

Medical History and Law Enforcement Interviews: Separate and Collaborative

Introduction

In an effort to coordinate services and minimize the need for multiple interviews, some jurisdictions allow a law enforcement officer to be present while the sexual assault nurse examiner (SANE) takes the patient's medical history. Despite the good intentions behind this practice, it is generally not recommended in cases involving adult victims for a variety of reasons.¹ The victim's decision to engage with law enforcement and report the crime to police should remain separate from the decision to receive health care. Whether or not a victim reports to law enforcement and participates in the criminal justice process, the patient-victim should be able to receive health care and a forensic examination, and to speak confidentially with treating health care professionals.²

The National Sexual Assault Kit Initiative's Training and Technical Assistance team (SAKI TTA), therefore, recommends that the SANE's medical forensic history of the patient (including psychosocial, medical, and history of the incident) remain separate from the law enforcement interview and report. This SAKI TTA resource describes the separate roles and responsibilities of a law enforcement officer as investigator and a SANE as health care provider. This resource also discusses the importance of affording the patient privacy and focusing on medical concerns throughout the sexual assault examination, and keeping health care information separate from the information shared during a law enforcement interview.

The Roles of Sexual Assault Responders

SANE Patient History

A sexual assault medical forensic exam is a physical examination performed by the health care provider of a patient who has been sexually assaulted. The examination is referred to as the "medical forensic examination" under the Violence Against Women Act (VAWA), and is ideally performed by a SANE or a sexual assault forensic examiner (SAFE) (herein, both types of professionals are collectively referred to as *SANEs*). The SANE has specific training and experience in both the treatment of sexual assault patients and the collection of forensic evidence.

The SANE's primary role is to conduct a patient-centered medical examination.

To do so, a patient history, including information the patient shares about the sexual assault, is collected to guide the medical forensic examination. Medical history, generally, is a key component of the medical forensic examination because it guides the physical examination and medical treatment for the patient-victim by allowing the patient to share in a safe environment what happened to them. This critical part of the examination obtains information essential for medical diagnosis and treatment. The SANE documents biological and physical findings and—with permission—collects evidence from the patient-victim. The SANE may also make referrals for follow-up care, including evaluation and treatment for sexually transmitted infections (STIs), pregnancy, care of injuries, counseling, suicidal ideation, interpersonal violence issues, alcohol and substance abuse, and other nonacute medical concerns.³

Law Enforcement Interview

When responding to a sexual assault call for service, law enforcement's primary responsibility is to gather the greatest amount of information possible while minimizing victim retraumatization. Law enforcement's purpose—when using a trauma-informed, victim-centered approach—is to learn what happened and to obtain information about witnesses and other evidence. The courts have ruled such interviews to be investigatory in nature.⁴ This initial interview by a member of law enforcement may be conducted at the hospital where the sexual assault victim receives a sexual assault medical forensic examination.⁵ However, any interactions that the law enforcement officer and the SANE have with the victim have clear and separate goals. When both law enforcement and medical personnel are together with the victim, in an initial interaction or after the medical examination, it is critical that the goals of the law enforcement and medical teams remain independent.

Separate and Collaborative

Maintaining a separate interview process ensures that the victim receives the most thorough patient-centered medical care. Additionally, this approach safeguards the integrity of the case as it moves through the criminal justice system.

Law enforcement's presence while the patient receives medical care may cause the patient-victim discomfort, adversely impacting the disclosure of medically necessary information and consequently preventing the victim's receipt of medically necessary care. This may result in the victim's disengagement from the criminal justice system, which creates lost opportunities for healing and justice, and ultimately undermines public safety.

An officer's presence can also transform the collection of medical history into a fact-finding interview, which can have an adverse impact on a case by casting the SANE as investigator and setting up potential challenges to the SANE's objectivity. When law enforcement and SANEs collaborate in a manner that respects their complementary but separate roles, victim services are improved and the response to sexual assault is strengthened.

Separate and collaborative means an individual knows their role and responsibilities while also understanding the need to work collaboratively to achieve success.

Preserve the Integrity of the Evidence

The presence of a law enforcement officer during any portion of the SANE exam increases the likelihood that the victim's statements will be deemed "testimonial" hearsay and, therefore, inadmissible in court if the victim is unable to testify at trial.⁶ When determining whether a statement is "testimonial" or "nontestimonial," the courts typically consider whether the primary purpose of the interview is medical, or a documentation of events for potential prosecution.⁷ Among the factors typically considered in determining the primary purpose of an interview is the involvement of law enforcement. In some jurisdictions, even limited involvement of an officer during the SANE exam may be sufficient for the court to conclude that the primary purpose of the SANE's interview was to obtain evidence for future prosecution. Maintaining a focus during the examination on the physical and emotional well-being of the patient will help to ensure that the medical purpose of the interview is not confused or misunderstood.

Further, the presence of law enforcement during the SANE interview may raise concerns about the Confrontation Clause if the victim is unable to testify at trial (i.e., the defendant has the right to defend himself or herself by questioning all witnesses and evidence offered by the prosecution). However, even if the victim isn't present at

trial, their statements during the medical history interview may corroborate other evidence. These statements, when made for the purposes of a medical diagnosis or treatment, may be allowable in court, as a "hearsay exception." If law enforcement is present during the medical history, the purpose of the interview might shift from a medical to an investigatory purpose, therefore eliminating the hearsay exception and depriving the prosecution of important corroborating evidence.

Conclusion

Law enforcement and SANEs must collaborate in the interest of providing the most comprehensive and effective response for victims of sexual assault. Taking sensitive medical history outside the presence of law enforcement, who will conduct their own interviews separately, advances this crucial goal. Importantly, a multidisciplinary approach to sexual assault plays a critical role in case outcomes and improved victim engagement and well-being. It includes a community-based response to sexual assault that provides victims with necessary care and services, including medical care, investigatory and legal responses, victim assistance, and advocacy. Each of these disciplines has a unique role in the medico-legal response to sexual assault; working collaboratively on these cases improves public safety and services for all sexual assault victims.

References:

1. Please note that different considerations may apply in cases involving child sexual abuse. This article focuses on the response to sexual assaults committed against adults. For additional information on medical examination and interviews in cases involving children, see GUNDERSEN NATIONAL CHILD PROTECTION TRAINING CENTER, www.gundersenhealth.org/ncptc/.
2. Patients have a *legal* right to privacy and confidentiality when they seek and receive health care services. For more information on patient-victim medical privacy considerations, please contact the Sexual Assault Kit Initiative Training and Technical Assistance Team (sakitta@rti.org). See also 34 U.S.C.A. § 10449(d) (requiring governmental entities eligible for rape exam funding to provide such exams without regard to victim participation in criminal justice proceedings).
3. A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents, Second Edition. U.S. Department of Justice, Office on Violence Against Women (Apr. 2013). NCJ 241903
4. See *Davis v. Washington*, 547 U.S. 813, 829–30 (2006). See also *The Prosecutors' Resource On Crawford And Its Progeny*, AEquitas (Oct. 2012). Available at www.aequitasresource.org/library.cfm.
5. For more information on investigating sexual assault cases and to access resources organized by the key areas of sexual assault response, please see the SAKI Toolkit at www.sakitta.org/toolkit.
6. See *Crawford v. Washington*, 541 U.S. 36 (2004); See *The Prosecutors' Resource On Crawford And Its Progeny*, AEquitas (Oct. 2012). Available at www.aequitasresource.org/library.cfm.
7. *Id.*

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