

**INVESTIGATING AND PROSECUTING**

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**ALCOHOL-FACILITATED SEXUAL ASSAULT**

AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN

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## ALCOHOL FACILITATED SEXUAL ASSAULT OR...

WHO NEEDS FORCE WHEN YOU HAVE ALCOHOL?



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- Marc LeBeau, Chief, Toxicology Lab, Federal Bureau of Investigation
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## OVERVIEW

- Why are these cases hard?
- 2-step charging process
- Basic toxicology
- Trying the case

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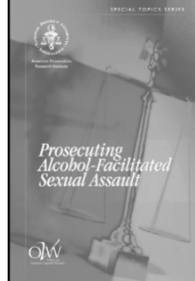
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## THE RESOURCE



[http://www.ndaa.org/pdf/pub\\_prosecuting\\_alcohol\\_facilitated\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf)  
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## WHAT IS ALCOHOL-FACILITATED SEXUAL ASSAULT (AFSA)?

- Victim is physically helpless for 1 of 3 reasons:
  - Surreptitious administration by assailant
  - Mixing of prescription or over the counter drugs with alcohol or recreational drugs
  - Recreational use by victim

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## VICTIM MAY BE INCAPACITATED DUE TO THE EFFECTS OF

- Alcohol alone
- Alcohol mixed with drugs surreptitiously administered by assailant
- Alcohol mixed with prescription, over the counter drugs
- Alcohol mixed with recreational drugs

UNDERSTAND THE SYNERGISTIC EFFECT OF COMBINING DRUGS

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## SYNERGISTIC EFFECT

The interaction of two or more substances or other agents to produce a combined effect that is greater than the sum of their separate effects

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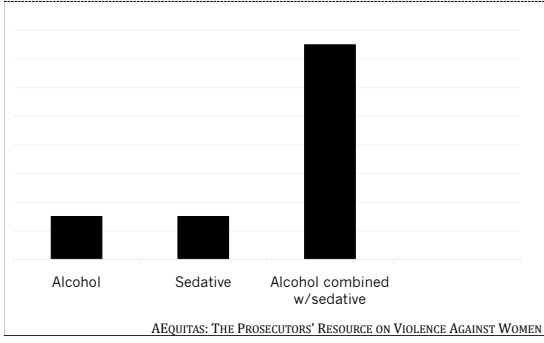
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## SYNERGISTIC EFFECT OF COMBINING DRUGS WITH ALCOHOL



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## PREVALENCE OF AFSA

More than 97,000 students between the ages of 18 and 24 are victims of alcohol-related sexual assault or date rape.

National Institute on Alcohol Abuse and Alcoholism: A Snapshot of Annual High-Risk College Drinking Consequences.  
<http://www.collegedrinkingprevention.gov/StatsSummaries/snapshot.aspx> (last visited May 6, 2010).

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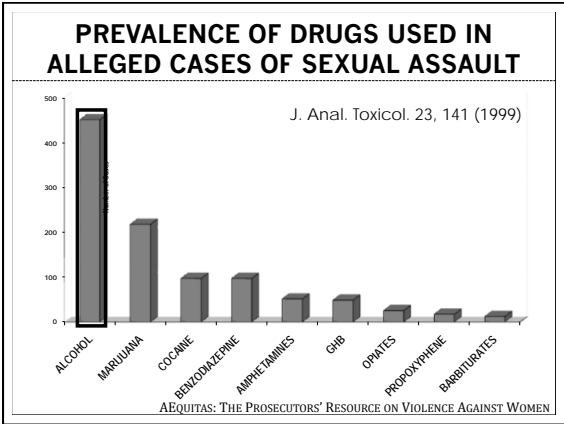
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### AFSA IS UNDERREPORTED

Victims of drug-facilitated or incapacitated rape were less likely than victims of forcible rape to report to authorities.

Kilpatrick, Dean, PhD, et al. Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)

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### WHY SHOULD WE CARE?

Of the study participants, victims of incapacitated rape were comparable to victims of forcible rape with regard to risk for post-traumatic stress disorder (PTSD) and depression but were nearly twice as likely as victims of forcible rape to have past-year substance abuse problems.

Kilpatrick, Dean, PhD, et al. Drug-facilitated, Incapacitated and Forcible Rape: A National Study (2007)

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**WHY IS AFSA SO PREVALENT?**

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**ALCOHOL USE IS A PART OF OUR CULTURE**

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- 82% of people 12 and older have used alcohol at least once in their lifetimes
- Nearly 1/2 of all Americans (12 and older) have used alcohol in the past month (approximately 109 million people)

Substance Abuse in Brief, April 2003, Volume 2, Issue 1, National Clearinghouse for Alcohol & Drug Information, Substance Abuse and Mental Health Services Administration, US Dept. of Health and Human Services

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**2-STEP CHARGING PROCESS**

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1. Does the victim's statement describing the event constitute criminal sexual conduct under the statute?
2. Can the elements of the offense be proven?

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# STEP 1: IS IT CSC?

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# WHAT IS RAPE?

- Traditional categories
  - Force or threat of force but with a drunk victim
  - Unconscious victim
- Victim is physically helpless

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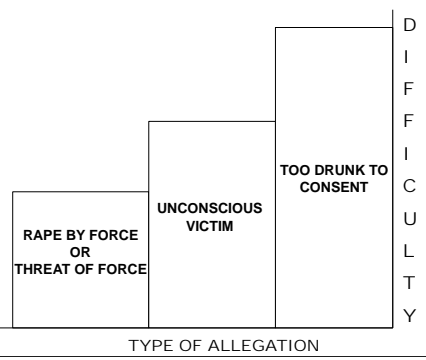
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# PROVING RAPE ALLEGATIONS



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**THE LAW: 2 WAYS TO PROVE**

- Physically helpless
- Mentally incapacitated

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**THE LAW: PHYSICALLY HELPLESS**

- MCL 750.520a(m)
  - a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.
- Unaware
- Physically disabled
- Unconscious
- Physically powerless
- Unable to communicate
- Physically incapable of resisting
- Asleep

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**THE LAW:  
MENTALLY INCAPACITATED**

- MCL 750.520a(j)
  - a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent
- Mentally incapable of resisting

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## ANALYZING YOUR CASE

ELEMENT(S)	WITNESS(ES)	EVIDENCE
By force (penetration)		
Intoxication to point where incapable of consent		
DEGREE OF INTOXICATION		
CONSCIOUS V. UNCONSCIOUS		
MENTAL ALERTNESS		
ABILITY TO WALK		
ABILITY TO COMMUNICATE COHERENTLY		
CONSENT PRIOR TO UNCONSCIOUSNESS		

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## LOOK AT THE TOTALITY OF THE CIRCUMSTANCES

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## INVESTIGATING DUI

- What do police look for with DUI?
  - Odor of alcoholic beverage
  - Bloodshot/watery eyes
  - Slurred speech
  - Unsure balance
  - In field tests:
    - ✦ Cannot follow instructions
    - ✦ Problems with balance and coordination

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### QUESTIONS FROM ALCOHOL INCIDENT REPORT

- When did you last eat?
- What did you eat?
- What were you doing during the last 3 hours?
- Have you been drinking?
- Are you under the influence of an alcoholic beverage now?
- Are you taking tranquilizers, pills or medications of any kind?
- When did you last sleep and for how long?

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### FACTORS

- Did victim:
  - Vomit?
  - Urinate?
  - Defecate?
- Could victim:
  - Walk?
  - Talk?
- Did victim have to be helped with physical tasks?
- Did defendant carry victim?
- Did the defendant follow victim?

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### FACTORS

- |  |   |
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| <ul style="list-style-type: none"><li>• Victim's coordination</li><li>• Who undressed whom?</li><li>• Victim's appearance clothing<ul style="list-style-type: none"><li>◦ Dirty?</li><li>◦ Disheveled?</li><li>◦ Bloodshot eyes?</li></ul></li></ul> | <ul style="list-style-type: none"><li>• Location of assault</li><li>• Was victim conscious?</li><li>• Sexual acts and position<ul style="list-style-type: none"><li>◦ Degree of coordination involved</li></ul></li></ul> |
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**YOU MUST ANTICIPATE  
AND BE PREPARED TO  
ADDRESS THE “RAPE IS  
NOT REGRET” DEFENSE**

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**DEFINING RAPE**

Almost 1/2 of the women who were characterized as victims of a completed rape by the National College Women Sexual Victimization Survey did not consider themselves to be victims of rape.

Rand, Michael and Callie Rennison, "How Much Violence Against Women is There?", p.8, DOJ, National Institute of Justice 199702

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**“RAPE IS NOT REGRET” ANALYSIS**

- Type of rape alleged
- Time and circumstances of report
  - Eye and ear witnesses
- Motive to lie
- Predatory behavior on part of accused

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**BUT THE BIGGEST  
CHALLENGE . . .**

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**...BUT HE WAS DRUNK TOO**

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- “So, why wasn’t it just drunk sex?”
- Isn’t his intoxication a defense?

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**THE REALITY**

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- Approximately 50% of all sexual assaults are committed by a man who has been drinking.  
Source: Abbey et al. (2004)
- In a nationwide survey of college students, 68% of sexual assaults involved alcohol consumption by the offender.  
Source: Fisher et al. (2003)

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**SEXUAL PREDATOR VS.  
JUST SOME DRUNK GUY**

- Look at:
  - His degree of intoxication, capacity to do other things
  - Any planning, manipulation or attempts to deceive victim
  - Accused's attempts to control the situation and overcome victim's will (e.g. providing alcohol or drugs, isolation, lies)

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**SEXUAL PREDATOR VS.  
JUST SOME DRUNK GUY**

- Is there any evidence the accused selected victim because he knew she would be an easy target?
- Did he use force?
- Did she say no?

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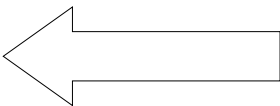
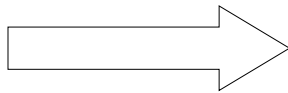
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**GOOD TARGET  
FOR  
PREDATOR**



**GOOD WITNESS  
FOR  
PROSECUTION**

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## **BOTTOM LINE**

We will never make the right charging decisions if we only consider the wrong evidence

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## **STEP 2: CAN THE ELEMENTS OF THE OFFENSE BE PROVEN?**

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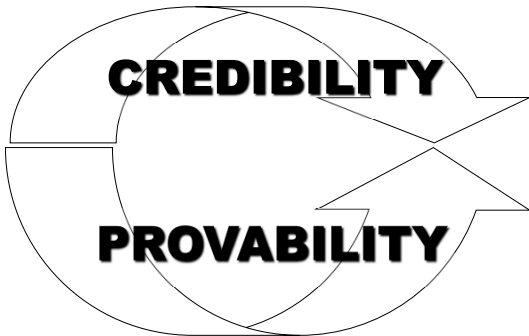
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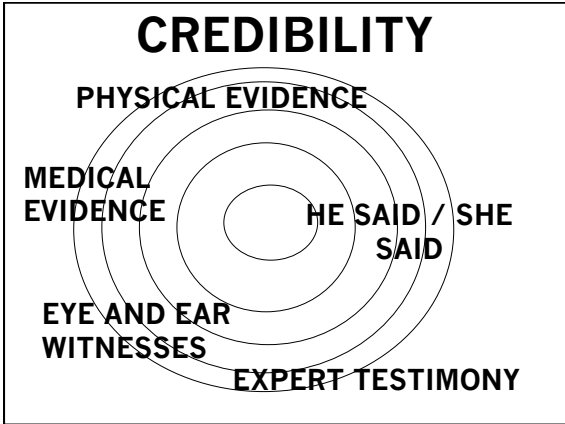
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**VICTIM'S CREDIBILITY**

- Perception at the time of the incident
- Memory after the incident
- Corroboration
- Perceived likeability of victim

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**PERCEPTION AT THE TIME OF THE INCIDENT**

- Degree of intoxication
  - Were her motor skills impaired?
  - Was she able to perceive what was happening around her?
- Who gave her the drinks or drugs?
  - Was it the accused?
  - Did accused encourage her to drink or use more drugs?

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**MEMORY AFTER THE INCIDENT**

- What does she remember about the incident?
- Where did she go that night?
- Did she black out or pass out?

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**MEMORY AFTER THE INCIDENT**

- Can anything refresh victim's memory?
  - Physical or medical evidence
  - Statements from other witnesses
  - Photographs, videotapes, 911 tape

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**CORROBORATION**

- Must corroborate everything possible
- THERE IS ALWAYS SOMETHING MORE

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## CORROBORATION

- Victim may not report or may delay in reporting
  - Evidence collection issues
  - Credibility issues

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## CORROBORATION

- Witnesses
  - Does she remember if anyone else was present?
  - Who did she first tell?
  - Who saw her first after the incident?

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## CORROBORATION

- Witnesses
  - To ingestion, incident, aftermath
  - Prompt complaint witnesses
  - Interview bartenders and waiters
    - ✦How much did the victim have to drink?
    - ✦Did she appear drunk or high?
  - Friends of victim and suspect
  - Look for ex-wives, girlfriends, other victims

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## EVIDENCE COLLECTION

- Is there corroborating physical or medical evidence?
  - Are there surveillance tapes?
  - Videotapes? Tape recordings?
  - Photographs?
  - Injuries?
- Evidence of victim's presence
  - Blood, hair, urine, vomit, clothing

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## THE ACCUSED

- Always attempt an interview
- Did accused know victim was drunk?
  - How much did she drink?
  - What signs of intoxication did she exhibit?
  - Who purchased alcohol?
  - Who provided the alcohol?
- Why does accused think the encounter was consensual (if he does)?

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## EVERYTHING WE EVER LEARNED IN DRUG INVESTIGATIONS...

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## PRETEXT PHONE CALLS

- Check the law
- Plan carefully
- Make sure the victim can handle it
- What can you say?
  - Victim has a sexually transmitted disease (STD)
  - I really enjoyed that drug you have me, what was it?
  - I really enjoyed last night...

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## VICTIM "LIKEABILITY"

- Victim becomes the focus of the trial instead of the accused
- The jury may believe the behavior goes all the way to "yes"
- Victim may blame self for placing self in a risky situation
  - May not want to cooperate with prosecution
  - Self blame may cause victim to be less sympathetic or less credible

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## PRETRIAL MOTIONS

- Rape shield motions
- Motions in limine
  - Motion to preclude arguing that intoxication is a defense
  - Exclude references to irrelevant bad behavior
    - ✦ Prior drug or alcohol use
    - ✦ Caveat: Rohypnol users build a tolerance for some effects so defense may be able to introduce in some cases

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## IMPLICATIONS FOR SEXUAL ASSAULT NURSE EXAMINERS

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## TOXICOLOGY SCREENS

- Should you do one in every case?
- When is it appropriate to obtain toxicology?
  - Importance of specific consent for toxicology
    - ✦ Concern – illegal drugs, underage drinkers, etc.
    - ✦ Must be able to have this discussion with patients

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## RESPONSIBILITY TO YOUR PATIENT

- Obtain informed consent for the whole exam
- If they are too intoxicated or unconscious, you must wait until they can consent or get a court order
- May not be able to give patients any information about what happened to them and they must understand that the exam may not give them the answers they seek

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## INVOLUNTARY INTOXICATION

- Implications for SANEs/SAFEs
- Does the possibility that the intoxication was involuntary change anything?
- Testing techniques

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## INJURIES

- Medical expert can explain lack of injuries
  - Unconscious victims CANNOT resist!
    - ✦ No defensive injuries
    - ✦ No torn clothing
  - Should look for injuries consistent with drunk or drugged victim
    - ✦ Bumps to head
    - ✦ Abrasions on back
    - ✦ Bruises

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## INJURIES: RESEARCH FINDINGS (ROSAY & HENRY)

- 38% of incapacitated patients had genital injury; 44% had nongenital injury: statistically significantly less likely to have genital and nongenital trauma than patients were not incapacitated at the time of the assault.
- Bruising to the arms and legs most common types and sites of nongenital injury
- Incapacitated patients less likely to have genital bruising and lacerations and less likely to have injury to their fossa, fourchette, vaginal walls, anus, and rectum than those not incapacitated.

<http://www.ncjrs.gov/pdffiles1/nij/grants/224520.pdf>

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## THE REALITY

- Many victims present to medical personnel while they are still under the influence of some substance or drug.
- Medical experts may be able to testify about alcohol and trauma related techniques

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## TOXICOLOGY

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## ALCOHOL (ETHANOL) CONTENT IN DRINKS

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| <ul style="list-style-type: none"><li>• Strength<ul style="list-style-type: none"><li>○ Beer<ul style="list-style-type: none"><li>✦ 4-6% ethanol by volume</li></ul></li><li>○ Wine<ul style="list-style-type: none"><li>✦ 12-15% ethanol by volume</li></ul></li><li>○ Liquor<ul style="list-style-type: none"><li>✦ 40-50% ethanol by volume</li></ul></li></ul></li></ul> | <ul style="list-style-type: none"><li>• Standard Drinks<ul style="list-style-type: none"><li>○ Contain about 0.5 ounce (15 mL) of pure ethanol</li><li>○ 12 oz beer = 4 oz wine = 1 oz 100-proof liquor</li></ul></li></ul> |
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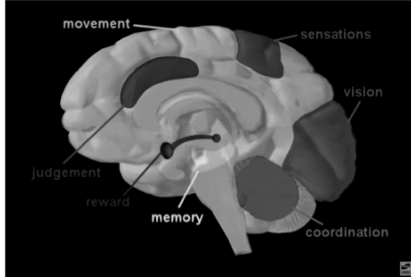
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## CENTRAL NERVOUS SYSTEM DEPRESSION OF ETHANOL



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## PHARMACOKINETICS OF ETHANOL ABSORPTION

- Mainly by ingestion, but also by dermal contact, inhalation, or injection
- Carbonated beverages enhances
- Fatty/oily beverages slows
- Ethanol concentration effects absorption
- Higher altitude promotes
- Food delays

J. C. Garriott. (1996) *Medicolegal Aspects of Alcohol*. Tucson, AZ: Lawyers and Judges Publishing Company, Inc.

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## CNS DEPRESSION OF ETHANOL

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| <ul style="list-style-type: none"><li>• Impairs judgment</li><li>• Depresses learned social and cultural inhibitions</li><li>• Impairs self-evaluation</li><li>• Euphoria</li><li>• Memory loss</li><li>• Shortened attention span</li><li>• Sedation</li><li>• Blurred vision</li><li>• Nystagmus</li></ul> | <ul style="list-style-type: none"><li>• Altered distance perception</li><li>• Impaired hearing</li><li>• Reduced muscle coordination</li><li>• Increased reaction time</li><li>• Light fixation</li></ul> |
|--|---|

J. C. Garriott. (1996) *Medicolegal Aspects of Alcohol*. Tucson, AZ: Lawyers and Judges Publishing Company, Inc.

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BAC (G/100 ML OF BLOOD OR G/210 L OF BREATH)	STAGE	CLINICAL SYMPTOMS
0.01 - 0.05	SUBCLINICAL	BEHAVIOR NEARLY NORMAL BY ORDINARY OBSERVATION
0.03 - 0.12	EUPHORIA	MILD EUPHORIA, SOCIABILITY, TALKATIVENESS, INCREASED SELF-CONFIDENCE; DECREASED INHIBITIONS; DIMINUTION OF ATTENTION, JUDGMENT AND CONTROL; BEGINNING OF SENSORY-MOTOR IMPAIRMENT; LOSS OF EFFICIENCY IN FINER PERFORMANCE TESTS.
0.09 - 0.25	EXCITEMENT	EMOTIONAL INSTABILITY; LOSS OF CRITICAL JUDGMENT; IMPAIRMENT OF PERCEPTION, MEMORY AND COMPREHENSION; DECREASED SENSITORY RESPONSE; INCREASED REACTION TIME; REDUCED VISUAL ACUITY; PERIPHERAL VISION AND GLARE RECOVERY; SENSORY-MOTOR INCOORDINATION; IMPAIRED BALANCE; DROWSINESS.
0.18 - 0.30	CONFUSION	DISORIENTATION, MENTAL CONFUSION; DIZZINESS; EXAGGERATED EMOTIONAL STATES; DISTURBANCES OF VISION AND OF PERCEPTION OF COLOR, FORM, MOTION AND DIMENSIONS; INCREASED PAIN THRESHOLD; INCREASED MUSCULAR INCOORDINATION; STAGGERING GAIT; SLURRED SPEECH; APATHY; LETHARGY.
0.25 - 0.40	STUPOR	GENERAL INERTIA; APPROACHING LOSS OF MOTOR FUNCTIONS; MARKEDLY DECREASED RESPONSE TO STIMULI; MARKED MUSCULAR INCOORDINATION; INABILITY TO STAND OR WALK; VOMITING; INCONTINENCE; IMPAIRED CONSCIOUSNESS; SLEEP OR STUPOR
0.35 - 0.50	COMA	COMPLETE UNCONSCIOUSNESS; DEPRESSED OR ABOLISHED REFLEXES; SUBNORMAL BODY TEMPERATURE INCONTINENCE; IMPAIRMENT OF CIRCULATION AND RESPIRATION; POSSIBLE DEATH
0.45 +	DEATH	DEATH FROM RESPIRATORY ARREST

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## ETHANOL AND BLACKOUTS

- Blackout: Periods of memory loss for events that transpired while a person was drinking (no loss of consciousness- not passed out)
- Ethanol induced memory impairment includes disruption to the hippocampus which plays a central role in formation of new memory

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## ETHANOL AND PASSOUTS

- Alcohol-induced unconsciousness
- Not asleep, but sedated-due to CNS depressant effect
- Resembles sedated state associated with surgery
- Can last for hours
- Groggy-sedated feeling can linger for 24 hours

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## TRYING THE CASE

- Recreate the reality of the crime
- “The devil is in the details”

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## OFFENDER-FOCUSED PROSECUTION

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## THEMES

- Sexual assault is all about control
  - Who needs force when you have alcohol?
- Drunk victims are less able to resist
  - A predator picks his prey
  - A man with a plan
  - The perfect crime

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## THEMES

- He picked a victim with no ability to choose / an easy victim / a victim with no memory
- He was planning for today, for this trial, before this jury, when he raped her

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## VICTIM PREPARATION

- Tell victim
  - Accused, not victim, is responsible for rape
  - Accused, not victim, is responsible for his behavior and lack of control
  - Although victim is not responsible for the rape, victim must be honest about drug and alcohol use

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## VICTIM PREPARATION

- Prepare for cross-examination
  - Consensual drug and alcohol use
    - ✦ Consented to drink, consented to drug use, did NOT consent to sex
    - ✦ If on college campus, were there consequences or did she get a free pass because she reported the rape?
  - Memory loss
  - Delay in reporting
  - "Promiscuous party girl"

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## HONESTY

- There is power in truth
- Be honest with the judge or jury about the victim's use of alcohol or drugs on the night of the crime
- If she doesn't remember everything, tell them why that is ok

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## HONESTY

- The jury should never hear harmful facts about the case from the defense attorney first
- Devastating words from the defense attorney
  - "Now I'm going to tell you the facts that the prosecutor doesn't want you to know."

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## MEDICAL TESTIMONY

- Medical expert
  - Can explain lack of injuries
    - ✦ Unconscious victims CANNOT resist!
      - No defensive injuries
      - No torn clothing
  - Should look for injuries consistent with drunk or drugged victim
    - ✦ Bumps to head
    - ✦ Abrasions on back
    - ✦ Bruises

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**EXPERT TESTIMONY**

- May need to call an expert
  - Inability to consent
  - Ability to perceive
  - Ability to remember
- Can call emergency doctor, SANE/SAFE, pharmacologist, toxicologist

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**EXPERT TESTIMONY**

- May be better for rebuttal
- May be difficult to do without BAC
- Forensic toxicologist must have an adequate background in pharmacology
- Make sure they testify in "Plain English"

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**DEFENSE BLACKOUT VS. PASSOUT EXPERT**

- Hold the defense to the discovery rules
  - Get a current curricula vitae (CV)
  - Get a written report from the expert
- Object on relevance grounds
  - Until there is evidence that a blackout occurred in the record, there is no factual basis to admit this testimony
  - Make defense proffer the testimony that will support the introduction of blackout testimony

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**DEFENSE BLACKOUT VS.  
PASSOUT EXPERT**

Motion in limine to preclude defense from using the term blackout unless there is evidence on the record to show that it was a blackout and not just inconsistencies in the victim's memory

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**DEFENSE BLACKOUT VS.  
PASSOUT EXPERT**

- Cross
  - Opinion based upon facts gained by talking to the accused
  - Scientific issues with blackouts
  - If victim's testimony were true, then this wouldn't apply would it?

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- Cross (cont.)
  - If a person blacked out, she would know that she had "lost time", right? (not recording memories whereas passed out is not observing anything because asleep)
  - When a person is drunk enough to black out, they are extremely intoxicated, aren't they? What other signs of that intoxication would they show? (use this to show that the offender should have known the person could not consent)

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**.Christopher Mallios**  
Attorney Advisor  
*Northeast Region*

801 Pennsylvania Avenue NW  
Suite 375  
Washington, DC 20004

P: (202) 596-4230  
F: (202) 393-1918

[cmallios@aequitasresource.org](mailto:cmallios@aequitasresource.org)  
[www.AEquitasResource.org](http://www.AEquitasResource.org)

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## AEQUITAS

Conducting legal research; providing 24/7 case consultation; hosting specialized or state-specific training events and webinars; providing individual experts to jurisdictions and organizations; and publishing articles, monographs, and other resources on topics relevant to the prosecution of violence against women.

[www.AEquitasResource.org](http://www.AEquitasResource.org)

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