

Navigating Domestic Proceedings for Clients in BDSM Lifestyles:
Legal Considerations and Strategies

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PREFACE

BDSM¹-- abbreviation for bondage, discipline (or domination), sadism (or submission), masochism; sexual activity that involves, for example, tying a partner up, games in which one partner controls another, or giving and receiving pain for pleasure.

"...BDSM can signify very different things, depending on one's ideological perspective and experiential knowledge. For aficionados, BDSM, often referred to simply as "kink," represents pleasure or satisfaction, usually erotic but not always, derived from consensual power play...For some, BDSM is simply an occasional treat used, for example, to "spice up" one's sex life. For others, it is a crucial and even immutable part of their identity. According to its detractors, however, BDSM is a negative and noxious practice. It can be cast as inherently harmful, a mental illness, a retreat from authentic intimacy, a camouflage for violence, a manifestation of patriarchy, an eroticization of white supremacy, a symptom of neoliberalism and capitalist decadence, and/or a slippery slope toward unmitigated sadism or self-destruction.²

¹ <https://dictionary.cambridge.org/us/dictionary/english/bdsm>

² Ashford C., Maine A., *Research Handbook on Gender, Sexuality, and the Law*, Edward Elgar Publishing, Inc., Northampton, MA , (2020).

Section I: BDSM is here.

For many of us in the southern United States, particularly in South Louisiana, BDSM is a foreign concept, i.e. something engaged in by people "over there," or somewhere else, but certainly not here. The reality is that BDSM as a set of activities and even as a lifestyle is prevalent throughout the United States, including in South Louisiana. Polling suggests between a third and a fourth of all Americans engage in some form of BDSM related activities.

"A 2015 survey of a representative sample of 2,021 American adults by Indiana University researchers showed that elements of BDSM were fairly popular, such as spanking (30 percent), Dominant/submissive (D/s) role-playing (22 percent), restraint (20 percent), and flogging (13 percent)"³.

An even smaller subset of adherents engage in BDSM as a lifestyle, with a distinct subculture, having its own values, standards, norms, and socialization⁴.

Early in my career in the late 1990s, the first time a potential BDSM issue presented itself, I was woefully unfamiliar with anything about BDSM⁵. I grew up a conservative Southern Baptist in the small town of Amite, Louisiana, and had little exposure to outwardly kinky people or their activities. At that time I had a divorce client that was accused of domestic violence. He swore he hadn't hit her. In discussing the case, I went through the protective order checklist (hit, slapped, kicked, punched, shoved, etc) and he denied it all. In the "other" section, I asked if there was anything else, and he said "well, I have pulled her hair a couple of times." I told him that yes, that

³ Herbenick D, Bowling J, Fu T-C, 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. <https://doi.org/10.1371/journal.pone.0181198>

⁴ "Practitioners in the public BDSM scene presumably constitute a fairly small percentage of people who engage in BDSM (Simula, 2019b), and the formal and informal socialization processes of the scene are relatively rigorous (Haviv, 2016)." "...[p]ractitioners usually must undergo some kind of socialization, whether through books, the internet, pornography, partners, friends, and/or the BDSM community (Carlstrom, 2019)." "Some kinksters are very casually involved, attending occasional happy hours and mixers for fellow kinksters, while others' entire social networks are made up of kinksters and most of their free time is spent attending, organizing, volunteering at, and/or teaching at scene events. The scene has its own values and norms regarding gender, sexuality, and relationships in general, and BDSM in particular (Bauer, 2014; Newmahr, 2011; Weiss, 2011). *Sexualities*, Volume 24, Issue 5-6, September 2021, P. ages 786-787.

⁵ At that time, it was called "S&M."

is domestic violence, and we are going to have a problem. Two days later he was found dead in a hunting blind where he had shot himself.

Fast forward a decade, and the Fifty Shades of Grey series was becoming a mainstream phenomenon, and was even called "mommy porn" by the Los Angeles Times in 2012⁶. The idea that dominance, bondage, and intense physical sensation, i.e. pain, could be desired and enjoyed by some people, and that it wasn't a function of mental illness or tolerance of abuse, was a revelation to many including myself.

When I remembered the client that told me about the hair pulling, a little voice inside my head was saying that it might have been consensual. My approach with him and my advice would have been very different if he'd told me that this was a consensual part of their life together, but I didn't know to ask.

Fast forward to January, 2020. A client hired me to represent her in what turned out to be one of the most viciously fought custody cases in my career. Some elements of that case: a 24/7 master/slave contract between the parents, bondage, discipline, polyamory, a trans paramour of one of the parents, ownership of a yearly for-profit convention of several hundred kinky people, injunctions, protective orders, and a parenting coordinator. In that case, being able to differentiate consensual BDSM from abuse greatly improved my approach to the client and to the facts of the case. As a result I was able to give my client good advice and represent the client much more effectively.

⁶ Kellog C., *Bestselling 'Mommy Porn': 'Fifty Shades of Grey'*, Los Angeles Times, March 13, 2012, <https://www.latimes.com/archives/blogs/jacket-copy/story/2012-03-13/bestselling-mommy-porn-50-shades-of-grey> (Last visited February 13, 2024 at 10:05am)

Section 2: When your family law case involves BDSM

In your own practice, you may see BDSM issues presented to you when:

- a) you ask a client about violence in the relationship, and they ask if BDSM (or a specific activity) counts;
- b) your client is the victim of domestic violence, and the perpetrator tries to claim "consensual" BDSM as a defense;
- c) your client and the other party have engaged in some BDSM activities, and one party wants to weaponize it against the other to win a custody case.

One of the hazards in both criminal law and in family law is that legal professionals who are repeatedly exposed to accounts of violence and the full spectrum of sexual behaviors can become desensitized to the impact these subjects have on others. In a 2020 child custody mediation between counsel, clients, and a court-appointed hearing officer, we mentioned to the hearing officer that the parties participated in BDSM. The hearing officer responded "What is that? I've never heard of that."

Then, in 2023 as I was preparing to deliver a CLE to my local bar association on differentiating BDSM from abuse, I was completely unprepared for the intense initial reaction the some of the members to the title and to the subject matter, including attorneys and judges, with one specifically objecting to having the term BDSM in the title alone. However, the strength of those reactions reinforced, to me, the vital importance for legal professionals dealing with child custody or spousal abuse to have a solid understanding of the dynamics of consensual BDSM in order to competently serve our clients. Because as much as we may believe judges and others in the court system have "seen it all," that is simply not the case.

Here are some items to keep in mind to advocate effectively for your client in a BDSM related case:

1. Show respect for the dignity of the accused and the accuser. To maintain your credibility with the court and opposing counsel, go out of your way to approach sensitive

topics in a professional manner, and without being judgmental toward the other party or their counsel.

2. Use correct legal terminology and clinical terms whenever possible when discussing abuse or sexual topics. There are terms of art commonly used in conjunction with BDSM activities that you should become familiar with. By using case-specific terms instead of inaccurate descriptors will help reduce the "shock value" of allegations (i.e. "sensation play" in the place of "spanking").

3. Advocate for the client, and educate, not advocate, about the lifestyle when necessary. Your initial approach with every legal professional and in your court interactions involving a client in the BDSM lifestyle should be from a neutral stance, neither endorsing nor condemning their activities, but presenting the facts as they are. Also, don't presume the other lawyer or judge any particular view on BDSM or accusations of abuse.

When faced with another legal professional who expresses an initially negative reaction to the topic of BDSM, the approach you should take is to inform without advocating. Again, provide factual information about BDSM as necessary for the understanding of the case without advocating for or denigrating the lifestyle. Also, be careful to keep your personal feelings and experiences separate from legal arguments. We don't have to be recreational skydivers to respect our client's choice to participate in and enjoy the activity, whether we ourselves would or not.

4. Be aware of potential discomfort of other professionals, and be willing to acknowledge the sensitivity of the subjects. Other professionals' experiences--unknown to you--can be the source of bias, whether conscious or unconscious to them. Personal sexual interests (and disinterests) are on a spectrum. An individual's openness to discussion of sexual topics may not be the same as yours. Also, no grouping of people (including attorneys or elected officials) is immune from domestic violence or sexual assault, and some among your colleagues in all likelihood, unfortunately, have been the

victim of sexual assault or have experienced domestic violence in some form. An initial reaction to the idea of differentiating consensual BDSM from domestic violence or sexual assault may be the result of personal experiences that they have no obligation to share with you.

Section 3: What makes BDSM different from abuse or domestic violence?

In the popular imagination, BDSM involves "whips and chains," leather garments, exotic equipment and devices, places like dungeons or the *Fifty Shades*⁷ "red room of pain," and all things gothic. Bondage and discipline, dominance and submission, and sadomasochism are, by their nature, intense. It may be difficult to imagine how a lifestyle with these elements would be anything but abusive.

The groundbreaking text *When Men Batter Women*⁸ published in 1998 is best known for categorizing serial physical abusers into two distinct categories: "cobras that attack a victim in a cold-blooded, blitz-style attack and do not lose control over themselves, and pit bulls who are explosive, insecure and lose control easily."⁹ However, one of the more potent insights revealed through their research is the motivation of the serial abuser--that from the perspective of the abuser, violence is a tool to gain and maintain control in the relationship, and that once the abuser senses or fears a loss of control, they would either remind the victim of past actual violence (threats, tone of voice, physical gestures) or would actually become physically violent in order to re-establish control. In other words, according to their research, the violence of the serial abuser isn't *caused* by external provocation, but rather by their own internal fear of *loss of control*. And for the serial physical abuser, unsuccessful control tactics are followed by the reminder of physical violence or actual physical violence.

Who was in actual control of the activity?

For couples engaged in consensual BDSM, however, the script is reversed, and it is the *recipient* who at all times remains in actual control, and with the agreement of both parties. The key difference distinguishing BDSM, as practiced today, from abuse is

⁷ E.L. James. *Fifty Shades of Grey*, Bloom Books, Naperville, IL, (2012).

⁸ Gottman, John, and N. Jacoson. *When Men Batter Women*, Simon & Schuster, New York, NY, (1998).

⁹ Šebešćan, Kristijan. "DOMESTIC VIOLENCE AS A PROBLEM OF CONTEMPORARY SOCIETY." *International Journal of Economics & Law* 13, no. 38 (2023): 67-73, at 71.

the recipient of the physical action¹⁰ in BDSM, whatever the action is, remains in final actual control of what is happening at all times. What this means is that even though the situation may otherwise appear to be abusive, it is happening only because the recipient actively intends that the particular action happens, has affirmatively expressed that intent, and has the actual power to stop any and all activity at any time. If the *recipient* of the action did not express an intent for the particular action to happen, or did not have the actual power to stop it at any time, the activity is abuse.

To establish limits and the ability of the recipient to exercise control, participants will often engage in "detailed pre-planning in the form of either questionnaires or extensive conversation about 'interests, fears, and limits..' and establish '**safewords**' that signal withdrawal of consent and are generally recognized as a safeguard both in private play as well as in public community spaces."¹¹

This is sometimes called a "power exchange," meaning to "...act as though we were giving up or taking real-world power, while retaining the ability to keep as much power as we need to feel safe, or to take no more than we feel OK about having¹²." It is also sometimes referred to as "Consensual non-consent," meaning " behaviors that may include role-playing nonconsensual behaviors, or may involve negotiating sexual behaviors where one partner agrees to give up consent during certain behaviors or relationships.... Consensual non-consent, in essence, reflects an extreme form of eroticization of powerlessness¹³."

¹⁰ "A person who agrees to give up control or receives the stimulation during kinky activities that may or may not include submission" is also referred to as a "bottom," and the "person who is consensually in control of the action during kinky activities" is also referred to as a "top." See Galilee-Belfer *infra* at 509. As the term "bottom" can also refer to an individual's posterior, the term "recipient of the action" is used instead to avoid confusion.

¹¹ Morgan Schumann. *Pain, Please: Consent to Sadoomasochistic Conduct*, 2018 U. Ill. L. Rev. 1184.

¹² Dossie Easton and Janet W. Hardy. *The New Topping Book*, Eugene, OR, Greenery Press, 2003. <https://a.co/e7nDE4z>

¹³ David J. Ley, PhD. *Consensual Non-Consent: Exploring Challenging Boundaries*, Psychology Today, <https://www.psychologytoday.com/gb/blog/women-who-stray/202102/consensual-non-consent-exploring-challenging-boundaries> (Last visited September 23, 2023)

In the context of BDSM, "some commonly applied theories of consent include:

"safe, sane, consensual" ("S.S.C.")¹⁴ [and] "risk aware consensual kink" ("R.A.C.K.")...

While nuances between these consent philosophies may be hotly debated among sadomasochism practitioners, fundamental to each of these approaches is that the participants not only give explicit consent but do so with a focus on, or at least an awareness of, safety and risk considerations."¹⁵

The question remains, however, as to why someone would go through something as involved as a negotiation just to tolerate someone's particular violent fantasy. The academic literature provides an answer, and that answer is "subspace."

"The experiencing of subspace (i.e., an altered psychological, emotional, and/or physiological state) is somewhat common among individuals who identify as masochists and submissives within the Bondage and Domination/Dominance and Submission/Sadism and Masochism (or Sadomasochism) (BDSM; Connolly, 2006) community....The occurrence of subspace tends to be a highly sought-after experience in BDSM interactions (known colloquially as "scenes"). An ... analysis of social science literature suggests that subspace ... within the context of a BDSM interaction...is often characterized by activation of the sympathetic nervous system, the release of epinephrine and endorphins, and a subsequent period of non-verbal, deep relaxation. This altered state of consciousness may include temporary feelings of depersonalization and derealization (Ludwig, 1966), which are generally experienced as positive and pleasant in the context of a BDSM scene, and may enhance connection and intimacy between partners (Sagarin et al., 2003; Sagarin et al., 2015)." Nichols (2014) describes . . . a change in blood flow and body chemistry that produces a feeling similar to flying or floating. Because masochism is antithetical to what most would consider normal operations of the self, it provides an opportunity to obliterate the individual's typical identity during a bounded period of time; subsequently, a focus on an immediately concrete and existential sensory experience replaces . . . the stresses and expectations of daily life (Baumeister, 1997). It is suggested that periodic absences from an awareness of self and the pressures associated with identity maintenance can provide relief in the form of a therapeutic reduction of stress. It is important to note that context plays an essential role in the exploration of consensual masochism. That is to say, individuals who seek out this type of interaction do so with specific partners and in the context of a negotiated scene; this generally does not take place in the majority of their interpersonal interactions in daily life."¹⁶

In summary:

BDSM is not abuse because the activities are specifically consented to in advance.
BDSM is not abuse because limits to the activities are agreed on in advance.
BDSM is not abuse because the recipient has control to stop the activities at any time.
BDSM is not abuse because the physical and emotional sensations are actively desired by all participants.

¹⁴ i.e. the acts between the parties should be safe, they should be sane, and they should be consensual.

¹⁵ Schumann, S., *Pain Please: Consent to Sadomasochistic Conduct*, University of Illinois Law Review, 2018 U.Ill. L. Rev. 1777

¹⁶ Dulcinea Pitago. *No Pain, No Gain?: Therapeutic and Relational Benefits of Subspace in BDSM Contexts*, Journal of Positive Sexuality, Vol. 3, November 2017 (deletions by presenter).

Section 4: Consent in The Louisiana Criminal Laws and Domestic Abuse Statutes

For consensual BDSM to be used as a viable defense to domestic violence or child custody, either for or against your client, you are going to need to know a few things first:

- ◆ What are the specific acts that one party or the other claims were consensual?
- ◆ Is the act itself something that can be consented to without legal consequence?
- ◆ Did the parties agree ahead of time how consent would be expressed and how it could be revoked?
- ◆ Once consent was expressed, was there a violation of consent, either alleged or actual?

Louisiana's Protection from Family Violence Act¹⁷ provides a powerful remedy for victims of domestic violence. It provides for same-day restraining orders enforceable in all fifty (50) states, and violation is itself a crime, meaning a violator can be arrested on the spot (rather than having to wait for a hearing with a judge in a traditional restraining order case), and temporary child custody can be granted immediately and without a hearing, i.e. *ex parte*.

In the criminal laws, consent is not a defense to the crime of domestic abuse battery. This is understandable in context of the history of domestic violence protections in the United States:

During the early 1970s, domestic violence remained largely unrecognized and virtually ignored in the legal, medical, and social spheres. Indeed, family violence in general was largely dismissed at this time. For its first thirty years of publication from 1939 to 1969, for example, *The Journal of Marriage and Family* did not include "violence" in its index. During the 1960s, scholars and social service providers were only beginning to recognize child abuse as a major social problem, while the scholarship and literature on wife abuse was, as one researcher later described, "virtually nonexistent." The little scholarship that did exist on violence against wives, mostly found in journals of psychiatry, was overtly hostile, suggesting that women provoked their own abuse¹⁸.

¹⁷ La. R.S. 46:2121, et seq.

¹⁸ Catherine Jacquet, *Domestic Violence in the 1970's* (October 15, 2015), <https://circulatingnow.nlm.nih.gov/2015/10/15/domestic-violence-in-the-1970s/> (last visited September 30, 2023)

Against this backdrop, the intent to eliminate victim-blaming becomes clear. A comparison of the criminal laws side by side makes this distinction even more obvious.¹⁹

<p>La. R.S. 14:33 Battery defined Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.</p>	<p>La. R.S. 14:35.3. Domestic abuse battery A. Domestic abuse battery is the intentional use of force or violence committed by one household member or family member upon the person of another household member or family member. <i>(notice that proving a lack of consent is not necessary to win a conviction)</i></p>
<p>La. R.S. 14:35 Simple battery A. Simple battery is a battery committed without the consent of the victim.</p>	

Simply put, if a person is charged criminally with the crime of Domestic Abuse Battery, "consent of the victim," BDSM or otherwise, is not a valid defense.

If, however, the acts are of a sexual nature, the criminal statutes for rape and **sexual battery** require the prosecution to **prove the absence of consent** as a necessary element of the crime:

La. R.S. 14:41. Rape; defined

A. Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed **without the person's lawful consent.**

La. R.S. 14:43.1 Sexual Battery

A. Sexual battery is the intentional touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, directly or through clothing, or the touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim, directly or through clothing, when any of the following occur:

- (1) The offender acts **without the consent of the victim.**

Prosecution of bondage or even kidnapping, as long as the accused is not "armed with a dangerous weapon," also **requires proving the absence of consent** as well:

La. R.S. 14:45. Simple kidnapping

A. Simple kidnapping is:

- (1) The **intentional and forcible** seizing and carrying of any person from one place to another **without his consent.**

La. R.S. 14:46. False imprisonment

A. False imprisonment is the intentional confinement or detention of another, **without his consent** and without proper legal authority.

La. R.S. 46.1. False imprisonment; offender armed with dangerous weapon

A. False imprisonment while armed with a dangerous weapon is the unlawful **intentional confinement or detention** of another while the offender is **armed** with a dangerous weapon.

¹⁹ The Louisiana Protection From Violence Act includes violation of certain criminal statutes in the definition of civil domestic violence.

When an offender is armed with a "dangerous weapon," the question of intent returns:

La. R.S. 14:2. Definitions

A. (3) "Dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, **in the manner used, is calculated or likely** to produce death or great bodily harm.

Both the popular imagination and the academic literature are filled with examples of props used in BDSM that would otherwise meet the definition of a "dangerous weapon":

"[BDSM] practitioners may use a wide variety of instruments to elicit sensations or responses, including whips, floggers, ropes, canes, gags, medical devices, fire, weapons, and other[s]..."²⁰

"In addition to knives, [BDSM] scene play may include razors (both safety and straight-edged), scissors, swords, hatchets, scalpels, and even machetes."²¹

However, the "calculated or likely" requirement brings both the intent of the accused and the understanding of the victim into consideration--i.e. what can we infer the accused intended and what did the victim (or others) understand or believe?

The Louisiana Supreme Court ruled in an armed robbery case that the "weapon" does not have to actually be able to cause death or great bodily harm²², and, ultimately, whether something meets the definition²³ is a question of fact²⁴.

²⁰ Shumann, *supra*, at 1179.

²¹ Jay Wiseman, *SM 101: A Realistic Introduction*, Eugene, OR, Greenery Press, 1998 at 229.

²² A precise definition of "great bodily harm" does not have to be given to the jurors. *State v. Smith*, 447 So.2d 42 (La.App. 1 Cir.1984). The phrase "great bodily harm" has been held to be "sufficiently clear to meet the constitutional standard." *State v. Mitchell*, 412 So.2d 547, 550 (La.1982). 97-235 La.App. 3 Cir. 10/8/97, *State v. Corley*, 703 So.2d 653 (La. App. 1997).

²³ "...[T]he firearm admittedly used, even if unloaded might nevertheless be a dangerous weapon because, if the victim believes it is loaded, there is objectively a danger of bodily harm or death arising from the great possibility of violent reaction between offender and victim." *State v. Bonier*, 367 So.2d 824 (La. 1979)

²⁴ "The 'dangerousness' of the instrumentality by reason of the manner in which it is used is a question of fact for the jury to decide. *State v. Murff*, 215 La. 40, 39 So.2d 817, 823 (1949)." *State v. Bonier*, 367 So.2d 824 (La. 1979).

For criminal law, therefore, any number of BDSM activities can be subject to a defense of consent, unless a charge is brought for criminal domestic abuse battery. If the acts alleged are sexual, consent is not only a defense, but it is the prosecutor who must prove the **absence** of consent. If the acts alleged are a physical battery without sex, however, the claimant **does not have to allege or prove the absence of consent** for a violation to occur. If objects are used, the question of whether it qualifies as a dangerous weapon opens the door to considerations of understanding and intent, and also greatly increases the stakes for both the accuser and the accused.

Choking

In Louisiana, any sexual activity which involves "choking," i.e. strangulation, is a felony whether or not consensual, and if the "choking," i.e. strangulation, is inflicted with an object of any kind, it would likely constitute a "dangerous weapon"²⁵ irrespective of the intent of the parties because of the likelihood of strangulation producing death or great bodily harm.

In 1998 when Jay Wiseman wrote *SM 101: A Realistic Introduction*, he described "breath control", i.e. "breath play" as "a fairly unusual activity" in the world of "S & M" that did not merit "tak[ing] up a lot of space here discussing..."²⁶ Over the quarter of a century since, "breath play" or "sexual choking" has become much more prevalent, particularly in young adults. This increase tracks consistently with another relatively recent phenomenon--the prevalence of choking in pornography. In a 2019 article in *The Guardian*, porn actor and director Erika Lust anecdotally described the trend:

“Face slapping, choking, gagging and spitting has become the alpha and omega of any porn scene and not within a BDSM context,” she says. “These are presented as standard ways to have sex when, in fact, they are niches.” * * * “Many people’s first exposure to sex is hardcore porn”.

²⁵ La. R.S. 14:2(A)(3) defines "dangerous weapon" as "any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm."

²⁶ Wiseman, *supra*, at p.344.

This, she says, teaches kids “that men should be rough and demanding, and that degradation is standard.”²⁷

The correlation between consumption of pornography and the sexual choking of partners has also been demonstrated:

[C]onsuming pornography more frequently leads to more exposure to pornographic depictions of sexual choking, which in turn predicts a higher likelihood of choking sexual partners through the belief that sexual choking is pleasurable, the belief that sexual choking is safe, and the disbelief that sexual choking requires consent from the person being choked.²⁸

As a result “[o]ne-third of randomly sampled under-graduate women were choked at their most recent sexual event (Herbenick et al., 2021a).”²⁹

The survey literature, perhaps unexpectedly, indicates that “most participants did not describe choking during sex as connected to power exchange, kink, or BDSM,” but, rather, “choking was often initiated without conversation or consent, occurred while intoxicated or drunk, and involved little to no effort to learn technical skills to reduce risk or call for help if needed.”³⁰

The practice of sexual choking itself has been and remains a controversial practice among BDSM adherents. Wiseman in 1998 offered this succinct opinion:

“As a person with years of medical education and experience, I know of no way whatsoever that either suffocation or strangulation can be done in a way that does not intrinsically put the recipient at risk of cardiac arrest. * * * Furthermore, and my biggest concern, I know of no reliable way to determine when such a

²⁷ Anna Moore and Coco Khan, *The fatal, hateful rise of choking during sex*. The Guardian, 25 Jul 2019, <https://www.theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex> Viewed January 23, 2023 at 7:08am.

²⁸ Wright, P. J., Herbenick, D., & Tokunaga, R. S. (2023). *Pornography Consumption and Sexual Choking: An Evaluation of Theoretical Mechanisms*. *Health communication*, 38(6), 1099–1110. <https://doi.org/10.1080/10410236.2021.1991641>

²⁹ Herbenick et al. *Sexual Repertoire, Duration of Partnered Sex, Sexual Pleasure, and Orgasm: Findings from a US Nationally Representative Survey of Adults*, *Journal of Sex & Marital therapy* 2023, Vol. 49, no. 4, 369–390; <https://doi.org/10.1080/0092623x.2022.2126417>

³⁰ Herbenick, et al. “*It Was Scary, But Then It Was Kind of Exciting*”: *Young Women’s Experiences with Choking During Sex*, *Archives of Sexual Behavior* (2022) 51:1103–1123 <https://doi.org/10.1007/s10508-021-02049-x>

cardiac arrest has become imminent. Often the first detectable sign that an arrest is approaching is the arrest itself."³¹

His concerns are borne out by the documented instances of fatalities in documented BDSM contexts. In a literature review, seventeen (17) instances of fatalities during BDSM activities between 1986 and 2020 were identified:

Strangulation in the course of erotic asphyxiation was the most common cause of death (88.2%). * * * In nine cases, the deceased and the partner were not new to BDSM activities. In two cases, the BDSM practitioners instructed their partners about breath control play and taught cardiopulmonary resuscitation before carrying out BDSM activities. In two of these cases, the partners were dominatrices and the decedents were not new to BDSM activities. In one of the nine cases, the deceased instructed his partner with a manual and pictures on the breath play; however, no safeword was agreed upon.³²

After a series of defendants in strangulation death cases claimed the 'rough-sex' defense, also called the 'Fifty-Shades' defense, the British parliament in 2021 passed the Domestic Abuse Act which, among other things, enacted a new statute defining and outlawing non-fatal strangulation or suffocation of another person, and clarifying that a person may not "consent to the infliction of serious harm and, by extension, is unable to consent to their own death."³³

In the state of Louisiana, the criminal law makes a distinction between "serious bodily injury" and "great bodily harm."³⁴ The term "serious bodily injury" in criminal law is defined as "bodily injury which involves **unconsciousness**; extreme physical pain; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or a **substantial risk of death...**" (emphasis by presenter).³⁵ The felony of Second Degree Sexual Battery incorporates the definition

³¹ Wiseman, *supra*, at p. 387-388.

³² Schori, et al. *How safe is BDSM? A literature review on fatal outcome in BDSM play* International Journal of Legal Medicine (2022) 136:287–295; <https://doi.org/10.1007/s00414-021-02674-0>

³³ <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet>

³⁴ Remember that the term "great bodily harm" has no precise definition, see note 23 *supra*.

³⁵ La. R.S. 14:2(C)

of "serious bodily injury," and does not require the proving of lack of consent. In other words, a person cannot consent to their own sexual choking to absolve another:

43.2. Second degree sexual battery

A. Second degree sexual battery is the intentional engaging in any of the following acts with another person when the offender intentionally inflicts **serious bodily injury** on the victim:

(1) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the body of the offender, directly or through clothing.

(2) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim, directly or through clothing.

B. Repealed by Acts 2019, No. 2, §3.

C.(1) Whoever commits the crime of second degree sexual battery shall be punished by imprisonment, with or without hard labor, without benefit of parole, probation, or suspension of sentence, for not more than fifteen years.

When the "choking," i.e. strangulation, involves a household member or a dating partner, it would, by definition, constitute a domestic abuse battery as well. La. R.S. 14:35.3(B)(7) defines "strangulation" as intentionally impeding the normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of the victim." If a household member or dating partner strangles a victim--again consent is not a defense--the criminal offense increases from misdemeanor to felony grade.³⁶ Furthermore, a "documented history" of strangulation is admissible in a bail hearing to deny bail upon clear and convincing evidence that the defendant poses an imminent danger to the victim. La. C.Cr.P. art. 330.3. The "history" can be proven by police reports, medical records, and affidavits.

The Louisiana Protection from Family Violence Act

The Louisiana Protection from Family Violence Act prohibits a wide range of activities under the category of "domestic abuse"³⁷ other than just the criminal definition of domestic abuse battery. It **"includes but is not limited to physical or sexual abuse and any offense against the person...as defined in the Criminal Code of**

³⁶ La. R.S. 14:35.3(L) Notwithstanding any provision of law to the contrary, if the domestic abuse battery involves strangulation, the offender, in addition to any other penalties imposed pursuant to this Section, shall be imprisoned at hard labor for not more than three years.

³⁷ La. R.S. 46:2132(3). Definitions

Louisiana, except negligent injury and defamation, committed by one family member, household member, or dating partner against another...."

However, proving the existence of violence in the relationship itself is not enough. In the second prong, the claimant must show "good cause" to grant an order of protection, meaning "an **immediate and present danger of abuse**" for a protective order to be issued³⁸. The court, furthermore, is *required* to consider "any and all **past history of abuse**, or threats thereof, in determining the existence of an immediate and present danger of abuse. There is no requirement that the abuse itself be recent, immediate, or present..."³⁹

But isn't consent irrelevant in cases of domestic battery? The civil statute *requires* the court to consider a past history of abuse and whether there is an *immediate and present danger* of abuse. Therefore, the existence of consensual BDSM activities in a couple's history can be extremely relevant to whether there is an immediate and present danger. If the acts of physicality all occurred within a consensual and negotiated BDSM context where the recipient of the action retained actual control, i.e. a power exchange with safewords, etc, and there was no violation of the consent, an argument could be made that such a past history of consensual BDSM activities should negate a finding of an immediate and present danger of abuse (the second prong). If either the first or second prong is not present, the claimant is not entitled to a temporary restraining order/emergency custody order or a final order of protection.

³⁸ You might notice that the "good cause" requirement is listed only in the temporary restraining order statute, 46:2135, and not the final protective order statute, 46:2136. However, the "good cause" requirement applies to both:

"It has been held that "good cause shown" applies to both the temporary restraining order and the other protective orders. *Dvilansky v. Correu* , 16-279 (La.App. 4 Cir. 10/26/16), 204 So.3d 686, writ denied , 16-2081 (La. 1/9/17), 214 So.3d 871 ; *S.L.B. v. C.E.B.* , 17-978, 17-979, 17-980 (La.App. 4 Cir. 7/27/18), 252 So.3d 950, writ denied , 18-1442 (La. 11/20/18), 256 So.3d 992.

....
"Therefore, it follows that all history of abuse or threats, past and present, must be considered in proving the allegations of abuse and entitlement to a protective order. *La.R.S. 46:2135(B)*.

"Thus, La.R.S. 46:2135 and La.R.S. 46:2136 should be read in *pari materia*." *Aguillard v. Aguillard*, 304 So.3d 473 (La. App. 2020) at 486-487. Emphasis in original.

³⁹ La. R.S. 46:2135

The details of the couple's negotiations and agreements are critical to making this argument. The attached discovery is intended to quickly and definitively provide the basis for making this argument if the activities were, in fact, consensual.

American Law Institute revisions on consent:

Because of concerns that even consensual activities could be misrepresented as acts of domestic violence criminally, The American Law Institute last year revised Model Penal Code, section 213:10 to add the affirmative defense of explicit prior permission:

You may personally give another person explicit prior permission to use threatened or physical force or restraint or to inflict or threatened to inflict harm in connection with an act of sexual penetration, oral sex, or sexual contact, as long as it doesn't cause serious injury.

As of today, no states have adopted this revision. However, the inclusion of this language in the Model Penal Code reflects a policy shift, and provides a neutral and authoritative basis for arguing that prior consensual sexual activities (BDSM) should not form the basis of a criminal prosecution or the issuance of a domestic violence protective order.

If you are counseling a client on a consent issue, and are finding they are having conceptual problems regarding when consent is required, there is a well-known video called "Tea and Consent" that may be worth watching with your client.

In summary, consent is not a defense to the crime of spouse or dating partner abuse, or to crimes involving strangulation of anyone. Consent can be a defense to criminal sex offenses, false imprisonment, and kidnapping. Consent can also be a factor in civil protective order cases regarding the 'immediate and present danger' prong.

Section 5: Family Violence and Child Custody

Abuse allegations are critically relevant to child custody determinations, and statutorily are the first and the primary consideration. Furthermore, the child custody statutes point back to the protective order statutes when any family member has been the subject of "family violence." So for purposes of child custody, if there is a "history" of "violence" or "abuse," the abuser cannot be awarded sole or joint custody of the children.

Art. 134. Factors in determining child's best interest

* * *

B. In cases involving a history of committing **family violence**, as defined in **R.S. 9:362**, or domestic abuse, as defined in **R.S. 46:2132**, including sexual abuse, as defined in R.S. 14:403(A)(4)(b), whether or not a party has sought relief under any applicable law, **the court shall determine an award of custody or visitation in accordance with R.S. 9:341 and 364.** The court may find a **history of committing family violence** if the court finds that one incident of family violence has resulted in **serious bodily injury**⁴⁰ or the court finds more than one incident of family violence. (emphasis by undersigned).

La. R.S. 9:362 Definitions

* * *

(4) "Family violence" includes but is not limited to **physical or sexual abuse and any offense against the person**⁴¹ as defined in the **Criminal Code of Louisiana**, except **negligent injuring** and defamation, committed by one parent against the other parent or against any of the children. Family violence does not include reasonable acts of self-defense utilized by one parent to protect himself or herself or a child in the family from the family violence of the other parent.

* * *

(6) "**Sexual abuse**" includes but is not limited to acts which are prohibited by R.S. 14:41, 42, 42.1, 43, 43.1, 43.2, 43.4, 78, 80, 81, 81.1, 81.2, 89 and 89.1⁴².

La. R.S. 9:364. Child custody; visitation

A. There is created a **presumption that no parent who has a history of perpetrating family violence**, as defined in R.S. 9:362, or domestic abuse, as defined in R.S. 46:2132, or has subjected any of his or her children, stepchildren, or any household member, as defined in R.S. 46:2132, to sexual abuse, as defined in R.S. 14:403, or has willingly permitted another to abuse any of his children or stepchildren, despite having the ability to prevent the abuse, **shall be awarded sole or joint custody of children. The court may find a history of perpetrating family violence if the court finds that one incident of family violence has resulted in serious bodily injury** or the court finds more than one incident of family violence.

⁴⁰ The term "*serious bodily injury*" is different from "*great bodily harm*." While the term "great bodily harm" has no precise definition, see *supra*, the term "serious bodily injury" means "bodily injury which involves **unconsciousness; extreme physical pain**; protracted and obvious disfigurement; protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or a **substantial risk of death**." La. R.S. 14:2(C). (emphasis by presenter).

⁴¹ An "offense against the person" is any offense listed in La. R.S. 14:29 through 14:502.2. This includes battery, assault (an attempted battery or putting in reasonable fear of receiving a battery), negligent injuring, rape, kidnapping, and false imprisonment. Again, except for domestic abuse battery and second degree battery (serious bodily injury), consent is a viable defense.

⁴² See attached Table 1.

Incidentally, one instance of choking, even if the victim does not lose consciousness, constitutes a substantial risk of death⁴³ meaning it is "serious bodily injury." Therefore, a court can find that a single instance of choking, "consensual" or not, is sufficient to award sole custody to the other parent.

Considerations of "moral fitness" and "mental health"

Other considerations of BDSM in child custody include "moral fitness" and "mental health":

Child Custody

Art. 134. Factors in determining child's best interest

A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including:

* * *

- (7) The moral fitness of each party, insofar as it affects the welfare of the child.
- (8) The history of substance abuse, violence, or criminal activity of any party.
- (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.

* * *

Is engaging in BDSM activities evidence of mental illness? No. As of the 2013 publication of the DSM-5⁴⁴, people who practice consensual BDSM activities are not automatically considered mentally ill⁴⁵. Furthermore, statistically speaking, BDSM practitioners do not have higher rates of mental health issues or relationship problems than the general population. A 2020 study found the following:

"BDSM related fantasies were found to be common (40-70%) in both males and females, while about 20% reported engaging in BDSM. Results show little support for psychopathologic or psychoanalytic models. In the selected samples

⁴³ In *State v. Diaz*, NO. 2017-KA-0324 (La. App. Sep 06, 2017), the court held that strangulation that did not cause unconsciousness was "serious bodily injury" because of the substantial risk of death inherent in strangulation.

⁴⁴ The DSM is the diagnostic manual for mental health practitioners.

⁴⁵ "Family court judges regularly removed child custody or visitation rights from adults who engaged in consensual bondage, discipline, dominance and submission, and sadomasochism (BDSM), fetishes, and cross-dressing behaviors before the American Psychiatric Association (APA) differentiated consensual paraphilias (sexual sadism, sexual masochism, transvestic fetishism, and fetishism) from the paraphilic disorders in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5)." Extract, Susan Wright, *De-Pathologization of Consensual BDSM*, *The Journal of Sexual Medicine*, Volume 15, Issue 5, May 2018, Pages 622–624, <https://doi.org/10.1016/j.jsxm.2018.02.018>.

studied, BDSM practitioners appear to be...well educated, and young, and do not show higher rates of mental health or relationship problems⁴⁶."

Furthermore,

"...[S]exually dominant and submissive persons are typically well-adjusted and engagement in sexual sadomasochism is not related to mental illness, history of abuse, or criminal behavior..."⁴⁷

The takeaway is that interest in and practice of consensual BDSM activities is widespread, and is not in and of itself evidence of mental illness, or a likelihood of committing crimes.

In summary, an affinity for BDSM alone is not a sign of mental illness and should not be a factor in child custody.

BDSM practitioners statistically are no more likely to suffer from mental illness or to engage in criminal behavior than the general population.

Consent may be relevant as a factor in custody cases where spouse abuse has been alleged.

A single instance of choking, whether "consented to or not," can empower the court to give sole custody to the other party.

⁴⁶ Brown A, Barker ED, Rahman Q. *A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated with BDSM*. J Sex Res. 2020 Jul;57(6):781-811. doi: 10.1080/00224499.2019.1665619. Epub 2019 Oct 16. PMID: 31617765.

⁴⁷ Tobias Greitemeyer, *Dark personalities and general masochistic tendencies: Their relationships to giving and receiving sexualized pain*, Acta Psychologica, Volume 230, 2022,103715, citing F. Labrecque, A. Potz, É. Larouche, C.C. Joyal, *What is so appealing about being spanked, flogged, dominated, or restrained? Answers from practitioners of sexual masochism/submission*, The Journal of Sex Research, 58 (2021), pp. 409-423,10.1080/00224499.2020.1767025

Section 6: BDSM in Divorce: Weighing Privacy and Threats of Outing, Remedies and Strategies

As the literature above establishes, there remains a great stigma surrounding consensual BDSM activities among some communities, and the prospect of disclosure of participation can act as a powerful disincentive from seeking relief, even in cases of clear consent violations. Conversely, describing consensual BDSM activities as physical or sexual abuse may be attractive to someone seeking a 103 divorce, :

Art. 103. Judgment of divorce; other grounds

Except in the case of a covenant marriage, a divorce shall be granted on the petition of a spouse upon proof that:

* * *

(4) During the marriage, the other spouse **physically or sexually abused** the spouse seeking divorce or a child of one of the spouses, regardless of whether the other spouse was prosecuted for the act of abuse.

(5) After a contradictory hearing or consent decree, a protective order or an injunction was issued during the marriage against the other spouse to protect the spouse seeking the divorce or a child of one of the spouses from abuse.

Even if a protective order was denied, and even if no criminal charges were advanced, the prospect of a faster divorce may provide incentive for a party to describe consensual BDSM activities as abuse. It may also provide a facially legitimate excuse to threaten to "out" the other spouse by describing the couples' BDSM activities in a public filing when the acts themselves were consensual⁴⁸.

In the event one party is attempting to use the exposure of the parties' BDSM activities to extract a concession of any kind, you may want to consider filing a seal order requiring that the entire record is hidden from public view, and that all proceedings are held in a closed courtroom. A sample motion to seal is attached.

At the same time, the attorney should preserve evidence, and engage in some very quick and comprehensive discovery about the activities of the participants to learn

⁴⁸ "Due to social stigma, BDSM participants may be hesitant to disclose their interests in personal and clinical settings. On disclosure, 34.1% reported feeling they could tell most of the adults in their lives about their BDSM interests, 52.4% said they could tell some people in their lives, 9.5% said they did not feel comfortable disclosing to anyone, and 4% reported they had to permanently hide their interests (Connolly, 2006). The majority (53.7%) felt uncomfortable by the prospect of their BDSM interests being discovered by others; 1.6% of these individuals said it terrified them. Another study found that fewer than 5% had disclosed to a family member, 25.6% to a friend, and 3.8% to a colleague (Holvoet et al., 2017)." Ashley Brown, Edward D. Barker & Qazi Rahman (2020) A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated with BDSM, *The Journal of Sex Research*, 57:6, 781-811, DOI: 10.1080/00224499.2019.1665619 at 807.

whether the elements of a consensual BDSM relationship may be a factor in the case. If any text or social networking evidence exists, instruct the client to preserve those before they can be deleted or withdrawn from view. Take screenshots to preserve conversations and any posts on social media.

In conjunction with the National Center for Sexual Freedom, we have developed a set of model discovery questions that I have attached and which can be adapted to your particular case. The discovery was drafted with several considerations: quickly and efficiently gathering any and all proof of the existence or absence of a consensual BDSM relationship, including consent and the ability to express consent; the avoidance of "victim blaming" or "kink shaming;" engaging in the discovery process in a non-threatening manner; showing respect and dignity for all persons involved.

Other options should include filing a motion in limine or a discovery order pursuant to La. C.C.P. art. 1426 limiting the discovery.

Section 7: Additional Resources and Acknowledgments

I would like to acknowledge the assistance of the National Coalition for Sexual Freedom, in particular Tess Zachary, for collaborating on the sample interrogatories found in today's materials. The NCSF has a wealth of information and expertise on issues of alternative sexual practices such as BDSM, kink, and polyamory, and I encourage you to reach out to them for any of these issues. They can be reached via their website www.ncsfreedom.org.

I would also like to thank Esme' James and her agent Rach Crawford for sharing an advance copy of Ms. James' text *Kinky History*, which has proven invaluable and insightful as a source.

**Attachment 1
Table of Statutes Referenced in 9:362(6)**

Statute	Title	Consent is a Defense
RS 14:41	Rape; defined	Yes
RS 14:42	First degree rape	Yes
RS 14:42.1	Second degree rape	Yes
RS 14:43	Third degree rape	Yes
RS 14:43.1	Sexual battery	Yes
RS 14:43.2	Second degree sexual battery	No
RS 14:43.3	Oral sexual battery	Adults, Yes/Minors, No
RS 14:43.4	Female genital mutilation	No
RS 14:46.2	Human trafficking	No
RS 14:46.3	Trafficking of children for sexual purposes	No
RS 14:80	Felony carnal knowledge of a juvenile	No
RS 14:80.1	Misdemeanor carnal knowledge of a juvenile	No
RS 14:81	Indecent behavior with juveniles	No
RS 14:81.1	Pornography involving juveniles	No
RS 14:81.2	Molestation of a juvenile or a person with a physical or mental disability	No
RS 14:86	Enticing persons into prostitution	No
RS 14:89	Crime against nature	No
RS 14:89.1	Aggravated crime against nature	No

Attachment 2: Motion and Seal Order

[CAPTION]

FILED: _____ DY CLERK: _____

**MOTION AND ORDER TO SEAL RECORD
AND INCORPORATED MEMORANDUM**

NOW INTO COURT, through undersigned counsel, comes [CLIENT], who respectfully suggest as follows:

1.

Certain private academic and health information regarding a [minor child/party/ non-party] has been raised in pleadings and argument, and is anticipated to be the subject of evidentiary filings, as detailed on the exhibits and motion attached hereto.

2.

Were same disclosed in open court, and were public access to the records thereof maintained, [minor child/party/ non-party] and the parties, their minor child and certain non-parties could potentially be subjected to “annoyance, embarrassment, oppression, or undue burden” as contemplated in La. C.C.P. art 1426.

3.

Furthermore, pursuant to the admonition of the Louisiana Supreme Court in *Copeland v Copeland*, 930 So.2d 940 (La., 2006), the parties herein respectfully suggest that the privacy interests of the [minor child/party/ non-party] herein greatly outweigh the interest of the public in open courts as enshrined in La. Const. Art. I, Sec. 22.

4.

The sealing the record herein, and the holding of the hearings therefor in a closed courtroom is narrowly tailored to cause the least interference possible with the right of public access.

WHEREFORE Movers respectfully pray that this honorable court order the instant matter sealed from the public, except for court personnel and counsel of record for the parties, and further order that the hearings therefore be conducted in a closed courtroom.

[ATTORNEY SIGNATURE BLOCK]

[CERTIFICATE OF SERVICE]

ORDER AND NOTICE INFORMATION FOLLOWING:

[CAPTION]

FILED: _____ DY CLERK: _____

ORDER

ON JOINT MOTION of [CLIENT], and upon finding that the subject matter alleged in the pleadings filed and in the pleadings sought to be filed under seal reference matters which, if made public or otherwise disclosed, would be detrimental to [minor child/party/non-party] and to the parties, their minor children who are the subject of the instant matter, and other non parties, and for good cause otherwise having been shown,

IT IS ORDERED that the pleadings, evidence, and all testimony in this matter shall be and are hereby ordered sealed and removed from those records which are made available to the public except for court personnel and counsel of record for the parties, and the courtroom shall be closed for the hearing thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the pleadings, evidence, and all testimony in this matter shall only be made available to the parties and/or their counsel, or otherwise upon further order of this court.

[JUDGE'S SIGNATURE BLOCK]

NOTICE INFORMATION FOLLOWING:

PLEASE SEND NOTICE TO:

Attachment 3: Sample Interrogatories



Sample Interrogatories

1.0 General Background of the Incident:

- 1.1 What was the date, time, address, and room (i.e., bedroom, carport) of the occurrence of the Incident?
- 1.2 Which body part(s) of yours which were contacted, and how?
- 1.3 Which body part(s) of the other person(s) were contacted, and how?
- 1.4 Were any objects used during the Incident? If yes, specify the object(s) and how they were employed.
- 1.5 Was there a risk of serious physical injury (i.e., leaving a permanent mark, impairment of a limb or organ, or risk of death)?
- 1.6 Was any physical harm caused? If yes, is there any physical or electronic evidence, which in any way depicts, refers to, or memorializes said harm?
- 1.7 Is there any person who observed or has knowledge of the Incident? If yes, identify by name and relationship to you, any person with knowledge.

2.0 Consent:

- 2.1 Was consent given to specific act(s) in the Incident? If yes, which act(s) were consented to explicitly?
- 2.2 How was the consent expressed (i.e., verbally or in writing)?
- 2.3 Did you understand the risks involved in the act(s)?
- 2.4 Was consent given to the intensity of the act(s)?
- 2.5 Was any act not explicitly consented to in the Incident? If yes, which act(s) were not explicitly consented to?
- 2.6 Was there any agreement that verbal or physical resistance could be ignored and that a withdrawal of consent would only be expressed in a specific and agreed upon manner (i.e., safeword or safe signal)?
- 2.7 Was consent withdrawn during the Incident? If yes, specify how was the withdrawal was expressed (i.e., verbal, physical, or otherwise).

3.0 Ability to Consent:

- 3.1 Were there any circumstances that prevented the withdrawal of consent (i.e., unconscious, asleep or gagged)?
- 3.2 Were you or the other person intoxicated or drugged to the extent that you were unable to either grant consent or to withdraw consent? If yes, please identify the intoxicant substance(s), if known.
- 3.3 Were you having a mental health crisis to the extent that you were unable to either grant consent or to withdraw consent? If yes, please identify the mental health crisis, if known.
- 3.4 Were you coerced or threatened into doing the act(s)? If yes, please identify the coercion or threats that occurred.