

When The Levee Breaks

**A guide to dealing with and avoiding arrest
and prosecution in BDSM scenes**

DISCLAIMER: THE MATERIAL PRESENTED IS NOT OFFERED AS LEGAL ADVICE. PLEASE CONSULT A LOCAL ATTORNEY IN YOUR AREA.

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Introduction

This document is a companion to the NCSF publication *In the Aftermath*, a guide for victims of sexual assault. It is not intended to provide a defense for indefensible acts, but rather to provide a perspective and a guide for those who have, through mistake, misunderstanding, or a fleeting lapse of reason, committed an act of criminally actionable sexual assault as well as to provide information on how better to protect oneself against arrest and prosecution. BDSM activities sometimes have the appearance of an assault, and are certainly sensual, if not actively sexual. The vast majority of BDSM activities, however, are certainly not sexual assaults, for the remarkably simple reason that such activities occur between consenting adults. The primary source of accusations and charges of sexual assaults is the breakdown of consent. Consent breaks down when either 1) an intimate partner withdraws consent and that withdrawal is not recognized or honored, or 2) an intimate partner believes consent has been given for the activity, when such consent has not been given. These two events are not mutually exclusive, and in fact often happen together.

Another object of this tract is to offer guidance for those engaging in BDSM activities when civil or criminal authorities have intruded in some fashion. As before, the purpose of this paper is not to provide an escape route for criminality, but rather to afford to those who seek freedom in their sexual activities some assistance in reckoning with secular authorities.

Part 1: Avoiding Problems

Here are some initial guidelines for avoiding problems in the first place.

SHARING INFORMATION

First and foremost, be careful of what personal information you disclose and to whom you disclose it. In particular be careful about sharing your last name, employer, address, phone number, date of birth, and Social Security number. Ask yourself, "Is the person I am sharing with trustworthy?" and "who is this person likely to inform?"

PLAYING WITH NEW PEOPLE

- Check references
- Establish safe calls, safety network and safety procedures
- Select and communicate regularly with a mentor
- Do not allow photos, recordings or videos
- Ask age and verify with a photo ID if in question

PLAYING AT HOME

- Check outside of house and "look in"
- Check noise levels from outdoors, and take appropriate measures
- Tell guests how to dress and conceal toys when arriving and leaving
- Know the real names and identities of participants [This may seem inconsistent with the "Sharing Information" section above. However, if this gathering is occurring in your home, knowing the actual identities of your guests is a reasonable precondition to having them in your home.]
- Be clear that illegal activities such as drugs are not allowed. If several people are involved, particularly ones that you don't know well, write and distribute the rules to guests.
- Be familiar with what to do if police arrive for any reason
- Have medical and safety supplies close and visible to scene
- Keep play out of the entry area so it is not visible from the door
- Be sure parking is not a problem with neighbors
- Use caution with photos, recordings and videos, and contracts, and be aware of potential legal consequences
- Call 911 promptly if serious problems occur
- Know your local laws as they apply to BDSM activities
- Home Insurance: "Standard liability coverage" versus "Umbrella policy" (umbrella has higher level of protection for negligence)

PLAYING IN PUBLIC

- Avoid areas with children
- Be aware that those around you in public are not consenting to participate in your scene
- Be aware that certain conduct, such as exposure or public sex, is illegal
- Be aware that this may be someone else's first exposure to someone who is a BDSM practitioner
- Use common sense

EMPLOYMENT ISSUES

- BDSM activities are not covered in current anti-discrimination legislation or policies
- Be discreet with coworkers; maintain good relationships
- Document thoroughly any treatment you consider discriminatory and keep a written record for future use
- For Military Personnel: You have no job protection rights and can be discharged - be very careful and don't freely admit to BDSM activity
- For Persons with Security Clearances: don't lie or you will lose your clearance permanently. While this means you should always answer questions honestly, it does not mean you should volunteer information about your BDSM activities.
- Seek advice from NCSF if you believe you have been discriminated against due to BDSM involvement

CUSTODY/CHILDREN ISSUES

- Be familiar with child protective services policies in your area
- Keep toys and scene paraphernalia locked and inaccessible to children
- Talk to your minor children about BDSM at your own risk; be aware of consequences
- It is extremely easy for someone to get child welfare authorities to investigate someone - anonymously and without any evidence. Child welfare authorities must investigate when a report is made.
- Seek advice from NCSF and an attorney if a child welfare agency intervenes due to your involvement with BDSM

RELATIONSHIPS DO NOT ALWAYS LAST

- Letters, photos, videos, recordings and contracts have all been introduced into criminal and civil proceedings as evidence
- Outing is a common threat in difficult relationship break-ups, and one which all too often moves beyond a threat to actual action
- Abuse may be claimed when there is none
- Incidents of stalking appear to be increasing
- BDSM is frequently introduced in difficult divorces related to child custody

ELECTRONIC INFORMATION/EMAIL/ETC.

- Employers have the right to monitor email and phone calls
- Internet Service Providers archive email and account information for long periods. This info is fairly easy to access by hackers, private investigators, attorneys, and law enforcement.
- Chat rooms, email lists, etc. are routinely logged and saved.
- Electronic communications pose a serious danger to those who wish to remain discreet.
- If trouble has arrived, take the time to pull down all of your postings on all of your social networking sites. You cannot change that which is past; you can avoid digging deeper holes.

Part 2: Recognizing Trouble

The tricky part of dealing with trouble is recognizing it when it arrives. Those who have the comfort of a local BDSM club or community to provide the benefits of collective experience and good judgment will often avoid disaster without ever knowing it was there. Those new to BDSM, those who play privately without guidance, and those experienced in BDSM matters who seek to test the outside envelopes may easily find themselves in difficulties that they do not recognize until the predicaments have become overwhelming. Let us keep this simple: a problem has occurred that requires immediate attention when:

- Police officers are calling.
- Child welfare authorities are calling.
- Someone is headed for the emergency room.
- A lawsuit has been started.

When one of these things happens, do not try to solve it by ignoring it or talking your way out of it. These types of problems will not simply go away. If you have the resources and the time, involvement of a lawyer is your first, wisest step.

GENERAL THOUGHTS ON HOW TO CHOOSE AN ATTORNEY

- In generally urban settings, look for specialists; in generally rural settings, look for experience and location. What you are primarily looking for is someone who can guide you through local rules and conventions. Never go into a remote jurisdiction without local counsel.
- When in doubt, ask another lawyer. They tend to know each other; if they don't, they can find out about each other pretty fast.
- Naturally, it would help if your chosen counsel was kink-friendly. That is one of the services provided by the Kink Aware Professionals (KAP) project. Additionally, ask at your local ACLU chapter or Lambda Legal's regional representatives. Those offices tend to have access to lawyers familiar with issues specific to the BDSM/poly/GLTB communities.
- The most desirable lawyer/client relationship is one of mutual respect and unconditional trust. Do what is necessary to foster that relationship.

What to say to a lawyer:

- The client shall make FULL disclosure to his/her attorney without reticence or omission. Failure to comply with this admonition will likely lead to disaster.
- Most peoples' secrets aren't that remarkable. Fear of disclosure is usually the worst of all fears; once disclosure is made, the activities in which you engage in private are normally not all that embarrassing.
- Your lawyer is a professional secret-keeper; you may speak with confidence in his or her discretion.
- NCSF, with your permission, is able to speak to your attorney and provide educational and resource information if you request it.

What to do when you don't have a lawyer, or can't afford one:

- Call the NCSF hotline and ask for help. You will get some.
- Don't talk to people with whom you do not have a privileged relationship, as you do with your doctor, your counselor, your priest, or (if it gets that far) your court-appointed lawyer. More damaging things will come out of your mouth than from any other source.

Part 3: Law Enforcement

When things have gone badly wrong, it is likely that conversations with police officers will be necessary. The following may be useful thoughts:

YOUR BASIC RIGHTS & RESPONSIBILITIES

Your basic legal rights and responsibilities may not always be clearly defined by law enforcement officials. If stopped or detained, politely ask the police officer "why" in a manner that is not confrontational. Remember, your priority should be to alleviate or minimize the potential charges and/or use of excessive force against you. In some states, there are no clear statutes or laws which delineate the use of deadly force by law enforcement officials. In these instances, the courts will decide, on a case-by-case basis, what is considered deadly or excessive force.

IF YOU ARE STOPPED ON THE STREET

- Answer all questions. Your answers should be factual to the best of your knowledge.
- Remember, you are not required to give testimony against yourself. You have Fifth Amendment rights.
- The foregoing two statements may seem inconsistent. As noted above, whether or not to respond to law enforcement officers' questions depends on the situation. When in doubt, say nothing.
- Do not "bad mouth" or walk away from law enforcement officials, even in instances where you feel they are wrong. If the police officer behaves inappropriately, report his or her misconduct to a superior police officer at a later time.
- If an officer has a "reasonable suspicion" that you may be carrying a weapon or illegal substance, you may be subjected to a "pat-down" search. Do not resist the search. Obey all requests made of you unless the request poses a risk to your personal safety or well-being. In that case, ask for a meeting with the officer's supervisor.

IF YOU ARE STOPPED IN YOUR CAR

- Slow down; pull over safely when you can. If the police vehicle is unmarked and you cannot identify the driver as a uniformed police officer, drive below the speed limit to a well-lit, populated spot and then pull over.
- Stay in the driver's seat with both hands in sight on the steering wheel. Do not exit your car unless asked to do so. Getting out of your car can be perceived as aggressive behavior and a threat to the officer's safety. Turn on your interior light if stopped at night.
- Comply with the officer's request to see your driver's license and/or registration. If they are in the glove box or under the seat, state that and then retrieve them slowly.
- If the officer has "probable cause," your car can be searched without a court-issued warrant. If you are the driver and/or owner of the car and do not want your vehicle searched, clearly inform the officer of your non-consent in a polite manner.
- If you are issued a ticket, sign it. Signing a ticket is not an admission of guilt-only an acknowledgment of receiving the ticket. However, refusal to sign a ticket could result in you being arrested and facing additional charges.
- If you are suspected of drunk driving, cooperate with the officer(s) on the scene. If you refuse to submit to breath, blood or performance tests, your refusal may be interpreted as an indication of guilt in later court proceedings. This could result in loss of driving privileges and/or heavy fines.
- Get out of the automobile if asked to do so.
- Most officers will not provide specific reasons for the stop until they have your license and registration in hand. Therefore, they will avoid having to debate the reason for the stop before they receive these items from you.

- If you wish to offer an explanation of your circumstances when stopped, do so before the officer returns to his vehicle. The officer cannot void the ticket once it has been written. If you believe you have been treated unfairly, present your case in traffic court and not to the officer along the roadside.

IF LAW ENFORCEMENT COMES TO YOUR DOOR

First, make sure each individual is really a law enforcement representative by requesting to see a police badge and/or identification card. Be pleasant but serious. The problems that police officers seek to correct are often mundane (noise, parking, routine neighbor contacts), and can be dealt with in a brief conversation.

Make sure the officers are at the correct house by asking, "How can I help you?" If entry is requested or seems likely, officers should have a warrant or be in "hot pursuit" of an individual suspected of committing a crime and running into your house. If the officers do not have a warrant or are not in hot pursuit, you can deny entry.

If the officers have a warrant, ask to see it. Determine the type of warrant-body (arrest) or search. A body warrant means that the officers are seeking an individual and, therefore, cannot search drawers and places not large enough for an individual to hide. A search warrant allows officers to search all places in which the items listed on the warrant can be hidden.

IF YOU ARE ARRESTED

Before the police take you into custody, make sure that your house or car is secure. Make sure you've made arrangements to care for pets, etc. Make sure you have been informed as to why you are being arrested.

NOTE: A lawyer should be called as soon as possible. The advice of an attorney is extremely important early in the process.

Under no circumstances should you make incriminating statements which might be used against you at a later time.

In most states, you must be taken before a judge, magistrate, constable or court commissioner within 24 hours of your arrest. You should secure legal representation before this initial court appearance.

Ask to telephone your parent, guardian, or lawyer immediately. You have the right to make one phone call to the person of your choice; use it. You also have the right to privacy during the call. If this right is denied, do not cause a confrontation that might result in additional charges being filed against you.

You should always have the number of a lawyer or a person you can rely on to get you an attorney if your lawyer is unavailable. Keep a record of that number, as well as the name and number of a lawyer in your wallet or purse

POLICE OFFICER MISCONDUCT AND YOUR RESPONSE

Law enforcement misconduct is loosely defined as "improper and/or illegal action(s) and/or conduct by an officer." Some of the more frequent types of misconduct are:

- Physical Abuse-slaps, kicks, punches, choke-holds, beatings, flashlight and night stick blows, tight handcuffs, and unnecessary use of firearms.
- Verbal Abuse-name calling, use of racial slurs.

The best way to avoid officer misconduct is to not provoke the officers while having a discussion about law enforcement matters. Showing off for friends and family will only get you arrested and possibly injured. Comply first then seek an explanation from the officer or his/her supervisor later.

Innocent individuals are often offended, angered, or both as a result of being detained by an officer for questioning. Although the delay might be inconvenient for you, the officer believes that there is a reason (probable cause) to stop you and ask questions.

Examples of probable cause might include questions about a crime or incident which occurred recently in the area, someone placing a complaint about your presence, or suspicious activity. The police officer usually does not want to detain you any longer than necessary. A few minutes of cooperation will speed up the process and get you on your way.

- Do not resist arrest for any reason.
- Control you emotions.
- Do not make threatening motions or statements to the officers talking to you.
- Never attempt to interfere with the arrest of others who may be with you.
- Always note the name of the officers with whom you come in contact.
- Report cases of officer misconduct immediately following your release from police custody.
- Record, document and describe any case of officer misconduct in a typewritten statement. Have your summary of the incident notarized within 72 hours of its occurrence.

A WORD OF CAUTION

Laws and law enforcement procedures may vary from state to state. You should consult an attorney or law enforcement representative who is familiar with the laws in your state.

The National Coalition for Sexual Freedom (NCSF) believes that the most important issue facing the BDSM/Leather/Fetish communities today is the consistent practice of courts and law enforcement officials to prosecute BDSM as criminal assault, with no defense of consent permitted. We know that BDSM is not assault, but rather is pleasurable, loving adult erotic activity, as long as it is mutually consensual.

NCSF is leading a major national campaign, "Consent Counts," to change the laws and police practices that our communities now endure, and to establish that consent is available as a defense in criminal BDSM prosecutions.

Part 4: Consent Counts

One of the best ways to avoid trouble is to pay attention to the central concept of consent. The National Coalition for Sexual Freedom (NCSF) believes that the most important issue facing the BDSM/Leather/Fetish communities today is the consistent practice of courts and law enforcement officials to prosecute BDSM as criminal assault, with no defense of consent permitted. We know that BDSM is not assault, but rather is pleasurable, loving adult erotic activity, as long as it is mutually consensual. NCSF is leading a major national campaign—Consent Counts—to change the laws and police practices that our communities now endure, and to establish that consent is available as a defense in criminal BDSM prosecutions.

BEST PRACTICES IN THE BDSM/ LEATHER/ FETISH COMMUNITIES

The practice of BDSM (Bondage, Discipline, SM) consists of intimate mutually pleasurable erotic activity within the scope of informed consent. The following "best practices" have been developed by our communities to ensure that the standard of "safe, sane and consensual" is met by all BDSM participants:

GUIDING PRINCIPLES

"Safe"

All participants are knowledgeable about the techniques and safety concerns involved in what they are doing, and all act in accordance with that knowledge.

"Sane"

Knowing the difference between fantasy and reality, and acting in accordance with that knowledge.

"Consensual"

All participants understand the nature of the activity in which they will be engaged, and the limits imposed by each participant, and respect such limits at all times.

BEST PRACTICES

- Each participant should fully understand both the desires and the limits of each other participant. Such understanding may be based on long familiarity with the other participant(s) or, where participants are new to each other, on a full discussion in advance of the BDSM activity.
- Consent must be clearly given to all aspects of planned BDSM activity and such consent must be freely given.
- Each participant in a BDSM activity is free to withdraw previously given consent at any time.
- Each participant should fully understand any limitations on another participant's ability to understand and consent fully to the planned BDSM activity, such as age, diminished mental capacity or use of drugs or alcohol.
- A means should be provided—normally a "safe word"—for the "bottom" to signal clearly her/his desire to terminate the activity.
- Relationships among BDSM practitioners should be fully respected by others. It is the responsibility of each person to make clear to others any relationship that imposes limits on that person's participation in BDSM activities.
- At parties or other events, the use of monitors may be advisable and rules should be clearly displayed.
- The more intense and physical the BDSM activity is, the more important it is to ensure clear understanding of and consent to the planned activity.
- Participants must recognize that BDSM activity resulting in serious bodily harm or that goes beyond the expectations of one of the participants may be deemed criminal, even where consent was initially given.

Summary and Conclusion

In the introduction to this document, the assertion was made that activities between consenting adults should not be considered sexual assaults. Law enforcement authorities, child welfare authorities, and courts may not agree. A vision of a world of adult sexual exploration, free from interference from the secular world, is an enticing image. That image is not yet a reality. NCSF seeks to aid in bringing that reality into being. Nevertheless, the protection of individual rights devolves primarily on the individual. NCSF seeks to help you help yourself.