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**C. P. C. S.**  
**Public Defender Division**

**interoffice**  
**Memorandum**

**To:** Public Defenders  
**From:** Stephanie Page  
**Date:** March 16, 2005  
**Re:** SANE Protocol DOJ 9-04

The US Department of Justice has recently published (September, 2004) National Protocol for Sexual Assault Medical Forensic Examinations. There is a lot of great language that could be used to establish 1) the cooperation with law enforcement; 2) the obvious pro victim bias; 3) the required training and 4) evidence collection. The document is 141 pages so I didn't want to attach it to this message. It can be downloaded at <http://www.ncjrs.org/pdffiles1/ovw/206554.pdf>

Here is some direct language with on line page numbers:

1. To use to document the **team approach with law enforcement:**

This section presents issues that impact all or most of the sexual assault medical forensic exam process. The following chapters are included: [p.32]

1. Coordinated Team Approach
2. Victim-Centered Care
3. Informed Consent
4. Confidentiality
5. Reporting to Law Enforcement
6. Payment for the Examination Under VAWA

Understand the dual purpose of the exam process. [p. 34] One purpose is to address the needs of individuals disclosing sexual assault. This is accomplished (with their permission) by:

- Evaluating and treating injuries;
- Conducting prompt examinations;
- Providing support, crisis intervention, and advocacy;
- Providing prophylaxis against STIs;
- Assessing female patients for pregnancy risk and discussing treatment options, including reproductive health services; and
- Providing followup care for medical and emotional needs.

The other purpose is to address justice system needs. This is accomplished by:

- Obtaining a history of the assault;
- Documenting exam findings;
- Properly collecting, handling, and preserving evidence; and
- Interpreting and analyzing findings (postexam); and
- Subsequently, presenting findings and providing factual and expert opinion related to the exam and evidence collection.

SART membership. [p. 35] A SART is composed of professionals involved in immediate response to disclosures of sexual assault. A core SART commonly includes health care providers, law enforcement representatives, and victim advocates. Prosecutors and forensic scientists also are often involved, but more as consultants than first responders.

**Encourage pretrial preparation of examiners.** [p. 129] When preparing to testify, the following suggestions may be useful to examiners:

- Although the criminal justice record includes the medical forensic report, photographs, and the results of evidence analysis, medical records are confidential in most jurisdictions. Before examiners or other involved health care providers can talk with an attorney about information in patients' medical records, those records must be successfully subpoenaed. Health care facilities and/or independent examiner programs typically have procedures in place for handling subpoenas.<sup>296</sup>
- It is critical that examiners meet in advance with the attorney(s) calling them as witnesses, in order to prepare for testimony in individual cases. Not only should they review and discuss the initial examination of the patient, but also any subsequent contacts between the patient and the examiner.
- Prior to testifying, examiners should review records of the exam and keep a log of materials reviewed.
- Expert witnesses should be prepared to educate the court, particularly jurors. They should consider terminology and descriptions that will most clearly advise lay persons in the courtroom.
- Examiners should keep in mind that anything they write about the case is potentially discoverable.
- Examiners should be prepared to prove qualifications and ready to discuss educational background, clinical experience, and prior experience as expert witnesses. They may also need to explain qualifications if they are testifying to facts in a case. They should keep a portfolio that lists education, experience, and previous appearances as a witness.<sup>297</sup>
- Examiners should understand that they may not testify as to whether or not patients consented to sexual contact; that is for the jury to decide. However, some jurisdictions allow expert testimony that speaks to the consistency between patients' statements and injuries rather than attempting to draw conclusions about how injuries were caused or whether a sexual assault occurred.

Although it is most likely that examiners will be called by the prosecution, they may also be **called by the defense**. In either case, examiners are expected to give objective testimony. In addition to the previous tips, examiners should consider the following: [p. 130]

- **Seek guidance from the prosecutor** regarding appropriate interaction with the defense attorney prior to testimony.
- When disagreeing with the questioning attorney, do so without argument or interruption.
- Be aware of the phrasing of questions by the cross-examining attorney that may be designed to place doubt on examiner testimony. For instance, if a compound question is asked, the answer to one part may be “yes” and to the other part may be “no.” Be sure to divide answers as appropriate.
- If the questions of the cross-examining attorney include incorrect interpretation of previous examiner testimony or documentation, the erroneous information should be corrected.
- Be careful to provide consistent answers, especially if cross-examining attorneys ask the same question several times, using different wording.

## 2. Victim-Centered Care

Every action taken by responders during the exam process should be useful in facilitating patients’ care and healing and/or the investigation (if the case was reported). [p.38]

## 5. Timing Considerations for Collecting Evidence

Recognize the importance of gathering information for the medical forensic history, [p.78] examining patients, and documenting exam findings, separate from collecting evidence. Examiners should obtain the medical forensic history as appropriate, examine patients, and document findings when patients are willing, whether or not evidence is gathered for the sexual assault evidence collection kit. The history and documentation of exam findings can help in determining if and where there may be evidence to collect and in addressing patients’ medical needs. In addition, they can be invaluable in and of themselves to an investigation and prosecution if a report is made. It is also important to document patients’ demeanor during the exam process (e.g., crying, shaking, or showing signs of upset) and their statements made related to the assault because if the case is reported, this information could be admitted as evidence at trial.

Examine patients promptly to minimize the loss of evidence. Evidence can be lost from the body and clothing through a number of mechanisms. For example, degradation of some seminal fluid components can occur within body orifices, semen can drain from the vagina or wash from the mouth, sperm can lose motility, bodily fluids can get washed away, and dried secretions and foreign materials can fall from the body and clothing.<sup>144</sup> Prompt examination also helps to quickly identify patients’ medical needs and concerns. **Recognize that evidence may be available beyond 72 hours after the assault. In recent history**, 72 hours after a sexual assault has been considered a guideline to use as

an outside limit for obtaining evidence for the evidence collection kit. Research and evidence analyses indicate that some evidence may be available beyond this time period. **For instance, sperm might be found inside the cervix after 72 hours and urine may reveal traces of certain drugs up to 96 hours after ingestion.** Some examples of situations where evidence may be found even after considerable periods of time include when patients complain of pain or bleeding, have visible injuries, or have not washed themselves since the assault, or where there is a history of significant trauma from the assault. **Some jurisdictions have extended their standard cutoff time beyond 72 hours (e.g., to 5 days or 1 week).**

Due to the stability of DNA and sensitivity of tests, advancing DNA technologies also continue to extend time limits. These technologies are even enabling forensic scientists to analyze stored evidence from crimes that occurred years before.<sup>145</sup> Such breakthroughs demonstrate the importance of collecting all possible evidence.

### **C. The Examination Process**

**This section focuses on the various medical and forensic components of the exam process, starting with the initial contact with victims to the court testimony by examiners on exam findings. [p.82]**

**The following chapters are included:**

- 1. Initial Contact**
- 2. Triage and Intake**
- 3. Documentation by Health Care Personnel**
- 4. The Medical Forensic History**
- 5. Photography**
- 6. Exam and Evidence Collection Procedures**
- 7. Drug-Facilitated Sexual Assault**
- 8. STI Evaluation and Care**
- 9. Pregnancy Risk Evaluation and Care**
- 10. Discharge and Followup**
- 11. Examiner Court Appearances**

Respond to requests for victim assistance as quickly as possible.<sup>151</sup> Understand that victims need immediate assistance for many reasons: they may not be safe, may be physically injured, and/or are experiencing trauma. Be aware that time delays in response can cause loss of evidence and increased trauma. [84]

In suspected cases of drug-facilitated assault, victims' first available urine sample should be sought if they cannot wait to urinate until arrival at the exam site. (For information on procedures, see *C.7. Drug-Facilitated Sexual Assault*.) Victims might

have been drugged without their knowledge. If they or their families, friends, or responders suspect drug-facilitated assault, a urine sample should be sought. [p. 85]

**Ensure completion of all appropriate documentation.** [p. 90] Examiners are responsible for documenting forensic details of the exam in the medical forensic report, according to jurisdictional policy. This report usually includes patient consent forms related to evidence, the medical forensic history, and documentation of exam findings.<sup>156</sup> (The medical forensic history and documentation of exam findings are discussed in more depth in later chapters in this section.) The only medical issues documented in this report are findings that potentially relate to the assault or preexisting medical factors that could influence interpretation of findings. If the case is reported, the criminal justice system will use the medical forensic report, along with collected evidence, photographs and video images, and victim/witness statements, as a basis for investigation and possible prosecution. If examiners are required to testify in court, they will use the report to recall the incident.

Separate medical documentation by examiners and other clinicians follows a standard approach of addressing acute complaints, gathering pertinent historical data, describing findings, and documenting treatment and followup care. Forensic examination records should be maintained separately from other records to avoid inadvertent disclosure of unrelated information and to preserve confidentiality. The medical record is stored at the exam site. The exam site should have clear policies about who is allowed access to these records.<sup>157</sup>

The medical record is not part of the evidence collection kit and it should not be submitted to the crime lab. Much of the record is not relevant to case prosecution, and releasing it infringes upon patients' privacy rights and could be used against patients. Although all or part of the medical record may be subpoenaed, if patients do not consent to its release,

**Coordinate medical forensic history taking and investigative interviewing.** [p. 92] Examiners typically ask patients to provide a medical forensic history after initial medical care for acute problems and before the examination and evidence collection. This history, obtained by asking patients detailed forensic and medical questions related to the assault, is intended to guide the exam, evidence collection, and crime lab analysis of findings. Law enforcement representatives also collect information from patients to help in the apprehension of suspects and in case investigation.<sup>158</sup> Prosecutors familiar with the legal requirements of the criminal statutes may also need certain specific information. Gathering information from patients often takes place soon after they have experienced the assault. Not only can discussing the assault cause patients to feel re-violated, but their emotional and physical condition may make communication difficult. They may also be uncomfortable discussing personal matters with involved responders. Those seeking information about the assault should work collaboratively to create an information-gathering process that is as respectful to patients as possible and minimizes repetition of questions.

**Presence of family members, friends, and other personal support persons.** [p.93]

Prior to taking the history, patients should be informed that the presence of personal support persons (other than advocates) may influence or be perceived as influencing their statements.<sup>161</sup> These individuals could be subpoenaed as witnesses in their case.<sup>162</sup> If, after receiving this information, patients choose to have personal support persons present during the history, these individuals should be advised not to actively participate in the process. For example, they should not answer questions for patients, comment on patients' answers, interrupt patients, or make facial expressions in response to patients' answers.

Consider the extent of **forensic photography** necessary. Taking photographs of patients' anatomy that was involved in the assault should be routine in sexual assault cases. Such photographs can supplement the medical forensic history and physical findings. [p. 96]

**Recognize the forensic purpose of the exam.** During the exam, examiners methodically document physical findings and facilitate the collection of evidence from patients' bodies and clothing. [p. 100] The findings in the exam and collected evidence often provide information to help reconstruct the details about the events in question in an objective and scientific manner.<sup>178</sup> Of course, health care needs and concerns of patients may be presented in the course of the exam that should be addressed prior to discharge. However, patients must understand that the exam does not provide routine medical care. For example, a pap smear will not be done during the female pelvic exam.<sup>179</sup> (This chapter focuses on forensic components of the exam. Other chapters in the protocol discuss more fully medical and other related needs and concerns of patients.)

**Collect as much evidence from patients as possible**, guided by the scope of informed consent, the medical forensic history, exam findings, and instructions in the evidence collection kit. Evidence collected during the exam mainly includes biological and trace evidence. To reconstruct the events in question, evidence collected is used in two potential ways in sexual assault cases:

- Transfer or associative evidence can provide information about contact between patients and suspects, patients and crime scenes, and suspects and crime scenes. The type of evidence recovered and its location can provide details about the nature of the contact.
- Identification evidence can give scientific data about the source of a specific piece of evidence.

**Be aware of evidence that may be pertinent to the issue of whether the patient consented to the sexual contact with the suspect.** In the majority of sexual assaults, patients know the suspects. For example, according to the National Crime Victimization Survey, in 2002, 66.1 percent of rapes/sexual assaults involved offenders who were nonstrangers.<sup>180</sup> Most nonstranger suspects and many stranger suspects (if confronted by the criminal justice system) will claim that the patient consented to the sexual contact.<sup>181</sup> Consent claims typically stem from a lack of evidence and documentation concerning force and coercion. Thus, evidence and documentation of physical findings related to whether force or coercion was used against patients (e.g., findings that reveal injuries,

drugs taken involuntarily, or signs of a struggle) are important in these types of cases. However, the absence of physical trauma does not mean that coercion/force was not used or prove that patients consented to sexual contact.<sup>182</sup> Also, some physical findings that suggest force are not necessarily indicative of a sexual assault. It is important to remember that if an investigation takes place, law enforcement officials will look for additional crime scene evidence that may help to overcome a claim of consent.

**Understand the importance of semen evidence.** [p. 102] The relevance of semen evidence in cases involving male suspects covers the spectrum, depending upon case facts. Semen is composed of cellular and liquid components known as spermatozoa (sperm) and seminal fluid. Semen evidence can be useful because it is positive identification that ejaculation occurred,<sup>192</sup> and it can be used to positively identify suspects. However, it is critical to note that failure to recover semen is not an indication that a sexual assault did not occur. There are a number of reasons why semen might not be recovered in these cases: Assailants may have used condoms, ejaculated somewhere other than in an orifice or on patients' clothes or bodies, or not ejaculated at all. Semen may have been depleted by frequent ejaculation prior to the sample in question.<sup>193</sup> Chronic alcohol or drug abuse, chemotherapy, cancer, infection (e.g., mumps or tuberculosis), or congenital abnormalities also may suppress semen production. Other factors may contribute to the absence of detectable amounts of semen evidence. For example, significant time delays between the assault and collection of evidence may cause loss of semen evidence, semen may be washed away prior to the exam or improperly collected, and an object other than a penis may have been used for penetration.

**General physical examination.** [102] Obtain patients' vital signs, note the date and time of the exam, physical appearance, general demeanor, behavior, and orientation, and condition of clothing on arrival. Record all physical findings (which include observable or palpable tissue injuries; physiologic changes; and foreign materials such as grass, sand, stains, dried or moist secretions, or positive fluorescence) on body diagram forms. Use an alternate light source to assist in identifying findings.<sup>195</sup> Be observant for redness, abrasions, bruises, swelling, lacerations, fractures, bites, burns, and other forms of physical trauma. Note areas of tenderness and induration. On dark-skinned individuals, it may be difficult to identify these areas and they may need to be sought out specifically.

**Anogenital examination.**<sup>196</sup> During the female genital exam,<sup>197</sup> examine the external genitalia and perineal area for injury, foreign materials, and other findings in the following areas: abdomen, thighs, perineum, labia majora, labia minora, clitoral hood and surrounding area, perurethral tissue/urethral meatus, hymen,<sup>198</sup> fossa navicularis, and posterior fourchette. The use of a colposcope during the external genital exam enhances viewing microscopic trauma and may provide photographic documentation.<sup>199</sup> Then examine the vagina and cervix for injury, foreign materials, and foreign bodies. Use a colposcope or other magnifying device if available. In some jurisdictions, toluidine blue dye may be used to detect trauma, either with or without the use of a colposcope.<sup>200</sup> Examine the buttocks, perianal skin, and anal folds for injury, foreign materials, and other findings. If rectal injury is suspected, an anoscope can be used as a tool to identify and evaluate trauma (it may also be used to help obtain anal swabs and trace evidence).

For male patients, examine the external and perineal area for injury, foreign materials, and other findings, including from the abdomen, buttocks, thighs, foreskin, urethral meatus, shaft, scrotum, perineum, glans, and testes. Document whether patients are circumcised.

**Documentation of findings.** Record findings from the general physical and anogenital exam on appropriate body diagram forms. Detailed descriptions of findings should be provided as required. During the exam, collect evidence as specified in the evidence collection kit and photograph anatomy involved in the assault according to jurisdictional policy. Follow jurisdictional policy regarding documentation, photography, and collection of bite mark evidence

**Collect evidence to submit to the crime lab** for analysis, according to jurisdictional policy. [p. 104] The following evidence from patients, along with completed documentation forms, typically is submitted to the crime lab designated by the jurisdiction.<sup>203</sup> Jurisdictions may require collection of additional or different specimens. Instructions on evidence collection are usually contained in the evidence collection kit. If any requested evidence is not collected, examiners should note reasons on documentation forms.

**Collect clothing evidence.** Clothing frequently contains important evidence in sexual assault cases. It provides a surface upon which traces of foreign materials, such as semen, saliva, blood, hairs, fibers, and debris from the crime scene, may be found. While foreign matter can be washed off or worn off the body, the same substances often can be found intact on clothing for a considerable length of time following an assault. Damaged or torn clothing may be significant, as damage may be evidence of force (do not cut through any existing holes, rips, or stains on clothing). Evidence on patients' clothing can be compared with evidence collected from suspects and crime scenes. Common items collected from patients include underwear, hosiery, blouses, shirts, and pants. Coats and shoes are collected less frequently.

Collect debris. [p. 105]

- Collect obvious debris on patients' bodies (e.g., dirt, leaves, fibers, and hair) on a collection sheet—package, label, seal, and initial seal.
- **Fingernail evidence:** ask patients whether or not they scratched the suspects' face, body, or clothing. If so, or if fibers of other materials are observed under patients' fingernails, collect fingernail clippings, scrapings, and/or swabbings, according to jurisdictional policy.<sup>211</sup> If fingernail scrapings are collected, package fingernail scrapings and tools used to obtain the sample, label, seal, and initial seal. Cut broken fingernails at the remaining jagged edge for later comparison. Collect a fake nail as a known sample if one is missing. Package, label, seal, and initial the seals.

**Collect foreign materials and swabs** from the surface of the body. Carefully inspect the body, including head, hair, and scalp, for dried or moist secretions and stains (e.g., blood, seminal fluid, sweat, and saliva) and other foreign material. Use an alternate light source to assist in identifying evidence. Obtain swabs from any suspicious area that may be a dry secretion or stain, any moist secretion, any area that fluoresces with longwave ultraviolet

light, and any area for which patients relate a history or suspicion of bodily fluid transfer (e.g., licking, kissing, biting, splashed semen, or suction injury). Also collect swabs from potentially high-yield areas (e.g., neck, breasts, or external genitalia) if the history is absent or incomplete.

### **Collect hair combings.**

Collect hair reference samples as needed.

**Collect oral and anogenital swabs and smears.** [p. 106] Patients' consent, the medical forensic history, and exam findings should guide collection of oral and anogenital specimens. In general, specimens should be collected only from orifices and areas surrounding the orifices that patients report to be involved in the assault.<sup>216</sup> Keep in mind that some patients may be vague about the type(s) of sexual contact that occurred. Examiners can help clarify which orifices were involved by asking appropriate questions. If there is uncertainty about involved orifices (e.g., because patients have little memory of the assault, were unconscious or incoherent, or do not understand what occurred), collection from oral, vaginal, and anal orifices (with patients' permission) may be appropriate. In some jurisdictions, policy calls for collection from all three orifices. Again, patients' consent is needed to collect these samples. Things to note when collecting these swabs and smears:

- Caution patients who use a bathroom prior to the exam that evidence may be present in pubic, genital, and anal areas and urge them not to wash or wipe away secretions until after evidence collection.

- When taking a swab, examiners should take care not to contaminate the collection with secretions or materials from other areas, such as vaginal to rectal or penile to rectal.

for timeframes in which samples should be collected (e.g., oral and penile samples are only collected within 24 hours of the assault in one jurisdiction) unless otherwise indicated.

- Do not stain or chemically fix swabs or smears.

- When preparing slides, note that coding of evidence material must allow the crime lab to know which swab was used to prepare which slide.

- Document any foreign substance or material introduced by health care providers (e.g., lubricating jelly on a speculum or betadine prior to introduction of a catheter).

**Toxicology samples** should be collected as soon as possible after a suspected drug-facilitated case is identified and informed consent is obtained, even if patients are undecided about reporting to law enforcement. [p. 114] The length of time that drugs used for drug-facilitated assault remain in urine or blood depends on a number of variables (e.g., the type and amount of drug ingested, patients' body size and rate of metabolism, whether patients had a full stomach, and whether they previously urinated).<sup>247</sup> Urine allows for a longer window of detection of drugs commonly used in these cases than does blood.<sup>248</sup> The sooner a urine specimen is obtained after the assault, the greater the chances of detecting drugs that are quickly eliminated from the body.<sup>249</sup>

Immediately collect a urine sample when appropriate. If patients may have ingested a drug used for facilitating sexual assault within 96 hours prior to the exam, a urine specimen of at least 30 milliliters but preferably 100 milliliters (about 3 ounces) should be collected<sup>250</sup> in a clean plastic or glass container (follow jurisdictional policy).

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