



Talking Points for Explicit Prior Permission

5 steps to get Explicit Prior Permission (EPP) for consent to kink:

1. You agree to specific acts and the intensity before you start.
2. You agree what roleplay resistance is ok to ignore.
3. You have to have a way to stop at any time, like a safeword or safe signal.
4. You are of sound mind.
5. You **can't** risk seriously injuring someone.

Contents

Background	1
Text of Explicit Prior Permission in Article 213 Section 10	1
Talking Points for the Alt-Sex Communities	2
Mainstream Talking Points	4

Background

The American Law Institute (ALI) is a research and advocacy group of judges, lawyers, and legal scholars established in 1923 to adapt U.S. common law to changing social needs. NCSF worked with the ALI to create the legal framework of Explicit Prior Permission for consent to kink in the revised Model Penal Code on Sexual Assault. NCSF's Consent Counts is educating victim advocacy agencies, LGBTQIA advocacy organizations, the alt-sex communities, and media outlets, which will lead to lobbying state legislators to adopt Explicit Prior Permission.

<https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>

Text of Explicit Prior Permission in Article 213 Section 10

AFFIRMATIVE DEFENSE OF EXPLICIT PRIOR PERMISSION: you may personally give another person explicit prior permission to use or threaten to use physical force or restraint, or to inflict or threaten to inflict any harm in connection with an act of sexual penetration, oral sex, or sexual contact, as long as it doesn't cause serious injury. Permission is "explicit" under subsection (1) when it is given orally or by written agreement:

- (a) specifying that the actor may ignore the other party's expressions of unwillingness or other absence of consent;
- (b) identifying the specific forms and extent of force, restraint, or threats that are permitted; and
- (c) stipulating the specific words or gestures that will withdraw the permission.

Prohibited acts under Section 213.10 are:

- (1) The defense provided by this Section is unavailable when:
 - (a) the act of sexual penetration, oral sex or sexual contact occurs after the explicit permission was withdrawn, and the actor is aware of, yet recklessly disregards, the risk that the permission was withdrawn;
 - (b) the actor relies on permission to use force or restraint or ignore the absence of consent when the other party will be unconscious, asleep, or otherwise unable to withdraw permission;
 - (c) the actor engages in conduct that causes or risks serious bodily injury and in doing so is aware of, yet recklessly disregards, the risk of such injury; or
 - (d) at the time explicit permission is given, the other party is, and the actor is aware of, yet recklessly disregards, the risk that the other party is:
 - i. younger than 18;
 - ii. giving permission while subjugated to physical force or restraint;
 - iii. giving permission because of the use of or threat to use physical force or restraint or extortion if that party does not give the permission;
 - iv. lacking substantial capacity to appraise or control his or her conduct due to intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants
 - v. incapacitated, vulnerable or legally restricted;
 - vi. subjected to prohibited deception;
 - vii. subject to trafficking.

Talking Points for the Alt-Sex Communities

1. Why is it important?

When people engage in BDSM practices, even if it's consensual, they need to know whether they can be charged with violating the law, and Explicit Prior Permission (EPP) provides a clear legal framework on consent to kink.

The new legal framework of Explicit Prior Permission prevents criminal prosecution of activities that are truly consensual and do not result in serious injury.

Explicit Prior Permission accurately reflects consent as it is practiced in the BDSM communities.

Explicit Prior Permission acknowledges pre-negotiation of BDSM activities and the use of safewords, protecting those who do it properly and equipping prosecution for when consent is violated or when serious harm is done.

To date, there is not a single appellate court decision anywhere in this country that has accepted consent as a defense in an assault or abuse prosecution arising from BDSM conduct.

Currently, case law has established that such acts as using nipple clamps or dripping hot wax on someone constitutes “serious bodily injury,” when in reality, these are relatively mild activities.[i]

With Explicit Prior Permission included in sexual assault or domestic violence law, survivors would generally be protected by “rape shield” laws, meaning that their prior sexual behavior with others can’t be used as evidence.

In the NCSF Consent Violations Survey (2015) out of 1,041 people who reported nonconsensual experiences, only 29 people (2.7%) said that they reported it to the police. If the legal system can better accommodate BDSM-related cases through the changes proposed in the MPC, one of the major barriers to reporting will be reduced.[ii]

2. How is consent defined for BDSM and similar kink activities in Explicit Prior Permission?

First there was SSC, then RACK... now EPP - Explicit Prior Permission!

Anyone can stop what's happening at any time during the activity – including consensual non-consent – and there must be an agreed upon word or signal to stop, such as a safeword or safe signal.

Explicit Prior Permission for BDSM activities must be given in advance, in writing or verbally, and must specifically identify the acts and the intensity that is agreed upon.

Explicit Prior Permission for kink activities requires informed consent. That means understanding the risks involved in the specific activities and agreeing to the intensity of those activities before you start.

You must be competent to give the Explicit Prior Permission and must not be forced or coerced to do so.

Each person involved should understand everyone’s limitations or barriers to their ability to consent to the planned activities, such as age, diminished mental capacity, or use of drugs or alcohol.

Prior consent doesn't mean current consent under Explicit Prior Permission, and consent to one thing doesn't mean consent to anything else.

Even with consent, you can't seriously injure someone in a sexual or erotic context.

Mainstream Talking Points

1. Why is it important?

Over 20 states have no definition of consent in their sexual assault law, and there is no uniform legal definition of consent according to RAINN.[iii]

Outdated moralistic preconceptions in the law do not accommodate modern understandings and practices of consent when it comes to BDSM. Even mild acts like dripping wax or using a riding crop are criminalized under case law.

Prosecutors haven't been pressing charges when crimes are committed that involve BDSM acts because they didn't have the legal framework to explain how consent is obtained and maintained when it includes the use of force or restraint. Now with Explicit Prior Permission, law enforcement has a legal framework that is intended to replace outdated case law.

2. How is consent defined in Explicit Prior Permission?

Explicit Prior Permission for kink activities requires informed consent. That means understanding the risks involved in the specific activities and agreeing to the intensity of those activities before you start.

Prior consent doesn't mean current consent under Explicit Prior Permission.

Even with consent, you can't seriously injure someone in a sexual or erotic context.

You have to agree to which expressions of roleplay unwillingness may be ignored, for example when you're acting out sexual fantasies in which words like "stop" or "no" may be said.

You have to specify the "safewords" or gestures that will withdraw the prior permission before starting.

Communication takes place before, during and after BDSM activities to ensure consent.

3. What is BDSM?

Millions of Americans engage in BDSM or kink behaviors, often involving role play and power exchange.

A national prevalence survey in 2017 found that 22% of adults in the U.S. engage in role play, 20% enjoy bondage, 13% enjoy “playful whipping” and 30% like to be spanked during sexual activities.[iv]

Kinky people suffer discrimination and even criminal charges for engaging in consensual sexual activities that are different than traditional sexual behaviors. The NCSF Violence & Discrimination Survey (2008) found that 1/3 of over 3,000 people surveyed suffered some form of discrimination or persecution. They lost their job or even their children because of the myths and stereotypes. Others suffered violence and were physically attacked because of the stereotypes

As a consequence, sexual assaults are underreported when it involves alt-sex practices. In the NCSF Consent Violations Survey (2015) out of 1,041 people who reported nonconsensual experiences, only 29 people (2.7%) said that they reported it to the police. This is a barrier to services and to justice.[v]

Definitions

Affirmative consent – when all those involved communicate a clear yes to each of the activities

Alt-Sex – sexual behaviors, identities, and communities that are not part of socially and culturally dominant sexualities

BDSM - Acronym that stands for Bondage & Discipline, Dominance & Submission, Sadism & Masochism. Consensual power exchange is the basis of BDSM interactions, wherein one person agrees to submit to specific activities and the other agrees to be in control for a certain period of time. BDSM also may involve role play and sensation play..

Model Penal Code – a model law designed by the American Law Institute to assist state legislatures in updating and standardizing criminal law in the U.S.

Power Exchange – a consensual exchange of power that often involves intimate activities

Rape Shield Law - limits the ability to introduce evidence or cross-examine rape complainants about their past sexual behavior and prohibits the publication of the identity of an alleged rape victim

Role Play – taking a role of a character or person and acting it out with a partner taking someone else's role

Safeword(s) - an agreed upon word or signal that can be used to stop an activity at any time. Common safewords include “safeword” as well as a traffic light system where “red” means stop, “yellow” means slow/need a break, “green” means all good.

[i] National Coalition for Sexual Freedom. <https://ncsfreedom.org/consent-legal-cases-3/>

[ii] Wright, S., Stambaugh, R. J., & Cox, D. (2015). [Consent Violations Survey](#). National Coalition for Sexual Freedom.

[iii] RAINN (Rape, Abuse & Incest National Network).

https://apps.rainn.org/policy/?_ga=2.96786009.7795869.1618244881-153654016.1618244881

[iv] Herbenick, D., Bowling, J., Fu, T. J., Dodge, B., Guerra-Reyes, L., & Sanders, S. (2017).

Sexual diversity in the United States: Results from a nationally representative probability sample of adult women and men. *PloS one*, 12(7), e0181198. doi:10.1371/journal.pone.0181198

[v] Wright, S., Stambaugh, R. J., & Cox, D. (2015). *Consent Violations Survey*. National Coalition for Sexual Freedom.