

4. Confidentiality

Recommendations at a glance for jurisdictions to maintain confidentiality:

- Be sure 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.
- Increase the understanding of 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 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/SARRT or other collaborating responders should inform victims of the scope of confidentiality with each individual responding to the sexual assault victim and be cautious not to exceed the limits of victim consent.

Increase the understanding of relevant confidentiality issues. Individuals responding to the sexual assault victim 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, individuals responding to sexual assault victims should be aware of the laws in their jurisdiction pertaining to privileged communications.⁸⁸ 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.

Responders should be aware that victims in the military who choose restricted reports can confidentially speak with a sexual assault victim advocate, a sexual assault response coordinator, military chaplain, or other specified military professional. Jurisdictions should be careful in their local response to protect any privileges that are available to victims. This can be done by limiting who speaks with the victim at each stage of the process, who will be present during discussions and/or interviews, and who will be the recordkeeper or notetaker.

In some jurisdictions, patients who are minors have fewer or more limited confidentiality rights than adults. For example, in some jurisdictions, minor patients have the right to grant or withhold consent to a forensic examination but not to keep the results of the exam private from their parent or legal guardian.

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. System-based advocates (such as those based in police departments, prosecutor's offices, or military installations) usually have limited or no ability to keep information confidential.

⁸⁸ 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. This does not usually apply to system-based advocates, such as those in law enforcement departments or prosecutor's offices. 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.)

- Absent a court order, 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.
- If the victim chooses to get an exam, but not make a police 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 have to be provided to the defense pursuant to the government's discovery obligations⁸⁹ (although prosecutors may request the court to shield certain information from the defense, such as history of prior pregnancies, abortions, and STIs).⁹⁰
- Each case potentially involves individuals from different agencies responding to the sexual assault victim that may have their own confidentiality policies (e.g., school counselors and mental health providers).
- Both prosecutors and defense attorneys can call witnesses, including responders, to testify in court;
- 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.
- Military members can confidentially⁹¹ report being sexually assaulted to specified officials within the military and therefore can be eligible to receive medical care, counseling, and victim advocacy services without requiring command notification or triggering the investigatory process. This is known as restricted reporting. Release of the information regarding the sexual assault to anyone other than the specified officials who may receive a restricted report will result in the loss of confidentiality for the victim and command and law enforcement will have to be notified of the sexual assault.

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) Privacy Rule and its implementing regulations (found at 45 CFR Part 160 and Subparts A and E of Part 164), established national standards for the protection of certain individually identifiable health information created or held by health plans, certain health care providers, and health clearinghouses. With respect to disclosures to victim advocacy organizations, the HIPAA Privacy Rule permits hospitals and other health care providers to alert a victim advocacy organization to the presence of a victim of sexual assault at the hospital without giving any identifying information about the victim. Further, once the advocate is at the hospital, if the victim is informed in advance and agrees or does not object, or the hospital reasonably infers from the circumstances, based on professional judgment, that the victim does not object, then the Privacy Rule permits hospital staff to introduce the advocate to the victim and share information pertinent to the advocate's involvement in the victim's care. For more information on the ability of a health care provider to communicate with persons identified by an individual as involved in the individual's care, see *A Health Care Provider's Guide to the HIPAA Privacy Rule: Communicating with a Patient's Family, Friends, or Others Involved in a Patient's Care*, available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/provider_ffg.pdf.

⁸⁹ 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.)

⁹⁰ 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.)

⁹¹ Within the U.S. Department of Defense's Restricted Reporting Policy, a military member may make a restricted report to a Sexual Assault Response Coordinator (SARC), victim advocate, or health care provider.

For more information about the HIPAA Privacy Rule generally, including the conditions under which other disclosures are permitted, visit the Department of Health and Human Services Office for Civil Rights (OCR) Web Site at <http://www.hhs.gov/ocr/privacy/> for an array of helpful guidance documents and Frequently Asked Questions.

HIPAA is not the only federal law that governs victims' privacy rights. Agencies that receive funding under the Violence Against Women Act (VAWA) must also comply with VAWA's confidentiality provisions. These provisions require that a victim's personally identifying information may not be released without a victim's written, time-limited, informed consent or a court or statutory mandate.

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, or the 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).