

Section III: The Sexual Assault Investigation

When a victim of sexual violence makes decisions about what steps to take after the assault, s/he will need information about her/his rights as a crime victim, how the medical exam will be conducted and who will pay, and what role law enforcement will play if s/he chooses to involve the police. This section will discuss these aspects of the sexual assault investigation.

Crime Victim/Witness Rights



Statute Reference:
Chapter 611A, Crime Victims Rights, Remedies, Agencies. Selected provisions

In the State of Minnesota, crime victims and witnesses are afforded some rights relevant to the handling of their case by the criminal justice system. The Crime Victims/Witnesses Bill of Rights, MS 611A was enacted in 1983 during the growing awareness of barriers that victims faced when turning to the criminal justice system for a response to crime. The language of 611A was drafted in response to a very specific litany of complaints heard from victims. Most grievances had to do with not knowing what was being scheduled, when the victim's participation was required or welcomed, what resources, financial and programmatic, existed to help victims through the process, and how to register a complaint about the process. The following is a short version of Minnesota's Crime Victim's Bill of Rights. Both victims and witnesses are addressed through these rights.

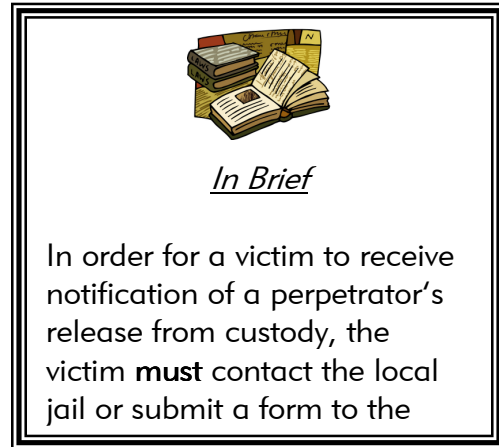
❖ Notification

Crime victims have the right to be notified of:

- Victim rights.
- Prosecution declining charges or dismissing case (for sexual assault and domestic violence victims)
- Content of any plea bargain agreements.
- Changes in the schedule of court proceedings to a victim who has been subpoenaed or requested to testify.
- Final disposition of the case.
- Any pending appeals by the defendant, including the right to attend the oral argument or hearing.
- Sentence modifications for the offender, including the date, time and location of the review.

- Release of the offender from prison or custodial institution.
- Transfer of the offender from prison or custodial institution.
- Escape of the offender from prison or custodial institution.
- The offender's petition for expungement.
- The right to request restitution and apply for reparations

You will recognize that most of the notification obligations are taken on by the prosecutor and law enforcement. All law enforcement agencies are required to give victims a card with a notice of victim rights and available programming to help. If you have questions about what is on the cards in your area, call your sheriff or police chief to find out about the victims rights notification card being used in your area. Local sexual assault, domestic violence and general crime programs should be listed with 24 hour numbers.



Most county attorney's offices have computer generated notification letters for victims that meet the statutory requirements here. Prosecutors also may use the services of a victim/witness staff person to ensure that statutory obligations of notification are met. However it is accomplished, often the notifications cannot keep up with rapidly changing court calendars. Coordinating with your local prosecutor or victim/witness staff person to ensure that victims receive timely cancellation notice can help alleviate the frustration that can occur.

Notification of release from custody usually involves action on the part of the victim to ensure that this happens. Often victims think that since they told someone (law enforcement, prosecutor, advocate, or corrections officer) that they wanted notification, it will happen. In fact, a victim must contact VINE (local jail) or submit a form to the Department of Corrections (prison) to be informed of release. **Those agencies only notify victims who have requested notification.**

❖ Participation in Prosecution

Crime victims have a right to participate in prosecution in the following ways:

- Right to request a speedy trial.
- Right to provide input in a pre-trial diversion decision.
- Right to object to proposed disposition or sentence.
- Right to bring a supportive person to the pre-trial hearing.
- Right to attend plea agreement hearings.
- Right to object orally or in writing to a plea agreement at the hearing.

- Right to inform court of impact of crime at the sentencing hearing.
- Right to inform court at the sentencing hearing of social and economic impact of crime on persons and businesses in the community.
- Right to attend the sentencing hearing.
- Right to request a probation review hearing.

The issues addressed here are relevant to the court process. The language of this part of the statute is designed to ensure that prosecutors keep victims/witnesses in the communication loop, gather input from them and ensure that their wishes are heard, even if not acted upon.

Ultimately, the court response does not rely on what the victim wants or needs from the process. But the ability to be heard and considered can be very powerful and healing for victims. Advocates can help victims prepare and deliver impact statements at the time of sentencing. Advocates can also help victims meet with the person writing the pre-sentence investigation. It can be very helpful for both the victim and the probation officer to talk about the impact of the crime on the victim. A victim who is comfortable with the probation officer will call that officer in the future if issues arise and that can ultimately help the officer supervise the offender in the community.

These rights require that an advocate or victim/witness staff from the county attorney's office work closely with a victim so that she/he can act on the rights available.

❖ Protection

Crime victims have the right to protection from harm:

- Tampering with a witness is a crime in Minnesota and should be reported.
- Employers may not discipline or dismiss victims or witnesses who are called to testify in court.
- Right to request address be withheld in open court.
- Right to a secure waiting area during court.
- Right to request law enforcement to withhold their identity from the public.

Victims may need assistance in accessing these rights. Many of these rights have been acted on in local jurisdictions by creating established procedures. For example, most criminal complaints do not identify the victim by name (usually use initials or Victim 1, Victim 2, etc.) or identify the victim's address. Many courthouses have established waiting areas that are reserved for victims.

❖ Application for Financial Assistance

Crime victims have the right to apply for financial assistance:

- Victims may be eligible for financial assistance (reparations) from the state if they have suffered economic loss as a result of a violent crime.
- Victims may request the court to order the defendant to pay restitution.

Victims of sexual assault often suffer financial loss. There are a variety of ways to recoup some loss, whether or not the defendant is found guilty.

- Restitution is a requirement for the defendant to repay the victim for certain out-of-pocket expenses. The victim can apply for restitution upon the conviction of the defendant. Costs to be recovered are ordered by the judge. Collection from offenders who are on probation or in prison can be difficult to ensure. Most counties are working to enhance their ability to collect restitution.
- Reparations funds are awarded to victims by the state and must follow strict guidelines established by the Reparations Board.

Both restitution and reparations are covered elsewhere in this manual.

❖ Other Rights for Victims and Witnesses

The four categories of rights covered above are the most commonly invoked rights. However, there are many other specifics addressed in 611A, so a review of that statute is a good idea.



Advocacy Sidebar: Crime Victim/Witness Rights

While Minnesota has a fairly comprehensive Crime Victims' Rights statute to guide the criminal justice system in its response to crime victims and witnesses, the statute does not carry any sanctions if a victim's rights are curtailed or abridged. In other words, there are no teeth in the Minnesota statute. Many well meaning professionals, however, do adhere to crime victim rights when they are aware of the language of the statutes. It is important that crime victims know they have a right to request these considerations. Most often when these rights are not followed it is due to the competing interests of the defendant. Defendant's rights, because they are constitutional, take precedence over victim rights. For these reasons, it is important for advocates to help victims know what their rights are and how to access those rights. It is equally as important for advocates to work with

local criminal justice professionals to ensure that systems are put in place to ensure the closest adherence to victim/witness rights. The result of responding proactively to these rights is to ensure greater participation in the process from victims, and ultimately more successful systems of holding offenders accountable.

Crime victims who feel that their rights have been seriously ignored can contact the Crime Victim Justice Unit at the Office of Justice Programs in the Department of Public Safety at 1-800-247-0390. That office can investigate the violations of victim rights and/or mistreatment of victims in the system. The outcome of an investigation might result in corrective work with the offending agency to ensure future compliance with victim rights.

The Forensic/Medical Exam

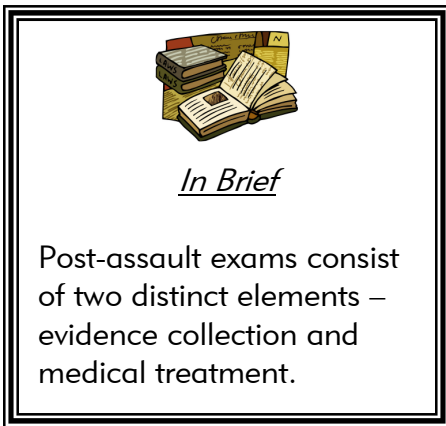


Statute Reference: Minn. Stat. §145.471 – 145.4713

Fact Sheet: Minor Consent to Medical/Mental Health Treatment

Fact Sheet: Drug Facilitated Sexual Assault

Once a sexual assault has occurred, the victim of the assault should strongly consider seeking medical attention. Even if some time has passed, the chance for injury or disease makes a medical exam important. Further, if the victim seeks medical attention, law enforcement will not normally be contacted unless s/he agrees to it. (See mandatory report fact sheet for exceptions to this.)



Medical professionals are often (not always) the first to interact with a victim of sexual assault. They play an integral role in the criminal investigation because they can collect forensic evidence from a victim's body following a sexual assault and document the condition of a victim's body. In some places, nurses and other health care providers have received special training through SANE [Sexual Assault Nurse Examiners] or SAFE [Sexual Assault Forensic Exam] programs on

examining sexual assault victims and effectively collecting evidence.

(For more information on SANE/SAFE programs, contact SVJI through the MNCASA website at www.mncasa.org.)

It is important to recognize that this exam in the hospital or clinic setting can consist of two distinct elements - evidence collection and medical treatment. While these may be distinct, they are usually closely related. For example, injuries require treatment but can support the victim's testimony about the assault. This section will focus on the forensic – or evidence collection - aspect of the exam.

Medical professionals in Minnesota use a specially designed kit for examining a sexual assault victim. The Bureau of Criminal Apprehension (BCA) develops and provides the "rape kits" for hospitals, clinics and law enforcement. This is a voluntary procedure, and thus the patient (victim) can refuse any portion of the exam, or terminate it at any time. The advocate should then explain the potential consequences of these decisions to the evidence collection process.

Forensic evidence collected in these examinations can include the perpetrator's semen, pubic or other hair, skin under a victim's fingernails, and injury to the victim, including the genital and anal areas. Results of tests for sexually transmitted infections and pregnancy status (tested at a later date) can also serve as evidence.

Many hospitals have set limits for how long they will retain the completed rape kit. If victims are unsure if they want to report the assault to law enforcement for possible prosecution, most hospitals will keep the "rape kit" in storage for a period of time. Often they will make a final contact to a victim before destroying the kit to make sure the victim has not had a change of heart. Some jurisdictions choose to keep the kit for the duration of the statute of limitations.

Victims of sexual assault have, at times, experienced difficulty getting all the information and medical resources they need from medical providers. This has been particularly true regarding pregnancy prevention and treatment of potential sexually transmitted infections (STI's). However, a statute passed in 2007 now requires medical providers to provide a standard of care including information on emergency contraception and the emergency contraception itself. The same is true for STI's – information and prophylaxis are now the standard of care for sexual assault victims (see the section below on STI testing). These requirements apply to all hospitals, regardless of faith affiliation.



Advocacy Sidebar: Forensic/Medical Exams

In many cases of sexual assault, no physical evidence is available for the investigation and prosecution of the crime. Sometimes this is because the criminal behavior did not result in any lasting physical manifestation, such as physical injury, or the depositing of incriminating physical evidence, such as the defendant's semen or hair.

Other times this is because the victim does not seek medical care or report the crime to the police until it is too late to collect physical evidence. The general rule is that an examination has to take place within 72 hours of the sexual assault in order for forensic evidence to be available for collection and preservation. However, there are exceptions to this 72 hour limit. Therefore, advocates should routinely refer victims to a medical provider even beyond the 72 hours to ensure that a medical check-up is done and that the provider can determine if there may be evidence still available.

The advocate's role during the evidentiary exam is to provide emotional support to the victim and assist the victim in making her/his needs known. Some victims may request that the advocate remain in the exam room. Others may want the advocate to leave the room during the exam.

It is crucial that the advocate take care throughout her work within the criminal justice system not to put herself in the role of witness. One area where this potential exists is during the victim's medical exam. The medical provider must maintain the "chain of custody" of the evidence collected during the exam. This means that the "chain" of people – link by link – who had possession of the evidence must be clearly identified to prove the integrity of the evidence.

If the medical provider begins to leave the advocate in sole possession of the evidence (the rape kit), the advocate should strongly refuse. It is the responsibility of the medical provider and law enforcement to maintain the links in the chain of custody – the advocate should remain out of that chain entirely. The advocate can be in the room with the rape kit evidence, but only if another person capable of being called as a witness is in the room.

As part of the exam, the victim may want not only herself tested for STI's including HIV, but also the assailant. However, unless a conviction is obtained, it is rare that the assailant can be tested for his/her own HIV status or other STD's. However, if the victim has specific information that leads him/her to believe that the suspect may have a communicable disease, (rather than merely wanting to know) it is possible for the prosecutor or law enforcement to get a court order permitting testing of the suspect.



Costs of the Evidentiary Exam



Statute Reference: Minn. Stat. §609.35 - Costs of Medical Examination
Fact Sheet: Evidentiary Exam Payment

In Minnesota, the victim does not pay for the medical costs associated with gathering forensic evidence of a sexual assault. The county where the sexual assault occurred pays these costs, including the “rape kit” examination and tests for sexual transmitted diseases or pregnancy. The county must cover these expenses, even if the victim decides never to report the assault to law enforcement and even if the assault is never prosecuted or investigated. While the victim can request that insurance be billed for the evidentiary exam (for example, the victim does not want the bill running through the county accounting system because Aunt Julie works there) the county cannot require that of a victim. The hospital can only ask the victim about the insurance option *after* the exam is completed. The hospital must also reassure the victim that not using insurance will not affect her ability to receive services.



Advocacy Sidebar: Cost of Medical Examination

The statute, 609.35 – Costs of Medical Examination, has caused some confusion from county to county about which county agency actually pays for the costs of the forensic medical exam. As with many similar issues, a coordinated community response is the best way to resolve this confusion – see the discussion on systems advocacy on pages 1-2 to 1-3. It is common practice in emergency departments/rooms to have the patient sign an insurance authorization immediately when they report to the ER. That practice is particularly prohibited by this statutory language. Other issues that are not identified by statute but which must be agreed upon locally include:

- *Which county agency processes the bills,*
- *When a medical issue becomes an evidence issue,*
- *Guarding the victim’s privacy in processing payment,*
- *How long after an assault the full exam will be done and paid for,*
- *If HIPAA regulations apply to billing for evidence collection, and*
- *Payment for follow-up exams.*

Some jurisdictions have trouble with the concept of paying for the exam if the victim is unsure about reporting the assault. You can help remind them that sexual assault victims are not receiving special treatment. The evidentiary exam is part of processing the crime scene. The county pays these costs for most other criminal investigations whether or not charges result. (ie gathering DNA from carpeting; combing grass for bullet casings; dusting a room for fingerprints.) The difference here is that the body is the crime scene; the hospital is the site where the work is done. Both of these realities confuse people into thinking that something other than criminal justice work is being done.

❖ STD/STI Testing

About testing: Shortly after an assault at the time of the sexual assault evidentiary exam, it is routine protocol for the hospital to do STD/STI testing including testing for HIV/AIDS. The reason for this testing is *not* to determine if the victim contracted an infection *at the time of the assault* but to establish a baseline against which to test the victim in the future. Infections and pregnancy do not show up immediately so injury of this nature can only be determined by follow up testing several days or weeks following the assault. For that reason there are some important considerations:

- If a victim knows or believes she already has an STD/STI and is worried that this information could become a part of the legal process, she can refuse testing at the time of the evidentiary exam and go to another facility (Planned Parenthood, public health clinic, etc.) to have the baseline tests conducted. That way if the hospital records regarding the assault are used for legal reasons the court will not have records of her previous STD/STI status.
- Some medical facilities do not test for STD/STIs but routinely administer prophylactics - a heavy dosage of antibiotics to counteract any possible infection. That is also an acceptable way to respond to the threat of infection.
- Usually, medical facilities will not give emergency contraception to a victim without first conducting a pregnancy test. This is to detect an already existing pregnancy, not to detect any pregnancy caused by the assault.
- Because of these considerations, it is very important for advocates to encourage a victim to go to any follow up medical exams that are scheduled. It is at these exams, usually scheduled between 2 and 6 weeks after an assault, that the tests can be conducted that indicate whether or not infection or pregnancy occurred as a result of the assault.

The Law Enforcement Investigation

If a victim of sexual assault chooses to report the violence to law enforcement, s/he will make the report to a police officer or sheriff's deputy, also known as a "law enforcement officer" or "peace officer." Law enforcement will be responsible for conducting an investigation.

The manner in which the investigation is started depends somewhat upon how the initial report is made and how the law enforcement agency typically handles sexual assault reports. If the victim reports almost immediately after the assault, the officer who typically responds to take the report will be a patrol officer. In sexual assault cases, patrol officers often play an initial role by assisting with processing the crime scene, assuring the victim's safety and apprehending the offender if appropriate.

If some time has passed since the assault occurred, an investigator or detective may be the person who takes the initial report. The victim may be able to go to the law enforcement center, or the investigator will meet with him/her at the advocacy program or elsewhere. In most jurisdictions, an investigator will ultimately take over the investigation of the sexual assault no matter how it is initially reported.

Even if a number of years have passed since the sexual assault, victims should still consider reporting to law enforcement. Statutes of limitations *only* apply to the ability of the prosecutor to file charges, *not* to the time when an investigator can take a report on a crime (see the Section IV regarding statutes of limitations). Even if they cannot proceed on this particular victim's case, law enforcement might be able to use the report to prove an allegation made by another victim. Obviously, the advocate should assist the victim in determining whether s/he feels emotionally ready to report even after time has passed.



In Brief

Statute of limitations apply only to the ability of a prosecutor to file charges, not to whether an investigator can take a report of a crime.

No matter when the assault happened, the role of the investigator is to search for the truth, and if the evidence indicates a crime has probably occurred, to report the information to the prosecuting authority for charging. The role of the investigator is *not* to prove that a crime occurred – but merely to investigate the report of a criminal offense.

To do this, the investigator will interview the victim/survivor, other people who may have information about what happened before, during, or after the assault, and the suspect. If there was a sexual assault medical/forensic exam, the investigator will get the reports from the medical personnel. If there is still a crime scene where evidence of the event might be

present, the investigator will go there and take photos and collect evidence. If the victim/survivor has bruises or other physical indications of an assault, the investigator will take photos of him/her. If the victim's clothing shows signs of a struggle, or could contain evidence of the assault, the investigator will collect the clothing.\



Advocacy Sidebar: The Law Enforcement Investigation

Before Reporting

Before reporting to law enforcement, a victim should be advised of a few things by his/her advocate. Once the report is made to law enforcement, the victim may not be able to change his/her mind and decide that s/he no longer wants the investigation to go forward. Once the investigator is aware of a crime, s/he has an obligation to discover whether a crime was committed and to report that to the prosecutor. While the victim's wishes should be considered, the criminal justice system may not comply at all times with his/her wishes. Work with your local law enforcement and prosecution regarding their policies on this topic.

Further, the advocate should explain to the victim before his/her interview that the investigator will need to ask very detailed and specific questions about the sexual assault. The law makes clear distinctions as to which body part was used, whether or not penetration occurred, etc, so the investigator must be very specific about those things. This should not dissuade a victim from reporting, but a good advocate will prepare the victim for this type of questioning, and explain that the investigator must ask the questions to be thorough. An example might be that the victim would say "he forced sex on me." The investigator will then have to clarify which body part(s) the suspect used, which of the victim's body parts were touched, and how force was accomplished.

A victim of sexual assault may be fearful or nervous about giving a statement to a law enforcement officer – especially if s/he has been charged or arrested in the past. The victim advocate can help reduce those fears by preparing the victim for questions and by developing a good working relationship with local law enforcement so that both agencies work well together.

Perhaps the most important thing for an advocate to explain to a victim before she gives a report to law enforcement is that the most damaging thing the victim can do is lie – about anything!! A victim of sexual assault may understandably question some of her own choices or behaviors leading up to

the sexual assault. It is human nature to take on some of the blame because one was drinking, using drugs, flirting, or doing something embarrassing. But lying to cover up something s/he is ashamed of, or to add something that never happened, can ruin a criminal case. Much of the time, the success of a case hinges strongly on the credibility of the victim. If the investigator or the prosecutor later discovers that the victim was lying – even about seemingly small facts – they may decide not to pursue the case any further. Otherwise, these false statements may be raised at trial, giving a jury reason to question the entire assault report. These cases are difficult to prove to juries even under the best of circumstances, and a victim who appears untruthful may make the case impossible to prove to a jury.

During the Interview

While sitting in an interview with law enforcement, the advocate should remain absolutely silent. The advocate's role here is for support only – not to aid in the investigation. The advocate should never do anything which appears to be coaching or suggesting what the victim should say or do – those actions could be raised at trial. If the advocate realizes that the victim has forgotten important information in the interview, the advocate may – after the interview is completed and the tape recorder shut off – take the victim aside and indicate that s/he may have forgotten to mention a certain subject. The victim may then decide whether or not s/he wants to approach the investigator with the information. This allows the investigator to get the information directly from the victim in her/his words.

After the Interview

SVJI recommends that police and prosecutors agree not to punish minor violations of the law by victims reporting sexual assault. The advocacy program should work with these agencies to gain an agreement that minor consumption, curfew, drug possession, or other relatively minor offenses by the victim will not be charged. Warrants for the victim's arrest- such as existing bench warrants - should also be discussed. If the law enforcement agency locates a warrant for the victim's arrest, they may permit the victim to make arrangements to set a court hearing and make that appearance rather than placing her under arrest. This will allow the victim to be more comfortable and open when s/he is talking with a law enforcement officer. This agreement should be reached as a policy matter before a specific case arises.

❖ Now He'll be Arrested. . . Right?

Only in certain instances will law enforcement arrest the suspect in sexual assault

cases. Arrest is used to confine a suspect that law enforcement and the courts believe to be a flight risk or ongoing risk to the general public.

Additionally, when a suspect is held in jail a time limit begins. Law enforcement and the prosecutor have only a window of a few days to complete the whole investigation and charge the suspect before he must be released. This time frame depends upon whether a weekend or holiday are involved. Due to the complicated nature of sex assault investigations, it may be difficult to interview all of the relevant parties and gather and assess evidence before that timeline runs. It could mean that the state misses an opportunity to charge the suspect fully.



In Brief

After an arrest, the prosecutor has anywhere from 12 to 48 hours (or even more) within which to file formal charges before the suspect must be released.

It is not unusual for the investigation to take several weeks, or even months. The investigator needs to interview numerous people, and follow up on their statements. The investigator may also be waiting for test results from the Bureau of Criminal Apprehension or another laboratory, which can take a long time. During that time, law enforcement, with the help of the advocate, should stay in touch with the victim to keep her/him informed of the progress of the case.

The police reports, however, will not be disclosed to the victim while the case is pending, and, depending upon the prosecutor, may not be disclosed until the case is completely resolved. This is based on data practices statutes which make the investigation private – even from the victim – until an individual has been charged or convicted.



Advocacy Sidebar: Advocacy During Investigation

A common misunderstanding, perhaps based on TV shows, is that it is the victim's responsibility to "press charges." In reality, once a crime is reported to law enforcement, they will take over an investigation and decisions about proceeding with criminal charges are made by police and prosecutors. They have a responsibility for public safety, so have considerations beyond the specific victim including the general community.

If the suspect is not jailed during the investigation and pre-charging phases, the advocate should stay in close contact with the victim, assist

when necessary with obtaining a restraining order and assist the victim with reporting any contact or threatening behavior to law enforcement.

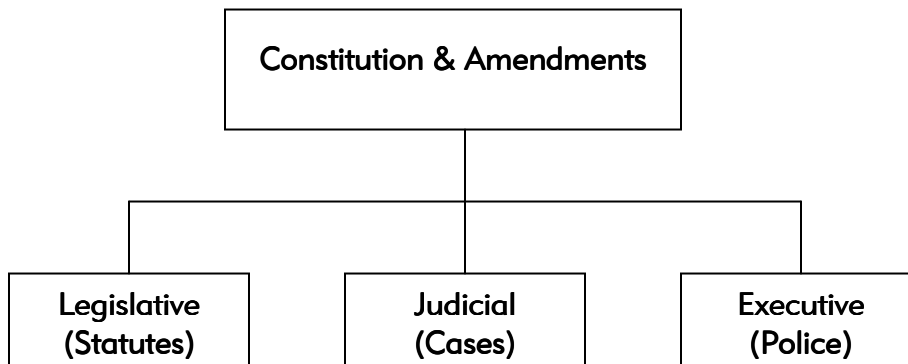
Further, although police get some training in responding to sexual assault crimes and the victims of these crimes, they have varying levels of knowledge about the dynamics of violent crimes. This is especially true about crimes perpetrated against women. For this reason, responders will vary in how responsive they will be to the needs of victims. If you believe police officers in your area would benefit from additional training in responding to sexual offenses, contact the Sexual Violence Justice Institute staff through the MNCASA website www.mncasa.org.

Limits on the Law Enforcement Power to Investigate

As a criminal investigation proceeds, the victim may wonder why the suspect is not arrested, why the police do not require the suspect to give a DNA sample immediately, or why they do not barge into the suspect's house to look for evidence. The answer may be that the investigator is aware of the constitutional limitations on his/her power to do so.

Even the most well-meaning and dedicated law enforcement officers may be slowed down by the limitations on their power to conduct a sexual assault investigation. These limitations are generally based on the constitution and the amendments which have been interpreted over the years by the Supreme Courts of the United States and Minnesota. This subject can be very confusing even to well-trained law enforcement. Therefore, this section will be a simple discussion of the limitations that apply most commonly to sexual assault investigations.

The constitution and its amendments (which are also a part of the constitution) created the three branches of government: the legislative (congress), the executive (governor/ police), and judicial (courts). Thus, it regulates those three branches and determines what they can – and importantly – what they cannot do.



The cases which the courts have written to interpret the constitution determine how police must behave regarding certain constitutional rights that a suspect has in an investigation. In sexual assault investigations, this mainly applies to three areas of the investigation:


- Search and Seizure
- Interviews and
- Identification Procedures

❖ Search and Seizure

The Fourth Amendment to the Constitution protects people from unreasonable search and seizure by the government (specifically, the police).

What the Fourth Amendment has come to mean through the court cases is that law enforcement must generally have a warrant based upon probable cause before searching or seizing. The idea is that a neutral judge who is not involved in the investigation will review the application for the warrant and determine if probable cause exists to issue the warrant.


The term “probable cause” (P.C.) means “where the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.” It means that the investigator must have a specific reason to believe, rather than just a hunch, that evidence will be found.



In Brief

Searches include:

- Taking a DNA sample from a suspect
- Searching a suspect’s home
- Searching a suspect’s car or backpack



In Brief

A “Seizure” includes:

- Arresting a Suspect
- Detaining a Suspect to ask questions
- Stopping a suspect driving a car
- Taking property belonging to a suspect as evidence

There are a few narrow exceptions to the warrant requirement which permit law enforcement to search or seize without obtaining a warrant. They are:

- Consent (suspect gives permission)
- Exigent Circumstances (evidence – such as blood alcohol content – will disappear if not gathered)

- Automobile search with P.C. (upon P.C. to believe evidence is in a car, it may be searched immediately)
- Felony arrest with P.C. (upon P.C. to arrest for a felony, suspect may be arrested without a warrant)
- Incident to arrest (upon being arrested, a suspect may be searched for weapons for safety)
- Hot Pursuit (felon fleeing from law enforcement may be pursued into his/her own home without warrant)
- Inventory (law enforcement may search a car to inventory contents if they are lawfully towing it)

Thus, when looking for evidence of the sexual assault which is located on the suspect's body or in his/her home or things, law enforcement must be cautious about how they proceed in order not to violate the constitution.

❖ Interviews

Another common area where the constitution controls sexual assault investigations is when law enforcement is interviewing the suspect. The Fifth Amendment to the constitution says that "no person shall be compelled to be a witness against himself." That has come to mean that people may not be forced to speak to law enforcement or to answer questions if they choose not to.

One of the few things that TV crime shows get right about law enforcement is that the *Miranda* warning must be read to a suspect who is in custody and being interrogated by law enforcement (though probably not immediately as they handcuff the suspect like on TV!)

The *Miranda* warning is only required if the suspect is 1) in custody and 2) being interrogated. When a person's freedom is significantly restrained and they are not allowed to leave, they are in custody. If the police then choose to ask the suspect questions about the sexual assault, the *Miranda* warning must be read to the suspect. If these two factors are not in place at the same time, the warning is not required for questioning.



In Brief

The *Miranda* warning tells a suspect:

- They have the right to remain silent (not to answer questions)
- Anything they say can and will be used in a court of law (their own statements could be used to prove their guilt later)
- They have the right to an attorney (they can have an attorney during questioning)
- If they cannot afford an attorney, one will be provided for them (if they qualify for a public defender, they can have one while being questioned)

In addition to the *Miranda* warning, law enforcement in the state of Minnesota has another requirement when interviewing suspects. When interviewing an individual who is in custody, they must tape record the interview if reasonably possible.

Thus, when the *Miranda* warning is required, Minnesota police must tape record the interview to get the best evidence of what is or is not said. This is pursuant to the *Scales* decision.

Finally, no matter how many times a *Miranda* warning might be read, a suspect who did not freely and voluntarily give a statement has not waived his/her right to be silent. Thus, the court will also review whether the statement was given voluntarily as a completely separate question from whether the *Miranda* warning was given.

The voluntariness question deals with the way the suspect was treated by police: was he/she given adequate water, bathroom breaks, was he/she old enough and smart enough to understand what was going on, how did the police speak to or treat the suspect – did they frighten a confession out of him/her? As long as the statement was given voluntarily, on tape, and after a *Miranda* warning, it should be admissible in court.

❖ Identifications

In our system of criminal justice, every person – guilty or innocent – deserves a fair trial. This idea is also contained in our constitution by combining several different amendments. It makes sense: if we only want to convict the truly guilty defendants, the trial should be fair to both sides so that the jury has accurate information on which to base their decision.

This concept has been applied to the way in which law enforcement obtain identification information by witnesses or victims in a sexual assault investigation. At times, the victim may be asked to identify his/her attacker. But in order to assure that the identification is accurate and fair, the courts have set out some guidelines which seek to ensure that victims are actually identifying the true attacker without help or prompting from the police.

Currently, the most common form of identification procedure is for law enforcement to put together a “photo array.” This is a sheet of paper including four to eight photos from which the victim might be asked to identify whether s/he recognizes the attacker.

The first part of the review by the court is to ask whether the identification procedure was “unnecessarily suggestive.” The court will look at how the choices were presented to the witness or victim to see if the identification suggested what the answer should be, rather than leaving that fully up to the witness/victim.


Examples of “unnecessarily suggestive” identification procedures are:

- “one of these things is not like the others” – the suspect looks so different from the other options in the line-up or photo array that the victim cannot help but pick him/her from the group
- show-ups – law enforcement officer physically brings the suspect to the victim and asks “is this the guy?”
- the suspect is photographed in jail clothes and handcuffs

While these procedures are generally disfavored, they may be necessary for some reason. In that case, the court will ask a second question to decide whether the procedure was still fair over-all. The court will review “the totality of the circumstances” to assess whether the suggestive procedure might still have been fair.

By reviewing all the circumstances the court may determine that, even though suggestive, overall, the identification was fair.

❖ Enforcing the Constitution



In Brief

The “totality of the circumstances” includes:

- witness’ view of attacker
- witness’ degree of attention to attacker
- accuracy of witness’ description
- level of certainty of witness when identification made
- time lapsed between criminal event and identification

After determining that certain rules and restrictions apply to law enforcement conducting a criminal investigation, the courts realized that they needed some type of consequence for violations if the rules were to have any real meaning. Thus, they have decided that any piece of evidence collected in violation of the suspect’s constitutional rights would be excluded from the evidence at trial – the “exclusionary rule.” Further, if a piece of evidence is obtained illegally by the police, then any evidence it leads to is also excluded.

The rule does *not* mean prosecution cannot go forward, but merely that the specific statement, or DNA, or other item taken illegally may not be used in court. Thus, the exclusionary rule punishes law enforcement who violate the constitution by preventing them from using evidence in trial when they collect it illegally. This is a very strong deterrent for law enforcement, and it means that generally they are pretty cautious about the parts of the investigation which might impact these constitutional rights. This fact may slow down an investigation while the investigator looks for more “probable cause,” or applies for a warrant before obtaining evidence. It does not mean that the investigator is stalling, but rather that s/he is trying to conduct the investigation such that the case will be winnable at trial.

Mandatory Reporting – Breaking Confidentiality



Statute Reference: Minn. Stat. §626.556 – Reporting of Maltreatment of Minors
Fact Sheet: Mandatory Reporting

Certain professions carry with them the obligation to report to social services or law enforcement when child abuse or neglect is suspected. These professions include medical professionals, hospital administrators, social service workers, school administrators, teachers, day care or childcare providers, psychologists, psychiatrists, clergy, and law enforcement personnel or delegates of these professions (i.e. sexual assault advocates).

A mandatory reporter who “knows or has reason to believe” a child is being sexually or physically abused, or neglected, by a care giver *must* report the abuse verbally to the local police agency or social services immediately after learning of the abuse. They must then follow with a written report within 72 hours. Failure of mandated reporters to file the required report is a criminal violation. After receiving an oral report of the suspected abuse, law enforcement and social services will perform an investigation to determine the needed services to ensure the safety and well-being of the child(ren) in question.

These requirements apply only to abuse which the reporter believes has occurred within the last 3 years, unless it involves two or more victims who are unrelated to each other. In that case (such as, for example, a clergy or daycare provider abusing multiple children), abuse occurring within the previous 10 years must be reported.

It is important that *only* child abuse or neglect by a *care giver* as described below must be reported. The statute names three categories of persons whose child abuse must be reported to authorities:

1. A person responsible for the child’s care is a person in the family unit who takes a role similar to the parent, or a person outside the family who provides short-term care for the child.
2. A person in a significant relationship is a family member or adult living in the same home.
3. A person in a position of authority is a person acting in the place of the parent, or who, even for a short time, has the responsibility for the health, welfare, or supervision of the child.

A criminal act of abuse or neglect against a child which is not perpetrated by someone falling into one of these three categories is not a mandatory report situation.

Persons making the report are protected. If a person makes a good faith report based on an honest belief that the abuse is occurring, the reporter will be immune from any personal civil liability attached to the report. Further, no employer may retaliate in any way against an employee filing a report. However, a person knowingly making a false or malicious report will not be given any legal protections and will be liable for any damages in a civil suit that the other incurred because of the false report.



Advocacy Sidebar: Mandatory Reporting

Perhaps no other legal issue creates as much confusion and outright disagreement for professionals than the mandatory reporting of child abuse statute. Many people have learned or believe that any criminal act against a child must be reported to authorities, and do not wish to limit mandatory reports only to the three care-giver categories discussed above.

Out of a desire to protect children, many people have a very emotional response to this issue and often disagree with the limitations on mandatory reporting in the statute.

However, a plain reading of the statute shows that the legislature has only required mandatory reporting when the person responsible for the abuse falls into certain narrow groups who should be protecting the child rather than abusing or neglecting him/her. Importantly, the fact that an act of abuse or neglect is not a mandatory report does not mean it is not a crime – it only means that the mandatory reporter is not required to report it.

The main thing to be concerned about when deciding whether to report abuse is violations of privacy requirements when divulging confidential information. Sexual assault advocates have confidentiality duties towards minor clients and may be required to keep private their knowledge of some conduct involving those clients even if it is criminal. The classic example is the adolescent who is having sex with a boyfriend while under the age of consent. The boyfriend is not a care giver to the child as defined by the three categories above, and therefore the child's confidences must be kept. It is important that advocacy programs have a reputation in their communities for keeping private information private unless required by law to divulge it.

One advocate phrased it this way: "either you must report child abuse, or you must not disclose it."

Before disclosing confidential information as a mandatory report, be sure that all the factors are met regarding the identity of the abuser and the child. If you are unsure, ask SVJI and/or your local social services or law enforcement agency without providing identifying information about the parties.