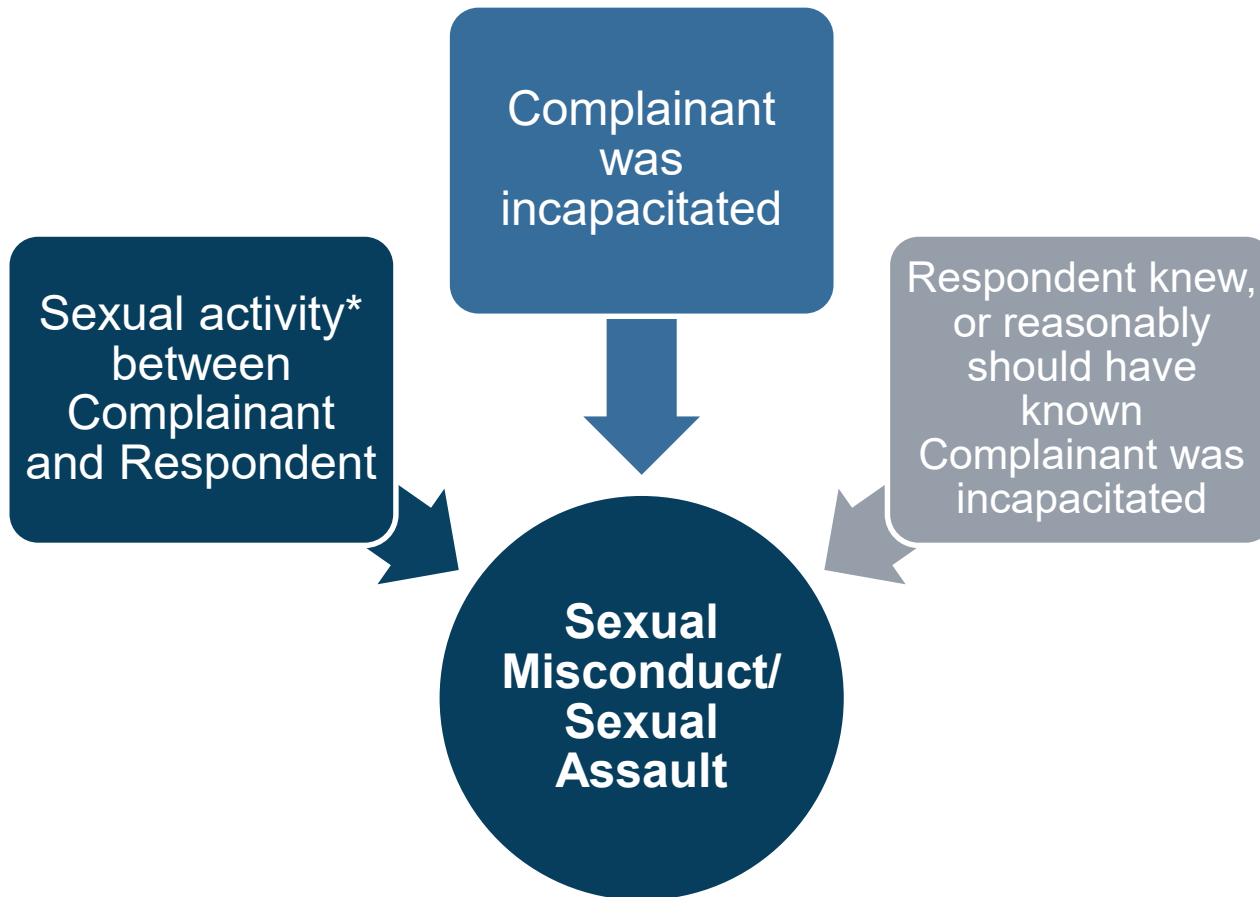
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