

4. Confidentiality

Recommendations at a glance for jurisdictions to maintain confidentiality:

- Be sure jurisdictional policies address confidentiality issues related to the exam process.
- Increase the understanding of responders and patients in relevant confidentiality issues.
- Consider the impact of the Federal privacy laws regarding health information on victims of sexual assault.
- Strive to resolve intrajurisdictional conflicts.

Be sure that jurisdictional policies address the scope and limitations of confidentiality as it relates to the examination process and with whom information can be legally and ethically shared. The confidentiality of records (as well as forensic evidence and photographic and video images) is intricately linked to the scope of patients' consent. Members of a SART or other collaborating responders should inform victims of the scope of confidentiality with each responder and be cautious not to exceed the limits of victim consent.

Promote understanding of confidentiality issues. Responders involved in the exam process need education on the basics of maintaining the confidentiality of their patients (e.g., knowing what information is confidential and with whom confidential data can be shared, and being aware of their surroundings and who may be listening when discussing cases). They also should build their understanding of the scope and limitations of confidentiality of each agency and responder involved.

In addition, responders should be aware of the laws in their jurisdiction pertaining to privileged communications.⁷⁹ More than half of the States have laws in place providing some level of privilege to the communications of sexual assault/rape crisis and domestic violence counselors. A few States' laws apply to victim counselors in general. In most States, counselors must complete a certain number of training hours to qualify for the privilege. However, privileges vary from State to State. Jurisdictions should be careful in their local response to protect the privileges. This can be done by limiting who speaks with the victim at each stage of the process, who will be present, and who will be the recordkeeper or notetaker.

Involved responders should be able to explain the following to patients:

- Community-based advocates usually can provide patients with some level of confidentiality (depending upon applicable jurisdictional statutes). It is important to convey to patients the scope and limits of confidentiality of this communication.
- Patients' medical records are confidential—exam facilities typically have policies in place to protect these records. It is important that patients understand the scope and limits of confidentiality of these records.
- If the assault is reported to law enforcement, health care providers provide to the criminal justice system information collected during the examination that is related to forensic evidence.
- When jurisdictions allow health care providers to collect evidence and forensic information from patients without a law enforcement report, the evidence collection kit is typically held in a secure setting for a period of time as determined by jurisdictional policy. Patients' identity should not be revealed to law enforcement. Patients usually need to make an official report by the end of the designated period of time or the evidence and information will be destroyed.
- Information that patients share with law enforcement representatives, prosecutors, justice system based advocates, and adult/child protective services becomes part of the criminal justice record. This record is typically available to investigators and prosecutors handling the patient's case. It also may be

⁷⁹ Traditionally, many types of communication have been protected from disclosure in court. These include communication between husband and wife, physician and patient, attorney and client, clergy and parishioner, and psychotherapist and patient. Confidential communication generated in the course of a counseling relationship has more recently been afforded some statutory protection. In general, victim-counselor privilege laws enable counselors (such as community-based victim advocates) to maintain confidentiality of information revealed to them. In addition to preventing counselors from testifying in court, many privilege laws extend protection to their written records. (Drawn from *Privacy of Victims' Counseling Communications*, Office for Victims of Crime, Legal Series, Bulletin #8 (November 2002), pp. 1–2.)

discovered⁸⁰ by the defense (although prosecutors may request the court to shield certain information from the defense, such as history of prior pregnancies, abortions, and STIs).⁸¹

- Each case potentially involves responders from different agencies that may have their own confidentiality policies (e.g., school counselors and mental health providers).
- Both prosecutors and defense attorneys can call witnesses to testify in court; and
- Court documents and proceedings are generally matters of public record, with the exception of certain excluded materials (e.g., some States' statutes prohibit victim contact information from appearing on public court documents).
- Patients may at some point wish to view or obtain applicable medical records and/or law enforcement reports. They should have access to such documentation, and exam site and jurisdictional procedures for accessing this data should be conveyed to patients.

Consider the impact of Federal privacy laws regarding health information on victims of sexual assault. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations (found at 45 CFR Parts 160 and 164), established national standards for the protection of certain individually identifiable health information created or held by health care providers, health insurance companies, and health clearinghouses. The impact of these privacy laws on the provision of services to victims of sexual assault is unclear, because interpretation of the laws depends on individual situations and the law of the particular State. Responders are encouraged to contact their State coalition for further discussion about the impact of the HIPAA regulations on their participation in the exam process.⁸²

Strive to resolve intrajurisdictional conflicts. For example, maintaining confidentiality is often difficult in isolated or small communities where people know one another or word of a crime travels quickly (e.g., school campuses and tribal, military, religious, or immigrant communities). Special precautions must be taken in these situations to preserve confidentiality. Every effort should be made to avoid conflicts of interest (e.g., the investigator is the cousin of the suspect or the health care provider, advocate, or interpreter is an acquaintance of the patient). Give patients as many options as possible to avoid these dilemmas (e.g., allow them to work with a different investigator or be examined at another site or by another examiner, if possible).

⁸⁰ Discovery in a criminal case is the turning over of any evidence or information that the prosecutor is obligated by jurisdictional statute or case law to turn over to the defense. (Drawn from electronic communications with Norm Gahn, Assistant District Attorney, Office of the District Attorney for Milwaukee County, Wisconsin, during the fall of 2003.)

⁸¹ Depending on jurisdictional law, law enforcement reports and reports of other governmental agencies may be subject to open public records laws or Freedom of Information Act laws. In such instances, jurisdictional policy would govern when such information could be released to the general public upon request. (Drawn from electronic communications with Robert Laurino, Deputy Chief Assistant Prosecutor, Essex County Prosecutor's Office, New Jersey, during the fall of 2003.)

⁸² A list of State sexual assault coalitions is available at <http://www.ojp.usdoj.gov/vawo/saresources.htm>.