



End Violence Against Women International  
(EVAWI)

# Effective Victim Advocacy Within the Criminal Justice System

Kimberly A. Lonsway, PhD  
Sergeant Joanne Archambault (Ret.)

With contributions from:  
Aurelia Sands-Belle  
Vickie Smith  
Alison Jones-Lockwood

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## **Authors**

**Dr. Kimberly A. Lonsway** has served as the Director of Research for EVAWI since 2004. Her research focuses on sexual violence and the criminal justice and community response system, and she has written over 60 published articles, book chapters, technical reports, government reports, and commissioned documents – in addition to numerous training modules, bulletins, and other resources. Over her career, she has trained thousands of professionals across the country and around the world, in a diverse array of disciplines and settings, and volunteered for over 15 years as a victim advocate; in 2012, she was awarded the first-ever Volunteer of the Decade Award from the Sexual Assault Recovery and Prevention (SARP) Center in San Luis Obispo, CA. She earned her PhD in the Department of Psychology at the University of Illinois, Urbana-Champaign.



**Sgt. Joanne Archambault** (Retired, San Diego Police Department) is the Chief Executive Officer for EVAWI. Prior to founding EVAWI in 2003, Sgt. Archambault worked for the San Diego Police Department for almost 23 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which had 13 detectives and was responsible for investigating approximately 1,000 felony sexual assaults each year. Sgt. Archambault has provided training for tens of thousands of practitioners, policymakers, and others – both across the country and around the world. She has been instrumental in creating systems-level change through individual contacts, as well as policy initiatives and recommendations for best practice.





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- Jennifer Adams, Executive Director, Sexual Assault Recovery and Prevention Center, San Luis Obispo, CA.
- Melissa A. Atwood, Supervisor, Victim Services Unit, Austin Police Department, Austin, TX.

- Aurelia Sands-Belle, Research Instructor, National Mass Violence and Victimization Resource Center (NMVVRRC), Durham, NC.
- Debra A. Bright, National Technical Assistance Project Director, VAWA Forensic Compliance Project, Maryland Coalition Against Sexual Assault, Arnold, MA.
- Heather J. Huhtanen, Director of Programs for the Oregon Attorney General's Sexual Assault Task Force, Eugene, OR.
- Alison Jones-Lockwood, Training and Technical Assistance Specialist Start by Believing Community Liaison, Sacramento, CA.
- Vickie Smith, Training Consultant, National Center on Domestic and Sexual Violence, Austin, TX (now Executive Director of the Illinois Coalition Against Domestic Violence, Springfield, IL).

Several other individuals provided expert feedback on an earlier version of the module. They are listed in the appendix.



## Learning Objectives

Objectives of this training module include the following:

- Review a brief definition of victim advocacy and the general role of victim advocates.
- Recognize similarities and differences in the professional role of victim advocates who work in a community-based organization, system-based organization, or the US military.
- Explore the complex issues surrounding victim privacy, confidentiality, and legal privilege of private communications between victims and advocates, and any written records.
- Identify opportunities for cooperation between advocates and criminal justice personnel, with the potential for increasing victim participation in the process of the law enforcement investigation and criminal prosecution.
- Examine the role of victim advocates during the medical forensic examination, various stages of the law enforcement investigation, and the process of criminal prosecution.
- Define the existing rights of crime victims on the state and federal level.
- Clarify the financial compensation that is available for victims of crime and recognizing state and federal eligibility requirements that often limit the availability of this reimbursement for victims of sexual assault.
- Identify other forms of assistance that advocates can provide for victims, including help in meeting civil legal needs and service as an expert witness in criminal or civil litigation.
- Analyze common challenges faced by advocates working within the criminal justice system and exploring possible strategies for successful resolution.

**Please note:** This module is a more in-depth version of the OnLine Training Institute (OLTI) Module entitled: [\*Breaking Barriers: The Role of Community-Based and System-Based Advocates\*](#). This course is recommended for victim advocates, but other professionals are more than welcome to take this course as well. The material is essentially the same in both, so we suggest completing one or the other and not both.



## Introduction

Throughout this training curriculum, we emphasize how important it is for professionals within a community to work cooperatively across disciplines – in order to better address the needs of sexual assault victims and hold offenders accountable. A fundamental requirement for this type of collaboration is for these professionals to understand each other's roles, yet all too often this is not the case. Frequently there are misunderstandings between professionals about their roles and the boundaries of what they can and cannot do within their discipline.

This module is designed to help address this problem, by clarifying the role of victim advocates particularly as it pertains to working with the criminal justice system. The goal is to provide victim advocates with the information, tools, and confidence that are needed to work successfully within the criminal justice context. This is particularly important because the research documents that advocates often receive only limited training in the law and criminal justice procedures (Maier, 2007). Yet “they may be the first, perhaps only, legal resource for victims (Maier, 2007, p.43). In one study, advocates were interviewed about their training needs, and many expressed a desire for more training focused on these issues. To illustrate:

*We should be able to support victims through the court process if needed and not all of our volunteers right now feel equipped to do that.*

*You always wish you had more time to go over rape laws because they are so hard to understand.*

This module is thus designed primarily for advocates themselves, but it will also be useful for other professionals who respond to sexual assault, such as law enforcement officers, health care providers, prosecutors, and others. The training is especially focused on clarifying the similarities and differences between community-based victim advocates and system-based victim advocates, terms that will be defined shortly.

**Please note:** Throughout this module, we typically refer to individuals who have been sexually assaulted as “victims.” We recognize that many people prefer to use the term “survivor,” to emphasize the empowerment that individuals can experience when they recover and heal. In this module (and others throughout the training curriculum), we use the term “victim,” because it focuses on issues pertaining to the criminal justice system. “Victim” is the term that is most commonly used in the context of the criminal justice system.



## What Is and Is Not Included in This Module

This module begins with a brief summary of victim advocacy, including distinctions between different types of advocates and a discussion of privacy, confidentiality, and legal privilege. Then the second half of this module offers a more concrete discussion regarding the specific strategies that advocates can use to successfully work on behalf of sexual assault within the criminal justice system. It is important to note, however, that this module does not cover a wide range of other information that advocates need to do their job effectively.

- Some of this information is provided in other OLTJ modules. For example, the module on *Breaking Barriers: The Role of Community-Based and System-Based Victim Advocates* includes a more detailed discussion about the general role and responsibilities of victim advocates (e.g., providing crisis intervention, accompanying victims, assisting victims in dealing with the media). That module is designed primarily for other community professionals, to provide a description of the history and role of victim advocates, but it may also be useful for advocates themselves.
- Other OLTJ modules that might be particularly relevant for victim advocates address the topics of: *Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?*, *Victim Impact: How Victims are Affected by Sexual Assault and How Law Enforcement Can Respond*, *False Reports: Moving Beyond the Issue to Successfully Investigate Sexual Assault*, *Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault*, *Law & Investigative Strategy: What Kind of Sexual Assault is This?*, *Effective Report Writing: Using the Language of Non-Consensual Sex*, and the two modules on Sexual Assault Response and Resource Teams (SARRTs).

In addition, extensive information is found in the training manuals and other materials published by the [state and territory coalitions](#) for sexual assault advocacy organizations.

- For example, the [advocacy manual](#) published by the California Coalition Against Sexual Assault (CALCASA, 1999) offers a particularly thorough description of the criminal justice system that could provide a useful overview for advocates in any state.
- The [SART handbook](#) in Oregon also provides a useful overview of criminal justice procedures (Oregon Attorney General's Office, 2009).

Advocacy manuals published by the state coalitions are also likely to be the best place to review more basic information on how to provide supportive services for victims, such as crisis intervention and effective advocacy in situations other than the criminal justice context. In addition, the Office for Victims of Crime also offers their [Victim Assistance Training Online](#) (or *VAT Online*), which they describe as “a basic victim advocacy web-

based training program that offers victim services providers and allied professionals the opportunity to acquire the basic skills and knowledge they need to better assist victims of crime. Specific information is also provided to meet the needs of target populations.”

**Please note:** While many excellent training materials exist for advocates, they typically provide few details on how advocates should fulfill their role in concrete terms. Guidance is usually provided in general terms, without recommendations for the nitty gritty reality of how to do the work effectively – especially how to manage the complex inter-relationships of the different professionals who are involved. We want to emphasize that this work is HARD, both professionally and interpersonally, and the two modules within the On-Line Training Institute on the role of victim advocacy within the criminal justice system are designed to provide more detailed instruction than is typically available on this topic.

## Definition of Advocacy

Before we go any further, it may be helpful to define the term “advocacy.” *Webster’s New College Dictionary* (2001) defines **advocacy** as “active support, as of a cause” (p.17).

The definition goes on to state that an **advocate** is:

- “One who supports or defends a cause” <*an advocate of equal rights*> and/or
- “One who pleads on another’s behalf” (*Webster’s New College Dictionary*, 2001, p.17).

Both aspects of this definition apply to the term when it is used to describe victim advocates who work in the field of sexual assault response.

## Individual vs. Systems Advocacy

On the one hand, victim advocates “plead on another’s behalf,” when they provide services to individual victims and work to protect their interests both inside and outside the criminal justice system. This can be described as advocacy on an **individual** level.

Individual advocacy includes providing direct services for victims of sexual assault, such as:

- Crisis intervention and emotional support.
- Information, resources, and referrals.
- Assistance in decision-making.
- Accompaniment to law enforcement interviews, medical forensic examinations, follow-up appointments, investigative procedures, and courtroom proceedings.

- Safety planning.
- Assistance securing orders of protection.
- Assistance accessing crime victim compensation.
- Emergency shelter and/or financial assistance.
- Counseling and case management.

Systems advocacy refers to advocates addressing systemic issues that impact victims. While systems advocacy may be used to help a specific victim (such as advocating on behalf of a victim who has not received the appropriate response from a professional within the health care, criminal justice, or community response systems), it is also used as a strategy for improving the overall response or outcomes for all victims of sexual assault. Examples of systems advocacy may include:

- Advocating on behalf of a victim to improve the response by another professional.
- Meeting with members of police departments to discuss their approach to investigating sexual assault and helping to craft questions to yield the best information.
- Collaborating with other criminal justice professionals to ensure that all victims can have an advocate present throughout the criminal justice process, if they want one.
- Collaborating through community Sexual Assault Response and Resource Teams (SARRTs).
- Engaging in legislative advocacy to enact laws that protect victims and their rights, such as rape shield laws and statutes prohibiting the use of the polygraph.
- Advocating for legislation to grant victims the right to an advocate, or to allow testimony regarding the trauma response to sexual assault during court proceedings.

It should also be noted that systems advocacy goes beyond the criminal justice system and legislative change. Victims of sexual assault work within a number of systems, including but not limited to health care, housing, mental health, and other social service systems.

In order to provide comprehensive support throughout the healing and criminal justice process, both forms of advocacy – individuals and systems – must be provided by victim advocacy organizations. Yet advocates should always let victims drive the



agenda for systemic change, meaning they should listen to the challenges and ideas victims share and then act upon them. This also means that advocates should consult with victims to get their opinions on potential changes in policies or law. One way to accomplish this is to invite victims to be active members of community SARRTs, as they can inform the participating professionals who are seeking to improve their response to sexual assault.

We will return to this discussion of individual versus systems advocacy later, when we highlight some of the differences between community-based and system-based victim advocates. However, most of the module deals with individual advocacy.

## **The General Role of Victim Advocates in the Criminal Justice System**

The unique dynamics of sexual assault all too often prevent victims from reporting the crime or participating fully in the process of investigation and prosecution. Many advocates can attest to how difficult this process can be for victims, especially given the attitudes of doubt and blame that are seen in our society when it comes to sexual assault. This is why at least one expert has described the process of advocating for victims within the criminal justice system as holding their hand on a walk-through hell (Weisz, 1999; cited in Koss, 2006). Yet victim advocates can be extremely effective in overcoming these barriers, by providing victims with the information, emotional support, and proactive assistance they need. When sexual assault victims choose to report the crime, advocates can therefore be a critical ally for criminal justice professionals.

In fact, the unique advantage of victim advocates is that they can maintain a primary focus on the safety, well-being, and interests of the victim. In contrast, criminal justice professionals – no matter how competent and compassionate – must balance the victim's interests with the objectives of the criminal justice system and the interests of public safety.

- To illustrate, law enforcement investigators often have to make decisions that an individual victim does not agree with, both during the process of conducting the investigation and determining a final disposition for the case. This is often the result of balancing the interests of the victim with the legal rights of the suspect, the safety of the community, and the professional role as a neutral fact-finder.
- Similarly, prosecutors often make charging decisions or negotiate plea agreements that go against the wishes of a particular victim. This happens because they must balance the wishes of the victim with their own assessment of the case, their professional obligation to charge only those cases they believe meet their legal burden, and their awareness of the limited resources of the court system.



### Resource: Expert Interview

In this [video interview](#), Judy Benitez describes the benefit of involving victim advocates in the investigation and prosecution of sexual assault.

In this [interview](#), Sergeant Elizabeth Donegan describes the three most important things law enforcement officers should do responding to a sexual assault victim, including notifying a victim advocate.

While law enforcement professionals and prosecuting attorneys are often very concerned with the well-being of victims – and frequently work on their behalf in a number of important ways – their professional role requires that their primary allegiance be to the law, the justice system, and ultimately the safety of residents within their jurisdiction. If there is ever a conflict between the interests of a particular victim and the criminal justice system, their professional role demands that they err on the side of public safety by serving the interests of the citizenry as a whole.

### What Does the Research Say About the Impact of Victim Advocates?

While the research in this area is somewhat limited, the consistent conclusion is that advocacy services facilitate victim recovery and increase access to other services in the community response system; this includes the criminal justice system as well as other social services.

- For example, in one statewide study of rape crisis center services, Wasco et al. (2004) “found that survivors consistently rated advocates as supportive and informative” (Campbell, 2006, p.32).
- In another study, Wasco, Campbell, Barnes, and Ahrens (1999) found that victims who worked with an advocate experienced less distress after contacting the legal and medical systems.

“Taken together, the results of these studies suggest that rape victim advocates are beneficial” (Campbell, 2006, p.32).

More specific evidence also addresses the question of exactly how advocates facilitate victim recovery by increasing their access to other services in the community response system. To illustrate, one study was conducted with victims of sexual assault who presented to the Emergency Department of local hospitals (Campbell & Bybee, 1997). Results of that study indicated that victims who had the assistance of an advocate received medical services at higher rates than are typically documented in the research literature:

- 82% received a medical forensic exam.
- 70% received information on pregnancy.
- 38% were provided emergency contraception.
- 67% received information on STDs.
- 79% on STD preventive antibiotic treatment (Campbell, 2006, p.32).

The objectives of this study were then expanded by directly comparing rates of service delivery for victims who worked with an advocate as compared with those who did not (Campbell, 2006). With respect to law enforcement, results indicated that when an advocate was involved:

- Victims were more likely to have a police report taken (59% vs.41%).
- The case was more likely to be investigated further (24% vs.8%).

Regarding medical services, a similar pattern of increased service delivery was also seen when advocates were involved:

- Victims were more likely to receive information on STDs (72% vs.36%) and HIV (47% vs.24%), as well as prophylactic treatment for STDs (86% vs.56%).
- Victims were more likely to be tested for pregnancy (42% vs.22%) and receive emergency contraception to prevent pregnancy (33% vs.14%).
- Medical professionals were less likely to refuse to conduct the examination because the assault occurred “too long ago” (24% vs.36%). This is particularly significant because none were “too long ago” based on accepted standards; all of the sexual assaults in the study were reported within 96 hours.
- Victims were less likely to be treated “impersonally or coldly” (36% vs.69%).

Very few victims in this study were given information on community referrals (6% and 11% in the two sites), but these rates were not different based on whether or not the victim worked with an advocate or not.

As a result of their contact with police and physicians, most of the sexual assault victims in this study experienced considerable distress (Campbell, 2006). However, some responses were seen less often among those victims who worked with an advocate (e.g., feeling bad about themselves, guilty, depressed, or reluctant to seek further help). In other words, victims who worked with an advocate were less likely than others to blame themselves for the sexual assault and less reluctant to seek further help from community response systems. As a result, they received more services from community professionals and had better recovery outcomes.

### Resource: Expert Interview

In this [expert interview](#), Dr. Kim Lonsway describes the benefits to law enforcement when the victim has an advocate present.

## Two Types of Victim Advocates

As previously stated, the purpose of this module is to provide victim advocates with information about the criminal justice system and guidance in how to work effectively within that context. To do this, we need to describe two basic types of advocates who work with victims of sexual assault: **(1) community-based advocates and (2) system-based advocates**. Your community may have neither, one, or both of these types of victim advocates. Yet in order to understand the role of victim advocates within the criminal justice system it is essential to discuss the important difference between these two basic types. We will first discuss the many aspects of victim advocacy that the two types have in common, and then highlight some differences. Of course, the bottom line is that both types must work together to improve the community's response to sexual assault crimes and better serve the needs of victims.

## Services Provided by Both Types of Advocates

Both types of victim advocates will typically provide a range of basic services, as described under the definition of "individual advocacy." These services typically include:

- Provide crisis intervention and emotional support.
- Offer information, resources, referrals, and written materials.
- Facilitate the victim's decision-making process.
- Accompany the victim to law enforcement interviews, medical forensic examinations, follow-up appointments, investigative procedures, and courtroom proceedings.
- Work to protect the victim's rights as established in state and federal law.
- Serve as a liaison between other agencies.
- Secure emergency shelter and/or financial assistance.
- Help to access services for victims with a physical or mental disability.
- Help to access interpretive service for non-English speakers.
- Develop a safety plan with victims.
- Help victims to deal with the media.

- Offer short-term and sometimes longer-term counseling.
- Evaluate risk of suicide and other mental health needs.

For both types of advocates, services will typically be provided not only to victims but also for their support people (e.g., family members, friends, spouses, and intimate partners). Services will also typically be provided for adult and adolescent victims of sexual assault, regardless of their gender. However, child victims may either be provided with services or referral to another appropriate agency if these services are not provided by the advocacy organization.

- Some advocacy organizations offer services by providers who are male and/or bilingual. However, the need for interpretive services is often desperate in advocacy agencies just as it is for other organizations in the community. This is an important issue that community professionals can address collaboratively to ensure that all victims of sexual assault can access the services they need.
- Both types of victim advocates will also document their services, by recording in a case file the contact information for victims, basic demographic information, and a summary of the services that were provided. This is necessary for agencies to track what services were offered to whom. However, there are important differences in documentation that will also be discussed later.

It is important to note that both types of victim advocates will provide only those services that they are trained to provide. Because community-based and system-based advocates often have different types of training, there are often differences in the services that they are qualified to provide. These and other differences between the two types of advocates are discussed next.

#### **Resource: Expert Interview**

In this [expert interview](#), EVAWI Director Aurelia Sands Belle discusses the difference between community-based and system-based advocates.

## **Community-Based Advocates**

When we use the term community-based advocacy, we are referring to those victim advocates who work for a private, autonomous, often non-profit agency within the community. The most common example would be a rape crisis center, but other community-based advocates might work for a local YWCA, hospital, legal services agency, SANE program, or other social service agency. They may also work for a dual agency serving victims of sexual assault and domestic violence. Alternatively, they may work for an organization that serves the needs of specific victims (e.g., elderly, people with disabilities, cultural groups). They may even be employed by a campus unit within

a college or university or provide services for a Native American tribe. Community-based advocates may be volunteers or paid staff, and they may describe themselves as rape crisis counselors, rape crisis advocates, victim advocates, or other similar terms.

### Resource: Multidisciplinary Video

Professionals in Alachua County, Florida created this [multidisciplinary video](#) detailing the role of Sexual Assault Response Team (SART) members, with a particular emphasis on the role of community-based victim advocates throughout the criminal justice process. The video was created by the Alachua County Communications Department.

## Characteristics of Community-Based Advocacy

Community-based advocates are actually the only professionals working with the criminal justice system who have an exclusive focus on the interests of the victim (and their support people). Their entire professional role is based on providing services for victims of sexual assault (and support people), and in doing so, they do not need to balance the victim's interests with the concerns of any other professionals working within the criminal justice system.

As part of their professional role, community-based advocates also assist victims in dealing with the impact of the sexual assault on all areas of their life, not just their interactions with the criminal justice system. Thus, advocates may provide services and advocacy for victims within the criminal justice system, but they will also offer assistance in other areas such as school, work, housing, mental health, emergency financial assistance, etc. Community-based advocates can generally provide victims with information about the resources that are available to them, and link victims with the financial, legal, and emotional resources they might need.

Community-based advocacy organizations typically have minimal restrictions on who is eligible to receive services. Thus, they will typically provide services to anyone who identifies as a victim of sexual assault; corroborating evidence is never required as a matter of principle. Some agencies do have certain restrictions on who is eligible to receive services, based on whether the victim meets a specified age cutoff, lives in a particular geographic area, is a member of an Indian tribe, serves in the military, etc. However, even if a victim is not eligible to receive services from a community-based advocacy agency, the organization will often play an active role in referring the victim to the appropriate resources and facilitating the transition. These services are provided regardless of how long it has been since the sexual assault, whether or not it was reported to law enforcement or other authorities.

Community-based advocacy agencies are typically based on an empowerment model, which means that they only provide services to victims who contact the agency

themselves. Community-based advocates do not typically contact victims proactively, for example, when they have reported their sexual assault to the police or disclosed to health care providers. Victims thus have a choice about whether or not to seek services from a community-based advocacy organization, and whether or not to follow up on what they have learned about various resources to assist them with their medical, emotional, financial, legal, and other needs.

Community-based advocacy services are often provided by paid staff members, who likely have some specialized training or professional expertise in the field of crisis intervention. However, services are also provided in many communities by volunteers who receive only limited training and may have no professional expertise in the field. Volunteers will likely have some supervision from staff members who serve as their backup, but they are often in a position of providing services or responding to a particular type of call for the very first time. This makes it difficult for advocacy agencies to maintain a high level of professional competence and consistency in the services provided. This situation is exacerbated by the fact that community-based advocacy agencies are often under-staffed and under-funded, so they tend to have high turnover rates among both staff and volunteers. This is not always the case, but in those agencies with high turnover rates it can be particularly challenging to provide sufficient services and to establish meaningful relationships with the other professionals in the community who respond to sexual assault.

## **Services Often Provided Only by Community-Based Advocates**

While community-based advocacy organizations typically provide all of the services that have been already described, they will also generally offer the following services that may be unique:

- A 24-hour hotline with immediate access to trained counselors/advocates.
- Longer-term counseling for victims of sexual assault.
- Support groups for victims of sexual assault or even their support people.

These services are often unique to the community-based advocacy agency within a community, although some system-based advocacy organizations may offer these services as well.

## **The Role of Community-Based Advocates in Victim Decision-Making**

As previously stated, the exclusive allegiance of a community-based advocate is to the victim with whom they are working. This means that the community-based advocate is committed to providing victims with the information they need to make their own decisions, including assisting them in the process of weighing any pros and cons for a particular course of action.



Once a victim has made a decision, it is then the responsibility of a community-based advocate to support that decision and assist the victim in implementing it. This role sometimes demands that community-based advocates help the victim to enact a decision with which they personally disagree. It often includes supporting victims in their decision not to report the sexual assault to police or to actively participate with the resulting investigation or prosecution. As a result, this particular role of community-based advocates can create tension in their professional relationships with law enforcement professionals and prosecutors.

- To some extent, this tension is inevitable because it results from a conflict in the mission of the two professional disciplines.
- Yet dealing with this tension requires that the professionals recognize that this will happen and understand that it does not mean that they cannot respect each other's role and work together productively.

Some of the tension between advocates and criminal justice professionals also results from misunderstandings or suspicion about what community-based advocates say in their private conversations with victims. For example, there is often a perception among law enforcement personnel that advocates "talk victims out of" reporting their sexual assault or otherwise participating in the investigation or prosecution. It is therefore important to note that this type of discussion by a community-based advocate would violate their fundamental role.

- Because community-based advocates must provide information to assist victims in their decision-making process, they have a responsibility to provide victims with information that is both accurate and realistic about their possible participation in the criminal justice system.
- In some situations, they may be critical of the criminal justice personnel in their area for not doing enough to investigate or prosecute charges of sexual assault – based on their experience and unique perspective.
- Yet regardless of their opinion, community-based advocates have a responsibility to assist victims in weighing the pros and cons of any particular decision. This should include a discussion of the reasons why it is beneficial to report the crime to law enforcement and participate in the resulting investigation and criminal prosecution.

As a result of such factors, it is a particularly difficult aspect of the role of community-based advocates to provide victims with information that is fair and impartial yet also realistic – given the actual people and agencies who represent the criminal justice system in their community.

## **Relationship Between State Coalition and Law Enforcement Organization**

One final characteristic of community-based advocacy is also worth mentioning in the context of criminal justice response, before moving on to discuss system-based advocacy. Most community-based victim advocacy organizations are supported on some level by a state coalition, which provides them with funding, training, technical assistance, and other resources. It will also typically have some kind of working relationship with the statewide organization governing standards and training for law enforcement. These organizations are often (but not always) referred to as a “POST” (for Police/Peace Officer Standards and Training).

- These relationships between the statewide sexual assault coalitions and law enforcement associations are developed to provide training, public education and to support policy changes in the law and administrative agencies.
- State coalitions can therefore be useful for any victim advocate or other community professional who is seeking information, training, technical assistance, or other resources on the topic of sexual assault. This includes information on effective victim advocacy within the criminal justice system.

State coalitions can also be instrumental in supporting legislative changes to help law enforcement investigate and prosecute sexual assault – another type of systems advocacy.

## **System-Based Advocates**

In contrast with community-based advocates, system-based advocates are employed by a public agency such as a law enforcement agency, office of the prosecuting attorney, or some other entity within the city, county, state, or federal government. Their roles and responsibilities will vary based on their host or governing agency, as will the specific term they use to describe themselves. For example, these professionals may describe themselves as victim advocates, Victim-Witness Assistance Coordinators, or other similar terms.

- This definition could include advocates working within the Victim Services Unit of a police department, Victim-Witness Assistance Unit within a prosecuting attorney’s office, or a county, state, or federal correctional setting.
- It also includes advocates working in dedicated positions with federal agencies such as the US Attorney’s Office or the Federal Bureau of Investigations (FBI).
- It even includes professionals who provide advocacy services as a collateral duty within federal agencies such as the US Postal Inspector, Internal Revenue



Service (IRS), the federal prison system, the Secret Service, and the Bureau of Alcohol, Tobacco, and Firearms (ATF).

- The definition also includes victim advocates who work in the military, often under the supervision of a Sexual Assault Resource Coordinator (or SARC).

Although their roles and specific responsibilities will vary, a primary goal of system-based advocates is to support victims in their role as a witness to a crime participating in the law enforcement investigation and criminal prosecution.

## **Characteristics of System-Based Advocacy**

Several aspects of this description are worth highlighting, because they have implications for the ways in which system-based advocacy agencies are structured and funded and how system-based advocates fulfill their professional role. First, it is important to highlight the significance of the fact that system-based advocacy programs are a component of a governmental structure. By the nature of this attachment, an overall philosophy or tone of the program is often set.

For example, advocates working in such a governmental structure will often seek to provide services and advocacy that will help victims in other areas of their life, but a primary focus is typically on assisting victims in their role as witnesses to a crime. The victim's needs and interests are therefore balanced to some extent with the interests of the criminal justice system.

- To illustrate, advocates working within a law enforcement agency will often see it as part of their role to encourage victims to report the crime and actively participate in the investigative process. This is often accomplished by assisting victims in identifying and addressing barriers they see to participating.
- Similarly, advocates working within a prosecutor's office will typically consider it a part of their role to encourage victims to cooperate with the prosecuting attorney handling their case, again by identifying and addressing any barriers.
- Any professional working within a governmental agency is also likely to be influenced by its political climate, because the system administrator is usually elected or appointed by other governmental leaders (e.g., Sheriff, Chief of Police, District Attorney). As a result, advocates working within any system-based program may experience periodic fluctuations in their perceived role or daily job activities.

This contrasts to some extent with the description of community-based advocacy that was provided earlier, because community-based advocates see their role as remaining neutral with respect to any particular course of action that victims might choose, and

simply providing them with the information they need to make their own decisions. System-based advocates often similarly see their role as assisting victims in making their own informed decisions. Yet a more prominent aspect of this process for system-based advocates will often be to address any barriers to the victim's participation in the law enforcement investigation and criminal prosecution.

Another implication of their organizational affiliation is that system-based advocates frequently offer a different range of services than community-based advocates. In general, system-based advocates will typically be able to provide services that are directly related to assisting victims in their role as witnesses within the investigation and prosecution of the sexual assault. Some programs also offer short-term counseling and other services. However, system-based advocates typically do not provide longer-term counseling or other services that relate to the victim's longer-term process of recovery. System-based advocates will often assist victims in meeting these longer-term needs by providing them with appropriate referrals – sometimes to community-based advocacy organizations, or other agencies in the community.

System-based advocates are also more likely to respond to crime scenes to provide immediate support for victims of sexual assault. While some community-based advocacy agencies may respond to field situations such as crime scenes, this is more common for advocates working within a governmental structure such as a police department or prosecutor's office. This is an issue that will be discussed in more detail in a later section.

System-based advocates are less likely to be publicly engaged in systems advocacy, given their position as employees within a governmental structure. While both types of advocates sometimes push to change the systems and structures that are involved in responding to sexual assault, it should not be surprising that this would be a more public and prominent role for community-based advocates who work outside the system than for system-based advocates who work inside the system. On the other hand, system-based advocates can often push for change more quietly and effectively within the system, given their status as "insiders." For example, system-based advocates working with the police department may meet with the detective before the detailed interview is conducted, to discuss the approach and craft questions.

System-based advocacy agencies typically have strict requirements for who is eligible to receive services. Thus, sexual assault victims will typically only be eligible to receive services from a system-based advocate if they report the crime to law enforcement and/or participate in the process of investigation and criminal prosecution. Some system-based advocacy agencies can provide services to victims who do not report the crime to law enforcement or participate in the criminal justice process, but these agencies constitute the exception rather than the rule.

System-based advocates often reach out proactively to victims of sexual assault in order to offer their services. They may be provided with the name and contact

information for victims when their sexual assault is reported to law enforcement or referred to the prosecutor's office. System-based advocates can then call or otherwise try to contact victims to describe their services and offer their assistance – sometimes even attempting more than once to contact them. However, the question of whether and how victims will be contacted proactively must be addressed in the agency's policies, as well as any interagency agreements or community-wide protocols. These policies and protocols must also include a discussion of how these services will be described to victims (and by whom), and how they will provide consent for being contacted.

## **Services Often Provided Only by System-Based Advocates**

While system-based advocates typically provide all of the basic services that were described at the beginning of this module, their status as government employees means that they are often better able to access information regarding the criminal justice processing of the victim's case. In addition, system-based advocates may offer some services that are unique. These include:

- Assist law enforcement investigators or prosecutors during victim interviews, by framing the issues, crafting the questions, or helping with communication.
- Offer victims transportation in a government vehicle if they need it, to participate in a medical forensic examination, interview with the law enforcement investigator or prosecutor, other investigative procedures, or court dates.
- Assess the level of psychological functioning for victims, to assist criminal justice personnel in the investigation and prosecution of the case.

These services are often unique to the system-based advocacy agency within a community. For example, a community-based advocate might assist victims in scheduling the appointment with an investigator and arranging for a translator or other form of assisted communication. However, it is not part of their role to provide suggestions to the investigator for framing the issues or crafting the questions for the law enforcement interview in a particular case. On the other hand, an advocate working within the Victim Services Unit of a police department might work with the detective before conducting the interview to help frame the issues or craft the questions.

Beyond any individual case, both types of advocates can certainly provide assistance to law enforcement through various types of cross-training to think about how to conduct effective interviews in a general way. Similarly, both types of advocates will often assess the level of psychological functioning for victims and use this information to access appropriate resources.

**Resource: Expert Interview**

In this [video interview](#), Judy Benitez describes the benefits of involving a system-based advocate.

## Collaboration Between Different Types of Advocates

When both types of advocates are present in a community (community-based and system-based), they must work together in order to best serve the needs of sexual assault victims. This requires establishing a means of on-going communication and cross-training, which is best accomplished with a collaborative structure such as a Sexual Assault Response and Resource Team (SARRT).

**Resource: Expert Interview**

In this [video interview](#), Judy Benitez explains why it is important for community based and system based advocates to work together.

- Unfortunately, in all too many communities the community-based and system-based advocates do not work effectively together, and may experience some misunderstanding about each other's roles, miscommunication, conflict, competition for resources, and even battles over "turf."
- This is tragic, because the ones who ultimately pay the price are victims of sexual assault.

A collaborative entity such as a SARRT provides a structure for clarifying the roles, responsibilities, boundaries, and limitations of each of the professional disciplines, as well as helping to reduce some of the tension commonly associated with "turf" issues. This can be particularly successful when these issues are clearly spelled out in a community-wide protocol that is developed cooperatively.

- For example, the community-wide protocol could clarify exactly how advocates will be called out to respond when victims report that they have been sexually assaulted, how this notification procedure might differ for the two types of advocates, which services will typically be offered by which type of advocate, and how to address issues of overlap to promote optimal efficiency and effectiveness.
- The community-wide protocol could also clarify any differences in the confidentiality of communications between victims and the two types of advocates. Collaboration between advocates can then be designed to take best

advantage of any differences, so both types can fulfill their roles and use their resources most effectively (Hagen, 2003).

This type of ongoing communication and cross-training can also yield positive reforms within the criminal justice and community response system.

- When the two types of advocates are communicating in a productive way – and working collaboratively with other community professionals – they can compare victim experiences. This shared information can then be used to determine where changes might be needed and how to best push for reforms.
- In addition, this type of structured collaboration is also the best environment for resolving conflicts that might arise between advocacy organizations and/or other professionals involved in the community's response to sexual assault.

Finally, a collaborative structure such as a SARRT provides better support for the professionals themselves, by increasing their effectiveness, reducing duplication of services, offering the opportunity for mutual respect and recognition, and helping to search for needed resources in an environment of cooperation rather than competition. No matter how formal or informal the collaboration is, some level of cooperation is required between the two types of victim advocates in order to maximize the efficiency of their work.

#### **Resource: Sexual Assault Response and Resource Teams (SARRTs)**

For more detailed information on how to establish interagency agreements and community-wide protocols, please see the two OLT modules addressing [Sustaining a Coordinated Community Response: Sexual Assault Response and Resource Teams \(SARRT\)](#) and [Sexual Assault Response and Resource Teams \(SARRT\): A Guide for Rural and Remote Communities](#).

### **The Question of Vertical Advocacy**

Before we go on to address issues of victim privacy, confidentiality, and legal privilege, it is worth discussing vertical advocacy. Many communities have strived toward this initiative, so victims can work with the same advocate throughout all the various stages of the criminal justice process. The goal of vertical advocacy is modeled after “vertical prosecution,” which is utilized in many prosecutors’ offices to ensure that victims do not have their case handed off mid-stream from one prosecuting attorney to another.

- The goal of vertical case management, whether it is practiced by law enforcement, prosecutors, or advocates is to maximize the potential for rapport between professionals and victims, as they work together through the various

stages of the legal process – and to avoid any unnecessary trauma and disruption for victims.

- It is a worthy goal, and vertical case management, including vertical advocacy, clearly represents best practice for the community response to sexual assault.

However, 100% vertical advocacy is often impossible, because no single advocate or victim service provider can be on-call 24 hours a day, 7 days a week.

- It is easier for criminal justice agencies to have the same professional (e.g., investigator, prosecutor) work with a victim throughout. The ideal of vertical case management is much more easily achieved by criminal justice agencies, because they are the ones who are actually managing the case. In other words, they can schedule interviews and meetings for times when they are on duty. As a result, it may be easier for system-based advocates to achieve vertical advocacy, if they are located within a criminal justice agency and providing services that are focused on the victim's role as a witness in the case.
- For most advocates (both community- and system-based), however, there is no way to ensure that all of the points at which a victim may need services will coincide with a time when they are scheduled to work.

In fact, to achieve the goal of 100% vertical advocacy, advocates would have to be willing to provide services for a particular victim regardless of when they are scheduled or take place. This is an unrealistic expectation, and one that is virtually guaranteed to lead to burnout and turnover among victim advocates. It is certainly not consistent with the goal of providing effective services for victims over the long-term.

A more realistic scenario is one in which the initial response to a sexual assault case is handled either by a volunteer advocate or other staff member, and then assigned to a primary advocate who will be responsible for follow-up communication, accompaniment, and additional advocacy services. Essentially, the primary advocate coordinates services with a victim, with the understanding that there may be instances when the primary advocate is unavailable, and another qualified advocate will step in.

## Issues of Victim Privacy

Now that we have described the two main types of victim advocates, we can explore the general issues of victim privacy and more specific questions of confidentiality and legal privilege – because they are different for community- and system-based advocates. Then we can complicate matters further by describing a third type of victim advocate – those who work for the military.



## Definition of Privacy

First, let's define what we mean by privacy:

**Privacy** is a general term, and it can be used to describe any situation where victims have a reasonable expectation that their name, other identifying information, and the details of their disclosure will not be provided to others.

For example, a university student who tells her professor that she has been raped probably expects that the professor will keep the information private. There is no legal protection of confidentiality in this situation, and in fact the university may have a policy stating that professors have an obligation to report such a disclosure in certain situations. However, it is probably reasonable to expect that the professor will not otherwise share the information.

## Victim Needs for Privacy

When sexual assault victims disclose what has happened, and especially when they report the crime to police, one of their most common concerns is privacy. Often, one of the first questions they ask is: "Who will find out what happened?" Other critical questions concern how others will react if and when they do find out: "Will they believe me? Will they blame me for what happened?" As Seidman and Vickers (2005) describe:

*"For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery" (p.473).*

Clearly, privacy issues must be addressed by advocates, because they are foremost on the minds of victims. This is especially true for victims who report their sexual assault to law enforcement or otherwise become involved in the criminal justice system. For those victims involved in the criminal justice process, some of the behaviors that threaten their privacy include:

- Parking a patrol car out in front of their residence.
- Transporting victims in the back of a patrol car.
- Asking victims to wait in the public waiting room at the hospital or police department.
- Billing victims or their private insurance for components of a medical forensic exam.
- Interviewing other people about the events before, during, and after the assault.
- Notifying parents when a minor has been sexually assaulted.
- Having to take time off from work to attend interviews, hearings, and trial.

- Receiving mail (such as a subpoena) or telephone calls at home, from investigators and prosecutors.

Some of these activities are best avoided completely. For example, policies can be implemented to ensure that victims of sexual assault will be given a private waiting area at the hospital or police department. However, other activities are a necessary part of the community's initial response to sexual assault and cannot be avoided. To illustrate, any law enforcement investigation is going to require interviewing other people about what happened. These activities must therefore be conducted with privacy concerns in the forefront, so the victim's privacy can be protected to the extent possible. Other recommendations include the following:

- Law enforcement investigators can avoid identifying the victim when canvassing a neighborhood and instead simply ask residents if they saw or heard anything suspicious at the time of the sexual assault.
- Law enforcement agencies can also identify only the "100 block" of a residence in any media reports, rather than the victim's exact address – and avoid identifying other witnesses or family members who would also identify the victim if they were named in any media reports.

#### **Resource: Confidentiality**

To protect the victim during public court proceedings, motions can sometimes be filed with the court, in order to keep the victim's name or image out of the record, close the courtroom, limit the information or evidence that can be presented, use alternative methods for providing testimony (i.e., close circuit), exclude cameras from the courtroom, and/or seal the records. Detailed information is provided by the National Crime Victim Law Institute document entitled: [Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions](#).

## **Privacy Rights of Victims in Each State**

Because privacy concerns are so important for victims of sexual assault, many states have enacted legislation to specifically address these issues.

- In some state laws, specific privacy rights are granted automatically to victims – for example, by stating that victims or other witnesses do not have to testify to such information or include it in public records.
- In other states, victims must access specific privacy rights by filing for a protective order or petitioning the court. Some statutes specify that these issues will be considered by the judge in a private hearing (referred to as an "in camera" hearing).



However, even those statutes that exist are rather limited in scope. First, **these laws provide only the bare minimum of privacy for victims.** Most simply limit the disclosure of the victim's name, address, telephone number, date of birth, and place of employment in court testimony, written records, and/or other disclosures by community professionals.

- A few state statutes also protect visual images such as a photograph or other likeness of the victim.
- Others specifically provide victims with the option of using a pseudonym on all documents that will become public record or offer criminal justice professionals discretion to use a pseudonym, initials, abbreviation, or other non-identifying indicator to refer to the victim in written documentation.

While any of these measures may prevent identifying information from being a matter of public record, they do not realistically protect victims from having others find out about the sexual assault. Obviously, there are many other ways that information is divulged within a community.

Second, **most of the privacy laws include exceptions** where the information could be disclosed if the court determines that there is a compelling need to do so. In addition, the rules governing criminal procedure also determine what information will be disclosed to whom and at what stage in the process. Therefore, criminal justice professionals in some states are simply limited from disclosing identifying information about the victim in situations other than those that are specified in the laws governing criminal procedure.

#### Resource: Victim Privacy

AEquitas: The Prosecutors' Resource on Violence Against Women has published a two-part series in their *Strategies Newsletter*, entitled: *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions*. [In Part I](#), author Viktoria Kristiansson provides an overview of the importance of confidentiality and privilege laws. [In Part II](#), she explores strategies for protecting privileges and the victims who assert them.

Third, **even these limited protections are granted only to minors in some states.** Thus, adult victims of sexual assault in these states are not offered the basic protection of privacy that child victims are. Finally, **many states have no such statute at all** granting privacy rights to victims of sexual assault.

## How to Explain Privacy Rights to Victims

Because these issues are complicated and vary by state, advocates must be familiar with the privacy rights that are granted to victims of sexual assault in their state and

strive to ensure they are protected. However, advocates and other community professionals must also be realistic in their communications with victims, to explain the privacy rights that exist but also describe the limits of any protections of privacy in the real world. Because most victims are assaulted by someone they know, it is nearly impossible to control who will find out about a disclosure once it is made. Advocates need to work with victims to prepare themselves for handling this extremely difficult aspect of disclosing a sexual assault and/or participating in the criminal justice process.

This is such an important aspect of advocating for victims of sexual assault, yet it often gets lost in the discussion of “victim rights,” because most of these issues are not addressed in any law (Huhtanen, 2007). Victims are often extremely distressed to learn that there is no legal protection against people in their lives spreading information – and misinformation – about the sexual assault through their own social networks of friends, family members, co-workers, acquaintances, and others. As a result, victims typically need all the help they can get in dealing with the onslaught they will experience on their privacy, when it seems that everyone knows about their sexual assault, and gossip, rumors, and lies abound. This is often especially true for adolescent victims, given the astonishing speed of their social networking, and those in closed communities such as schools, campuses, workplaces, Native American tribes, military bases, etc.

## **Interagency Considerations**

Privacy issues can become especially challenging when multiple agencies are involved, which is typically the case when a sexual assault is reported to law enforcement (*National Protocol*, 2004). When multiple agencies are involved, they may have different policies governing confidentiality and mandated reporting (e.g., criminal justice personnel, school staff, employers, health care professionals, and mental health providers). Thus, every effort must be made by advocates and other community professionals to explain their role and the limits of their confidentiality. Advocates can also assist in clarifying these differences for victims, so they understand these issues and are not surprised later when information is shared by professionals.

- For example, advocates can explain that nothing a victim says to a law enforcement professional or prosecutor will be confidential.
- On the other hand, information shared with a nurse or community-based advocate might be confidential, depending on the circumstances.
- Information shared with a counselor will typically remain confidential, although there are exceptions and it doesn't mean that the counselor won't be subpoenaed.

Because these issues are often confusing for victims, they can be advised that anytime they are unsure whether or not something they say will be confidential, they can ask about it first.

### Resource: Civil Legal Needs of Survivors

Multiple agencies are particularly likely to be involved if the sexual assault involves an Indian victim and/or perpetrator, or if the crime was committed in Indian country. For more information, see the National Crime Victim Law Institute document entitled: [\*Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors\*](#).

## Privacy Challenges in Small or Isolated Communities

Victim privacy is also particularly difficult to protect 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” (*National Protocol*, 2004, p.44). These issues are therefore best addressed in such communities with the coordinated effort of all the agencies involved in responding to sexual assault. To illustrate, the victim may know some or all of the advocates who could potentially provide services. In this situation, some victims may feel comfortable receiving services from an advocate they know – but others may prefer to choose another option (*National Protocol*, 2004). Two options are described in the National Protocol.

- First, it may be possible in some situations for the victim to speak with another advocate for the local agency who is on-call.
- Alternatively, the advocate could contact another agency in a neighboring jurisdiction, to provide services for the victim. In fact, it is a good idea for agencies in neighboring jurisdictions to establish an agreement ahead of time to provide backup in such situations (National Protocol, 2004).

Other options may also be available, although these situations are understandably very challenging. In general, it is best to provide as many options for victims as possible, regarding who might be contacted to provide them with information, resources, and emotional support.

## Confidentiality in Communications and Written Records

Beyond these general issues of victim privacy, the issues become even more challenging when it comes to the questions of confidentiality and legal privilege in communications and records.

## Definitions of Confidentiality and Legal Privilege

Again, let’s begin by defining what we mean by confidentiality and legal privilege:

**“A confidential communication** is one made with the expectation that it will not be widely repeated or shared, or otherwise accessible to the general public. The information may be private in nature or embarrassing if released, but disclosure of confidential information is not necessarily legally prohibited. For example, details about an assault told in confidence to a co-worker, friend, or classmate are not legally protected even if the person promises to keep them confidential. If non-privileged information is subpoenaed or otherwise ordered disclosed by the court, it generally must be released” (Victim Rights Law Center, 2007, p.55).

“In contrast, **a privileged communication** is specifically protected from disclosure by established legal safeguards. The information is required to be kept private as a matter of law. State and federal laws establish these legal privileges. The scope of, and exceptions to, privilege laws vary from jurisdiction to jurisdiction. In every jurisdiction, however, privileged information is afforded enhanced privacy and is not generally accessible unless it falls within an exception or the privilege has been waived” (Victim Rights Law Center, 2007, p.55).

Very few individuals actually have legal privilege to protect the confidentiality of communications with victims. In most jurisdictions, this would include the victim’s lawyer, medical provider, clergy member, or psychotherapist (Victim Rights Law Center, 2007). Typically, this means that these individuals can keep information from a communication with the victim confidential, even if they are called to testify as a witness in a trial or court proceeding (OVC, 2002g).

Also, it is worth noting that it is not the professional who holds the privilege, but rather the victim (or the victim’s guardian, conservator, or personal representative if the victim is dead). Therefore, only the victim can waive the privilege of confidential communications, either by disclosing the information to someone without legal privilege or signing a waiver (CALCASA, 1999). Advocates cannot do so without dire consequences: “If a professional discloses confidential and privileged communications, he or she not only violates the victim’s rights (once punishable as a misdemeanor) but may also inadvertently compel disclosure of the entire content of the communications the victim intended to keep confidential” (CALCASA, 1999, p.312).

## Varying Levels of Counseling Privilege for Community-Based Advocates

As it currently stands, community-based advocates across the country have varying levels of legal protection for the confidentiality of their communications with victims and the privacy of their written documentation. In their Legal Series Bulletin (#8) on the *Privacy of Victims’ Counseling Communications*, the Office for Victims of Crime (OVC) delineates three different levels of confidentiality that exist between victims and advocates in various jurisdictions across the country: Absolute, Semi-Absolute, and

Qualified Privilege. Community-based advocates in your state may have any of the three levels of confidentiality, so it is important to know which applies.

**Absolute Privilege:** If community-based victim advocates in your state have absolute privilege, it means that they can provide victims with the assurance that anything the two discuss in private can be kept confidential (unless this privilege is waived by the victim or jeopardized by the actions of the advocate). “Such assurances can help victims feel secure enough to discuss their fears, thoughts, and feelings about the crime committed against them” (OVC, 2002g, p.4).

**Semi-Absolute Privilege:** With semi-absolute privilege, community-based advocates can reassure victims that most things they discuss privately will remain confidential, except in certain situations described in state statute or case law (e.g., when advocates are mandated to report abuse, perjured testimony, or the victim’s intention to commit a crime). “Because the limitations are clearly contained in the statutory language, victims can be given adequate notice of the type of circumstances that can trigger disclosure, enabling them to make informed choices concerning the information they share” (OVC, 2002g, p.4).

**Qualified Privilege:** In those states with qualified privilege laws, there is no upfront assurance that the communications between a victim and a community-based advocate will remain confidential. Rather, this determination would be made by the judge in any resulting criminal case, if the defense filed a request for counseling records (OVC, 2002g, p.4). Victims need to know if this is the situation, so they can make informed decisions about what information to share with a community-based advocate.

#### Resource: Confidentiality

Detailed information on the topic of confidentiality for victims of sexual assault is provided by the National Crime Victim Law Institute document entitled: [Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions](#).

## Courts Moving Toward Broader Protections of Confidentiality

As described by the Office for Victims of Crime (OVC), there is reason to believe that the courts are moving toward broader protections of the confidentiality in communications between victims and community-based advocates. In the 1996 case of *Jaffee v. Redmond*, the US Supreme Court stated that the purpose of providing counseling privacy cannot be met if victims do not know in advance whether or not they will be protected. Assuming that the purpose of protecting the confidentiality of these communications is to provide victims with the assurance that the information they share

with their counselor (or community-based advocate) will remain private, the privilege of confidentiality cannot meet this purpose when the decision regarding confidentiality is made later by the judge at trial. The court in that case thus concluded that victims:

*“must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all”* (cited in OVC, 2002g, p.6).

Clearly, these issues are complicated and depend upon the laws on counseling privilege in your state. However, regardless of the laws, it is best to work within the framework of protecting confidentiality, by ensuring that the agency’s policies and procedures are designed to protect any privilege that does exist to maintain confidentiality between victims and advocates. There is some reason to believe that even in the absence of legal privilege, the confidentiality of communications between victims and community-based advocates may be protected by court decisions – assuming the advocate acted within proper professional bounds and the victim did not waive the privilege of confidentiality in ways we will describe in a moment. Agency policies and practices must therefore be developed in consultation with legal counsel and reviewed periodically so staff can be trained in any changes that are needed on the basis of recent court decisions (Hagen, 2003).

## **But a Subpoena is Still a Subpoena**

Regardless of what level of privilege community-based advocates have in their private communications with victims, this does not mean that they can ever ignore a subpoena or other legal request for information or documents pertaining to a sexual assault victim.

**When community-based advocates are called to testify in a deposition, hearing, or trial, they must always respond to the subpoena – regardless of any laws providing legal privilege in their communications with victims.**

If it is a criminal case, the prosecuting attorney can then appeal to the judge by arguing that the information is privileged and therefore confidential. The argument for this appeal would be based on any relevant legislation or case law addressing counseling privilege. The final decision will be made by the judge. As the National Crime Victim Law Institute (2005c) states, any agency providing advocacy services “should have policies in place regarding how to respond to a subpoena” (p.28) as well as a warrant to search the premises or obtain certain records.

It may also be helpful in some situations for the advocacy agency to have the assistance of their own civil attorney during the process of responding to a subpoena (for example, if they believe the prosecutor in the case is not effectively arguing the



case or if there is a concern for an important precedent to be set in the case. It is also a good idea for agencies to have a template on hand for seeking to quash a subpoena.

## **Exception to Confidentiality: Some Disclosures Trigger a Mandated Report**

Even in those states where the communications between community-based advocates and victims are legally protected as confidential, an exception is typically made if the disclosure triggers a mandated report (this is described as semi-absolute privilege in the previous section).

- For example, community-based advocates are typically mandated reporters for suspected child abuse, neglect, or maltreatment as well as elder abuse (Victim Rights Law Center, 2007).
- As a result, any information that is provided by a victim which causes an advocate to suspect that a child or elder is being abused, neglected, or maltreated will not be protected as confidential – it will be reported in compliance with the mandating reporting requirements of the state.

Advocates often respond to this type of situation by stopping victims if they sound like they are about to describe such abuse, neglect, or maltreatment of any child or elder and notifying them of their status as a mandated reporter. That way, victims can decide whether or not to proceed with what they were saying. These situations are often very difficult for advocates, because their professional mission to advocate exclusively for the victim sometimes conflicts with their mandate to report any situation of abuse.

Advocates are also required to report any situation where the victim poses a harm to themselves or others (Victim Rights Law Center, 2007).

## **Victims Can Always Waive Their Right to Confidential Communications**

Beyond these situations where a victim's confidentiality is violated through mandated reporting, victims also waive their right to confidential communications in a variety of other ways. One way is by reporting the crime. When victims report their sexual assault to law enforcement, they automatically waive some of their confidentiality. For example, if a medical forensic examination is conducted, information on the reported assault will be turned over to the law enforcement agency. It will then be provided to the prosecutor and to the defense, as part of the criminal justice process. For victims who file a civil suit, some of their confidentiality will also be waived. For example, any counseling records will need to be turned over to the defense if the victim's mental health becomes an issue or if there is a claim for physical or emotional damages.

Victims can also sign a waiver releasing an advocate from the legal obligation of confidentiality, at any time and for any reason. This is because it is the victim (or the

victim's parent, guardian or representative) who actually holds the legal privilege of confidential communications – not the advocate (CALCASA, 1999). Before any victim signs such a waiver, however, the implications of doing so must be carefully explained by an advocate. This is because **a signed waiver may inadvertently waive all communications and all records, involving any employee of the agency and pertaining to any topic** (National Crime Victim Law Institute (2005c). The information may then be available to the defense and part of the public record in the case. Obviously, victims need information and assistance to avoid this situation.

## Confidentiality Protections are Required for VAWA Grantees/Subgrantees

The 2005 reauthorization of the Violence Against Women Act (VAWA 2005) first included a provision expressly prohibiting all grantees and subgrantees from disclosing personally identifying information about a client. To release such information, an advocate must have a written release that is “reasonably time-limited” and signed by the victim, indicating her/his consent. Of course, victims must be informed so they truly know what they are agreeing to.

Advocates need to be familiar with state laws as well as federal legislation such as VAWA, because they are required to meet the standards of whichever law offers victims the strongest protection. It is also critical to consider whether laws apply to adult, adolescent, or child victims – and whether they pertain to domestic violence, dating violence, sexual assault, and/or stalking.

### Resource: Confidentiality

For detailed information on survivor confidentiality and release waivers, please see the [FAQs on Survivor Confidentiality Releases](#), published by the National Network to End Domestic Violence. They also publish a 1-page document entitled, [Survivor Confidentiality and Privacy: Releases and Waivers At-A-Glance](#). Template forms are also available for a *Client Limited Release of Information Form* in both [English](#) and [Spanish](#), along with other resources in this area.

## Privilege Does Not Extend to Communications with a Third Party

Another aspect that causes considerable confusion among community professionals is the fact that even in states where advocates have legally protected privilege in their communications with victims, **this privilege does not extend to communications that take place in the presence of a health care provider, law enforcement officer, or other third party**. This would obviously include anything that was said, observed, or learned while the advocate was present during a law enforcement interview, forensic



medical examination, or other investigative procedure such as a line-up or pretext phone call.

- In other words, anything that a community-based advocate sees or hears from the victim while a third party is present must be described in a deposition, hearing, or trial – if the advocate is called as a witness.
- When victims want to discuss something confidentially with a community-based advocate (in states where this confidentiality in communications is legally protected), this must be done outside the presence of a law enforcement officer, forensic examiner, or other third party.

## Communications with a System-Based Advocate are Not Typically Privileged

While the level of privilege varies for community-based advocates in different states, it is clear that **system-based advocates typically never qualify for counseling privilege**. In other words, nothing that a victim says to a system-based advocate will typically be protected as confidential. If a system-based advocate is called to testify, this information will need to be shared – with the prosecution and then the defense. The same is true for anything the system-based advocate observes or learns about the victim or case, not just what the victim says in their private communications. This is because system-based advocates are employees of the government when they work for a law enforcement agency, prosecutor's office, or other governmental unit). As a result, anything they do as a result of their employment is discoverable.

## Confidentiality and Written Documentation by Community-Based Advocates

So far, we have talked about confidentiality issues that pertain to verbal communications between victims and community-based advocates. The issues are largely similar for written documentation. Thus, the bottom line is that system-based advocates do not have any legal protection of the confidentiality of their written documentation, whereas community-based advocates may or may not depending on state laws and recent court decisions in their jurisdiction. It will also depend on the nature of the documentation, and the services that were provided by the community-based advocate to the victim (e.g., advocacy versus counseling).

While we mentioned previously that advocates should not take notes or write reports in a sexual assault case, the reason for this should now be clear. The reality is that advocates can always be called to testify in a deposition, hearing, or trial – and any argument that the information is legally protected as confidential will then need to be made directly to the judge. When it comes to record keeping, best practice is therefore to limit the information that is written down regarding advocacy services.

For example, most advocates will record basic information in a victim's client file, such as the day and time of the contact, as well as various demographic characteristics of the victim.

- This type of information is used to track agency services and to help when writing grants and seeking other sources of agency funding. It may consist solely of a note like this: "Intake appointment – 1 hour – 6/10/2006." This note may not even include the name of the victim if it appears in a general intake or service log for the agency.
- Other advocates will record the victim's name and contact information in their paperwork, in order to create a file and track ongoing services provided to that individual victim. Either of these record-keeping strategies is appropriate.

What is not appropriate, however, is for advocates to record detailed information about the sexual assault, the victim's personal history, information provided by the victim during a law enforcement interview, or the findings of a medical forensic examination or law enforcement investigation. In addition, "advocates should never document their own personal observations of the victim's demeanor, disclosures, and responses to the provision, or lack thereof, of services" (Oregon Attorney General's Office, 2009, p.22).

In general, advocates are advised to record only the information that is needed for the functioning of their program, because "information that is irrelevant or extraneous only increases the potential danger of subsequent disclosures" (Hagen, 2003 p.3). Hagen (2003) describes the types of information that may be particularly vulnerable to disclosure.

- This type of vulnerable information would include any indication that the advocate was actively involved in the evidence collection procedures. For community-based advocates, they should never actively assist with evidence collection procedures, because this is a violation of their proper role.
- Equally problematic would be any exculpatory evidence for the suspect/defendant that might be recorded by an advocate. This could include statements made by the victim that could be interpreted as minimizing the sexual assault, blaming the victim, or excusing the perpetrator. Yet these types of statements are commonly made by victims: "I was drunk," "It's my fault," "I'm not sure what happened – I might have done something wrong."
- The names and addresses of witnesses, statements of defendants, or past criminal records of witnesses also do not belong in the advocate's records (Hagen, 2003). Such information will most likely be in the police report or the written records of other professionals that a system-based advocate might have access to. However, they should not be recorded by advocates themselves – especially by community-based advocates.

While these issues won't typically pose a problem for most advocates, they are worth highlighting because defense attorneys have become more aggressive in seeking access to the information recorded by community-based victim advocates. In fact, it may be best for both types of advocates to only record the kind of basic information described above, either to track agency resources and/or to create a client file – but never to summarize the facts of the assault, the statement of the victim, or the findings of the medical forensic examination.

## **Consequences of Violating Confidentiality**

Any community-based advocate (or other professional) violating the victim's legal privilege of confidentiality could be sanctioned professionally, sued by the victim in civil court, and/or prosecuted for a misdemeanor offense. These sanctions are serious, and they could have a number of very damaging consequences, including the following:

- Private information about the victim that is shared in violation of confidentiality protections could become part of a discovery order and shared in open court.
- For sexual assaults occurring in the context of intimate partner violence, any information revealing the current location of victims could leave them vulnerable to further violence by the perpetrator.
- The information may also damage the prosecution's case against the perpetrator.
- This could then have a chilling effect on victims in the community who might otherwise seek services from the agency (Hagen, 2003).

As if this weren't bad enough, advocates who disclose confidential information "may also inadvertently compel disclosure of the entire content of communications the victim intended to keep confidential" (CALCASA, 1999). In other words, by violating the confidentiality of communications with one victim, the advocate may jeopardize all of their communications and written records – not just for this one client but the whole agency. This may also constitute a violation of the agency's own policies and a breach of obligations to funders and/or contractors (NCVLI, 2005c, p.29).

## **Policies and Procedures to Promote Confidentiality**

To avoid such dire problems, the National Crime Victim Law Institute (2005c) listed the following policies and procedures to promote confidentiality (these are quoted verbatim):

- Rules of Professional Conduct.
- Written and Signed Confidentiality Statement.

- Exceptions to Confidentiality.
  - Child Abuse and Other Mandatory Reporting.
  - Ongoing or Future Crimes/Harm to Self or Others.
- Notifying Victim of Confidentiality Policy.
- Ensuring that Victim has Given Informed Consent When She Waives Right to Privacy.
- Confidentiality for Support Groups.
- Providing Confidential Services to Minors.
- Record Keeping – What Information Records Should and Should Not Contain.
- Definition of “Records” and “Record Custodian.”
- Maintenance, Storage, and Disposal of Records.
- Internal Communications and Supervision Within the Center.
- Electronic Communication (Email, Online Counseling).
- Responding to Subpoenas (NCVLI, 2005c, p56).

Advocacy organizations are advised to develop policies and procedures in these areas (with the assistance of legal counsel), train all volunteers and staff, and review them regularly.

#### **Resource: Confidentiality**

To provide guidance on the issues of confidentiality, the Office for Victims of Crime has published a Legal Series Bulletin (#8) entitled, [\*Privacy of Victims' Counseling Communications\*](#). Detailed information is also available in the document entitled: [\*Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions\*](#).

## **Victim Advocates Working Within the US Military**

Although advocates working for the military would most likely be considered system-based advocates, their role and responsibilities are rather unique. Their role therefore requires a bit more detailed explanation. Within the military, victims of sexual assault can access victim advocacy services by contacting a Victim Advocate (VA) and/or Sexual Assault Resource Coordinator (SARC) who supervises Victim Advocates. Victims can also access advocacy services outside the military, for example, from a community-based advocacy organization; this issue will be discussed later. However, the role and responsibilities of advocates working with victims of sexual assault in the military have changed dramatically in the past few years, in light of a policy on “restricted reporting” that the US Department of Defense has enacted.

**Resource: SAPRO**

Centralized information on the military response to sexual assault can be found at the US Department of Defense website regarding [Sexual Assault Prevention and Response](#).

## Policy on Restricted Reporting

The policy issued by the US Department of Defense allowing confidential reporting has left many members of the US military – and the professionals who serve them – confused about what happens when they tell another service member that they have been sexually assaulted.

- Before this change in policy, advocates and health care providers working within the military did not have any confidentiality in their communications with victims. This is similar to system-based advocates in the civilian criminal justice system. If they were aware of any sexual assault committed by or against a service member, they had a legal obligation to report it through the chain-of-command. Any such disclosure would then have resulted in the notification of law enforcement authorities and the initiation of a full investigation (US Army CID, 2005).
- In fact, the lack of confidentiality did not just end with the sexual assault – anyone working within the military had the duty to report any conduct of another service member that violated the Uniform Code of Military Justice or military regulations.

Unfortunately, any disclosure of a sexual assault might have also revealed the fact that the victim had been drinking underage or fraternizing with someone prohibited by military regulations. Given how often such violations occur in the context of sexual assault, this policy had a chilling effect on victims, making it extremely unlikely that they would come forward to tell anyone within the military what happened or to seek medical treatment or other services.

In contrast, this policy – which has been implemented in all the branches of the US military – now allows for confidential reporting (referred to as “restricted reporting”) by victims of sexual assault. As described in a publication by the US Air Force (2005):

*“Restricted reporting is intended to give a victim additional time and increased control over the release and management of the victim’s personal information and to empower the victim to seek relevant information and support to make an informed decision about participating in the investigative process. A victim who receives appropriate care and treatment and is provided an opportunity to make an informed decision about filing an unrestricted report with law enforcement or command*

*authorities is more likely to develop increased trust that their needs are a primary concern” (p.7).*

One of the explicit goals of the change in policy is actually to increase the number of unrestricted reports that result in a full investigation. As described by the US Air Force (2005):

*“The intention to offer a restricted option is to enhance the likelihood that an individual will seek and receive care and ultimately make an unrestricted report of a sexual assault” (p.8).*

A restricted report can now be made by disclosing the sexual assault to a Victim Advocate (VA), Sexual Assault Resource Coordinator (SARC), or a health care provider. As discussed later, all of these individuals will need to provide some limited information about the sexual assault to the installation commander – even with a restricted report. Within the military, only chaplains have full confidentiality; they do not have a legal obligation to report any disclosure of a sexual assault committed by or against a service member (US Army CID, 2005).

## Advantages of Restricted Reporting for Victims

While a report remains restricted, victims in the military can now obtain all of the following services **without triggering the investigative process**:

- Medical testing and treatment.
- Medical forensic examination.
- Advocacy services.
- Counseling assistance (US Air Force, 2005).

There are obviously a number of advantages of restricted reporting for victims, which may make it more likely that they will disclose the sexual assault and seek medical treatment and support.

## Disadvantages of Restricted Reporting

On the other hand, some of the disadvantages of restricted reporting include the fact that:

- No investigation or prosecution is conducted.
- Forensic evidence is collected without establishing a proper chain of custody, may deteriorate or disappear.
- The offender goes unpunished.
- The victim is unable to obtain a military protective order (MPO).



- The victim may have continued contact with the offender.
- The victim cannot discuss the sexual assault with anyone other than the personnel listed above because those service members would have an obligation under military regulations to report any such disclosure to their commander.

Only individual victims can decide whether their best option within the military system is restricted or unrestricted reporting. It is therefore important to note that victims can decide at any time to change a restricted (i.e., confidential) report to an unrestricted report, which will then trigger the investigative process. However, once initiated, an investigation cannot be terminated at the wishes of the victim. In other words, a restricted report can change to an unrestricted report, but an unrestricted report can never go back to being restricted (US Army CID, 2005).

## Victim Preference Statements

Whenever a victim of sexual assault in the military contacts a victim advocate or SARC, they will be asked to read and sign a Victim Preference Statement that:

- Explains reporting options to victim.
- Explains limitations of restricted reporting.
- Memorializes victim's reporting decision.
- Is signed and dated by victim (US Army CID, 2005).

After the victim has read and signed the Victim Preference Statement, a copy must be provided both to the victim and to the SARC (US Army CID, 2005).

## Limits on Confidentiality in Communications

Even with the restricted reporting policy, it is important to understand that **advocates working within the US military still do not have legal privilege protecting the confidentiality of their private communications with victims**. Upon receiving a restricted (confidential) report, a limited amount of non-identifying information must be provided within 24 hours by the SARC to the commander of the victim's unit (US Army CID, 2005). This includes the following non-identifying information about the victim and suspect:

- Age
- Gender
- Grade
- Component
- Status
- Location
- Type of assault (US Army, CID, 2005)



This information is provided to the SARC by any victim advocate or health care provider working within the military who is aware of a sexual assault that has been committed by or against a service member.

- These professionals have a legal duty to report this basic information about the incident to the SARC who then provides it to the senior installation commander.
- The SARC may become aware of a sexual assault report as a result of a direct disclosure from the victim, or through information that is provided by law enforcement authorities or other professionals outside the military.
- As previously stated, only chaplains have full confidentiality with such a disclosure; they do not have a legal obligation to report any disclosure of a sexual assault committed by or against a service member (US Army CID, 2005).

This information provided by the SARC to the senior installation commander is designed to “provide commanders a clearer picture of the sexual violence within their commands” and to “enhance a commander’s ability to provide a safe environment” (US Air Force, 2005, p.7). However, it must be clear that even with a “restricted report” this limited information will be shared.

## Exceptions to the Confidentiality of Restricted Reporting

Additional information may also be shared with the senior installation commander, when it is seen as raising command-related concerns or when any of the following situations apply:

- A victim consents in writing.
- Disclosure is necessary to prevent or lessen a serious and imminent threat to the victim or another.
- When required to determine fitness for duty or disability retirement.
- To supervise direct victim services adequately.
- Ordered by federal or state statute (US Army CID, 2005, quoted verbatim).

The decision to share this information is made primarily by the SARC, but in consultation with others, to determine if any of those situations apply:

*“The SARC, in consultation with the commander’s servicing staff judge advocate, will evaluate the information provided and determine whether an exception applies. Exceptions do not necessarily equal wholesale disclosure, only information necessary to satisfy the respective exception should be disclosed” (US Army CID, 2005).*

A sexual assault investigation may also be initiated – regardless of the victim’s wish to have the report remain restricted – if the commander receives information about the sexual assault through some avenue other than a restricted report. This can also happen if the victim discloses the circumstances of the sexual assault to someone who is not covered by restricted reporting (i.e., someone other than a victim advocate, SARC, chaplain, or health care provider; US Army CID, 2005). Again, victims must understand that the decision to report the sexual assault confidentially does not guarantee that it will remain a “restricted report;” the decision may be made by military personnel to initiate a full investigation with an “unrestricted report.”

## **Protecting Victim Privacy Within the Military Environment**

Beyond these limits on the confidentiality of communications, advocates and SARCS have an important obligation to protect the victim’s privacy and confidentiality to the extent possible. This means that victim advocates and SARCs should avoid discussing with anyone outside their program the names of any clients they are working with, or issues raised, or even the fact that they are clients at all. This can sometimes be difficult to do, when they experience pressure from commanders to provide such information. Yet as difficult as it can be, victim advocates must find a balance and always consult with the SARC, because they are subject to punitive action for any failure on their part to protect the victim’s privacy (US Army CID, 2005). To illustrate:

- The SARC, victim advocate, or health care provider may not disclose information from their private communications with the victim, unless the victim has authorized the disclosure in writing or another exception applies.
- Even when the disclosure has been authorized by the victim, the SARC, advocate, or health care provider can only disclose the information that is needed to satisfy the purpose at hand (e.g., to meet the purpose of one of the exceptions to be described). Further disclosure will not be made unless the victim authorizes the disclosure in writing (US Army CID, 2005).

In addition, victim advocates working with victims of sexual assault within the military also have an ethical responsibility to identify command related concerns and disclose these to the SARC. It is then the responsibility of the SARC to determine whether the information should remain confidential or be passed along to the senior installation commander (US Army CID, 2005).

## **Providing Assistance to Military Victims**

Victims must understand that even with a restricted report there are a variety of situations in which the information that they share with a victim advocate, SARC, or health care provider will be disclosed to a senior installation commander. These are important limitations on the confidentiality of communications victims have with professionals within the US military.

Outside the military, the question also remains whether advocates or SARCs are required to disclose information from their private communications with victims or provide copies of their written records in response to a subpoena from a civilian court. This issue can also be explained to victims, who may choose to work with professionals outside the military in order to have the benefit of confidentiality in their communications and any written documentation of advocates.

## Victim Advocacy at Various Stages of the Criminal Justice Process

### The Initial Community Response: Medical Forensic Examination and Law Enforcement Investigation

Now that we have explored the general role of victim advocates, it is time to turn our attention to the specific responsibilities of victim advocates during various stages of the criminal justice process. This includes the preliminary law enforcement investigation, medical forensic examination, ongoing law enforcement investigation, and criminal prosecution or other court proceedings. First, we will explore the two primary elements of the initial community response: (1) the medical forensic examination; and (2) the preliminary law enforcement investigation.

#### Please Note:

For victims with serious physical injuries, the emergency medical response will obviously be the first priority for responding community professionals. This may require transporting victims to a forensic exam facility (e.g., a SART facility) if they were first transported to a trauma hospital. However, most victims of sexual assault do not sustain serious physical injuries (please see the module on [Dynamics of Sexual Assault: What Does Sexual Assault Really Look Like?](#))

### Medical Forensic Examination

For those victims who contact health care providers or law enforcement authorities within days of the sexual assault, they may be asked to consent to a **medical forensic examination** conducted by a health care professional. The purpose of this medical forensic examination is to:

- Meet the medical needs of the victim, through medical testing and treatment.
- Document a basic history of the assault and the physical examination of the victim.
- Identify, collect, package, and document any forensic evidence.

The medical forensic exam is one important part of a community's initial response to a sexual assault disclosure. We will talk in more detail about the examination process in a later section.

## **Preliminary Investigation by Law Enforcement**

Another part of the community's initial response will be a preliminary investigation conducted by law enforcement professionals. A central component of this **preliminary investigation** by law enforcement will be the initial interview with the victim.

- This preliminary investigation will need to be conducted whenever a sexual assault is reported to a law enforcement agency, regardless of whether or not the victim had a medical forensic examination and no matter how much time has passed since the sexual assault was committed. It will generally be conducted by the law enforcement agency with jurisdiction in the location where the assault occurred.
- A preliminary investigation will often need to be conducted even when the report was made by a third party. This happens, for example, when medical professionals are mandated by state law to report that one of their patients has been sexually assaulted. Third party reports of sexual assault are also frequently received from family members, friends, teachers, coaches, members of the clergy, and others who receive disclosures from victims. With these third-party reports, the preliminary investigation may be extremely limited – especially if the victim is surprised, upset, or chooses not to talk with law enforcement professionals.

The services of an advocate can be extremely helpful to victims during this initial community response, whether it includes a medical forensic exam, a preliminary investigation, or both.

## **What Exactly Do We Mean By “Preliminary Investigation?”**

In general, the preliminary investigation includes the first steps in the law enforcement response to a reported sexual assault. These steps often include:

- Determining whether the location is safe.
- Obtaining emergency medical care for the victim if needed.
- Requesting assistance, including translation if the victim speaks another language.
- Conducting a basic initial interview with the victim (e.g., who, what, when, where, how).
- Evaluating what crime (if any) is being reported.
- Determining whether a medical forensic examination is warranted.
- Identifying and securing the crime scene(s).

- Identifying and interviewing witnesses.
- Identifying and interviewing the suspect (when appropriate).

During the preliminary investigation, information is thus gathered during an initial interview with the victim and anyone else who is present and/or from health care providers, communications personnel (i.e., dispatchers), and other first responders (e.g., EMS). However, this initial contact with the victim is not the time for a comprehensive interview; at least one detailed follow-up interview will need to be conducted as part of the longer-term law enforcement investigation.

- In many communities, a patrol officer will conduct the preliminary investigation, with a detective assigned for more detailed follow-up investigation.
- In others, the same officer will conduct all of the steps in the investigation.

After it is determined by law enforcement that a sexual assault is being reported, then the protocol for responding to a sexual assault must be initiated, including contacting an advocate.

#### **Resource: Preliminary Investigation**

For detailed information on the preliminary law enforcement investigation conducted in a sexual assault case, please see the OLT module entitled: [Preliminary Investigation: Guidelines for First Responders.](#)

After the preliminary investigation is completed, the follow-up investigation will include at least one detailed interview with the victim and any interviews to be conducted with the suspect, witnesses, and others with information about the sexual assault. The follow-up investigation may also include other efforts by law enforcement investigators to obtain evidence, such as a photographic line-up, pretext phone calls, and attempts to identify additional victims or other similar acts that the suspect committed in the past. More detailed information on the law enforcement investigation of sexual assault is provided in other OLT training modules.

## **Determining the Appropriate Jurisdiction**

As noted, the law enforcement agency with the responsibility for investigating a sexual assault is the one with jurisdiction over the location where the crime was committed:

*“In most cities, it is the city police department. In unincorporated county areas, it is usually the county sheriff’s department. On property belonging to the state, federal government, or a special district, there is a designated law enforcement agency. If the survivor was moved from one place to another during commission of the crime it is sometimes difficult to establish the jurisdiction where criminal*

*activity first occurred*" (CALCASA, 1999, p.335).

Because the location of the sexual assault is not always clear, there is sometimes a question regarding which law enforcement agency has jurisdiction. In other situations, the initial report presumes that the sexual assault took place in one jurisdiction when the investigation reveals that it likely took place somewhere else.

- If the officer responding to the sexual assault determines that another law enforcement agency actually has jurisdiction, that officer will typically turn the investigation over to the other agency. When advocates become aware of this type of jurisdiction problem, it can be extremely helpful to call this to the attention of the officer responding to the report (CALCASA, 1999).
- However, in some situations the responding agency may continue to investigate the case as a matter of professional courtesy to the agency with jurisdiction. This continuity is also extremely beneficial for victims, so their case is not "handed off" from one agency to another during the course of the investigation.

This type of courtesy report also represents best practice in situations where the agency with jurisdiction is unable to investigate the report, as we saw with the New Orleans Police Department in the aftermath of Hurricane Katrina. Many victims of sexual assault who were displaced by the disaster reported the crime to other law enforcement agencies, and best practice is for these other agencies to investigate the report as a matter of professional courtesy. This would include not only taking the crime report and conducting whatever follow-up investigation is possible in the situation, but also facilitating a medical forensic examination when warranted based on the facts of the case and the amount of time since the sexual assault was committed. This type of courtesy report and investigation by another jurisdiction clearly serves the interests of victims, who would otherwise be unable to report their sexual assault.

**Please Note:**

It is distressing to hear of cases where victims report their sexual assault to a law enforcement agency or health care provider and are told by these first responders that nothing can be done because the crime was committed outside their jurisdiction. In addition to natural disaster situations, this also happens when victims are sexually assaulted while traveling and then report the crime after they return home. Whatever the reason, it does not serve the interest of victims to tell them that they have to bear the time, cost, and inconvenience of returning to the jurisdiction where the sexual assault was committed to report it. Best practice is clearly for the agency contacted to prepare a courtesy crime report which would then be forwarded to the agency where the crime actually occurred. This courtesy report should typically include the victim's statement, any evidence collected from the victim, and the evidence and report from a medical forensic examination.



## Notification of Victim Advocates

Regardless of who is contacted first by the victim, best practice is to notify an advocate (either community- or system-based) any time a medical forensic examination and/or preliminary investigation is going to be conducted. Law enforcement agencies and forensic exam facilities must therefore have written policies documenting their responsibility to notify victim advocates as soon as possible and specifying exactly how this will be done – so those individuals with responsibility for notifying an advocate can be trained how to do so. Of course, the definition of “as soon as possible” will vary depending on the specific circumstances.

For system-based advocates working within a police department, this notification may be almost immediate, with an advocate called out along with responding officers when a report is received. For community-based advocates, this notification may take place after immediate needs are met:

*“When a crime has just occurred, or if the suspect still poses a danger to the survivor, the request for a sexual assault victim advocate may be less urgent than other responsibilities for the first responding officers. In such cases, the sexual assault victim advocate is not likely to arrive before much of the initial questioning...has been completed” (CALCASA, 1999, p.334).*

In other words, advocates do not need to be notified by law enforcement immediately when someone calls 911 or reports a sexual assault. After a responding officer has addressed immediate safety issues and conducted an initial assessment to determine that the incident being reported does indeed meet the elements of a criminal sexual assault offense – then the advocate can be contacted to either respond to the field or meet the victim and officer at the hospital, exam facility, police department, or other designated location.

### Resource: Advocate Notification

An example of a community-wide protocol for notifying advocates is seen in the [Standards for Providing Services to Victims of Sexual Assault](#) published by the New Jersey Office of the Attorney General. One standard state that: “All hospitals and law enforcement agencies shall provide sexual assault victims with information about the local designated rape care program, regardless of when or where the incident occurred, or whether or not the victim has reported the incident to police. Additionally, these agencies must afford the victim the opportunity to contact the rape care program and to have a rape care advocate present during any medical treatment or law enforcement interview” (New Jersey Office of the Attorney General, 2004, p.2).



## Advocates Called Out as Routine Procedure

Some medical facilities have a policy requiring that victims be asked first whether or not they want to talk with an advocate before one is contacted (National Protocol, 2004). Yet this places an undue burden on them, and many will decline services that would have been helpful.

- Often, victims will decline the services of an advocate, because they don't really understand what those services are or appreciate how helpful they might be.
- Also, victims may feel that they don't want to cause anyone else additional inconvenience. This is particularly true in the middle of the night or at other inconvenient times, when victims do not want to feel responsible for having someone called out just to meet with them.
- In addition, there is considerable pressure in our society to handle problems without any outside assistance, and asking victims whether they want the help of an advocate places them in a position where they are very likely to say "no." We all want to feel competent and capable, and asking victims whether they want help carries with it the implication that they cannot handle the situation on their own.

For all of these reasons, it is best to avoid making victims responsible for whether or not an advocate will be called. In other words:

**Victims should not be asked whether or not they want to work with an advocate before they have actually met the advocate personally and had the opportunity to discuss the services that an advocate can provide.**

### Resource: Advocate Notification and HIPAA

For a discussion on advocate notification and potential violations of HIPAA (the Health Insurance Portability and Accountability Act of 1996), please see the EVAWI Training Bulletin entitled: [Notification of Advocates and HIPAA](#) and the OLT module [Breaking Barriers: The Role of Community-Based and System-Based Victim Advocates](#).

Once the advocate has been called out and is introduced by one of the other professionals at the exam facility, most victims will at least talk with the advocate before deciding whether to accept or decline their services. Of course, victims can always decline the services of an advocate, at any point they wish. However, even when victims do not want to work with an advocate, the advocate may still be able to provide information, support, or other services to family members or friends who are present at the exam facility. Once the advocate does respond, it will be possible to evaluate whether or not the victim has established rapport with the officer conducting the

investigation. If not, the advocate can help to determine the basis for any distrust or other problem and assist in resolving it (CALCASA, 1999, p.334).

#### **Example: New Jersey Standards**

The New Jersey standards of care also include routine notification of victim advocates. The standard states that all sexual assault victims “will be afforded the opportunity to speak privately with a rape care advocate prior to investigative and sexual assault medical forensic interviews or procedures. The rape care advocate will explain the advocate’s role and the services of the rape care program” (New Jersey Office of the Attorney General, 2004, p.2).

### **Advocates Notified Even if Incident Doesn’t Meet Crime Elements**

It is important to note that an advocate should be notified even if the incident does not meet the elements of a sexual assault crime. Often, people report experiences to law enforcement that they experience as a rape even if it falls outside the criminal code for the state. While this would obviously mean that the incident will not result in a criminal prosecution, the system response should still be supportive. In this situation, a referral to the community-based advocacy agency is likely the most appropriate response.

As stated in the Oregon *SART Manual* (2009): “In cases where law enforcement determines that the report of sexual assault does not meet the elements of a crime, law enforcement has a continuing obligation to assist the victim with information and referrals” (p.27). The same obligation holds for forensic examiners, victim advocates, and other community professionals.

### **Variations in How Victim Advocates are Notified: Who is Contacted First?**

While victim advocates should be notified as soon as possible, this process will vary as a result of how community services are structured, and which agency is contacted first by the victim. These notification responsibilities should be spelled out in the policies of the agencies involved – as well as a community-wide protocol – so personnel can be trained to perform this duty.

**When victims initially present to the hospital or other forensic exam facility,** it is the responsibility of the forensic examiner or other staff person within the exam facility to notify the advocate as soon as possible. Whether or not law enforcement is also notified would depend on whether state law requires mandated reporting and/or the wishes of the victim.

**For victims who contact law enforcement first,** the advocate will either be contacted by the law enforcement agency or the forensic exam facility (if an exam is going to be conducted). Within the law enforcement agency, the person with notification responsibility

could vary, including: the responding officer, communications operator (dispatcher), watch commander or other personnel. As already described, this notification should typically take place as soon as the law enforcement professional has addressed immediate safety needs and collected enough preliminary information to determine that the incident being reported meets the elements of a criminal sexual assault.

**If a medical forensic exam is going to be conducted**, best practice is for the advocate to be notified before the victim is transported to the hospital or exam facility. This way, the advocate can meet the victim at the hospital or exam facility. If for some reason, the advocate has not been notified of the medical forensic examination by the time the victim arrives at the exam facility, it is then the shared responsibility of the forensic examiner and responding officer to ensure that this notification has been made.

**If no medical forensic exam is going to be conducted**, it is still best practice for the advocate to be notified as soon as possible. The advocate can then respond to the location where the interview with the victim is going to be conducted. Unfortunately, in many jurisdictions, advocates are only notified when a medical forensic exam is conducted, but experience suggests that victims are best able to participate in a law enforcement investigation when they have adequate information and support during the process. As a result, best practice is to offer advocacy services to all sexual assault victims reporting the crime, regardless of whether or not a medical forensic exam is conducted.

Of course, **some victims contact the advocacy agency first**, in which case the advocate will typically encourage the victim to get medical attention and discuss the option of reporting to law enforcement and obtaining a medical forensic exam. In some cases, the advocate may help to arrange transportation for the victim, to the exam facility and/or law enforcement agency.

## **Variations in How Victim Advocates Are Notified: Where the Interview Will Take Place**

The response will also vary depending on whether the law enforcement interview of the victim will take place in the field (e.g., at the victim's residence), at the law enforcement agency, or even at the advocacy agency. Unfortunately, advocates are not notified in many communities when a victim is interviewed at the law enforcement agency. Yet this type of response would not typically pose a problem for advocates in terms of their agency's policies.

If the interview is going to be conducted in the field (e.g., the victim's home), however, **many advocacy agencies have policies prohibiting their staff and volunteers from responding to that type of location**. (This type of prohibition is more common for community-based advocacy agencies than system-based agencies.) If this is the case, the law enforcement and advocacy agencies must work together to explore alternative ways of providing crisis intervention and advocacy for sexual assault victims who are interviewed in the field – because the victim's home is often a good location for conducting a successful and compassionate interview.

On the other hand, **some victim advocates are allowed by their own agency's policy to respond in the field**, and they can work with the law enforcement agencies in their area to design policies for doing so safely. (This is typically the case for system-based advocates, but also many community-based advocates as well.) To illustrate, some victim advocates are allowed by their agency's policy to respond in the field (i.e., the victim's home) as long as they are accompanied by law enforcement. The two professionals might meet near the home and proceed together to meet with the victim. This may be especially helpful in situations if children were involved in the sexual assault (either as victims or witnesses). Such protocols must be developed carefully and thoughtfully with coordination between law enforcement agencies and victim advocacy organizations.

## **Responding to the Victim's Identified Needs**

Before any medical forensic examination or initial interview can be conducted as part of the initial community response, it is necessary to first respond to the victim's immediate needs, concerns, and priorities. Victim advocates can play a very important role in this process.

- To illustrate, victims may not be able to fully participate in the process if they are worried about a cat that hasn't been fed, a dog that hasn't been let out, a child who needs to be picked up from school, or a specific responsibility for school or work that they will now be unable to fulfill (e.g., missing a meeting or test, or not being able to complete a project or homework assignment). Victim advocates can often provide assistance in addressing these immediate needs.
- Alternatively, victims may have a particular question or concern that is pressing and needs to be addressed before they can concentrate on participating in the process. This may be the fear of becoming pregnant or contracting a Sexually Transmitted Infection (STI) – even HIV/AIDS. Or it may be fear that the suspect will harm the victim or the victim's friends or family members. While such concerns may be best met by the health care provider or law enforcement professional, advocates can again be helpful by assisting the victim in identifying this specific need and ensuring that it is addressed.
- Of course, for victims with special needs based on disability or language, an exam or interview cannot be conducted until these issues are resolved. This may require obtaining an interpreter or assistive communication device such as a word board or speech synthesizer. It may also include using cards with pictures of the medical procedures or human anatomy to assist victims with cognitive disabilities or limited vocabulary. Obviously, the time to develop these resources is before the immediate need arises, by working with other community professionals involved in the multidisciplinary response to sexual assault.
- For many victims, their primary concern is based on their own criminal history or involvement in illegal activity. It is obviously very difficult for many victims to

consider reporting their sexual assault to law enforcement when they fear being arrested. Advocates need to be prepared to provide information for these victims that is accurate and realistic, and this must be based on discussions with law enforcement personnel and prosecutors, as well as other professionals in the community response.

Issues such as these are often foremost on the minds of sexual assault victims at the time of the medical forensic examination and/or initial law enforcement interview, and they must be addressed so they can concentrate fully on the task at hand. Meeting these immediate needs is therefore a frequent activity for victim advocates, and the task often requires coordination with the forensic examiner, law enforcement investigator, and/or the victim's support people.

## Addressing the Victim's Concerns Regarding Prosecution

One of the most common errors made during the initial stages of a sexual assault investigation is to ask victims whether or not they want to participate in criminal prosecution. All too often community professionals (as well as friends and family) ask: "Do you want to press charges?"

- In fact, this type of question should never be asked during the preliminary stages of an investigation, by the investigator, forensic examiner, or advocate.
- Rather, the time to ask a sexual assault victim about participating in a criminal prosecution is at the end of a thorough, evidence-based investigation.

In other words, before discussing the issue of criminal prosecution with a sexual assault victim, law enforcement professionals, forensic examiners, and advocates must do their jobs first. An important part of this process is explaining the purpose of the law enforcement interview and the medical forensic examination, describing the role of other members in the Sexual Assault Response and Resource Team (SARRT), and addressing the victim's initial concerns regarding criminal prosecution. Then, the next step is for law enforcement professionals to conduct a thorough investigation to identify any witnesses, obtain suspect statements, and collect evidence to corroborate the facts of the sexual assault. Only at that point can the decision be made regarding the prosecution of any criminal offenses that have been committed.

## Addressing the Victim's Reluctance to Report

Of course, even if investigators, examiners, or advocates do not explicitly ask the victim about criminal prosecution, it is likely to be one of the victim's primary concerns during the initial response to a sexual assault. As a result, advocates often work to address the victim's concerns and their initial reluctance to participate in an exam or interview. For example, many victims are concerned that talking with an officer means that they will be responsible for the offender being arrested and put in prison. Others are concerned that

their name will appear in the newspaper or on television, and that they will be identified as the victim of a sexual assault.

- When victims are uncertain about their participation in the medical forensic examination, it is appropriate for law enforcement investigators and forensic examiners to encourage victims to do so. They can explain the importance of receiving medical care to protect the victim's physical health and collecting evidence to preserve the victim's option of a future criminal justice response.
- They can also highlight the fact that forensic evidence from the victim's body must be identified and collected as quickly as possible, because it will deteriorate in a matter of days or even hours.

For community-based advocates, however, it is not an appropriate part of their role to encourage victims into a particular course of action. Rather, their role is to provide information on the potential advantages and disadvantages of various courses of action, to assist victims in making their own decisions. For system-based advocates, the extent to which they will encourage a victim to report the crime or participate in the investigation or exam will often vary.

In their [Legal Advocate Manual](#), the New York State Coalition Against Sexual Assault (NYSCASA) summarizes a variety of factors for victims to consider when making decisions regarding reporting to law enforcement.

This section is taken from the [Legal Advocate Manual](#) (Chapter 3, pp.47-48) and is reprinted with permission of the New York State Coalition Against Sexual Assault with all rights reserved.

## Advantages of Early Reporting

- Evidence can be gathered and preserved before it is destroyed or lost. Survivors can provide information while their memory is still fresh.
- Survivors may appear more credible to a jury if a report is made soon after the crime is committed.
- It may be easier for police to find and question any witnesses.
- Perpetrators can be found and apprehended quickly.

## Other Advantages of Reporting

- Taking action by telling what happened can be healing in itself.



- Other victims' reports of assault or abuse may be substantiated.
- Even if the perpetrator is not convicted, the arrest itself may be enough to convince the perpetrator to think about his behavior and reduce the incidence of future assault. He may realize his actions are against the law and that he will be held accountable for those actions.
- If the crime is reported and the perpetrator apprehended and convicted, there is a possibility that others may be protected from becoming victims.
- The survivor will be eligible for Crime Victim Compensation.

## **Risks of Reporting**

- It may be difficult for the survivor to repeat her story many times to police officers and in court.
- The lengthiness of the criminal justice process may delay a survivor's healing.
- The decision to prosecute an alleged perpetrator is solely that of the district attorney, so the survivor may feel as though she has lost control.
- Many cases are not prosecuted and there is no guarantee that if a case is prosecuted, a conviction will result.
- If the case goes to trial, cross examination can be traumatic.
- Even if there is a conviction, she may not feel a sense of satisfaction or of having "won."

## **Tips for Advocates**

If you are assisting a survivor who has decided to make a report to the police, you can offer the following tips:

- Give as much detail as possible.
- Try to stay focused and give answers that pertain to the specific question asked.
- Answer honestly even if it presents something that could be perceived as negative or questionable about your own actions or decisions.
- If you do not understand a question, say so. Answering without totally understanding can lead to giving the police inaccurate information.



- You have the right to read the report – which may be lengthy and appear in more than one draft – and you may request changes to the report before signing it and it can be amended if you remember things later.

The NYSCASA [Legal Advocate Manual](#) was supported by Grant # VW01543535, awarded by the Office of Justice Programs, US Department of Justice to the State of New York, Division of Criminal Justice Services (DCJS). Points of view or opinions contained within the document are those of the author and do not necessarily represent the official position or policies of the US Department of Justice or DCJS.

**Please Note:**

The excerpt above refers to right of victims to read their police report, but this right only exists in some states. In those states where the right exists, this can obviously be communicated to victims. However, it is critical to find out if this is the case in your state.

Of course, just because a victim participates in the process of an exam or interview does not necessarily mean that the case will be successfully prosecuted. However, it does leave the door open to that possibility, and this fact can be communicated to victims. In fact, best practice is for advocates to talk realistically with victims about what an investigation might look like and what criminal justice outcomes might be expected. After this discussion, victims can decide whether or not to report the crime to law enforcement, with the realization that decisions regarding prosecution are actually made later in the process, after an investigation has been completed.

As we will discuss in a later section, victims in some communities may be able to participate in a forensic examination and have the evidentiary kit stored for a specified period of time while they make a decision regarding whether or not to participate in the criminal justice process. The length of time varies by community, from a matter of days or weeks to months or even years.

## Not a Question of “Now or Never”

While it is certainly appropriate to emphasize to victims the importance of obtaining a medical forensic examination as soon as possible, this must not be used to coerce victims into participating in the exam or investigation. Unfortunately, this can happen if community professionals convey the message that reporting to law enforcement is a question of “now or never” or implying that there will be no investigation if a medical forensic examination is not conducted immediately.

**Please Note:**

The decision to report a sexual assault must not be framed as a question of “now or never,” and victims must not be coerced into participating in a forensic examination or law enforcement investigation on that basis.

For community professionals, it is important to remember that other types of evidence may still be available days, weeks, months, and sometimes even years after a sexual assault. This can include clothing, bedding, photographs, etc. In fact, although delayed reporting means that some types of evidence may be lost (e.g., forensic evidence collected from the body of the victim and/or suspect), other types of evidence will be actually be gained, such as a longer-term description of the victim’s behavior in the aftermath of the sexual assault. With a delayed report, investigators are able to document information regarding the victim’s personality, demeanor, and behavior before the sexual assault, and contrast this with a picture of who the victim became afterward. This can be very powerful corroborative evidence when investigating a delayed report of sexual assault, and it can be documented at any point in time after the sexual assault.

- It is important to remember that a sexual assault can be reported anytime within the statute of limitations. These time limits vary by state, but many states are extending or even abolishing the statute of limitations for sexual assault offenses.
- Victims can be informed of this fact, as they weigh the advantages and disadvantages of participating in a law enforcement investigation.

It is generally a point of agreement among community professionals that victims should be encouraged to seek medical treatment in the aftermath of a sexual assault, because even if they are not aware of any physical injuries they may be apparent to a trained medical practitioner. On the other hand, the decision to report to law enforcement or participate in a medical forensic examination must remain with victims. While law enforcement professionals and forensic examiners may encourage victims to do so, the role of an advocate is to remain neutral and provide victims with the information and support to make their own decisions. The ultimate decision must be made by victims and then respected by community professionals.

## VAWA Forensic Compliance

In 2005, the Violence Against Women Act (VAWA) was reauthorized with several landmark changes particularly affecting the response of law enforcement agencies and health care facilities to victims of sexual assault. These provisions, referred to as “forensic compliance” remain in place with the most recent reauthorization of VAWA 2013, with a few specific revisions that will be noted. States, territories and Indian tribal governments were originally given four years after the VAWA 2005 reauthorization – until **January 5, 2009** – to certify their compliance with the forensic compliance

provisions. However, compliance is not simply a one-time event; states, territories, and tribal governments must remain in compliance in order to retain their eligibility for ongoing STOP grant funding.

VAWA legislation states that victims of sexual assault must be provided with access to a medical forensic examination:

- Free of charge.
- Without requiring them to cooperate with law enforcement or participate in the criminal justice system.

Under the 2005 version of VAWA, it was acceptable for victims to pay out-of-pocket for the medical forensic exam as long as they were fully reimbursed. However, in the most recent reauthorization of VAWA 2013, this is no longer allowed. States, territories, and tribal governments must now certify that medical forensic exams are available to victims free of charge.

It is important for advocates to understand the forensic compliance provisions so that they can adequately explain the options that victims have regarding obtaining a forensic medical exam.

#### **Resource: Forensic Compliance**

For more information on this topic, please see the [forensic compliance](#) section of our website, which includes links to a number of articles, resources, and other tools designed to assist communities with implementation. Another valuable resource is our OnLine Training Institute (OLTI) module entitled: [The Earthquake in Sexual Assault Response: Implementing VAWA Forensic Compliance](#). In addition to providing background information and a detailed discussion of the underlying philosophy, the module also includes a number of resources and tools communities can adapt for their own use when implementing forensic compliance.

#### **If the Victim Decides Not to Report or Participate in the Exam**

For those victims who decide they are not able to report to law enforcement or participate in a medical forensic examination at the time of their initial contact, it must be clear to all of the community professionals that all is not lost with respect to the investigation. Rather, law enforcement professionals, forensic examiners, and advocates can assist the victim by explaining the process of reporting to law enforcement and summarizing the possible benefits and consequences of doing so. Any alternative reporting procedures can also be explained, if the law enforcement agency with jurisdiction over the sexual assault has a process in place for receiving these alternative types of reports.

Alternative reporting methods have been developed by a number of progressive law enforcement agencies – in collaboration with community partners – to reduce barriers and increase victim reporting and participation with the criminal justice process. Implementation of a real, meaningful, and well-functioning program for alternative reporting methods will require a significant investment of time and effort on the part of a number of professional disciplines. Strong leadership is obviously needed from within the law enforcement agency, but collaborative work and leadership will also be needed by professionals in other disciplines, including victim advocacy, health care, and prosecution. Benefits are likely to be seen, not only for individual victims, but also for law enforcement agencies and the communities they are sworn to protect and serve.

For example, in Cambria County, Pennsylvania, criminal justice and community professionals worked together collaboratively for over three years to develop a comprehensive [sexual assault protocol](#) that includes anonymous and non-investigative reporting (for victims age 18 and over), including those who participate in a medical forensic examination. By briefly discussing some of the factors that discourage victims from engaging the criminal justice system and other community resources, the goal for the protocol is clearly described as increasing victims' access to improve their well-being.

If no such alternative reporting procedures exist in the community, this must also be explained to victims because it will obviously limit their options and may influence their decisions.

In addition, it must be clear to victims who decide not to report the crime or participate in the medical forensic examination that they can actually file a report at any point within the statute of limitations for a sexual assault offense in that state. Victims can be reassured that their sexual assault report will be taken seriously and investigated to the extent possible whenever it is filed. In fact, this type of professional, respectful, and compassionate response may be the best strategy for increasing the chance that victims decide to report their sexual assault to law enforcement. As the National Protocol summarizes:

*“Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future” (National Protocol, 2004, p.45).*

While reporting and prosecution are certainly the goal of all of the professionals within the criminal justice system, it must never be seen as the only measure of success for a coordinated community response. Rather, more important measures of success include the competence and compassion of all of the professionals involved in the community response to sexual assault.

### Resource: Expert Interview

In this [video interview](#), Debra Holbrook describes blind reporting as an alternative reporting option.

### Resource: Alternative Reporting Methods

For more information on alternative reporting methods, please see our OLT module: [Reporting Methods of Sexual Assault Cases](#).

In addition, EVAWI offers a program called [Seek Then Speak](#), a digital platform where victims of sexual assault can gather information, explore their options, and take action if they choose. Victims are even offered the option to connect with a victim advocate, or to begin the process of reporting the assault to authorities. To learn more, please visit the [Seek Then Speak](#) website.

## Presence of Others During the Exam or Interview

If the victim does participate in a preliminary investigation and/or medical forensic examination, one of the first decisions that must be made is whether the advocate or anyone else will be present with them during that process. However, it is important to discuss this issue privately with victims, in order to determine who should be included or excluded from the room. Advocates will typically see it as part of their role to ensure that the victim has been provided with the information and support needed to make these decisions. These decisions will need to address the role of advocates as well as other support people such as a friend or family member.

Unfortunately, law enforcement professionals and forensic examiners in some communities are reluctant to have an advocate present during the interview or exam. We will discuss this issue in the final section of the module. In this section, we simply address the issues that are involved with having others present during the forensic examination or law enforcement interview.

### Please Note:

Especially during the medical forensic exam, it is important that a third party of some kind is always present – whether it is an assistant for the examiner or a support person for the victim. It is also a good idea to have a third-party present during any law enforcement interview, especially if the investigator is a male and the victim is a female. Having a third-party present during the exam or interview protects everyone involved – the victim, the professionals, and their agencies.

## Presence of Victim Advocates

When it comes to **victim advocates**, best practice dictates that all victims of sexual assault should be offered the option of accompaniment by an advocate, in order to provide information, support, and other forms of assistance during the exam or interview. However, the victim must be the one to make the final decision regarding whether or not the advocate will be present.

- In many states, the victim advocate can be present during the law enforcement interview, if this is what the victim wants.
- In fact, some states have enacted legislation stating that victims have a legal right to have an advocate present during the law enforcement interview.

### Example: New Jersey

In New Jersey, the statewide standards of care state that “the victim has the right to have a rape care advocate present prior to and during any medical treatment, evidence, collection procedure, or law enforcement interview” (New Jersey Office of the Attorney General, 2004, p.3).

- In other states, victim advocates are required to sign a written waiver of confidentiality before they can accompany a sexual assault victim to a law enforcement interview.
- Advocates and other community professionals must be aware of state and local procedures governing the presence of advocates during the exam or interview.

### Example: California

In those states where victims have a legal right to have an advocate present at any investigative procedures, this will also need to be clearly explained to victims. For example, in California, state law gives victims of sexual assault the right to have an advocate present during any stage of the investigation and prosecution. An advocate cannot be excluded by law enforcement professionals or prosecutors, if the victim wants the advocate to be present. California law also gives victims the right to have an additional support person of their choosing present at all interviews and other investigative procedures, unless the law enforcement professional or prosecutor deems that the support person is (or is going to be) disruptive.

When advocates are not present during the interview, they can still remain on-site to provide information and emotional support to the victim – both before and after the exam or interview.



### Resource: Right to an Advocate

To find out whether victims have the right to an advocate in your state, please see the [legal compilation](#) prepared by AEquitas: The Prosecutors' Resource on Violence Against Women. The document summarizes the existing statutes pertaining to the presence of a victim advocate during the medical forensic examination.

## Law Enforcement Should Not Be Present During the Medical Forensic Exam

As a rule, law enforcement professionals should not be in the room during the medical forensic examination, although they might be present for part of the patient interview if it is conducted jointly. Law enforcement professionals may also take some photographs of the victim in certain situations, but only of non-genital injuries. This issue is discussed in detail in a position paper published by the Oregon Attorney General's Sexual Assault Task Force, which is excerpted here:

**This section is taken from the Oregon Attorney General's Sexual Assault Task Force position paper entitled, "[A Best Practice: Why Law Enforcement is Excluded from the Forensic Medical Exam](#)" and is reprinted with permission. All rights reserved.**

The position of the Task Force is that it is inappropriate for a law enforcement officer – regardless of gender – to be present during the medical forensic examination of a victim. The medical exam routinely involves private, sensitive, and potentially traumatic procedures that require a victim to disrobe, a physical inspection from head to foot, a vaginal speculum exam, and an anal exam. The medical exam will also involve a conversation between the Sexual Assault Nurse Examiner (SANE) and the patient regarding private medical information such as STIs, emergency contraception, prior sexual contact and practices, and medical or mental health follow-up. The involvement and physical presence of law enforcement during the medical forensic exam places the officer in the position of a witness rather than investigator, which can create legal issues at trial. Most importantly, it is a violation of a patient's privacy rights when law enforcement is observing and/or listening to the conversation between the victim/patient and the SANE or other medical professional. Law enforcement officers have no legal foundation that authorizes them to be present during a medical exam. Law enforcement interviews can be conducted before or after the exam – when the patient is fully dressed.

It is therefore the position of the Task Force that it is improper for law enforcement to ask any victim for permission to be present during the medical exam. In circumstances when a victim has established a rapport with law enforcement and has specifically requested the presence of an officer during the exam, the best practice would obligate the officer to

explain to the victim why it is improper for him/her to be present, and to encourage an advocate, family, or friend, to be utilized as a support person during the exam.

## The Presence of Other Support People

Beyond victim advocates, decisions may also need to be made regarding the presence of any **other support people** during the exam or interview. Sometimes having a support person, such as a friend or family member, in the room can help a victim provide better information and otherwise participate during the process – as long as they are not a witness to any events related to the sexual assault and they clearly understand the role of this support person. It is important to keep in mind, however, that while advocates should have a good understanding of the investigative process due to cross-training with law enforcement professionals in their community, other support people will most likely not have this information or training.

### Example: Oregon

Another best practice in this area is seen in the state of Oregon, where all victims of person crimes who are at least 15 years old have a legal right to have a “personal representative” present with them during most phases of a law enforcement investigation, including the medical forensic examination. Oregon state law SB 198 – known as the “personal representative law” – states the following:

- The victim may choose anyone 18 years or older (advocate, friend, or family member) to be their personal representative.
- The personal representative may not be a suspect in the criminal case, or a witness or party to the criminal case.
- The personal representative’s role is to provide emotional support for the victim.
- The personal representative may not be prohibited from accompanying a victim unless a health care provider, law enforcement agency, protective service worker, or court believes the personal representative would compromise the process.

Other states would be well advised to implement a similar law to protect the rights of victims.

Because these support people are very important for the victim’s emotional well-being and ability to participate in the exam or interview, it is critical that they also have their questions and concerns addressed as well as the victim’s. Only then can they

adequately support the victim throughout the investigation and serve as an ally during the process.

## General Role of the Advocate or Other Support Person

When advocates or other support people are going to be present during an exam or interview, their role must be very clear – both for themselves as well as the victim. It is the shared responsibility of victim advocates, law enforcement professionals, and forensic examiners to ensure that this is clear. In fact, the best way to clarify the role of advocates during the exam or interview is to address this issue in a community-wide protocol for all of the agencies involved. This helps both advocates and other community professionals to establish clear mutual expectations.

- For example, it must be very clear that advocates and support people are there only to provide **emotional support** to the victim during the medical forensic examination.
- Advocates and other support people are not there to **ask or answer questions**, interrupt the victim, comment on the victim's responses, or otherwise respond visibly (e.g., with facial expressions) to any victim responses during the exam or interview (*National Protocol*, 2004).
- Advocates and other support people also must not **take notes or write reports** to document any part of the investigation or victim interview.

To summarize, decisions regarding who will be present during a medical forensic examination or interview are best left up to the victim. This includes interviews conducted by law enforcement investigators, prosecutors, defense attorneys, and during any court hearings or other proceedings. For victims who request that an advocate or support person be present, this request should be accommodated whenever possible. As long as the person is not disruptive and does not actively participate in the process, the benefit in victim cooperation by having them included is usually well worth the presence of an additional person in the room.

## When Support People Should Be Excluded from the Exam or Interview

On the other hand, there are situations where sexual assault victims do not want a support person such as a parent, husband or boyfriend present during an exam or interview. In such a situation, the victim might not feel comfortable expressing this wish in front of that person. This is certainly likely to be the case when the person is the one who committed the sexual assault, or if there are other forms of abuse in the relationship. It also happens when the victim feels particularly embarrassed or ashamed of something that happened or something they did, and they don't want their loved one to know about it.

This is why advocates and other community professionals must be very careful to avoid asking the victim about whether or not to include a support person while that person is present. Instead, the advocate or other community professional addressing this issue must find a moment to ask victims privately whether or not they want a particular person to present during the exam or interview. It is also important to keep in mind that anyone who could potentially serve as a witness in the case should be excluded from the medical forensic examination or law enforcement interview. There are two reasons for this.

- This situation **compromises the credibility of the victim's testimony**, because jurors do not always view a victim's statement as equally reliable when family members or friends are present. There is a sense that victims may omit or distort certain information about the sexual assault because the support person is there.
- The second reason is that the support person is likely to be an important witness in the case, and their presence in the victim interview could **taint the credibility of their own testimony**. To illustrate, a friend who brings the victim to the hospital or the police department may be the first person that the victim told about the sexual assault. In that situation, the friend is a very important witness who will need to be interviewed. To protect the credibility of the friends' testimony as a key outcry witness, the friend should not be present during the victim's interview with the law enforcement investigator or medical forensic examination.

When a support person is going to be excluded from the medical forensic examination and/or initial law enforcement interview, it is critically important that the law enforcement investigator or forensic examiner be the one who assumes responsibility for the decision by asking the person to leave and explaining how this benefits the victim and the investigation. The role of the victim advocate only extends to assisting victims with making their own decision and communicating it to the forensic examiner or law enforcement investigator. The implementation of that decision falls to the other community professionals, but victim advocates can certainly provide assistance to facilitate the implementation of this decision if necessary.

## Advocate Responsibilities During the Interview or Exam

At this point, we want to talk more about what victim advocates actually DO when they respond during the criminal justice process. As noted previously, defense attorneys have become increasingly aggressive in seeking access to written records and information from private conversations between sexual assault victims and advocates. There is certainly considerable cause for concern, and advocacy agencies are responding with practices to protect the confidentiality of victims with the hope of avoiding this devastating outcome for victims.

On the other hand, many advocates are feeling inhibited from providing the services they know that victims need, because they are afraid of "interfering" with the criminal justice process and jeopardizing the confidentiality of records and communications. This

is also cause for concern, because only a very small percentage of sexual assault cases will ever go to trial; estimates range around 5%. It is therefore important to balance the need to advocate effectively for all victims of sexual assault, by implementing practices that will protect the 5% who will see a trial without sacrificing the needs for the 95% who will not.

With this issue in mind, we would like to discuss some of the specific responsibilities for advocates working effectively within the criminal justice context. Perhaps the most obvious situation arises when an advocate accompanies a victim during the medical forensic exam or law enforcement interview. In this situation, advocates can provide emotional support for victims, answer any questions that victims direct to the advocate, and ensure that the victim's rights are protected. In general, the advocate's role during an exam or interview will be non-verbal, by providing comfort and reassurance with their physical presence. However, depending on the situation, the advocate may need to speak to victims, forensic examiners, law enforcement investigators, or other community professionals.

## **Verbal Support and Encouragement**

In some situations, advocates may decide that they need to speak with victims during an exam or interview, in order to check in with their emotional state, provide reassurance and validation, and ask if they need to take a break. In general, these verbal communications will be addressed directly to the victim – not to the other professionals involved.

- To illustrate, questions that might be appropriate for an advocate to ask a victim during an interview might include: “Are you doing okay?” “Would you like to take a break?”
- In addition, it is both common and appropriate for advocates to provide verbal support and encouragement during an interview, with statements such as: “You’re doing great” or “We’re almost done now, hang in there.”

Advocates also frequently help victims use relaxation techniques, like releasing muscle tension, breathing deeply, or focusing on an object or image. Typically, this type of communication is not likely to create any concern or tension among the other professionals involved.

## **Monitoring the Victim’s Well-Being and Clarifying Questions**

However, other types of communications might create such tension, even if they are within the appropriate role for a victim advocate. For example, part of the advocate’s role is to monitor the victim’s verbal and nonverbal responses for signs of distress. In many cases, this distress is inevitable, due to the difficulties of disclosing a sexual assault and participating in a medical forensic exam or law enforcement investigation.

Often the best response for an advocate is to suggest taking a break and then addressing the victim's questions or concerns in private. In other situations, however, it may be appropriate for advocates to provide a prompt for the victim to clarify communication with the forensic examiner or law enforcement investigator.

- To illustrate, if it is clear to the advocate that the victim has misunderstood or misinterpreted something that the forensic examiner or law enforcement investigator has said, the advocate may provide the victim with a neutral prompt to help clarify, such as: "Would you like the nurse/officer to explain that again?"
- This type of situation often arises when a forensic examiner or law enforcement investigator asks a question that is necessary but sounds judgmental to the victim. For example, it is appropriate for forensic examiners to ask about recent consensual sexual contact and for law enforcement investigators to ask about the clothes the victim was wearing prior to the sexual assault. Both of these questions have a legitimate purpose but may sound to victims as if the professional asking the question doesn't believe them or blames them for the sexual assault. It might therefore be appropriate in this situation for the advocate to ask the professional if he/she would mind explaining the reason for the question, because "sometimes it helps people to answer if they know why a question is being asked."

It is important to note that such verbal prompts are neutral, designed only to assist the victim and the examiner or investigator in communicating clearly. It is NOT part of the role for victim advocates to ask any substantive questions or to provide any factual information about the sexual assault. It is also worth noting that such prompts should generally be used sparingly by advocates, and only in situations where they believe that there is a risk of serious miscommunication or victim distress arising from a particular question or procedure. Having said that, the role of system-based advocates (such as those working within a police department) might be more proactive in addressing communication issues than community-based advocates.

## Addressing More Serious Concerns

A more difficult situation arises, however, when the advocate determines that some intervention is needed to address distress that is being caused by the forensic examiner, law enforcement investigator, or other community professional. Again, some of this distress is inevitable, given the difficulty of reporting a sexual assault and participating in an exam or interview. No matter how competent and compassionate community professionals are, victims will typically experience distress during these procedures. However, victims often forget that they actually have rights during the process – and that they are the ones in charge of making important decisions. Often, victims feel that the process has a life of its own, and they are simply being swept along without any control or decision-making ability. **It is therefore appropriate for advocates to remind victims of their rights throughout the process.**



- For example, it is appropriate to remind victims at some point during the medical forensic exam that they have a right to refuse procedures or terminate the examination completely. It is easy to forget that consent is an ongoing process.
- Many victims also want a summary of the findings from the examination, and this can be gently prompted by the advocate – either to the victim or the examiner. In fact, many victims are anxious after the medical forensic exam to get a statement from the examiner about whether they “found anything.” There are obviously limits on what the examiner can say in that situation, but it is important to provide victims with as much information as possible. It is the victim’s body, after all.
- Similarly, during the law enforcement interview, it is appropriate to remind victims that they can take a break, ask questions, or terminate any examination or interview whenever they want. Again, system-based advocates (such as those working within a police department) may take a more proactive role in this type of intervention than a community-based advocate would as an “outsider.”

This is a difficult balancing act for advocates – to intervene as needed to make sure that a victim’s rights and interests are being protected – but not disrupt the process unnecessarily or discourage victims from participating in certain aspects of the exam or law enforcement interview and investigation. As with the previous example, the best response is often to suggest taking a break and then privately discussing with the victim, law enforcement investigator, or forensic examiner any issues that are causing particular concern. This discussion may need to take place with the victim, law enforcement investigators, or forensic examiner, as appropriate.

## **The Importance of Taking Breaks**

We’ve suggested that breaks are important for advocates to address many of these issues privately with victims. When discussing the role of advocates within the criminal justice process, therefore, community professionals can also explore ways of responding to the needs of victims who may need a break during the medical forensic exam or law enforcement interview.

- In some situations, directly asking victims if they need to take a break may not be the best strategy, because they will often decline simply to be polite and cooperative.
- Rather, community professionals can discuss alternatives such as having advocates take the initiative to request a restroom break when they sense that the victim is tiring or having difficulty.

In some situations, it may be possible for professionals in the community who respond to sexual assault victims (e.g., members of the Sexual Assault Response and Resource Team or SARRT) to establish a means for communicating (perhaps with a code word,

or nonverbal signal) when they need to discuss something that has happened that is not appropriate or needs correcting. Using this code word or nonverbal signal, community professionals can indicate that they want to take a break to discuss an issue privately.

It is sometimes difficult for forensic examiners and law enforcement investigators to sense when victims need a break, because they are attending to so many complex demands at the same time. Because advocates are focused only on the emotional well-being of victims, they may be better able than the other professionals to monitor nonverbal cues that victims exhibit.

## When the Victim's Rights are Violated

By far, the most difficult situation is when the behavior of another community professional violates or threatens to violate the victim's rights as a crime victim. While the short-term response to this situation is often the same as the others – the advocate can suggest taking a break to discuss the issues privately with the victim and/or other professionals – the longer-term response is different because it requires addressing the issue with the professional and possibly contacting the person's supervisor or other appropriate agency representative. However, it is important to remember that advocacy does not have to be adversarial or confrontational in order to be effective (*NYSCASA Legal Advocate Manual*). Often, the best response is to try to resolve the issue first with the professional involved. Then if this fails, the issue may need to be brought to the attention of the person's supervisor or the chief administrator of their agency. Other specific strategies for addressing violations are addressed in the section on crime victim rights.

## Balancing the Needs of this Victim and the Next One

Advocates often struggle with the reality that challenging another community professional may mean that the professional will not contact an advocate the next time they respond to a sexual assault case. This is often painful for advocates, who struggle to balance effective advocacy for this victim while protecting the next victim's right to have an advocate called.

Often, responding to this type of situation requires separating out the issues of the immediate response to the conflict and the longer-term approach to resolution. In general, when advocates encounter conflict with other community professionals while working with a specific sexual assault victim, their approach will include advocating for the interests of this particular victim, regardless of the longer-term implications for community systems, agencies, or relationships between professionals. While advocates certainly strive to protect their relationships with other community professionals, it must be clear that their role requires them to work on behalf of the victim's stated wishes, even when this causes the advocate to come into conflict with the other professionals within the community who respond to sexual assault.

On the other hand, it is best for advocates to try to fulfill this aspect of their professional mission without expressing conflict with other community professionals in front of victims. Victims are typically experiencing a great deal of trauma and disorganization after reporting a sexual assault, and the last thing they need is to witness conflict between professionals in the community who are there to respond and assist them. Whenever possible, any immediate conflicts between community professionals should be addressed outside the presence of the victim. We will discuss some specific examples of this in a later section.

## Specific Responsibilities During the Medical Forensic Exam

In the previous section, we discussed some of the responsibilities of victim advocates during the initial community response, regardless of whether that included a medical forensic examination, an initial law enforcement interview, or both. Next, we'd like to talk about some of the responsibilities of advocates that are unique to the specific context of the medical forensic examination. When a medical forensic examination is conducted with a victim, the responsibilities of an advocate may involve making sure that victims receive information they need about the medical forensic examination process and any relevant medical concerns. Depending on the type of sexual assault, the victim might also need specific information regarding pregnancy, sexually transmitted diseases, or HIV infection.

Another specific issue that often arises during the medical forensic examination is the need for extra clothing, if the clothes that the victim was wearing are collected as evidence. Victim advocates must therefore ensure that victims will have a change of clothes to wear after the medical forensic examination. In some situations, victims may pack clothes for themselves before coming to the exam facility, or they may need to ask a friend or family member to bring extra clothes for them. Sometimes, extra clothing may be available at the exam facility or provided by the victim advocate. To address this issue, the different agencies within the community must work together to ensure that some protocol is in place to provide clothing for all victims who receive a medical forensic examination, if the clothing they are wearing at the time is collected as evidence.

### Resource: National Protocol

For detailed information on the forensic examination process, please see the [National Protocol for Sexual Assault Medical Forensic Examination, 2<sup>nd</sup> Edition](#), which is published by the Office on Violence Against Women.

## Explaining the Medical Forensic Examination to Victims

After any immediate needs of the victim are met, advocates can help to explain the process of the medical forensic examination before it is initiated. This explanation will primarily be provided by the law enforcement professional and/or forensic examiner.

However, it is also the responsibility of advocates to ensure that victims clearly understand the following issues:

- The importance of forensic evidence and the need to collect it as soon as possible.
- How the costs of the examination will be covered, and whether there are any limitations based on state law and/or victim compensation program criteria.
- General information regarding the process of forensic evidence collection, including the fact that both genital and non-genital photographs will be taken.
- The role of each professional involved in the medical forensic exam process, including the law enforcement investigator, medical personnel, and the advocate.
- What to expect after the sexual assault is reported to law enforcement.
- The fact that the victim's clothing may need to be collected if it was worn during or immediately after the assault, and whether an extra set of clothing is available.
- The fact that blood samples may be submitted for toxicological analysis, to determine if any alcohol or drugs are present in the victim's system at the time.
- The fact that a blood or saliva sample may be requested from any partners with whom the victim had consensual sex within the past few days.
- The policies for HIV testing for the victim, and possibly the suspect.
- The victim's right to refuse to participate in any of the medical or evidentiary procedures, and the right to revoke consent at any time during the examination.
- The specific types of information that will remain confidential or shared with other community professionals.
- The limits of confidentiality in communications with each of the professionals involved in the medical forensic examination process (e.g., forensic examiner, law enforcement professional, victim advocate).
- The process for obtaining a copy of any written reports resulting from the exam.

Although some aspects of the medical forensic examination are likely to be difficult and even painful, victims are likely to be more comfortable and feel more in control if they have a detailed understanding of the process (*National Protocol*, 2013). Advocates can thus explain that the entire process of the medical forensic examination will generally

take between 2 and 4 hours to complete. Of course, this will depend on many factors, but it can be helpful to give victims an expectation for how long it will likely take. While many sources recommend that advocates advise victims not to eat, drink, smoke or urinate before the medical forensic exam, this must be handled carefully to avoid making victims feel bad if they have already done any of these things. Rather than proactively providing such advice, it may therefore be best for advocates to simply address the issue if and when it arises. For example, if the victim asks where the bathroom is while waiting for the medical forensic exam, the advocate could ask if it is possible to wait for the forensic examiner – and explain the reasons why. Then when the forensic examiner does arrive, the advocate can help the victim to determine whether the urine sample could be collected first. Similarly, victims who want to eat or drink can be asked if they can wait, and then advocates can assist in requesting that any oral samples be collected first.

## Facilitating the Victim's Own Decision-Making

Before a medical forensic examination can be conducted, victims must provide informed consent for both the medical treatment and evidence collection procedures. It is therefore part of the role of an advocate to assist victims in their decision-making regarding participation in the medical forensic examination process, by providing them with accurate information and realistic expectations for what will happen.

While they are making this decision, advocates will assist victims by explaining that the decision to decline any procedures in the medical forensic examination may negatively affect the quality of care that victims receive, as well as the usefulness of evidence collected for any law enforcement investigation. They can also explain that “declining a particular procedure might also be used to discredit them in court” (*National Protocol*, 2013, p.5).

On the other hand, advocates should also clearly communicate to victims that the decision to decline a medical forensic examination does not revoke their right to report the sexual assault to law enforcement and have that report taken seriously and investigated as thoroughly as possible. All too often, there is a sense that the medical forensic examination will “make or break” the investigation of a sexual assault, and this can place undue pressure on the victim to participate. Yet it can be helpful to remember that the medical forensic examination is only one component of the investigative process and few cases are decided solely on the basis of findings from the medical forensic examination. Often much more important are evidence collected from the suspect or crime scene, and the statements of the victim, suspect, and witnesses.

It is certainly reasonable to expect that victims will be encouraged by law enforcement professionals and health care providers to participate in a medical forensic examination, because that is part of their professional role. However, it is critically important that they not pressure victims or engage in coercive or intimidating tactics of any kind. If such pressure is being exerted, advocates must address the issue immediately – both with

the victim and with the other professional. Then for those victims who decline any aspect of the medical forensic examination, their reasons for doing so must be respected by all of the community professionals involved. It should go without saying that no medical forensic examination should ever be conducted against the wishes of a sexual assault victim (*National Protocol*, 2013).

## Dual Purpose of the Medical Forensic Examination

Once the victim has provided informed consent, the medical forensic examination can begin. The examination itself should be completed according to established protocol, which will vary in different communities. However, it is always important to keep in mind that a medical forensic examination is rather unique because it is designed to meet two very different purposes: (1) addressing the medical and emotional needs of the victim, and (2) identifying, collecting, and documenting forensic evidence (including documentation of the assault history by the victim).

## Address the Medical and Emotional Needs of the Victim

As described in the *National Protocol for Sexual Assault Medical Forensic Examinations* (2013), protocols for addressing the medical and emotional needs of the victim will typically include:

- Evaluating and treating injuries.
- Providing support, crisis intervention, and advocacy.
- Providing prophylaxis against Sexually Transmitted Infections (STI's).
- Assessing female patients for pregnancy risk and discussing treatment options, including reproductive health services and emergency contraception.
- Providing follow-up care for medical and emotional needs (p.23).

As previously stated, one of the most important and immediate components of a forensic examination is assessing the victim for serious physical injury. If the victim has any injuries that are life threatening or require immediate medical treatment, these will obviously receive attention before forensic evidence collection. However, this is relatively rare; some have estimated that serious physical injury is seen in approximately 3-5% of sexual assault victims (Cartwright, Moore, Anderson, & Brown, 1986; Marchbanks, Lui, & Mercy, 1990; Tucker, Ledray, & Werner, 1990). Other aspects of the examination are therefore designed to meet the medical and emotional needs of the victim in the aftermath of the sexual assault.

## Identify, Collect, and Document Forensic Evidence

While one central purpose of the forensic examination is to address the medical and emotional needs of the victim, this type of examination is unique because a second



purpose is to document a history of the assault, and identify, collect, and document forensic evidence for use in the criminal (or civil) legal system. Again, turning to the National Protocol (2004), this will include:

- Obtain a history of the assault.
- Document exam findings.
- Properly collect, handle, and preserve evidence.
- Interpret and analyze visible findings (post-exam).
- Subsequently, present findings and provide factual and expert opinion related to the exam and evidence collection (p.23).

#### **Resource: Expert Interview**

In this [video interview](#), Debra Holbrook defines what a forensic nurse is, explains their role, and describes how a forensic nursing program works.

### **What Can and Cannot Be Concluded from the Exam**

To provide appropriate information to victims, advocates must understand what can and cannot be concluded on the basis of a sexual assault medical forensic examination. Many people expect that the forensic examiner will be able to “diagnose” a sexual assault, but it is critical to note that this is impossible. In fact, medical professionals cannot make any definitive conclusions regarding the degree of force used by the assailant or whether the victim consented to any sexual activity. In other words, the forensic examiner cannot conclude on the basis of the examination that the victim was raped. Forensic examiners also cannot make a definitive conclusion about the degree of force used by the suspect, whether the victim consented to any sexual activity, and whether there was consensual versus non-consensual penetration.

What the forensic examiner can appropriately conclude is whether there is visible evidence of sexual contact or recent trauma. These are relevant to the questions of victim consent and use of force. The forensic examiner can also make a conclusion regarding consistency between the physical findings and the victim’s account of what happened (Green, 1988; Ledray, 1999).

- Of course, consistency between the victim's account of events and the physical findings are not proof that the sexual assault occurred as described by the victim.
- Rather, such consistency simply indicates that the findings or lack of findings in a forensic examination could have resulted from the events described.

Therefore, the forensic examiner may make a general conclusion that the findings are “consistent with” or “congruent with” the history given by the victim. For example, a forensic examiner could note in a written report that “there is congruence between the victim’s account and the injuries observed” or that “the observed injuries are consistent with the victim’s account of the sexual assault” (Sheridan, 1993). This can only be done, however, by interpreting the forensic evidence in the context of information provided by the victim during a detailed medical forensic interview regarding the victim’s medical history and the account of what happened during the sexual assault. Therefore, the single most important part of the medical forensic examination in many cases is the documentation of the assault history provided by the victim.

In fact, for those cases that go to court, the most important pieces of evidence from the medical forensic examination are often: (1) the fact that the exam was conducted at all, and (2) the documentation of the assault history as provided by the victim to the forensic examiner (Huhtanen, 2007). These two pieces of information are frequently more important for supporting prosecution than any specific forensic or biological evidence collected during the exam.

## **Addressing the Possible Need for Emergency Contraception**

The possibility of an unwanted pregnancy is a primary concern for many victims of sexual assault, and although some forensic examiners are able to provide emergency contraception for those victims who would like it, others are prohibited by their hospital policy from doing so. For example, because many Catholic medical facilities do not routinely provide emergency contraception to sexual assault victims, advocates may need to assist the victim in making alternative arrangements. The options available to victims must be determined in advance, preferably through coordinated communication among the various professionals in the community who respond to sexual assault (e.g., the Sexual Assault Response and Resource Team or SARRT).

- For example, advocates and other community professionals may work with staff at the hospital or other facility to obtain special permission to provide emergency contraception for victims of sexual assault.
- Alternatively, advocates and other professionals in the community can work together to locate another hospital or medical facility that will provide emergency contraception as part of the medical forensic examination.
- In some communities, advocates and other professionals have even established networking agreements with medical personnel who will provide emergency contraception for any sexual assault victim who receives a medical forensic examination at a Catholic hospital or other facility that does not provide it.

- Emergency contraception is also available over-the-counter in some states, so advocates and other community professionals can also provide the information and assistance that victims would need to pursue this route.
- Again, the options for victims to receive emergency contraception will vary in different communities, but protocols and networking agreements must be developed in advance by community professionals, regardless of whether or not there is an established Sexual Assault Response and Resource Team (SARRT).

## Payment for the Medical Forensic Exam

As previously noted, the [Violence Against Women Act](#) includes a provision to ensure that victims of sexual assault have access to a medical forensic exam free of charge regardless of whether they talk with law enforcement or participate in the criminal justice process. This legislation affects many aspects of the criminal justice system and the community response to sexual assault, including payment for medical forensic exams and medical mandated reporting. EVAWI offers a great deal of detailed information on this topic (often referred to as “forensic compliance”), in a special section of the [website](#). Information is also available in the OLT module entitled: [The Earthquake in Sexual Assault Response: Implementing VAWA Forensic Compliance](#) that is specifically dedicated to this topic.

## Mandated Reporting by Medical Professionals

The issue of medical mandated reporting can be a complicated one, especially as it intersects with the implementation of VAWA forensic compliance. In general, the phrase refers to any legal requirement that health care professionals or others (such as adult protective services) may have to report to law enforcement – either when a patient discloses that they have been the victim of a certain crime – or when they otherwise have a reasonable basis for suspecting that a patient has been the victim of a certain crime (e.g., they observe indicators that a sexual act has been committed against a child or a dependent adult).

These laws vary dramatically in terms of what triggers the mandated reporting requirement, what information must be reported, who must be notified of the report, and what specific procedures must be followed to comply with mandated reporting. For example, in some states, the mandated report needs to be made to the office of the prosecuting attorney rather than – or in addition to – the law enforcement agency with jurisdiction over the assault. It is therefore critical for professionals involved in responding to victims of sexual assault to understand any such laws.

First, all states require medical professionals to report sexual assault **when the victim is a child** (as defined by state law). In addition, most states require medical professionals to report sexual assault when the **victim is a dependent adult**. The definition of what constitutes a dependent adult is also defined in state law, but it

generally includes such factors as advanced age, severe disability, or other factors. Most state laws also require mandated reporting of any sexual assault committed by a **caregiver or other authority figure**, although the exact provisions of these reporting requirements vary by state.

The majority of states do not require health care professionals to report sexual assault of a **competent adult**. However, they may still require a report if the victim presents with **certain types of injuries**, including those that are non-accidental, result from violent crime, or involve the use of a weapon that is either described as “deadly” or specified in some other way (e.g., firearm, knife). In states with such a requirement, health care professionals are required to notify police that a patient has presented with the specified injury, but they may not be obliged to say that the patient was also sexually assaulted. Yet it remains unclear in some states whether such laws require medical professionals to report a sexual assault against a competent adult victim that did not result in any physical injury **other than the sexual assault itself**.

Finally, a few states have medical mandated reporting for **intimate partner violence**. In these states, health care providers are required to notify law enforcement when a patient discloses that a sexual assault occurred within the context of intimate partner violence (or when the health care provider has reason to believe this is the case). Whenever a mandated report must be filed, it is clearly a best practice for victims to be informed of this fact. The health care provider should also explain what specific information will be included in the report. The information that is required will be outlined in state law.

Often a standard report form has been developed by the state to be used for the purpose of making a medical mandated report. In some states, reports may also be made on the phone, but this is typically in addition to submitting the information in writing, within a certain period of time. When the state-recognized form includes only basic information about the incident, health care providers often retain a more detailed report documenting their exam findings as part of the medical and/or SARRT records at their own health care facility. Again, whatever the procedure is, it should be carefully explained to victims, so they understand exactly what will happen.

When a health care professional is mandated by law to report a suspected sexual assault or injury to law enforcement, it must be clear that victims do not have the option of deciding whether this report will be made. Victims do decide, however, whether they want to provide any information to law enforcement in connection with the report. In other words, just because a mandated report is filed, this does not mean the victim is required to personally talk with an officer. This would be inconsistent with VAWA forensic compliance provisions.

### Resource: Mandated Reporting

To find out any laws regarding medical mandated reporting in your state, please see the document entitled, [Mandatory Reporting of Domestic Violence and Sexual Assault](#)

[Statutes](#), created by the National District Attorneys Association. It is a compilation of the laws pertaining to medical mandated reporting for all US states and territories (current as of 2010).

**For states with medical mandated reporting requirements**, we offer a few tools that could be useful to assist with implementing alternative reporting procedures. For example, in the [Forensic Compliance Resources](#) section of our website, we provide a sample form with reporting instructions for the state of California. In California, most medical forensic exams are conducted with a victim who personally talks with law enforcement in connection with the report, so the mandated reporting requirement is met when the forensic examiner submits the [standard medical forensic examination form](#) (known as the OES-923). This form is used to document evidence from an adult victim of sexual assault. However, when a medical forensic exam is conducted with a victim who does not personally talk with law enforcement, health care providers must still meet their requirement for mandated reporting. This is accomplished by submitting a [Suspicious Injury Report](#), which is available along with the corresponding [Instructions](#). These materials can thus be adapted for use in other communities.

For professionals in **states without medical mandated reporting requirements**, we offer template materials for anonymous reporting, which include relevant procedures for health care providers. These documents are posted in the Forensic Compliance Resources, under the tab for [Anonymous Reporting](#).

The Office on Violence Against Women (OVW) has determined that states with medical mandated reporting can be compliant with VAWA forensic compliance provisions, as long as victims are not required to participate in the criminal justice process. While the definition of “participation” is not explicitly defined, common sense suggests it means that victims cannot be required to personally talk with an officer – even when a mandated report has been filed with law enforcement.

In some communities, there is a policy or practice of having an officer personally meet with victims whenever a mandated report has been filed – even if the victim has not yet decided whether to participate in the criminal justice process. This does not represent best practice, which would be to conduct the medical forensic exam first and then offer the opportunity to talk with an officer only when the victim has decided to do so.

### **Do Not Report Without a Legal Requirement**

For states without medical mandated reporting for competent adult victims of sexual assault, the decision regarding whether or not to file a report with law enforcement should generally be left to the victim. In this situation, the health care provider and/or victim advocate can provide information for victims about their reporting options. Health care providers and advocates can also help victims to weigh their options, so they can make informed decisions regarding criminal justice participation.

However, some health care facilities have a written policy, or an unwritten practice, that they will report to law enforcement even when they do not have a legal mandate to do so. This practice violates the spirit of VAWA forensic compliance provisions, which are designed to increase access to medical forensic examinations for victims who are unsure, unwilling, or unable to report to law enforcement.

Moreover, this practice of reporting a patient's disclosure of sexual assault to law enforcement constitutes a violation of HIPAA unless one of two conditions are met:

- (1) The report is required or expressly authorized by state law, OR
- (2) The patient has consented to the report being made.

In most of the discussion of medical mandated reporting, it is assumed that the report to law enforcement will include the victim's name and/or other identifying information. However, there is an important distinction between states that require mandated reports to include the victim's name and other identifying information – and those that do not.

In some states, **health care providers must provide the victim's name to law enforcement**, so mandated reports cannot be anonymous. It should go without saying that this must be made very clear to victims.

In other states, **health care professionals may be able to meet their mandated reporting obligation without providing the victim's name or identifying information**. For example, the SAFE or other health care professional may use a standard report form but write the phrase "declined by patient" in the space for the patient's name, address, and telephone number. The same phrase might also be used in place of the suspect's information. In addition, a non-identifying address may be used for the location of the assault. For example, if the assault was committed in the victim's own home (or the victim is unsure where it happened), the address for the police department could be used. Alternatively, the 100-block of the assault location could be used to avoid listing a specific address that would identify the victim.

Any such protocol must be carefully designed with collaboration between law enforcement personnel, health care providers, victim advocates, and other community professionals. The protocol must also be supported with written documentation of a good faith agreement that law enforcement agencies will not investigate these reports, except in certain circumstances.

### Resource: Forensic Compliance and Medical Mandated Reporting

For more information on medical mandated reporting and HIPAA, please see our two-part series of [training bulletins](#) on the topic.



For more information on medical mandated reporting, please see the [FAQ's](#) on Best Practices on our website, as well as our OnLine Training Institute module entitled, [The Earthquake in Sexual Assault: Implementing VAWA Forensic Compliance](#). We also offer both a [training bulletin](#) and [webinar](#) in our archives, on the topic of medical mandated reporting for sexual assault. Additional resources, tools, and FAQs are also available on the topic of [forensic compliance](#).

## The Question of Evidence Storage

Unfortunately, in many communities, evidence from any medical forensic examination that is conducted without law enforcement involvement might be retained for only a very short period of time at the exam facility. However, best practice in this type of situation is for the evidence to be held for the entire period of time covered by the statute of limitations for the crime – because sexual assault victims who have not filed a report may need months, if not years, before they have the emotional resources needed to even attempt to navigate the criminal justice system.

- This poses a challenge, because hospitals and other forensic exam facilities are not equipped for this type of long-term evidence storage.
- Community-based advocacy organizations or other similar agencies also cannot store this evidence for a long time and properly maintain the chain of custody.
- Such long-term storage is even challenging for law enforcement agencies, because managers and supervisors of property storage rooms typically believe that they do not have sufficient storage space to meet this ideal.

Particularly in those states where the statute of limitations for sexual assault has been extended or abolished, this recommendation for best practice could cause serious problems for the long-term storage of evidence. Yet it does not make sense to ask victims to go through the process of a medical forensic examination if the evidence is going to be destroyed in a matter of days or weeks, before they have had sufficient time to decide that they are able to file a formal report and participate in the process of an investigation. Community professionals know that victims often wait weeks, months, and even years to disclose their sexual assault or report to law enforcement. It is therefore clear that any community seeking to implement a protocol for conducting medical forensic exams without a police report must work together to address questions of receiving, storing, archiving, and retrieving the evidence in these cases.

### Resource: Evidence Storage and Retention

For more information on this topic, please see the [EVAWI Model Policy Materials on Evidence Retention, Disposition and/or Removal](#).

## Concluding the Medical Forensic Examination

Once the medical forensic examination is concluded, the victim may need transportation or other assistance (e.g., filling prescriptions). Advocates can therefore assist with any arrangements that are needed with law enforcement professionals, support people, or others, in order to ensure that all victims are transported safely to their home or other safe location of their choice (*National Protocol*, 2004). If the crime was reported to law enforcement, victims should also be provided with the phone number to contact for more information – both regarding the medical forensic exam and the law enforcement investigation.

### Please Note:

Although many jurisdictions do not store evidence for the entire statute of limitations, this clearly represents best practice. Perhaps development of such a form could provide an impetus for reforming the protocol and encouraging evidence storage for the statute of limitations. It is in fact difficult to imagine a victim wanting to participate in the criminal justice system if the evidence from their medical forensic exam has been destroyed.

For those exams that are conducted without law enforcement involvement, it will probably be necessary to remind victims how to initiate a police report if they decide at a later point in time that they are able to participate in a law enforcement investigation. This information should be provided in concrete and realistic terms, with a phone number or other contact information, so victims do not have the barrier of having to figure out how to file a report if they decide to.

In fact, it may be necessary to create a standardized form to provide with the discharge instructions for those victims who have a medical forensic exam without filing a police report. Beyond information on how to file a report at a later time, this form should also include information about how long the evidence will be stored. It may also include a disclaimer statement describing how deferred reporting may have a negative effect on the possibility of successful prosecution. However, if this type of disclaimer is provided, it should be accompanied by a statement that victims are encouraged to contact law enforcement at any point, that crimes can be investigated and prosecuted any time within the statute of limitations, (which can also be stated on the form), and an encouraging statement that sexual assault cases can be successfully investigated and prosecuted without evidence from a medical forensic examination. Ultimately, the tone of the form should invite victims to participate in the law enforcement investigation of their sexual assault at whatever point they feel they are able to do so.

## **Follow-Up Appointments**

Advocates can also assist in ensuring that victims receive discharge information they need, regarding symptoms to watch for, follow-up testing and treatment (including any prescriptions that have been given) and contact information for questions or concerns. Sometimes, the discharge instructions given to a sexual assault victim will include the recommendation to schedule a follow-up appointment with the forensic examiner or other health care professional. This could be for the purpose of medical testing or treatment – or for forensic purposes, such as photographing physical injuries in order to document healing. Typically, this type of follow-up appointment will take considerably less time than the original exam, and advocates can provide accompaniment for victims who would like to access this service.

## **Advocate Responsibilities During the Investigation**

Regardless of whether or not a medical forensic examination is conducted, the role of an advocate also includes providing services to victims throughout the course of a law enforcement investigation, when they have reported the crime. As with other stages of the criminal justice process, this will include meeting the victim's immediate needs for crisis intervention, various forms of concrete assistance, emotional support, information, and help with decision-making. Many of the issues discussed in previous sections are thus equally relevant for this process. In this section, however, we will focus on addressing the unique responsibilities of the advocate during the law enforcement investigation. For example, some advocate responsibilities that are unique to the law enforcement investigation include the following:

- Explain the process of the police investigation, answering any questions the victim might have, and addressing their concerns to the extent possible.
- Provide victims with a realistic expectation of what will happen during the course of the investigation, and what the likely outcomes might be.
- Explain the services that advocates can provide throughout the process, including accompaniment during any law enforcement interviews and other investigative steps such as constructing a composite, conducting a pretext phone call, line-up, or other procedures. Accompaniment by an advocate can often greatly alleviate the stress that victims experience during these procedures.
- Help victims to identify and articulate their preferences regarding the presence of an advocate or any other support people at any investigative procedures. Advocates can also work with the other professionals involved in the community response, to ensure that the victim's wishes regarding the presence of an advocate or other support person are respected and implemented whenever possible.

- Ensure that victims have the information they need to make decisions and protecting victims from any coercion by community professionals or support people to make any decisions that they are not prepared for.
- Assist victims in addressing their safety concerns, by discussing their fears and drafting a realistic safety plan. Advocates can also work with the law enforcement professionals handling the case to finalize such a safety plan and determine how victims should respond if they feel threatened by the suspect, or the suspect's family members or friends.
- Work with law enforcement professionals to ensure that victims have all the necessary and appropriate information in a timely manner, without compromising the integrity of the case. This could include notifying the victim of the status of an investigation, if and when the suspect might be arrested, providing information about the detention and location of the suspect, and keeping victims apprised of any changes in detention status, including the suspect's location or bail.
- Signal to the law enforcement investigator when a victim appears to need a break from an interview or other investigative procedure. In most cases, the actual decision to take a break should be left to the victim, but advocates can assist the investigator by being tuned into the victim's nonverbal behavior and symptoms of trauma and/or exhaustion.
- Help victims to get a copy of the police report in their case, if they want one. In most states, crime victims do not have an explicit legal right to get a copy of a police report. However, many law enforcement agencies have a policy of providing one. Otherwise, victims may need to submit a written request to get a copy of the report, according to the Freedom of Information Act (often referred to as a "FOIA request").

#### **Resource: Model Policy**

For more information about the law enforcement investigation, please see the [Model Policy](#) and corresponding [Concepts and Issues Paper](#) published by the International Association of Chiefs of Police (July, 2005).

## **The Detailed Victim Interview**

One primary component of the ongoing law enforcement investigation is a detailed interview of the victim. This may be conducted by the same officer who responded initially to the sexual assault call – or it may be conducted by an investigator or detective with specialized expertise. In fact, more than one follow-up interview may need to be conducted, to clarify issues and gather additional information as the investigation evolves. The first detailed interview may actually take several hours. As described in the

advocate training manual published by the California Coalition Against Sexual Assault (CALCASA, 1999), advocates can be of assistance to a sexual assault victim during a law enforcement interview:

*“by helping her [or him] to understand the importance of the information she [or he] is providing, by attempting to make the survivor as comfortable as possible, by clarifying the process, by watching for cues in the survivor’s statements or body language that indicate she [or he] is uncomfortable, by suggesting the survivor take a break if she [or he] needs to, and by processing feelings and reactions after an interview. It is important, however, that sexual assault victim advocates not participate in the investigation in any way (for example, translating questions)” (p.336).*

For those law enforcement agencies that have a policy of audio- or videotaping victim interviews, it is especially important that victims are always advised of this fact and offered the services of an advocate to provide them with information and support during the interview process. The advocate can also discuss with the victim any issues or concerns that arise as a result of taping.

## **Assist with the Decision Regarding Whether or Not to Postpone the Interview**

As part of the preliminary investigation, one of the decisions that must be made by law enforcement professionals is whether to conduct a detailed interview with the victim immediately upon receiving the report – or to postpone that detailed interview for a day or two. Although this decision must ultimately be made by the law enforcement investigator, based on the specific facts of the case and relevant legal and evidentiary issues, advocates can sometimes provide assistance to victims in articulating their concerns and wishes – and to law enforcement professionals in balancing these with investigative considerations.

In some situations, it makes sense to conduct only a limited, initial interview with the victim at the time the report is received and then postpone the more detailed interview for a day or two. Such a postponement can provide victims with the opportunity to rest, process what has happened, address immediate needs, take advantage of supportive services within the community, and make any necessary arrangements for transportation or child care during the interview. This is particularly important because the detailed interview of a sexual assault victim may take hours, if done skillfully.

When the detailed interview is postponed, it is also easier for an advocate to arrange to be available, to provide emotional support during the interview, and answer any questions the victim might have for the advocate.

- In some situations, the most obvious answer is that the detailed victim interview should be conducted by a law enforcement professional immediately upon

receiving the report. This is often the case for victims who report a sexual assault that happened weeks or months ago, and the determination is made that there is no need to conduct a medical forensic examination. In cases like this, the preliminary investigation will typically begin with a detailed interview with the victim. An advocate will still need to be contacted when a delayed report is received by the law enforcement agency, in order to provide services for the victim throughout the process of the investigation.

- With delayed reports, the reality is that even though the sexual assault happened a while ago, something has triggered the victim's decision to report the sexual assault to law enforcement at this point, and the victim is therefore likely to be in a state of crisis even though the report is delayed. In some situations, like this, the determination may therefore be made to postpone the detailed interview of the victim, to allow the victim some time to process the consequences of the disclosure, talk with friends and family members, and access supportive services in the community.
- On the other hand, when the victim reports the sexual assault within a matter of hours or days, it is much more likely to make sense to conduct only a very limited initial interview at the time of the report and postpone the more detailed interview for a day or two. This is especially true when the victim has undergone the ordeal of a medical forensic examination, and when the victim is exhausted and/or still under the influence of alcohol or drugs.

#### **Resource: Victim Transportation**

Whenever the detailed interview is going to be conducted, investigators and advocates may need to assist the victim with transportation. In some cases, law enforcement personnel can provide transportation. In others, the advocacy agency can assist; although some advocacy agencies have policies against transporting victims, they may be able to provide bus tokens, or provide some other assistance. For more information, please see the module on [Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault](#).

### **Assist in the Selection of an Appropriate Location for the Detailed Interview**

This also raises the question again regarding where the detailed interview will take place and how to ensure that victim advocates can be present. The issue of where to conduct victim interviews must be addressed ahead of time, so law enforcement investigators and advocates can discuss the alternatives and design a general strategy to best meet the needs of victims. Of course, victims must also be consulted in this decision, as they may have preferences based on privacy concerns, or issues of transportation, child care, or convenience.



To illustrate, many victims feel that they would be most comfortable being interviewed in their home, and this can therefore be the best place to conduct the interview with some victims. On the other hand, this raises some issues, and victims must have the information they need to weigh the advantages and disadvantages of conducting the interview in their home. For example, victims can consider whether the location will be private enough from other household members, whether the police car (even unmarked) that is parked in front of their home will draw attention, and whether investigators have access to all of the equipment they will need (e.g., for videotaping, pretext phone calls, photo line-ups). It may be that an initial interview in the home will need to be supplemented with an office appointment to conduct follow-up investigative procedures.

## **Personal Property of the Victim's Taken as Evidence**

During the medical forensic examination and/or the law enforcement investigation, victims may have items of their property taken for evidentiary purposes. If a forensic examiner does not collect the victim's clothing, the law enforcement investigator will likely ask the victim to provide the clothing that was worn during and/or immediately after the sexual assault. Other personal items may also be collected, such as bedding or towels. In some cases, investigators or crime scene personnel may even seek to collect samples from the victim's furniture, carpet, etc. Not surprisingly, this can be very difficult for victims, because they may never see these items again and/or the items may be ruined as part of the evidence collection or crime scene analysis.

Advocates can be instrumental in keeping victims informed of their rights. For example, victims have the right to voice their opinion if they do not want any particular item seized as evidence. Advocates can also help victims to discuss with the forensic examiner and/or law enforcement investigator what the advantages and disadvantages are for collecting a particular item as evidence. The final determination can then be made based on the facts of the particular case.

- For example, some items may be extremely likely to yield important evidence and not represent a significant loss for victims (e.g., sheets from the victim's bed). In this type of situation, victims may be comfortable facing the reality that they will probably never see those sheets again. In truth, most victims will not want bed sheets returned even when they are no longer needed by the investigating agency.
- On the other hand, it may be determined based on the facts of the case that a particular item is not likely to yield important evidence but would represent a significant loss for the victim. To illustrate, the victim may have worn an expensive pair of shoes or winter jacket after the sexual assault and be alarmed at the prospect of having these items seized as evidence. While no one can say with certainty that there is no evidentiary value to these items, the victim's account of the sexual assault could be used to determine that the likelihood is

relatively low and does not outweigh the loss that the victim would experience if they were seized.

- A particular problem is often seen when the victim's car is seized for evidentiary purposes. In fact, cars are often seized as evidence, but this can obviously create a very significant problem for victims who rely on their car for transportation. Whenever possible, advocates can work with investigators to try to get the victim's car processed as quickly as possible.

Depending on the specific rights afforded to crime victims in your state, victims may have a stated right to have their property returned as soon as possible. However, any discussion of this right must be presented realistically to victims.

- For one thing, analysis of the property may ruin it. To illustrate, with items that are made of fabric (e.g., sheets, towels, clothing), the section with evidentiary value (e.g., stain) may be cut out for analysis. The item may also be exposed to chemicals "to produce chemical reactions to determine if evidence is present" (McSparron, 2003, p.4).
- For victims whose sexual assault is not prosecuted, their property may be stored as evidence indefinitely or until the statute of limitations for the crime expires.

Based on issues such as these, victims must be presented with a realistic sense that any items of property taken from them are unlikely to be returned intact. They should also be given specific information about whom to contact with questions about the property that was taken from them for evidentiary purposes. Typically, this would be the law enforcement investigator assigned to their case or the Victim-Witness Assistance Coordinator in the prosecutor's office. While Victim-Witness Assistance Coordinators cannot get property returned for victims, they can contact the crime victim compensation program in the state to determine whether the financial loss can be reimbursed. They can also make inquiries with the appropriate agencies to determine the status of the evidence.

## **Arrest and Referral for Prosecution**

When the investigation is concluded, the investigating officer will make a number of important decisions, including whether or not to arrest a suspect, whether or not to refer the case for prosecution, and whether or not to clear or otherwise close the case. Regardless of the specific outcome, advocates can provide assistance to victims by ensuring that they are provided with timely information about the outcome of their case and helping them to deal with their emotional reactions.

- For example, when the case is closed by the law enforcement investigator without referring it for prosecution, victims may feel a range of very strong emotions, including anger, disappointment, betrayal, frustration. At the same time, however, they may also experience some sense of relief. The same is true

when the case is referred for prosecution but not charged or filed by the prosecutor.

- On the other hand, when an arrest is made in a sexual assault case, victims often feel a sense of elation or euphoria, because they believe they are safe from re-victimization. Unfortunately, this feeling is often temporary and quickly replaced with anxiety over the next steps of criminal prosecution. Victims often experience particular anxiety when the suspect is released a few days after being arrested, when the prosecutor has determined that there is insufficient evidence to file criminal charges at the time.

Advocates can also assist victims with contacting the investigator or prosecutor assigned to their case, to discuss the outcome and the rationale. This can help the victim to achieve closure emotionally, which is why it constitutes a Standard of Practice for the Miami-Dade Police Department:

*“Once an investigation is complete and it has been determined that charges will not be filed, the victim will be contacted and advised of the reason(s) the case was closed and what her/his alternatives are. This includes their right to meet with the detective, the detective(s) supervisor or the Assistant State Attorney” (p.8).*

The benefits of working with advocates continue for victims long after the investigation is concluded, and the case is referred for prosecution or rejected. As noted above, many victims will continue to work with an advocate throughout this process. They may also be referred to a counselor within the same agency or to another mental health professional within the community to deal with their process of recovery on a more regular and longer-term basis.

Another option for victims is to hire a private investigator and/or private attorney to assist with the investigation of their case, as long as their professional conduct is lawful. However, law enforcement personnel and prosecuting attorneys have discretion regarding what (if anything) to do with the information that is revealed as a result of a private investigation. Given the level of sophistication required for sexual assault investigations, the costs involved, and the uncertain results, this is not a realistic option for most victims. As a result, it is extremely rare for victims to hire a private investigator or attorney during a criminal investigation. It is much more likely to be seen if a civil suit is filed.

## **Assist Victims in Obtaining a Protective Order**

Another service that advocates can provide to victims of sexual assault is assistance in obtaining a protective order, in states and situations where that type of remedy is available.

- A protective order is likely to be an option for any victim who is assaulted by someone covered under the state’s domestic violence code. The definition of

which relationships are covered in the domestic violence code will vary by state, but they will typically include current or former intimate partners, someone who currently or formerly shared a residence with the victim, and someone who has a child in common with the victim.

- In some states, protective orders are also available for victims of sexual assault regardless of their relationship with the suspect.

### Resource: Model Legislation

Although protective orders are available for victims in a number of states, model legislation is seen in Washington where the statute specifically addresses a number of issues such as the situation where the victim and suspect attend the same school. The law also explicitly grants victims the right to have an advocate assist them in the preparation of the petition for the protective order and accompany them to any court proceedings. More information is available on the website for the [Washington Coalition of Sexual Assault Programs](#). The text of the law is available [online](#).

- Other types of protective orders may also be available, including those specifically granted to stalking victims and those protecting the elderly, disabled, or other members of especially vulnerable populations (NCVLI, 2005b).
- Victims may even be able to obtain an “anti-harassment” or general “no contact order” under certain circumstances (NCVLI, 2005b, p.22).

### Resource: Protective Orders

The National Crime Victim Law Institute has published a detailed document, entitled: [Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence](#). It includes a chart with information on protective orders that are available for victims of sexual assault in each state.

Another summary of [protective orders](#) available in each state is posted by the American Bar Association Commission on Domestic Violence.

“In some cases, a survivor may seek to secure more than one order, as the duration, scope of protection, enforcement mechanisms, and other terms and conditions, may vary” (NCVLI, 2005b, p.22). Advocates can provide assistance to victims both by explaining the availability of any protective orders and assisting victims in obtaining one. In the best-case scenario, protective orders may serve as a tool for enhancing victim safety; however, as the National Crime Victim Law Institute (2005b) cautions, they may also “serve as a trigger for continued violence” (p.22)

in the worst-case scenario. Victims must be advised of this possibility and provided assistance for prevention and response.”

As described by the Office for Victims of Crime, in their Legal Series Bulletin (#4) on the topic of *Enforcement of Protective Orders*, “courts are increasingly being given discretion to restrict conduct and impose specific conditions, and they can tailor a protective order to fit the particular circumstances of a case” (2002c, p.1). In other words, while all states have laws on the books authorizing civil and/or criminal protective orders, they vary increasingly in exactly how they are obtained, implemented, and enforced.

#### **Resource: Protective Orders in Indian Country**

In Indian country, the issues pertaining to protective orders – and in fact, every aspect of the criminal and civil legal system – are particularly complex. For guidance in the area of protective orders, please see the document entitled: [Confidentiality and Sexual Violence Survivors: a Toolkit for State Coalitions](#).

The content of criminal or civil protective orders are generally similar; they typically include provisions that:

- Prohibit abuse, intimidation, or harassment.
- Determine child custody and visitation issues.
- Mandate offender counseling.
- Prohibit firearm possession.
- Order other forms of relief as deemed appropriate by the court (OVC, 2002c).

Yet the penalties imposed for violating these orders vary considerably. Depending on the jurisdiction and the original crime that was charged, an individual who violates a provision of a protective order may be found in contempt of court (either civil or criminal), charged with a felony or misdemeanor crime, fined, ordered to obtain counseling, or punished with other related penalties such as “bail forfeiture; bail, pretrial release, or probation revocation; imposition of supervision; and incarceration” (OVC, 2002c, p.2; see also NCVLI, 2005b).

Based on provisions of the 1994 Violence Against Women Act, protective orders that are issued by one state must be given “full faith and credit by courts in every other state” (OVC, 2002c, p.3). However, criminal justice professionals face challenges in verifying the existence of protective orders and identifying their specific provisions. While work is currently underway to develop a national registry for protective orders, communities can work to improve the standardization of methods for obtaining and enforcing existing protective orders. One promising practice is to automatically impose a no-contact order in all criminal cases. In addition to relieving the victim of the burden of

applying for such an order, this type of automatic mechanism will also likely serve to standardize the procedures for responding to violations (OVC, 2002c).

**Please Note:**

Of course, protective orders are only effective “when the restrained party is convinced the order will be enforced” (OVC, 2002c, p.1). The primary challenge for community professionals is therefore to ensure that protective orders are enforced by punishing violations.

Another recommended practice is to work with law enforcement professionals to develop a practice similar to the one used in Colorado, where peace officers are required by state law to:

*“presume the validity of and enforce...a foreign protection order that appears to be an authentic court order that has been provided to the peace officer by any source” [Colo. Rev. Stat. S 18-6-803.8 (2000) cited in OVC, 2002c, p.4].*

In other words, a protective order that appears authentic should be assumed to be valid and enforced accordingly. If this is not currently the practice in your community, it constitutes an area for improvement that can be addressed collaboratively by victim advocates, law enforcement professionals, prosecutors, and others involved in sexual assault response.

**Resource: Enforcement of Protective Orders**

In addition to the document already described by the National Crime Victim Law Institute, more information on protective orders is also available in Legal Series Bulletin #4 published by the Office for Victims of Crime, entitled: [Enforcement of Protective Orders](#).

## Use of the Polygraph Prohibited

We have already described some provisions of the Violence Against Women Act regarding forensic compliance. Yet another VAWA provision states that jurisdictions will lose their eligibility. STOP Violence Against Women Formula Grants (commonly referred to as STOP Grant funds) if their policy or practice is to ask or require adult, youth or child victims of sexual assault to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the crime. In addition, the refusal of a victim to submit to such an examination must not prevent the investigation of the crime. Jurisdictions originally had until January 5, 2009 to comply with the provision, and they must remain in compliance.



- In response, many states have enacted laws which prohibit anyone investigating or prosecuting a sex offense from requiring or requesting that the victim submit to a polygraph examination as a prerequisite to filing an accusatory pleading.
- Other agencies and organizations have also taken a practice stand in discouraging or prohibiting the use of polygraph examinations with sexual assault victims.

Yet even this type of legislation or model policy will not go far enough to meet the VAWA mandate. The law requires states to respond more proactively by enacting laws to “certify” that they have prohibited the practice in order to remain eligible for STOP Grant funding. It will also require law enforcement agencies to develop written policies and protocols, so information can be disseminated to officers, detectives, and prosecutors.

This legislative development therefore provides an excellent opportunity for victim advocacy agencies to work cooperatively with law enforcement agencies to craft appropriate protocols, conduct cross-disciplinary training, and design a structure for responding to any potential violations. By becoming actively involved with a collaborative and multidisciplinary effort in the state, advocates can play an important role in designing the law that is ultimately passed regarding this issue.

### Resource: False Reports

The OLT module entitled, [\*False Reports: Moving Beyond the Issues to Successfully Investigate Sexual Assault\*](#) explains how the presentation of a polygraph or other truth-telling device can communicate an attitude of mistrust and potentially intimidate victims into withdrawing their cooperation or even recanting their report. These methods can include the use – or threat of using – polygraph examinations, voice stress analysis, handwriting analysis, statement validity analysis, and other means to determine whether the victim is telling the truth. Such methods put the victim in the “hot seat” and can damage or destroy any rapport or trust between the victim and law enforcement.

## Responsibilities During Prosecution and Court Proceedings

It should go without saying that the process of participating in a criminal prosecution is inevitably going to be very stressful for victims of sexual assault.<sup>1</sup> Advocates can continue to offer services to victims throughout the process in order to provide them with information, emotional support, and various forms of assistance they might need such as accompaniment. Again, many of the general responsibilities of advocates have been discussed in prior sections of this module; this section addresses those responsibilities that are unique to the prosecution phase.

<sup>1</sup> For a review of the research literature documenting the often-traumatic impact of participating in the criminal justice system, please see: Koss (2000) or Koss, Bachar, Hopkins, & Carlson (2004).

A primary component of the advocate's role during the criminal prosecution is keeping the victim notified of the time and place of any court proceedings, including any meetings with the prosecutor, the arraignment, hearings, court appearances, etc. One of the most frequently cited frustrations among victims within the criminal justice system is the lack of information, yet it is also difficult for busy criminal justice professionals to stay on top of this type of notification. For one thing, they are often very busy managing many different cases. Equally important, court dates are often continued at a moment's notice and plea negotiations are often finalized at the last minute, after the prosecutor and victim have prepared for trial.

Advocates can often be extremely helpful for victims and criminal justice professionals alike by helping to keep victims apprised of the status of their case and any scheduled court proceedings, as well as generally assisting them to navigate this complex system. Keep in mind that for advocates to keep victims apprised on such developments, they will likely need to ask the victim to sign a release waiver, indicating that the advocate can contact criminal justice professionals to discuss their case.

Additional services that can be offered by advocates during the process of criminal prosecution include:

- Serve as a communication link for victims within the court system, to ensure that victims are included in the decision-making process and consulted about important decisions such as plea negotiations or sentencing.
- Ensure that victims have the name, address, and telephone number of the prosecuting attorney or Victim-Witness Assistance Coordinator who will be their primary contact.
- Accompany victims to any interviews, meetings with the prosecutor, and any court proceedings. In some cases, advocates can even help victims to arrange transportation to attend any of these interviews, meetings, or court proceedings.

**Please Note:**

As described by the National Crime Victim Law Institute (2005a), victims typically have a right to have an advocate or other support person present during any court proceedings; only witnesses may be excluded. "Thus, if the victim's support person is a witness, there could be a motion to exclude them" (p.30).

- Explain the nature and status of each of these court proceedings to victims.
- Help victims to write impact statements and prepare to speak at sentencing hearings, in order to convey the impact of the sexual assault on their life.

- Inform victims about options other than filing a criminal complaint, such as seeking a protective order or pursuing other civil remedies.
- Follow developments in the law regarding sexual assault that may not be known to law enforcement and prosecutors and communicating these issues to the other community professionals in order to most effectively manage these cases.
- Facilitate a meeting for victims with the prosecuting attorney to discuss the outcome of their case. For victims whose case is not charged, best practice is for the prosecuting attorney to provide a personal explanation of why this decision was made and convey a clear message whenever appropriate that this does not mean that the victim was not believed, or the crime was not taken seriously.

### Resource: Civil Legal Remedies

Victims may be allowed to have a civil attorney present during any prosecution or court proceedings, including conferences with the prosecuting attorney, as a matter of due process (NCVLI, 2005). Civil attorneys may also provide assistance for victims requesting a protective order. However, they are not typically allowed to be present in Grand Jury proceedings without an order from the presiding court. For more information, see the document entitled, [\*Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors\*](#) published by the National Crime Victim Law Institute.

## Provide Input into Charging Decisions and Plea Negotiations

In some states, victims have an explicit right to confer with the prosecuting attorney during the criminal justice process; in other states this is presented as a standard of care or described in the policies of the prosecutor's office. To illustrate, the language in the *Recommended Guidelines for a Coordinated Community Response to Sexual Assault* published by the Arizona Office of the Attorney General (2001) states that:

*"If an assigned prosecutor declines to proceed with a case, victims of sexual offenses have the right to be informed of the reason(s) why, and the right to be given an opportunity to confer before the decision is final" (p.8); and*

*"Victims of sexual offenses also have the right to confer with the prosecuting attorney (by request) about the disposition of the offense. This right includes conferring about dismissal of charges, pre-trial diversion programs, plea or sentencing negotiations, and prior to the beginning of a trial" (p.8).*

When it comes to plea negotiations, victims generally have "the right to object to a plea bargain in open court at the entry of a plea hearing" (NCVLI, 2005a, p.40). However, even if this legal right exists, victims often have a difficult time evaluating the advantages and disadvantages of a plea agreement. Also because of the power differential between

victims and prosecutors, it is not uncommon for victims to “agree” to a plea agreement when it is explained by the prosecutor but later express regret or dissatisfaction when the terms of the agreement are fully understood. It is therefore essential for victims to have an advocate present to help them fully comprehend the terms of the plea agreement and feel comfortable expressing their true thoughts and feelings.

Victims also typically have the right to have a private attorney present to represent them at these hearings (NCVLI, 2005a), but the reality is that this right is only rarely exercised by victims. This is due to the fact that attorneys are expensive (and pro bono attorneys are rare), but also because criminal justice professionals are not typically very comfortable with the idea of victims having their own attorney playing an advocacy role during the process. This issue may need to be discussed between members of a community SARRT, to clarify the roles and boundaries of a civil legal attorney representing the victim, before this resource is recommended by advocates.

#### **Resource: Evidence-Based Prosecution**

Recently, there has been considerable discussion among community professionals regarding whether sexual assault cases can and should be prosecuted on the basis of evidence, when the victim is unable to participate in the investigation and prosecution of the case. (Among criminal justice professionals, this concept is often referred to as “hostile prosecution” or “evidence-based prosecution”). In the past, this type of prosecution strategy has typically only been used in domestic violence cases where the victim has recanted. Despite this discussion, it is not expected that sexual assault cases will often be prosecuted without the cooperation of the victim. For a discussion of this issue with respect to sexual assault cases, please see the [Promising Practices](#) article in the January, 2007 issue of the e-newsletter published by Sexual Assault Training and Investigations (SATI), Inc.

### **Requesting Special Victim Protections When Necessary**

Given that most sexual assault cases involve some kind of relationship between the victim and perpetrator, there is often a need for special protection of the victim. Advocates can provide a variety of forms of assistance to victims in obtaining resources to help to protect their safety.

- For example, the victim may require temporary housing in a shelter or other safe house. Advocates can assist by providing referrals to the appropriate community resources and facilitating the victim’s communication with these other agencies.
- Occasionally, pre-trial security and transportation may also be issues in these cases (for example, with those involving gang activities). Advocates can help victims to identify and articulate their concerns in such cases and then

communicate them effectively to law enforcement professionals and others, to ensure that adequate precautions are taken to protect the victim's safety.

## **Discuss Any Special Conditions of the Offender's Bail, Parole, or Probation**

Advocates can also assist victims in seeking and understanding any special conditions of the suspect's bail or the offender's parole or probation.

- For example, if the suspect/offender typically uses the same parking garage as the victim, a special condition of bail may be that he cannot use that garage.
- Special conditions can also provide that the suspect/offender cannot use alcohol or come within 500 yards of the victim or any of the victim's family members.
- Other possibilities include Home Detention Monitoring or Global Positioning Satellite (GPS) Services (NCVLI, 2005).

Special considerations are important because most victims know the person who sexually assaulted them, and the court can therefore invoke conditions that help reduce the risk of the victim and suspect having contact with each other. In reality, this can be extremely difficult in some situations, as in rural or remote communities – or in closed communities such as a college campus, military base, or Native American reservation. Advocates can provide assistance by helping victims to identify special conditions that might be appropriate and working with prosecutors and other court personnel to achieve those conditions.

### **Please Note:**

When discussing special conditions, advocates must strive to ensure that victims truly understand exactly what the conditions are and what behaviors of the offender are in compliance or violation of those special conditions. Victims must also understand the consequences of an offender violating the conditions set by the court.

If victims are not asked by the prosecutor about special conditions that might be helpful, advocates can facilitate this discussion. The advocate can also help to explain those special conditions to victims and assist them in the process of consideration and decision-making.

When judges make a decision regarding the special conditions, they often ask prosecutors whether they have discussed the special conditions with the victim. Advocates can thus help by facilitating this discussion to ensure that the special conditions reflect the wishes of the victim.

## Address Issues of HIV Testing

Advocates may also need to explain any laws pertaining to HIV testing of the defendant. States vary with respect to who requests such testing (the victim or the prosecuting attorney), whether the judge has discretion in ordering testing, who pays for the test, and the rules surrounding confidentiality of the test results.

### Resource: HIV Testing

For a summary of state laws pertaining to HIV testing and sex crimes, please see the document entitled: [Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions](#).

Information is also available in their document entitled, [Rights and Remedies: Meeting the Civil Legal Needs of Sexual Violence Survivors](#).

## Responding to Defense Counsel

In their [Legal Advocate Manual](#), the New York State Coalition Against Sexual Assault (NYSCASA) describes how advocates can assist victims in responding to defense counsel.

**This section is taken from the [Legal Advocate Manual](#) (Chapter 3, p.57) and is reprinted with permission of the New York State Coalition Against Sexual Assault with all rights reserved.**

It is important to inform the survivor that the defense will conduct its own investigation. Alert the survivor to the possibility of being contacted by the defense attorney or by an investigator hired by the defense. You should explain to her that the investigators may not clearly identify themselves as representing the defense but may say something to the effect that they are “investigating the case against (the defendant’s name),” implying a connection with law enforcement or the district attorney’s office. They may also say they “work for the state” which is true if the person is hired by the state public defender’s office. Rarely will they falsely claim such status. Instead they may be vague, knowing that the survivor will assume they are connected with the prosecution. The survivor should ask them which agency they work for, or if they are part of the defense team. It is also possible they will clearly identify themselves as representing the defense, and then act as if there is something suspicious about the survivor not wanting to talk with them.

It is up to the survivor to decide whether to discuss the case with the defense. You can emphasize to her that she is not required to talk with anyone representing the defendant and that anything she tells them can and probably will be used to discredit her in court. If anyone other than the detective with whom she is familiar or the district attorney or assistant district attorney on her case contacts her to arrange an interview, she should



call the district attorney to determine which side the person represents. If she chooses to speak to the defense, she should do so with the district attorney present. She should also inform her family, roommates, or anyone else from whom the defense may attempt to obtain information that they may be contacted, that they are not obligated to talk to the defense representatives and that to do so can be damaging to the case.

The NYSCASA [Legal Advocate Manual](#) was supported by Grant # VW01543535, awarded by the Office of Justice Programs, US Department of Justice to the State of New York, Division of Criminal Justice Services (DCJS). Points of view or opinions contained within the document are those of the author and do not necessarily represent the official position or policies of the US Department of Justice or DCJS.

## Explaining Rape Shield Laws

Just as issues regarding confidential communications with an advocate evolve as a result of court decisions, the interpretation and application of rape shield laws continues to develop and change over time. The original intent of rape shield laws was to ease the emotional burden for rape victims who testified in court, by limiting the types of questions that could be asked about the victim's prior sexual behavior and other unrelated aspects of the victim's lifestyle, personality, and reputation. Feminist leaders worked with legislators and other policymakers to craft rape shield laws, not only to protect victims who testify in trial but also to reduce one of the sources of fear that prevented countless victims from reporting their sexual assault or participating in the investigation and prosecution of their case. However, this type of evidence is often still admitted, either because of exceptions to the rape shield law, loopholes, discretionary decisions of judges, or because the information is needed to provide the history of what happened. As Bryden and Lengnick (1997) describe:

*"One cannot prosecute a man who allegedly raped a hitchhiker, for example, without revealing how it was that the victim came to be seated in a stranger's car. If the parties went to the woman's apartment to smoke marijuana and then the rape occurred, the illicit purpose of the visit cannot honestly be suppressed during the woman's testimony, and even if it could, the jury might then infer that the true purpose must have been sexual. Not infrequently, the jury can draw speculative inferences about the alleged victim's sexual habits from the legitimate evidence about events prior to the rape, without having to hear testimony specifically devoted to that subject. All this is not to say that rape shield laws are wholly ineffective; only that the woman's lifestyle will often be fairly evident to the jury even in a jurisdiction with a reasonably tough shield law" (p.1288).*

### Resource: Rape Shield Statutes

For a summary of rape shield statutes in each state, please see the [chart](#) compiled by the National Center for the Prosecution of Violence Against Women at the National District Attorneys' Association. A [legal compilation](#) of [rape shield statutes](#) has also been prepared by AEquitas: The Prosecutors' Resource on Violence Against Women.

For information on whether and how to appeal a court decision regarding the admissibility of such evidence, see [A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence](#), published by the National Crime Victim Law Institute.

## Facilitate Victim Input at Sentencing and Beyond

When a defendant is sentenced, victims may have specific rights to confer with the prosecutor, attend sentencing hearings, give an impact statement, and even make sentencing recommendations. The victim may or may not be subject to cross-examination at this hearing. Advocates can assist victims during this process and accompany them to the hearing, as can a civil attorney representing the victim (for more information, see NCVLI, 2005a).

Victims may also have the right to be notified of and to participate in any hearings regarding the defendant's probation or parole. If so, they can probably have an advocate, attorney, or other support person accompany them. Some states have a computerized system to notify victims by telephone, often referred to as VINE (Victim Identification and Notification Everyday).

### Resource: VINE

[VINE](#) is a system that lets victims of crime and other concerned citizens access timely and reliable information regarding offenders. It is offered free of charge to registrants, is completely confidential, and features multiple language support. The VINE service lets victims call a toll-free number, visit the VINE website, or use the VINELink™ mobile app to anonymously check on an offender's custody status. Victims can also register to receive automated notifications about changes in that status.

## Protecting Crime Victim Rights

Federal and state legislation affords legal protection to victims through a variety of rights; most of these pertain to the process of investigating and prosecuting a criminal case. It is therefore the responsibility of victim advocates to be familiar with these rights and to work to ensure that they are protected throughout the legal process. While the specific rights afforded to victims vary by jurisdiction, they typically include the following:

- The right to notification of all court proceedings related to the offense.
- The right to be reasonably protected from the accused offender.
- The right to have input at sentencing (in the form of a victim impact statement).
- The right to information about the conviction, sentencing, imprisonment, and release of the offender.
- The right to an order of restitution from the convicted offender.
- The right to notice of these rights.
- The right to enforce these rights (quoted verbatim from OVC, 2002a, p.1).

### Resource: Crime Victim Rights

For more information on crime victims' rights, please see the [Rights Enforcement Toolkit](#), developed by the National Crime Victim Rights Law Institute, NCVLI.

For detailed information on crime victim rights in each state visit the [NCVLI website](#).

Additional rights that are specified for crime victims in some jurisdictions include: the right to be informed of the availability of rape crisis services; the right to have their names (or other private information) withheld from public record; the right to seek an emergency protective order; the right to apply for crime victim compensation; the right to have their schedule considered when trial dates are set; and/or the right to prompt disposition or a speedy trial (NCVLI, 2005a; OVC, 2002a). These rights continue to evolve as a result of legislative reform and court decisions. For example, a recent decision by the Ninth Circuit Court of Appeals upheld the right of crime victims to actually speak at the defendant's sentencing hearing – not just to submit a written victim impact statement.<sup>2</sup> In Arizona, victims have the right to attend any part of a criminal trial where the defendant is present. This is unusual but constitutes an important advance for the crime victim rights.<sup>3</sup> Advocates must therefore remain updated on the current status of crime victim rights and how they are implemented and enforced locally.

### Resource: Expert Interview

In this [video interview](#), Commander Cathryn Masters explains how crime victim rights benefit the criminal justice system.

<sup>2</sup>Kenna v. US District Court for the Central District of California (January 20, 2006), No. 05-73467, DC No. CR-03-00568-JFW. The text of the opinion is available at the [website](#) for the 9<sup>th</sup> Circuit Court of Appeals.

<sup>3</sup> Arizona [state law 13-4420](#) is titled Criminal proceedings; right to be present and states that "The victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present."

### Resource: Expert Interview

In this [interview](#), Meg Garvin describes what law enforcement officers need to do to ensure that crime victim rights are protected.

## Notification of Crime Victim Rights

Of course, any rights granted in state or federal law are worthless unless victims know about them. Therefore, victims typically have a right to be notified of their rights by criminal justice professionals, whether by law enforcement and/or prosecutors. In some states, crime victims even have a right to be notified in writing regarding their rights. The specific point at which victims must be provided notification of their rights may be specified in the relevant laws, as well as additional information that must be provided by criminal justice professionals (e.g., police report number, contact information, resource information, or written referrals).

One study found that victims were more likely to be notified of their rights in states with strong laws protecting crime victim rights, as compared to those in states with weak protective laws.

However, even in states with strong protective laws, many victims still did not receive notification of their rights and/or events taking place in the criminal justice process. The authors thus concluded that professionals in the criminal justice and community response system must continue to work to ensure that all victims of crime are notified of their rights and important criminal justice proceedings in their case (Kilpatrick, Beatty, & Smith Howley, 1998).

## Invoking Crime Victim Rights

Because victim's rights are often not protected even in states with strong laws on the books, a number of roadblocks clearly arise in the process of implementing and enforcing them. The Attorney General's Office (2006a) *Advocacy Manual* offers a very good description of crime victim rights and some of the problems in invoking and enforcing those rights. As the manual describes, some crime victim rights are supposed to be "automatic," so victims do not have to do anything to be afforded this right. This would include, for example, the right to be treated with dignity and respect, to be notified of rights, to be protected from the offender, etc. Others specifically state who has responsibility for honoring the right. To offer an illustration, some states specify in their summary of crime victim rights who has the responsibility for notifying victims of their rights (Oregon Attorney General's Office, 2006a).

However, a problem arises when the victim has a specific right, but state law does not specify who is responsible for honoring it. This is often seen when crime victims have a stated right to be informed of court proceedings, but no one is specifically tasked with the responsibility of providing victims with this notification. In these situations, it is

obviously difficult for victims to know how to invoke or enforce their rights (Oregon Attorney General's Office, 2006a)

The manual goes on to describe that most crime victim rights are not automatic, but rather "require a crime victim to take some action" for the right to go into effect (Oregon Attorney General's Office, 2006a). "This action can include making a request for the right, applying for crime victims' compensation, initiating a court action, consenting to or asserting something in a case, choosing to waive a right, or making a recommendation" (Oregon Attorney General's Office, 2006a, p.142). Yet again, it is easy to understand why many victims face difficulty knowing what their rights are, let alone ensuring that they are honored, and any violations are enforced.

## Enforcement of Violations

As described in the *Oregon Advocacy Manual*, crime victim rights in many states are "illusory" because they are "neither legally guaranteed nor legally enforceable" (Oregon Attorney General's Office, 2006a, p.17). In other words, even if a stated right is not honored for a victim of sexual assault there is no recourse because no one is specifically tasked with the responsibility of honoring the right and no agency has the responsibility for enforcing violations. Many people actually find this difficult to believe, but it describes the situation in many states in the country.

When a sexual assault victim has had a particular right violated that is not legally enforceable, the best options are typically to attempt to resolve the situation with the person or agency involved. Advocates can obviously be helpful to victims as they attempt to resolve this issue, as can other support people. If this attempt fails, the issue can be taken to the person's supervisor or the chief administrator of the agency that is involved. If this also fails, victims can then contact a statewide agency involved in crime victim rights issues. This is likely to be the Attorney General's Office, the Department of Public Safety, or other similar entity.

In other states, fortunately, crime victim rights are more stringent because specific agencies are tasked with the responsibility of honoring and enforcing those rights. In these situations, advocates can help victims to protect their rights by notifying the person or agency with responsibility for honoring a right if it has not been. If this fails, the next course of action would be to contact the entity tasked with legal responsibility for enforcing violation of victim rights.

For example, crime victim rights are stringent in the state of Colorado because specific responsibilities for honoring rights are spelled out in the law for: law enforcement agencies, the District Attorney, the Court, the Department of Corrections, the Division of Youth Corrections, the Juvenile Parole Board, state hospitals, private and public community corrections agencies and Probation. In addition, Colorado's statute contains a provision that allows for victims of crime to file complaints, as to any alleged violation of their rights, with the Governor appointed Victims' Compensation and Assistance

Coordinating Committee. The process for insuring that a crime victim's rights are protected is similarly spelled out in detail. As described on the website for the Colorado Department of Public Safety, the agency in which Colorado's Victim Rights Act (VRA) compliance program is housed, victims are encouraged first "attempt to seek compliance at the local level," with the type of strategies that have already been described (e.g., contacting the person involved or a supervisor or chief administrator of the agency).

Victims are further advised that:

*Contacts may be verbal or in writing. Accurate records of your efforts to seek compliance at the local level will be helpful to you and to the Coordinating Committee should you decide to file a formal request for compliance with the Victim Rights Act.*

This advice is equally valuable for victims in other states, because documentation of any efforts to resolve the issue could potentially be helpful in any later efforts to enforce a violation.

If an attempt by a victim to resolve the issue locally fails, victims in Colorado may contact Victim Rights Act Specialist at the Colorado Department of Public Safety, Division of Criminal Justice (DCJ), to obtain assistance with the resolution of his or her concerns. The victim may elect to file a formal VRA complaint with the Victims' Compensation and Assistance Coordinating Committee. Colorado's formal VRA complaint process is then described on the DCJ [website](#) and victims can print out a formal complaint form and the policies and procedures for filing a complaint. This type of detailed guidance constitutes a best practice for ensuring that crime victim rights are meaningful. Other professionals may want to make work toward advocating such an approach in their own state. The same study that was cited earlier found that victims in states with strong laws protecting their rights were in fact more likely to be notified of their rights and participate in the process. Not surprisingly, victims who were informed of their rights and felt their participation had an impact on their case were more satisfied with the criminal justice system process (Kilpatrick, Beatty, & Smith Howley, 1998).

#### **Resource: Crime Victims' Rights**

You may view the [full document](#) on crime victim's rights in Colorado.

Although most crime victim rights pertain to their rights during court proceedings, it is critical to keep in mind that the vast majority of sexual assault victims never make it to this stage. It is therefore equally important that law enforcement personnel, advocates, and other community professionals involved in sexual assault response work together to ensure that the rights of all victims of sexual assault are protected – regardless of whether the crime is prosecuted.



## National Center for Victims of Crime Document

We have made an effort to avoid duplicating information in this training module that appears in other written resources. We also believe it is important for you to familiarize yourself with some of these other written resources to ensure that you have the information you need to provide effective advocacy within the criminal justice system. Therefore, we will ask you at different points in this training module to print out documents from external sources – this information will be covered in review exercises and test questions for this training module.

**For the purpose of successfully completing this training module, you will need to print out the [Summary of Victim Rights](#) prepared by the National Center for Victims of Crime.**

After reviewing this document, you will be asked a series of review questions about the content, as it pertains to the following topics:

- General Overview of Victims' Rights.
- The Right to Attend.
- The Right to Compensation.
- The Right to be Heard.
- The Right to be Informed.
- The Right to Protection.
- The Right to Restitution.
- The Right to Return of Property.
- The Right to a Speedy Trial.
- The Right to Enforcement / Remedies of Victims.

The material in this document will also be covered in test questions at the end of the module.

### Resource: Crime Victim Rights

EVAWI created a [3-part training bulletin series](#) that provides a basic understanding of crime victim rights, including what these rights are, as well as outlining the requirements for informing victims about their rights, explaining the process for asserting those rights, and exploring the procedures to follow when victims feel their rights have been violated during a criminal or civil proceeding.

For more information on the rights of sexual assault victims at every stage of the criminal justice system, please see: [A Criminal Justice Guide: Legal Remedies for Adult Victims of Sexual Violence](#), published by the National Crime Victim Law Institute. This document also includes a summary of relevant state laws, rules, and procedures.

Also, The Office for Victims of Crime also publishes a [Legal Series of Bulletins](#) addressing specific crime victims' rights, such as the enforcement of protective orders, the crime victim's right to be present, victim input into plea agreements, and restitution.

## Crime Victim Compensation

As indicated above, one of the rights typically afforded crime victims is the right to be compensated for any crime-related financial losses. Therefore, one important role for advocates is ensuring that victims are aware of the various forms of crime victim compensation that are available and helping them to access those resources. The most common means of obtaining financial reimbursement is applying to the state crime victim compensation program. However, other options include restitution or civil actions. Each of these will be discussed in turn.

### Basic Information on State Crime Victim Compensation Programs

Financial compensation is available for victims of crime in all 50 states, the District of Columbia, the Virgin Islands, and Puerto Rico. All of these jurisdictions have statutes providing for crime victim compensation, with programs administered by the state (or territory or district), with funding from both state and federal sources (OVC, 1998). These programs have many similarities. For example, "all programs conform to similar guidelines regarding eligibility, claim submission requirements, and reimbursable expenses" (Herman & Waul, 2004, p.19).

- Most of these jurisdictions generate the majority of the money for their crime victim compensation program from fees and fines levied against convicted criminals. Most programs use no tax revenue at all, either for administration or awards (Herman & Waul, 2004).
- These state funds are also supplemented with money that is provided by the federal government and allocated through the Victims of Crime Act (VOCA) by the Office for Victims of Crime (OVC). For every \$100 distributed for crime victim compensation at the state level, OVC supplements it with an additional \$40 to spend. VOCA only allows 5% of their funds to be used for program administration; states thus bear most of the administrative costs (OVC, 1998).

- To be eligible for VOCA funds, the federal government requires that states must cover all US citizens – regardless of their residency – through their crime victim compensation program based on the location of the crime. States must also cover all US citizens who are the victim of any crime committed in a federal jurisdiction such as a national park, military base, or on tribal lands (OVC, 1998).

The Crime Victim Compensation Program is available to sexual assault victims who resided in the US at the time the crime was committed and may be available to US residents even if the crime occurred outside of the US. With just a few exceptions, programs will even cover foreign residents injured in the states. Because these issues are complicated, however, advocates who assist victims in applying for crime victim compensation need to become familiar with the availability of benefits for non-citizens and US citizens who live in other countries.

Crime victim compensation programs are operated out of a variety of entities. These include independent agencies designed specifically for this purpose, as well as more general state agencies such as the Department of Public Safety or Criminal Justice Planning, the Attorney General's Office, the program for Workers Compensation, the court system, corrections, social services, financial or management department, or even the local prosecutor's office (as in Colorado and Alaska; OVC, 1998).

## National Association of Crime Victim Compensation Boards Document

This is another one of those points where we will ask you to print out a document from an external source, because it provides an excellent review of the topic that does not need to be repeated within this training module.

**For the purpose of successfully completing this training module, you will need to print out the [overview of crime victim compensation](#) prepared by the National Association of Crime Victim Compensation Boards.** After reviewing this document, you will again be asked a series of review questions about the content. Material will also be covered in the test questions at the end of the module.

## Implications for this Training Module

In addition to the information that is provided in that document, it is also important to explore a few implications of crime victim compensation that are particularly relevant for the topic of this module – effective advocacy for victims of sexual assault within the criminal justice system. For example, it is worth noting that advocates and other community professionals must be able to summarize for sexual assault victims both the type of costs that are eligible for compensation and the appropriate referrals for them to receive assistance in the application process.

- In many communities, providing victims with assistance in applying to the crime victim compensation program is a primary activity of system-based advocates. Therefore, system-based advocates must be prepared to assist victims with their application, and community-based advocates may best serve victims by referring them to system-based advocates for this particular form of assistance.
- In other communities, however, community-based advocates may be the ones who offer victims assistance with their application for crime victim compensation.

Obviously, this is an issue to clarify in the policies of both types of advocacy agencies, and to communicate with other community professionals so they can provide accurate information for victims of sexual assault.

## Restrictions on Eligibility

It is also worth highlighting the fact that there are a variety of eligibility criteria for victims to be reimbursed for financial losses associated with the crime (this issue was mentioned previously). Unfortunately, these restrictions often mean that sexual assault victims are disqualified from receiving any reimbursement for their financial losses. For example, most states require that **victims report the crime to law enforcement promptly**. In fact, most states have a specified timeline for eligibility, for example, stating that the crime must be reported within 72 hours for the victim to be eligible for compensation. Yet delayed reporting is in fact the norm for victims of sexual assault (see the module on Dynamics for more information). Most victims of sexual assault do not report the crime to law enforcement ever, but if they do, they typically do so only after a delay of days, weeks, months, or even years.

Therefore, this requirement for reporting within specified timelines may disqualify many victims of sexual assault from eligibility for crime victim compensation. Most states do include a possible exemption from the reporting requirement – or the timelines for reporting – if the victim can demonstrate good cause for not reporting or not reporting within the specified timeline. Advocates can often be extremely helpful during the application process for crime victim compensation by helping victims to articulate why they had good cause for not reporting their sexual assault within the specified timeline.

Related to this issue is the common requirement that victims **participate with criminal justice professionals during the investigation and prosecution of their case**.

Again, this is often particularly difficult for victims of sexual assault and may also serve to disqualify them from eligibility for crime victim compensation. This is another requirement that the Office for Victims of Crime has recommended loosening in order to decrease the likelihood that victims of sexual assault will be excluded disproportionately as compared with other types of crime victims (OVC, 1998). It may also be impacted by the VAWA provision stating that victims must not be required to participate in the criminal justice system in order to obtain a medical forensic examination, because exams are sometimes paid for by the crime victim compensation fund.

A third requirement that disqualifies many victims of sexual assault from eligibility for crime victim compensation is that they must be **innocent of any criminal activity**. In fact, many victims of sexual assault have participated in criminal activity – typically misdemeanor offenses such as underage drinking or illegal drug use – but also sometimes more serious offenses such as driving under the influence of drugs or alcohol or participation in the sex trade. In some states, such behavior may even be seen by administrators within the crime victim compensation program as contributing to the commission of the crime (e.g., their own sexual assault).

Therefore, many programs will view such behavior as an automatic basis for disqualifying the victim from eligibility. In other states, victims may be able to provide documentation to obtain an exemption from these criteria and again, advocates can provide assistance in this way. In many cases, advocates are able to use knowledge gained from previous experiences with the program in order to assist victims in completing their application and supporting the argument for an exemption. Advocates can also help victims to appeal decisions made by the crime victim compensation board, which could include working with the law enforcement investigator if this person is supportive and can provide information that would assist in the appeal.

## Under-Utilization of Crime Victim Compensation

Eligibility restrictions are one primary reason why crime victim compensation funds are under-utilized, and many programs have large surpluses that are not being distributed to victims. The National Center for Victims of Crime thus reported that over the 5-year period from 1998-2002, an average of 24% of claims were denied (Herman & Waul, 2004).<sup>4</sup> Furthermore, a study conducted by the Urban Institute revealed that the most frequently cited reason for denial of a claim was contributory misconduct on the part of the applicant (Newmark et al., 2003).

*“In other words, it is determined that the victim probably engaged in illegal or culpable behavior at the time of the crime. Contributory misconduct accounted for an average of 28 percent of denied claims across the states in 1999” (Herman & Waul, 2004, p.25).*

Other reasons for denying claims that were found in the Urban Institute study were:

- Failing to comply with filing deadlines and required paperwork (16%).
- Filing a claim for an ineligible crime or ineligible expense (16%).
- Filing a claim for losses that were actually covered by another source (15%).

Another reason for the under-utilization of crime victim compensation is that victims are not aware of the program. In their report, the National Center for Victims of Crime

<sup>4</sup> The source of this data was cited as the Analysis of Office for Victims of Crime 2002 state compensation program report data, 1998-2002.

estimated that compensation was sought in only 4% of violent crime victimizations (Herman & Waul, 2004).

- On the one hand, 83% of states require law enforcement professionals and prosecutors to notify victims about the availability of crime victim compensation. All victim services organizations receiving VOCA funds are also required to tell their clients about crime victim compensation and explain how to apply.
- Despite this fact, the Urban Institute study found that only 45% of crime victims who were assisted by staff within a program that was funded by VOCA had heard of victim compensation. Rather, most referrals for victim compensation were found to come from prosecutors, with referrals by law enforcement professionals and victim service providers a distant second and third (Newmark et al., 2003).

Victim advocates can assist by helping compensation programs to identify gaps in the costs that are reimbursed and barriers for victims seeking to apply for compensation. Advocates must also make sure that they provide appropriate information to victims of sexual assault and their support people and offer assistance in applying.

### **Resources: Crime Victim Compensation**

For more information on crime victim compensation, including contact information for the program in your state, territory, or district, please see the [website](#) for the National Association for Crime Victim Compensation Boards.

Other documents that are particularly useful on this topic include the following:

[\*Crime Victim Compensation: New Directions from the Field. Victims' Rights and Services for the 21<sup>st</sup> Century.\*](#) Bulletin available from the Office for Victims of Crime.

[\*Repairing the Harm: A New Vision for Crime Victim Compensation for America.\*](#) Report by the National Center for Victims of Crime. Written by S. Herman and M. Waul (2004).

[\*A Criminal Justice Guide: Legal Remedies for Adult victims of Sexual Violence.\*](#) Report by the National Crime Victim Law Institute.

A [brochure](#) for crime victims on the topic of financial compensation is also available from the National Association of Crime Victim Compensation Boards.



## Financial Reimbursement for Crime-Related Losses

Crime victim compensation programs are not the only way for victims to pursue reimbursement for financial losses associated with the sexual assault. Yet the need for financial redress is perhaps described best by the Victim Rights Law Center (2007):

*“A victim client may (mistakenly) believe that she has to bear the full cost of any expenses associated with the assault, and that nothing that can be done to relieve her of this burden. As a result, she may never discuss her financial concerns with you and will instead struggle to meet them alone. Or, she may decline treatment or services because she cannot afford them. This can exacerbate the harm, leading to further financial losses including eviction, car and other property repossession, high interest loans, debt collection service fees, and even civil or criminal repercussions (e.g., unpaid support obligations, traffic fines, etc.).”*

*Although it may feel awkward or invasive for an advocate to ask about a client’s financial situation, it is possible to query a client in a respectful, non-judgmental manner. Because a survivor may not be aware of the options available to her or may not feel comfortable raising money issues without an express invitation to do so, you should discuss financial issues as part of your comprehensive screening process. It may be helpful to pose the questions in general terms, noting that many sexual assault victims incur financial costs and have financial concerns following an assault, and this is an area in which you may be able to provide assistance” (Victim Rights Law Center, 2007, p. 350).*

## Restitution

Restitution can be ordered by a judge in any criminal case so that the convicted perpetrator is required to “reimburse certain expenses incurred by a victim, a victim’s survivors, or a third party who has provided services or other assistance to the victim” (Herman & Waul, 2004, p.20). For victims, restitution can be used to compensate for a variety of crime-related financial losses including medical expenses, lost wages, counseling expenses, lost or damaged property, and funeral expenses (Herman & Waul, 2004). Restitution can also be used to reimburse expenses incurred by law enforcement agencies or prosecutor’s offices. This might include the cost of conducting a medical forensic exam with the victim or suspect. It could also include the cost of submitting evidence collected from the exam for analysis.

Every state has laws on the books granting criminal courts the authority to order restitution. In fact, it is mandatory for all criminal convictions in more than one-third of states (OVC, 2002e) and in nearly all violent crime cases at the federal level (Herman & Waul, 2004). “The trend is to make restitution mandatory and to include more categories of loss in restitution” (NCVLI, 2005a, p.44). However, each jurisdiction must develop an

organized process for accepting restitution payments. Realistically, this means there is a great deal of variety in the structure, process, and quality of systems. It also means that very few victims currently receive restitution. In one study, fewer than 20% of crime victims received any restitution for their financial losses, and this included victims in two states with strong laws protecting crime victim rights and two states with relatively weak laws (Kilpatrick, Beatty, & Smith Howley, 1998).

While restitution is typically not fully paid by perpetrators (OVC, 2002d) and currently covers only a small percentage of the costs incurred by crime victims (OVC, 1998), it offers an important area for future improvement. Indeed, many believe that restitution is one of the most unenforced victim rights within the criminal justice system (Herman & Waul, 2004, p.20).<sup>5</sup> Therefore, future efforts to improve the availability of enforcement of restitution include:

- Conducting a comprehensive investigation of the perpetrator's assets at the time of sentencing, in order to provide the information necessary to award restitution and develop an appropriate payment schedule.
- Utilizing aggressive methods to preserve those assets, such as a restraining order, injunction, and/or criminal charges for concealing or even wasting assets.
- Providing victims with contact information for their perpetrator's probation or parole officers, to help monitor compliance with restitution payments.
- Charging perpetrators with a violation of their probation or parole conditions for non-payment of restitution.
- Extending probation or parole for a certain amount of time if restitution remains unpaid (OVC, 2002d).

Even with these improvements, restitution will not be an option for the majority of sexual assault victims whose perpetrators are never arrested and prosecuted (Herman & Waul, 2004). However, it remains one important area for future reform efforts to improve the reimbursement of some costs incurred by some victims and other service providers.

### Resource: Restitution

For more information in restitution, see the following documents:

<sup>5</sup> Office for Victims of Crime (1998). *New Directions from the Field: Victims' Rights and Services for the 21<sup>st</sup> Century*. Washington, DC: US Department of Justice. Cited in: S. Herman & M. Waul (2004). *Repairing the Harm: A New Vision for Crime Victim Compensation for America*. Report by the National Center for Victims of Crime.

[Restitution: Making it Work](#). Office for Victims of Crime, Legal Series Bulletin #5. Washington DC: US Department of Justice, Office of Justice Programs.

[Ordering Restitution to the Crime Victim](#). Office for Victims of Crime, Legal Series Bulletin #6. Washington DC: US Department of Justice, Office of Justice Programs.

## Civil Actions

Civil actions are also available as an alternative source of financial compensation for costs incurred as a result of sexual assault victimization. As summarized by Herman & Waul (2004):

*“Every crime victim has the right to file a civil lawsuit against the perpetrator or other responsible parties. A civil lawsuit can result in compensation for economic and non-economic losses, as well as punitive damages. Crime victims have successfully sued and recovered damages from perpetrators for their intentional harm, as well as from third parties for inadequate security and negligence, including negligent hiring and supervision and premises liability. For many crime victims, a civil suit is not an option because the perpetrator may not have been identified or have the resources to pay a civil judgment, and a responsible third party may not exist” (p.20).*

In other words, all victims of sexual assault have a legal right to sue their perpetrator, but the reality is that a civil lawsuit requires more time, money, and energy than most victims have. This topic is discussed further in the next section, in the context of civil legal issues for victims.

## Civil Legal Issues

Another evolving area of advocacy is the current effort to expand the services that are available to meet the civil legal needs of victims. This can include increasing access to civil attorneys who can assist victims in each of the following areas:

- Privacy
- Immigration
- Physical Safety
- Housing
- Education
- Employment
- Financial Loss

Examples are provided by the National Crime Victim Law Institute (2005b):

- In the area of **physical safety**, victims may need assistance in identifying, obtaining, and enforcing civil protective orders.
- With respect to **housing**, victims may need assistance increasing the security of their residence, relocating, or avoiding eviction.
- In the **employment** context, victims may need assistance in avoiding termination or quitting, improving their safety in the workplace, obtaining leave, addressing confidentiality issues, or securing financial reimbursement for those who do leave or lose their jobs. If the sexual assault was committed at work or by a co-worker, the victim's civil legal needs in the employment arena are compounded.

#### Resource: Model Legislation

One particularly innovative development in this area is a [law](#) enacted in the state of Washington requiring employers to allow victims of domestic violence, sexual assault or stalking to take a reasonable leave from work – either to participate in the investigation and prosecution of their case or to pursue medical treatment or counseling. This law covers all employers, although the leave may be paid or unpaid and may be accessed by employees through sick leave or other compensatory time.

- Students who are sexually assaulted in an **educational** setting may need civil legal assistance to obtain a number of remedies, including the removal or suspension of a teacher or student who committed the crime (pending an investigation), adjustment of their academic schedule or living arrangements, obtaining and enforcing a no-contact order, or transfer to another school.

#### Resource: Civil Legal Issues

The civil legal issues pertaining to immigration are particularly complex. Information and resources are available from [Legal Momentum's Immigrant Women Program](#).

The Washington Coalition of Sexual Assault Programs also publishes a [brochure](#) for victims to describe their civil legal rights.

## Filing a Civil Lawsuit

Although the decision is an extremely difficult one, some victims also file a **civil lawsuit** as a result of their sexual assault. A court decision can only award financial damages, yet an out-of-court settlement may also yield a variety of creative remedies, including

opportunities for the victim to confront the defendant, require that he take medications or participate in training, etc. Advocates must therefore advise victims that they can file a civil lawsuit instead of or in addition to reporting the crime to law enforcement. Because the standard of proof is lower for civil cases as compared to criminal cases, it is possible for victims to win a civil case even after the criminal case results in an acquittal. However, information about the criminal case will not likely be admitted into the civil trial. If the criminal case results in a guilty plea or verdict, on the other hand, the perpetrator's guilt will be presumed, and the issue to be determined at trial will simply be the extent of the harm done to the victim. When considering a civil suit, victims must realize that they can be cross-examined in a criminal case about their consideration or participation in a civil lawsuit, and this may have implications for their credibility, particularly in the eyes of jurors (NCVLI, 2005b).

### **Resource: How to File a Civil Lawsuit**

The Illinois Coalition Against Sexual Assault offers a guidebook, entitled [\*A Guide to Civil Lawsuits: Practical Considerations for Survivors of Rape and Childhood Sexual Abuse\*](#) for victims on civil lawsuits.

A [\*Survivor's Guide to Filing a Civil Lawsuit\*](#) is also available from the [Washington Coalition of Sexual Assault Programs](#).

In Indian country, the civil legal remedies that are available may be more creative and wide-ranging, including banishment, forfeiture, civil contempt, fines, and various forms of restorative justice. However, the civil legal system varies a great deal across tribes and nations. For more information, see the NCVLI (2005) document on [civil legal needs](#).

Victims may even need assistance by an attorney if they are sued by the perpetrator, as a result of reporting the crime or filing a civil lawsuit. There is reason to believe that this type of harassing lawsuit filed by perpetrators against victims is becoming more common, especially in the university setting. Clearly, victims of sexual assault may have a number of wide-ranging civil legal needs, and these are often unmet. This represents an area where many communities could see considerable improvement through collaborative effort.

## **Advocates as Expert Witnesses**

Based on the widespread and powerful rape myths in society, members of the public often have certain expectations about the dynamics of sexual assault, including stereotypes about victims and perpetrators. When they serve as jurors, these expectations are then carried into the criminal justice system. As described by Estrich (1987), jurors often expect any case of sexual assault to fit their stereotype of "real rape," with a violent rape being perpetrated by a stranger, in a dark alley, using a weapon, and

resulting in physical injury. Jurors also expect the victim to be extremely emotional or hysterical after the incident and then immediately report it to police. When presented with a case and victim that do not fit this stereotype, jurors may doubt the credibility of the victim and the veracity of the case. It can therefore be extremely helpful for jurors to have a sexual assault expert explain the realistic dynamics of the crime and common reactions of victims. One important – but often overlooked – role that victim advocates can therefore play is to serve as an expert witness in cases of sexual assault.

Advocates can address the general dynamics of sexual assault, including empirically documented characteristics that differ from the stereotype of “real rape” (Benitez, 2001). By reconstructing who the victim was before, during, and after the assault, prosecutors can later convey to the judge or jury the entire context of the victim’s behavior. Prosecutors can even utilize an expert witness such as a psychologist or victim advocate, to help demonstrate the similarity of these behaviors with other common reactions to sexual assault – and to contrast these reactions with the behavior of someone who has engaged in consensual sexual activity. The admissibility of this type of information is well established in most jurisdictions.

In some areas, experts such as victim advocates can even be qualified by the court to address the behavior of the defendant or the characteristics of the crime. However, the admissibility of this kind of testimony varies around the country. In some places, testimony regarding the defendant may be used only at the sentencing hearing and not before a jury – due to the prejudicial nature of the information and the prohibition against admitting character evidence in most courts (Anne Munch, personal communication, February 10, 2004).

### Resource: Expert Witnesses

Detailed information on the use of expert witnesses in cases involving domestic violence or sexual assault can be found in the [manual](#) published by the American Prosecutor’s Research Institute.

Please also see the document entitled: [The Use of Expert Witnesses in Cases Involving Sexual Assault](#), which is posted by the Minnesota Center on Violence Against Abuse (MINCAVA) electronic clearinghouse.

## Advantages of Advocates Serving as an Expert Witness

Benitez (2001) has discussed several advantages and disadvantages of using a victim advocate as an expert witness in a case involving sexual assault. Some of the advantages of using a victim advocate are that they are generally accessible and cooperative and may not expect to be paid for their services. Victim advocates are typically qualified to testify regarding their own personal observations and conclusions,



as supported by the length of the time in the field and number of victims assisted. Their testimony can therefore be extremely effective.

## Disadvantages of Advocates Serving as an Expert Witness

Unfortunately, one of the *disadvantages* of using victim advocates in the role of expert witness is that their testimony can sometimes be tarnished with cross-examination regarding the reputation of the individual and/or the rape crisis agency (Benitez, 2001). Because victim advocates have the stated mission of working on behalf of victims, this is sometimes used to undermine their credibility by suggesting that their testimony is biased. An advocate might also inadvertently harm the victim's credibility or case when questioned by the opposing side, due to lack of experience with expert testimony and other courtroom procedures.

There are even more critical disadvantages when the victim advocate serving as an expert witness has provided direct services to the victim. First, this advocate is too closely involved in the case to be an effective witness, because the testimony can be easily characterized as biased. More importantly, the victim advocate cannot protect the confidentiality of any privileged communications with the victim. In fact, the rule on witnesses observed in most jurisdictions dictate that the victim advocate cannot provide direct services to the victim once subpoenaed to testify in the case. Because both the victim and advocate serve as witnesses in the trial, they would thus be prohibited from discussing any evidence or testimony, reviewing trial developments, and even processing emotional reactions. This can serve to further isolate the victim from much needed support (Roger Canaff, personal communication, June 14, 2004).

## Recommendations for Advocates Serving as an Expert Witness

For all of these reasons, **it is recommended that a victim advocate serving as an expert witness should not be the advocate who worked with the victim personally** (Bayliff, 2000; Roger Canaff, personal communication, June 14, 2004). Ideally, the expert witness should be drawn from another agency entirely. This strategy is likely to increase the effectiveness of a victim advocate as an expert witness, by decreasing the perception of bias in the case. More importantly, this will protect the confidentiality of privileged communications and allow the advocate to continue providing direct services throughout the litigation process. By designating certain advocates as potential expert witnesses, these individuals will also be able to develop specialized expertise in providing courtroom testimony.

## Addressing Reluctance to Integrate Advocacy Services

As we discuss the role of advocates in the criminal justice system, it is important to recognize that some community professionals are extremely reluctant to involve advocates in the process of the medical forensic examination, law enforcement investigation, or court proceedings. This reluctance may stem from a variety of sources.

- This reluctance is often based in part on the differences in personality and philosophy between different professions. The type of person who becomes a law enforcement professional or prosecutor is sometimes very different from the type of person who becomes an advocate, and this can make it difficult to achieve the level of trust, respect, and comfort that is required to work together productively.
- However, the reluctance is also sometimes based on conflicts that arose between the disciplines in the past – perhaps as a result of a misunderstanding, lack of mutual respect, insufficient cross-training, or outright hostility.
- If the reluctance is not based on actual past conflicts, however, it is often based on the expectation that such conflicts will arise if advocates are “allowed” to work with sexual assault victims within the criminal justice system.

## **Common Concerns of Other Community Professionals**

In general, criminal justice professionals are often concerned that advocates (but especially community-based advocates) will talk victims out of reporting the sexual assault to law enforcement, disrupt their interviews, or otherwise interfere with their investigation and prosecution of the crime.

- To illustrate, there are examples where advocates respond to the exam facility before an officer arrives. Then, because victims do not understand the different roles of the responding professionals, they immediately begin to provide a detailed history of their assault to the advocate. When the officer does arrive, however, victims are understandably frustrated when the law enforcement interview begins, and they have to start all over again. In this case, victim advocates should receive training to clearly identify their role, describe the services they can provide, and gently explain to victims that they need to wait until the forensic examiner and the officer arrive to go into the details of the assault. Meanwhile the advocate can attend to the victim’s immediate needs and emotional well-being.
- Other problems arise when advocates take notes or write a report following the law enforcement interview. Not only does this violate the fundamental role of the advocate, but it also raises serious concerns regarding confidentiality and increases the likelihood that there will be inconsistencies in the documentation of the case. Such inconsistencies will then be used against the victim if the case ever proceeds to trial.
- In other situations, officers have told us that advocates have interrupted their interview without cause or that they have answered questions for the victim rather than allowing the victim to respond. Again, these behaviors violate the proper role for advocates.

- Problems also arise when advocates unknowingly become part of the chain of evidence. This can happen anytime advocates even temporarily have possession of evidence in the case (e.g., the victim's clothing or personal items) or when they have the potential to come into physical contact with forensic evidence. This could happen, for example, if the forensic examiner asks the victim to hold something or otherwise assist with the process of collecting, storing, or documenting forensic evidence.

All of these concerns can be addressed with cross-training between the various professional disciplines involved in sexual assault response. They can also be addressed by increasing, improving, and standardizing the training that advocates receive on the criminal justice system.

### **Concern That the Advocate Will Become a Witness**

Another concern that is often expressed is that advocates will become a witness in the criminal investigation if they are present during the law enforcement interview. The reality is, however, that if the advocate responds and is involved in any part of the medical forensic examination and investigation, the advocate already IS a potential witness in the case. Therefore, agencies need to have policies in place that will reduce any risks associated with responding. For example, advocates should not handle evidence, take notes, or collect information about the sexual assault beyond basic service documentation (e.g., date of service, location, specific services provided). With such documentation, advocates who are later subpoenaed would only be able to provide extremely limited information. Moreover, this type of documentation reflects the reality of the advocate role. When advocates respond to a call, their role is not to be concerned with the details of the sexual assault or the investigation. Their attention and focus must remain centered on the emotional needs of the victim; the specific details of the assault do not matter for this purpose.

### **Concern That Advocates Serve as “Watchdogs”**

Some criminal justice professionals might also feel reluctant to involve victim advocates in the criminal justice process, because they are afraid that the advocates will serve as “watchdogs,” always ready to turn into “attack dogs” if they make a mistake or say something wrong. It is important to recognize that this concern is understandable. None of us would leap at the prospect of having someone outside our field watch our every move while we do our work, criticizing us when we make a mistake and even contacting our supervisors when we do something that they perceive is wrong. This would be particularly true if we believed that this outsider did not have sufficient training in our job to really understand what we were doing and why. Simply understanding this source of reluctance can go a long way toward helping to address it.



## Overcoming Reluctance and Addressing Conflict

It should be clear by now that the reluctance to involve advocates in the criminal justice process stems from a variety of sources. To overcome this reluctance therefore takes a number of steps.

### Recognize Differences in Personality and Philosophy

First, it is important to recognize the differences in personality and philosophy and strive to emphasize the shared values that underlie the work of all the community professionals who respond to sexual assault.

- For example, the definition provided at the beginning of this module described advocacy as being based on the inherent belief that something is wrong in society and should be made right. Thus, an advocate **sets out to right a wrong**.
- This fundamental principle is typically shared between victim advocates and other community professionals. To illustrate, law enforcement professionals and prosecutors are very likely to describe their professional mission as seeking justice, in order to “right a wrong.” Health care providers and other human service professionals would similarly view social justice as part of their mission.
- In addition to this fundamental mission, advocates also share with the other professionals working within the criminal justice system an **action orientation** that is not focused on analyzing problems but rather on facing them head-on. This is another important commonality.

Thus, advocates and other community professionals typically share an action orientation and a mission of bringing about justice in the world. When seeking to build teamwork and establish collaborative relationships, it is impossible to overstate the importance of these shared values and principles. While the various professionals may have different views of sexual assault and a different understanding of its causes and potential solutions, it can often be helpful to maintain a focus on this shared mission while facing challenges and resolving disagreements.

The New York State Coalition Against Sexual Assault (NYSCASA) Legal Advocate Manual recommends that any strategies for conflict resolution should convey “the problems from the survivor’s point of view” (Chapter 3, p.56):

*“You should always stress your positive intentions which will benefit the immediate survivor as well as keep the door open for future survivors rather than denouncing or discrediting the detective or agency. You can become more comfortable with questioning, negotiating, and even confrontation as you build your advocacy skills and knowledge of systems. As the advocate, you are seeking accountability and justice from critical*

*actors in significant social and legal systems. This need not come from a place of hostility, disrespect, or distrust. You can re-frame the situation so that it becomes an ethical identification of problems or injustices”*  
(NYSCASA, Chapter 3, pp.56-7).

For a summary of some of the factors influencing law enforcement attitudes and responses to sexual assault victims, please see the excerpt from the NYSCASA Legal Advocates Manual provided in the appendix.

## **Address the Issue of Past Conflict**

Second, the issue of any past conflicts must be addressed head-on. Wherever possible, the conflict must be analyzed not only by the professional disciplines that were involved but also by others who may have important insight into what went wrong, why, and how to fix it. In many cases, the solution is training – particularly cross-training between the professional disciplines that were involved in the conflict. If the conflict arose as a result of a misunderstanding or misinformation, it is critical that the professionals involved clearly understand the roles and boundaries of the other disciplines. This will include recognition of those points where their professional objectives overlap, and when they do not.

To demonstrate the potential for cross-training to address these challenges, we would like to briefly describe the results of a survey conducted by the Institute of Public Health at San Diego State University with almost 1,000 professionals who attended training conferences hosted by EVAWI. Participants represented the disciplines of law enforcement, prosecution, forensic medicine, and victim advocacy (both system-based and community-based), and the goal for each conference was to improve the investigation and prosecution of non-stranger sexual assault. After participating in training, the vast majority of professionals stated that they expected the criminal justice response to improve “moderately” or “greatly” in a number of areas, including the quality of law enforcement investigations and the number of successful prosecutions. Most also said that they expected to see changes in their relationships with professionals in other disciplines, including an increased understanding of their perspectives, better appreciation for possible role conflicts, greater likelihood to reach out for collaboration, and increased willingness to explain a colleague’s perspective when others are critical of them. These findings encourage optimism regarding the impact of such cross-training.<sup>6</sup>

## **Address the Expectation of Future Conflict**

Yet even when there have not been any specific conflicts in the past, one reason that criminal justice professionals are often reluctant to work with advocates is because they anticipate such conflict in the future. It is therefore critical to air these concerns, address

<sup>6</sup> Lindsay, S. et al. 2007, January). Making a Difference (MAD) Conference Evaluation Report for End Violence Against Women International (EVAWI). Institute for Public Health, San Diego State University. Report available from the author or the staff of EVAWI.

them directly, and seek to prevent them. This will often involve cross-training between the professional disciplines, providing policy input for the various agencies involved in responding to sexual assault within the community, and working together to develop a community-wide protocol outlining the roles and responsibilities of each of the professional disciplines.

## **Address the Concern that Advocates Will Talk Victims Out of Reporting**

As we already mentioned, one common concern of criminal justice professionals is the belief that community-based advocates will try to talk victims out of reporting the sexual assault or participating in the process of the investigation and prosecution. (Given their status within the criminal justice system, this is not typically a concern for system-based victim advocates).

In some cases, this issue can be addressed by having community-based advocates explain their role as assisting victims in making their own decisions, by providing them with the information they need and supporting whatever decision they make – even when the advocate personally disagrees with it. While this is the appropriate role of a community-based advocate, it differs from the role of criminal justice professionals (including system-based advocates) whose job is to facilitate the victim's participation in the criminal justice process. As a result, they will not always agree with each other on this issue, but they will hopefully understand and respect that this is because of the differences in their professional roles and not a personal disagreement.

However, we also need to recognize that in some communities, community-based advocates might believe that the criminal justice agencies will NOT respond appropriately. This may be based on their perception of how victims have been treated by criminal justice personnel, or by the fact that very few cases are thoroughly investigated and successfully prosecuted. As a result, the information that they provide to victims may serve to discourage them from reporting or participating in the investigation. In this type of situation, community professionals must work together collaboratively so that all the involved agencies can be provided with the resources and training to do their job effectively. While community-based victim advocates do need to provide victims with realistic information about the criminal justice agencies in their communities, it does not serve the longer-term interest of victims to respond to problems by “working around” one of the core disciplines involved in the criminal justice and community response system. If such problems exist in the community, they must be approached with reform efforts involving all of the different professional disciplines involved in the community response to sexual assault.



## Address the “Watchdog” Role of Advocates to Ensure it is Fulfilled Appropriately

We also stated that a primary source of concern stems from the fact that advocates do in fact serve as “watchdogs” in a way, because part of their professional role includes ensuring that the victim’s rights and interests are protected at all times. Therefore, it is a proper part of an advocate’s role to seek redress when they believe the rights or interests of a victim have been violated. However, there are certainly more and less effective ways of fulfilling this role, and the various community professionals who respond to sexual assault can discuss ahead of time how best to do so.

- For example, criminal justice professionals and advocates can describe some possible scenarios and determine which type of remedies are available – both in the immediate situation and afterward.
- Advocates can also specify for the other community professionals what the procedure is for them to raise concerns regarding the professional behavior of an advocate, when it is the advocate who has made a mistake, acted inappropriately, or otherwise stepped outside the bounds of their properly defined role.

No one is going to deny that these issues can be extremely difficult for all of the professionals involved. This is perhaps one of the most important arguments for establishing a collaborative body such as a Sexual Assault Response Team (SART), which can provide a much-needed forum for addressing challenges and conflicts as they arise. In fact, such challenges and conflicts are inevitable, and they are best resolved in an environment of mutual trust and respect. Therefore, whether or not a community establishes a SART, it is always a good idea to work proactively to establish personal and professional bonds between those who respond to sexual assault. Whether this includes a formal recognition dinner or a backyard barbecue, it is critical to establish these personal relationships, so the groundwork is laid for the trust and respect that will be required to face the challenges and conflicts ahead.

### Resource: Sexual Assault Response and Resource Teams

For much more detailed information on Sexual Assault Response and Resource Teams (SARRTs), please see the two OLTJ modules on this topic: [Sustaining a Coordinated Community Response: Sexual Assault Response and Resource Teams](#) and [Sexual Assault Response and Resource Teams: A Guide for Rural and Remote Communities](#).

## Address the Concern that Advocates Withhold Important Information

We also mentioned that another common concern of criminal justice professionals is the belief that advocates will withhold information that would be important for the

investigation and prosecution of the sexual assault. There is often a perception that victims tell advocates “everything,” but advocates choose not to disclose this information to criminal justice professionals for ideological reasons or simply out of spite. It is important to note at the outset that this situation does not arise as often as some criminal justice professionals believe.

In fact, advocates often have LESS information about the sexual assault than criminal justice professionals do. This is particularly true for community-based advocates, because it is not part of their role to ask the victim any questions about what happened. They also do not typically learn any information about the assault from other professionals – other than the information that is disclosed by the victim in the presence of the advocate (e.g., during an interview or exam). Rather, the advocate’s role is to focus on the victim’s physical and psychological well-being, and respond by providing crisis intervention, emotional support, and various forms of assistance. Much more typical is the situation where the forensic examiner and law enforcement investigator know a great deal more about the sexual assault than the advocate.

Nonetheless, it certainly happens in some situations that an advocate learns some information that the victim has not shared with criminal justice professionals – and the advocate knows that this information could be important for those professionals to assist in the investigation and prosecution of the sexual assault. How advocates respond in this situation will vary, depending on a number of factors, including the legal protections they have (or do not have) regarding the confidentiality of their communications with victims.

**Please Note:**

In some communities, system-based advocates may be housed in a community-based organization, they might have a policy of confidentiality and/or they may have even completed the same training as a community-based rape crisis advocate counselor. Although these are all promising practices, it is important to remember that the system-based advocate is still a government employee and therefore there is no privileged communication and any information they have is discoverable.

For **system-based advocates**, this particular concern is not as relevant, because they do not have legal privilege to protect the confidentiality of their private communications with victims. This concern can thus often be addressed by simply clarifying that it would violate their role to withhold important information regarding the case and victim. If they are asked directly about the case by a police investigator or prosecutor, most system-based advocates are required to divulge what they know, even if the information was learned during a private conversation with the victim. If they are not asked directly about the case, however, the question of whether or not to provide the information proactively is realistically left in the hands of the system-based advocate. They must personally decide how to respond based on their understanding of their professional role and legal obligations regarding whether or not to provide the information. This is yet another issue

that should be addressed in policies and cross-training, so everyone is clear about what to expect in such a situation.

For **community-based advocates**, however, it must be clear to everyone involved in the community response system that they CANNOT share confidential information, because it violates their professional role and mission. (Whether they may ultimately have to divulge the information if they are served with a subpoena to testify is a more complicated question and depends on the specific laws and court decisions in their state.) When a community-based advocate has information that they know could be important for the investigation and prosecution of the sexual assault, the most appropriate response is to explain this fact to victims – privately – and provide victims with the information they need to make their own decisions regarding what to do. For example, if the victim has decided to report the sexual assault and participate in the investigative process, an advocate can point out that the information in question would be useful for the law enforcement investigator and/or prosecutor handling the case. This would be an appropriate role for advocates, because it helps victims to follow through on a decision they have already made. On the other hand, if the victim decides not to share the information with criminal justice professionals, community-based advocates just have to accept that fact as one of the more difficult parts of their professional role.

Because this concern is often prominent in the minds of criminal justice professionals, it certainly should be addressed directly in any cross-training with advocates, so both professionals have a clear understanding of each other's role, responsibilities, obligations, and boundaries.

## Address the Concern that Advocates Aren't Really Part of the "Team"

When discussing these types of concerns (i.e., that advocates talk victims out of reporting, or withhold important information), the underlying sense among many criminal justice professionals is that advocates aren't really part of the same "team." Yet reviewing the history of SARTs can be helpful in this regard. For example, the name alone – Sexual Assault Response TEAM, – leads many criminal justice professionals to believe that if all the members are on the same team, they must all have the same goals. There is a part of this sentiment that is true, but another part is not quite right. On the one hand, almost all of us who are professionals involved in this work can agree that we need to provide effective victim services in order to hold offenders accountable. On the other hand, our professional missions are not exactly the same across disciplines – and in fact they can sometimes be in direct conflict with each other.

The situations described in this module provide examples of this type of conflict in professional missions. For example, it is clearly consistent with the professional mission of criminal justice professionals (and system-based advocates) to encourage victims to report the crime to law enforcement and to provide information to criminal justice professionals that would assist in the investigation and prosecution of the case. However, it violates the professional mission of community-based advocates to do

either of these two things. Their role is to support victims in the process of making their own decisions, and it would violate their role to divulge confidential information. This is exactly the same type of violation that would occur if a doctor or attorney were asked to divulge confidential information without the consent of their patient or client.

### **Resource: Expert Interview**

In this [video interview](#), Dr. Wendy Patrick explores the question of whether rapport between first responders and the victim can influence juror perceptions.

## **An Extended Example: When the Facts “Just Don’t Add Up”**

Beyond these generalities, it is impossible to say what the immediate response to conflict will be on the part of an advocate, because it will depend on too many factors to list. It will of course depend on the nature of the conflict, but also the facts of the case, the demeanor of the victim, the relationship between the professionals, the location of the interaction, and a million other factors. To provide an illustration, we will explore one common conflict that arises between advocates and law enforcement professionals: when the investigator does not appear to believe the victim and/or begins to switch to an “interrogation mode” because the facts “just don’t add up.”

The issue underlying this conflict is that some law enforcement professionals might begin to suspect that a victim of sexual assault is filing a false report, or she just isn’t telling the truth. This is a suspicion that is often shared by other professionals in the community, as well as friends, family members, and other people in the victim’s life. All too often, victims are faced with skepticism or outright disbelief when they disclose that they have been sexually assaulted. Yet when this suspicion is expressed by a law enforcement investigator, it often involves questioning victims in a way that feels more like an interrogation of a suspect than an interview with a victim.

When questioned or challenged on this practice, officers will often say that it is their responsibility to “get to the truth.” This is true, because their professional mission is to serve as a neutral fact finder. Yet the suspicion is often misplaced. In fact, there are a number of reasons why the facts might “not add up” in a victim’s statement, and most of these have nothing to do with the possibility of filing a false report. The reality is that most victims provide details in their statement that are inconsistent or incorrect. This is typically due to memory impairment resulting from trauma and disorganization but can also stem from the fear that victims won’t be believed or that they will be blamed for their own sexual assault. As a result, they often attempt to make the statement sound more like the stereotypical “real rape” (e.g., with a stranger, weapon, physical resistance, injury).

In this type of situation, the immediate response of an advocate will depend on a number of factors, as already described. However, it may involve stepping outside with

the law enforcement investigator and asking where he or she is going with the interview. Often, the investigator will express the concern that the report is false, in which case the advocate can ask if the victim is now a suspect. If so, a suspect of what? Filing a false report? Obstructing the officer in the performance of his or her duties? Is the victim free to leave?

In some situations, this type of questioning is enough to call attention to the fact that the sexual assault is no longer being investigated and cause the investigator to at least think about the purpose of the interview being conducted. Whether or not the investigation is conducted appropriately beyond that point, at least the “interrogation mode” of the interview has not gone unquestioned and the advocate can advise the victim of what is happening and what the possible implications are. Victims can then make an informed decision regarding their ongoing participation in the law enforcement investigation.

However, in some cases an advocate can help law enforcement investigators by acknowledging the gut reaction that we all have when we suspect someone is lying to us and remind them that their professional obligation is to investigate through that gut reaction. They can be reminded of the many reasons why victims often provide information that is inaccurate or inconsistent and challenged to think about the consequences of being wrong. That is, if the investigator does not believe the victim and the suspect walks away, he may very well go on to assault someone else. Investigators can also be reminded that a determination about the facts cannot be made solely on the basis of a victim interview; the victim interview is only one piece of an investigation, which also includes collecting and documenting evidence and conducting interviews with the suspect and witnesses to events before, during, and after the sexual assault. Only after a thorough investigation has been conducted will there be enough facts to make a final determination in the case.

If the investigator states that charges might be pursued against the victim for filing a false report, this obviously indicates a dramatic turn of events in the investigation. At this point, the advocate will obviously need to explain this situation to victims and inform them of their rights, including the right to legal representation of their own. It is a tragedy when a proper law enforcement investigation is not conducted when a sexual assault is reported, but when it does happen, the role of an advocate is to provide the victim with the information, emotional support, and community resources they need to make informed decisions and to assist them in implementing those decisions. Any longer-term strategies for problem solving must wait.

### **Resource: Trauma Response to Sexual Assault**

EVAWI offers a number of resources to support law enforcement in conducting victim interviews that are “trauma-informed.” EVAWI offers a training bulletin entitled: [Understanding the Neurobiology of Trauma and Implications for Victim Interviewing](#), written by Dr. Chris Wilson, Dr. Kim Lonsway, and Sgt. Joanne Archambault (Ret.), with contributions by Dr. Jim Hopper. This training bulletin provides basic information



about the brain and explores the impact of trauma on behavior and memory. It then highlights the implications for law enforcement interviews conducted with victims of sexual assault and other traumatic crimes.

The following webinars on the neurobiology of trauma and trauma-informed interviews are available:

- [Forensic Experiential Trauma Interview: A Trauma Informed Experience Webinar](#). In this webinar, Russell Strand explores practical applications of the FETI, reframing questions, and how to close a FETI interview. Mr. Strand also talks about how FETI can be applied to both preliminary and follow-up interviews.
- A two-part series on the *Neurobiology of Sexual Assault* presented by Dr. Jim Hopper of Harvard University. In [Part 1](#), Dr. Hopper focuses on the topic of Experience and Behavior, while [Part 2](#) emphasizes Experience and Memory.
- Another good webinar on this topic is: [The Neurobiology of Sexual Assault: Implications for First Responders in Law Enforcement, Prosecution, and Victim Advocacy](#), with Dr. Rebecca Campbell, and hosted by the National Institute of Justice.
- Finally, we offer an archived webinar on [Effective Victim Interviewing](#), by prosecution expert Roger Canaff and EVAWI's Sergeant Joanne Archambault. While it does not specifically address the impact of trauma on neurobiology, valuable guidance is provided for how to plan and conduct successful interviews with sexual assault victims.

## Longer-Term Strategies for Resolving this Particular Conflict

Continuing with this example, it is also possible to discuss the type of strategies that can be used for resolving conflict over the longer term. Many of these have already been discussed in general terms but can now be illustrated in the context of this specific example.

To address this particular conflict over the longer-term, advocates and other members of the SARRT might therefore consider:

- Asking individual victims to write down their account of the sexual assault, either to help them prepare for the law enforcement interview or to provide information in an alternative form if the interview is unsuccessful and/or conducted as an interrogation.



- Providing training to law enforcement and other community professionals involved in sexual assault response on the realistic dynamics of sexual assault and challenging the misconception that false reports are common.
- Inviting law enforcement professionals to provide training for advocates on the purpose and specific steps involved in an investigation. In some cases, the conflict may actually be the result of a misunderstanding on the part of the advocate. If not, the training may provide the opportunity for dialogue about the nature of the conflict and ways to resolve it in future cases, including a clear explanation of the role of victim advocates and law enforcement investigators.
- Regularly scheduling formal or informal meetings to discuss specific cases or hosting meetings any time there is a change in the agency's staff or administration. This will help to maintain ongoing relationships and ensure continuity in the community response system.
- Contacting a trusted person within the law enforcement agency whenever questions arise regarding the criminal justice process or an advocate's response. This type of consultation can help to build trust, and it communicates that their input is valued. If there are concerns regarding the confidentiality of discussing a particular case, the question can often be presented as a hypothetical scenario (NYSCASA Legal Advocate Manual).
- Surveying victims regarding their experiences with all of the various professionals in the community who responded to their sexual assault and provided them with services. This information can be used to help all of the professionals within the community to respond more effectively to sexual assault cases and victims.
- Establishing a structure for ongoing communication and problem-solving among community professionals, such as a Sexual Assault Response and Resource Team (SARRT). As we've already stated, this type of structure provides a forum not only for resolving conflicts, but also increasing the level of mutual understanding and respect that are necessary to be successful. It may also involve coordinated effort to undertake a particular project (e.g., grant proposal, fundraising event) that will help in some specific way to address the conflict within the community.

### **Example: San Diego County**

To illustrate, San Diego County provides victims of sexual assault with a SART Questionnaire to evaluate the services that they received and provide other types of information to improve the community-wide response system. Many professionals working in this field are surprised by the pattern of responses that are received. In 2000-2001, for example, sexual assault victims rated the services provided by law enforcement as favorably (on average) as those provided by advocates. In fact, out of



138 surveys, 96.5 % of the responding victims said that the services provided by the officer/detective were either “excellent” or “good.” Regarding advocates, there were 186 responses by sexual assault victims, and 87% of them said the services they provided were either “excellent” or “good.”

Working to develop interagency agreements and community-wide protocols, spelling out the roles and responsibilities of the various professionals involved in responding to sexual assault. (Models for developing such an agreement or protocol are available in the two OLTi modules on Sexual Assault Response and Resource Teams).

- Clearly outlining the responsibility of law enforcement professionals and forensic examiners to withhold judgment until a thorough investigation has been completed. By articulating this standard of care, it provides the basis for providing training to personnel within the law enforcement agency and holding the agency accountable for fulfilling this responsibility.
- Advocating for a delay in the detailed, follow-up interview of many victims of sexual assault after the initial disclosure and SART response, so they can rest, recuperate, and get support from their friends and family members. This determination requires balancing a number of other factors, but whenever possible it can help victims provide better information and participate in a more productive way during the law enforcement interview and investigation.
- Gathering local data on the realistic dynamics of sexual assault, to compare with known patterns from larger-scale national studies. This type of local data can be invaluable for use in both professional training and community education programs on what sexual assault really looks like and to challenge the myth that false reporting is common.
- Focusing on one conflict at a time, if possible. While there may be a number of conflicts that are seen between community professionals, it may be helpful to think strategically, in order to choose the one that is the most urgent, important, and/or attainable. It is often tempting to tackle a number of challenges simultaneously, but this may not be the most effective strategy – especially if it involves conflict between community professionals.
- Remaining patient, optimistic, and tireless in the pursuit of positive reform. Often these conflicts are not addressed with a single effort, but with persistent work over time. Sometimes it requires a change of agency administration or other aspects of the political climate, as long as the conflict isn't simply pushed aside in the hopes that such a positive change in the landscape of community agencies will be seen.
- Providing positive reinforcement and recognition whenever possible. Advocates can help encourage positive reform by sending thank you notes or notes of

commendation for other community professionals who provide a competent and compassionate response to victims. This could include law enforcement professionals, forensic examiners, or prosecutors who conduct a particularly effective victim interview – or even for positive aspects of an interview that might not have otherwise been exemplary. Successful interviewers can also be recognized by the agency in any number of informal and/or formal ways, including letters, awards, recognition events, and even small tokens of appreciation (e.g., a mug with agency logo). Anytime such recognition is provided for a community professional, it is also a good idea to send a copy to that person's supervisor or chief to ensure that others in their chain of command know that they are doing a good job in this area (NYSCASA *Legal Advocate Manual*).

Finally, we can all strive to find ways to structure the dialogue regarding conflicts such as this one in a way that does not pit advocates against law enforcement professionals – or against other professionals within the community – but rather involves all of the community professionals in an effort to address some external demand. For example, law enforcement personnel and advocates can team up to provide presentations together at community education programs, basic academy training, or continuing education for advanced officers.

## **Remind Community Professionals of the Benefits of Working with an Advocate**

A final strategy for overcoming the reluctance of community professionals to working with advocates is to remember the many benefits of doing so – not just benefits for victims but also the benefits to themselves as professionals. These can be summarized as providing victims with crisis intervention, emotional support, information, and various forms of concrete assistance. These benefits for victims also work to the advantage of the other professionals within a community who respond to sexual assault. This is true because the services that advocates provide ease the burden on other professionals by relieving them of these responsibilities. Yet advocates also assist the other professionals within the community who respond to sexual assault, by providing the support and assistance that victims need to participate constructively in the medical forensic examination, law enforcement investigation, and criminal prosecution of their sexual assault.

## **Conclusion**

To conclude, we want to therefore return to the results of the survey of conference participants described earlier. In that same survey of almost 1,000 multidisciplinary professionals who had attended a training conference hosted by EVAWI, they were also asked to rate the effectiveness of services provided by professionals in each of the different disciplines. Results indicated that “the largest percentage of conference participants rated community-based victim advocates as effective in the services they provide to sexual assault victims” (Lindsay et al., 2007, p.21). The percentage rating the

services they provided as “moderately” or “very” effective was 92%. However, ratings for other professionals were also quite high: 87% for both system-based advocates and medical professionals / forensic examiners, 76% for law enforcement, and 73% for prosecutors (Lindsay et al., 2007). In other words, almost all of these professionals involved in the criminal justice and community response to sexual assault viewed the services provided by the various disciplines as rather effective, but this was especially true for the two forms of victim advocacy (both system-based and community-based).

By building on the mutual respect that is documented in this survey and emphasizing the shared value of victim advocates, we hope that community professionals can find a way to overcome any reluctance that exists and provide all victims of sexual assault access to advocacy services.

It is probably safe to assume that all of the professionals involved in responding to sexual assault cases want to see more perpetrators held accountable for their crimes. Yet we can only accomplish this when victims are able to successfully participate in the process of a law enforcement investigation and criminal prosecution. This, in turn, will only happen when victims are supported by friends, family members, advocates, and other professionals. In other words, to hold more offenders accountable **we must provide all victims of sexual violence (and their loved ones) with as much support as possible.**

One-way communities can ensure this happens is by participating in the Start by Believing campaign. Start by Believing is the global campaign developed by EVAWI to transform responses to sexual assault and overcome the common belief that victims are only fabricating reports out of revenge, a desire for attention, or as an excuse for their own questionable behavior. It “flips the script” on the message victims have historically received from professionals and support people, which is: “How do I know you’re not lying?”

Advocates often play an integral role in bringing this campaign, and the overall philosophy, into their communities. Community-based and system-based advocates have a unique ability to bring criminal justice professionals together to unify in a single message for survivors – we support you and we will Start by Believing.

For more information, please visit the [Start by Believing website](#).

## For More Information

Just Detention International’s [Hope Behind Bars: An Advocate’s Guide to Helping Survivors of Sexual Abuse in Detention](#) provides an excellent manual to help advocates provide support to survivors of sexual abuse in detention.

## Appendix

This section is taken from the [Legal Advocate Manual](#) (Chapter 3, p.44) and is reprinted with permission of the New York State Coalition Against Sexual Assault with all rights reserved.

Some officers are already extremely sensitive to sexual assault survivors, while others can benefit from the assistance of advocates in improving their communication with survivors. Some police may not understand the way their attitudes, including non-verbal communication toward survivors, can impact on their ability to accomplish their goals. They may not be aware that they are often the first to come in contact with the sexual assault survivor after an assault, nor do the officers always truly understand the impact of victimization. In addition, insensitive police behavior can reflect an underlying attitude based on a “fear of contamination,” which is characterized by persons distancing themselves from the horror of a crime by criticizing or ridiculing survivors, discouraging prosecution, or minimizing the seriousness of the victimization. As is potentially a pattern for others who come in contact with a survivor of a violent crime, blaming the victim may help police avoid contemplating the vulnerability of themselves or their own families to similar crimes. There also can, for some officers, emerge in daily practice a real or seeming indifference to a victim’s plight stemming from the pressure of law enforcement work. Other examples of barriers to officers’ understanding are:

- Unfamiliarity with the serious psychological and emotional impact of sexual assault due to lack of training in the basic elements of psychology and victimology.
- Comparison of the case to others in the officer’s own experience resulting in a minimization of the sexual assault. (“It could have been worse...”)
- Awkwardness and resentment over the officer’s own helplessness, especially if not trained to deal with sexual assault.
- Lack of training in how to communicate empathy while conducting an investigation.
- Overreaction to a victim’s misdirected anger; lack of understanding that the victim may perceive the officer as a “safe” person for the expression of anger and that the anger is likely to stem from pain rather than hostility.
- Avoidance of the psychological pain which comes from “getting personally involved.
- The officer’s perception that the victim does not sufficiently appreciate his/her efforts.
- Racial, class, social or other prejudices.



- Over-zealousness to get the job done and pressure to obtain information and get back on patrol, which can preclude taking the time to be kind, sympathetic, or supportive.
- Loss of compassion or sensitivity due to constant exposure to misfortune and human suffering.
- A historical adversarial “us-against-them” relationship between police and the public.
- The commonly practiced defense mechanism of making quips or remarks which reflect police humor, but which survivors may perceive as insensitivity.
- Hardness, cynicism, or a mistrust of people developed through dealing with criminals on a daily basis for long periods of time.

In addition to the factors listed above, common cultural attitudes toward the crime of sexual assault can serve as barriers to successful police-victim interaction, including:

- A tendency to blame the survivor for being victimized or for precipitating the crime by carelessness, stupidity, or ignorance of the survival rules in modern society.
- Second guessing of survivor’s behavior which most commonly surfaces in questions which challenge the victim’s judgment. (“Why in the world did you...?” “Didn’t you know that...?”)

Mistrust and doubt regarding the survivor’s credibility, ranging from the non-verbal cynically raised eyebrow to outright accusations of lying.

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