

Tribal, Federal and State Laws that Impact Sexual Assault Service Providers

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Objectives

- Will be describe how state laws impact informed consent and confidentiality .
- Will be able to describe what types of confidentiality VAWA requires.
- Will be able to describe how Tribal laws impact confidentiality.

Disclaimers

- Information during this presentation is not legal advice
- Laws differ from state to state and from tribe to tribe. The specifics of these laws may be important in deciding an issue

Getting Legal Help

- Find an attorney who specializes in the area of law where you need help.
- Local Resources
 - Local Bar Association
 - Law School Clinics
 - Law Libraries
 - Disability Law Centers

National Resources

- Victims Rights Law Center
<http://www.victimrights.org/>
- Immigration – Catholic Legal Immigration Network
<https://cliniclegal.org/>
- VAWA Forensic Compliance-
<http://www.evawintl.org/Forensic-Compliance>
- Tribal Court Clearinghouse <http://www.tribal-institute.org/>
- National Indian Country Clearinghouse on Sexual Assault <http://niccsa.org/>
- Health and Human Services Office of Civil Rights
<http://www.hhs.gov/ocr/>

State and Tribal Laws that Impact Sexual Assault Survivors

Mandatory Reporting Laws

- Child Abuse
- Elder Vulnerable Adult Abuse
- Injury Reporting Laws
- Public Health Laws

Who is required to report

What information needs to be reported

Who can receive the information

VAWA Forensic Compliance

- 42 USC 3796gg-4
- States must certify that the state or another government entity covers the “full out of pocket cost” of forensic exams
- Victims must be able to get access to the exam and payment without cooperating with law enforcement or the criminal justice system

VAWA Forensic Compliance cont.

- This includes the head to toe exam, medical history, collection of evidence, documentation, and related ancillary expenses (e.g., if there is a charge for the room, equipment, or supplies)
- States can cover additional (medical) costs at their discretion

VAWA forensic compliance part 3

- Insurance:
- States are allowed to use victim's personal insurance to cover the costs although it is strongly discouraged
 - Must make sure that victims are not billed for out of pocket costs such as copayments or deductibles
 - Can use VAWA STOP Formula funds to pay for exams if
 - 1) do not require victims to seek reimbursement from insurance
 - 2) trained examiner

Mandatory Reporting Laws

These laws impact VAWA Compliance

1. In states where sexual assault must be reported to law enforcement the crime must still be reported, but an adult victim does not have to cooperate with the law enforcement investigation.
2. In state where there is no mandatory reporting of sexual assault – sexual assault evidence can be collected anonymously.

State and Tribal Age of Consent Laws and Criminal Statutes

- Determine at what age someone under of the age of 18 can consent to a sexual relationship.
- State or tribal laws can set a lower limit and may also state that difference in age between a child and another child or adult determines when consensual sex is illegal.

State Victims Rights Amendments 32 States

OFFICE OF JUSTICE PROGRAMS

VictimLaw

VictimLaw is a searchable database of victims' rights legal provisions including federal, state, and territorial statutes, tribal laws, state constitutional amendments, court rules, administrative code provisions, and summaries of related court decisions and attorney general opinions.

More About VictimLaw

There are four ways to search:

- Topical** Search victims' rights laws by topic and subtopic. [Search by Topic](#)
- Term** Search victims' rights laws by entering one or more keywords. [Search by Term](#)
- Contents** View VictimLaw contents by jurisdiction. [Search by Contents](#)
- Citation** Find a document by entering its citation or accessing a citation list. [Search by Citation](#)

Resources:

- [Learn About Victims' Rights](#)
- [Learn About the Different Search Types](#)
- [Understanding the Justice System](#)
- [Find Additional Resources](#)
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You do not have to log in to search the database, but you can log in to save your searches:

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Search by Content | Find Additional Resources | Right to Compensation | Right to Seizure

Search by Citation | Search the Legal Glossary | Right to Be Heard | Right to Return of Property

About Search Types | Right to Be Informed | Right to Privacy | Right to a Speedy Trial | Right to Enforcement

Victim Rights Communicator Awards
Website of the Year

Tribal Victims Rights

- More than 100 tribes have adopted victims rights into tribal code.
- Federal Victim Rights applies if the case is under federal (FBI) jurisdiction
- State victim rights laws apply if under state or PL 280 jurisdiction

Victim Rights Laws

- **77-37-3. Bill of Rights. Utah**
- (1) The bill of rights for victims and witnesses is:
- (a) Victims and witnesses have a right to be informed as to the level of protection from intimidation and harm available to them, and from what sources, as they participate in criminal justice proceedings as designated by Section 76-8-508, regarding witness tampering, and Section 76-8-509, regarding threats against a victim. Law enforcement, prosecution, and corrections personnel have the duty to timely provide this information in a form which is useful to the victim.
- (b) Victims and witnesses, including children and their guardians, have a right to be informed and assisted as to their role in the criminal justice process. All criminal justice agencies have the duty to provide this information and assistance.
- (c) Victims and witnesses have a right to clear explanations regarding relevant legal proceedings; these explanations shall be appropriate to the age of child victims and witnesses. All criminal justice agencies have the duty to provide these explanations.
- (d) Victims and witnesses should have a secure waiting area that does not require them to be in close proximity to defendants or the family and friends of defendants. Agencies controlling facilities shall, whenever possible, provide this area.

Federal Victim Rights 18 U.S. Code § 3771

a)RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

(1)The right to be reasonably protected from the accused.

(2)The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3)The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4)The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5)The reasonable right to confer with the attorney for the Government in the case.

42 U.S.C. 10607

- **(1)**A responsible official shall—**(A)**inform a victim of the place where the victim may receive emergency medical and social services;
- **(B)**inform a victim of any restitution or other relief to which the victim may be entitled under this or any other law and [\[1\]](#) manner in which such relief may be obtained;
- **(C)**inform a victim of public and private programs that are available to provide counseling, treatment, and other support to the victim; and
- **(D)**assist a victim in contacting the persons who are responsible for providing the services and relief described in subparagraphs (A), (B), and (C).

42 U.S.C. 10607

- **(7)**The Attorney General or the head of another department or agency that conducts an investigation of a sexual assault shall pay, either directly or by reimbursement of payment by the victim, the cost of a physical examination of the victim which an investigating officer determines was necessary or useful for evidentiary purposes. The Attorney General shall provide for the payment of the cost of up to 2 anonymous and confidential tests of the victim for sexually transmitted diseases, including HIV, gonorrhea, herpes, chlamydia, and syphilis, during the 12 months following sexual assaults that pose a risk of transmission, and the cost of a counseling session by a medically trained professional on the accuracy of such tests and the risk of transmission of sexually transmitted diseases to the victim as the result of the assault. A victim may waive anonymity and confidentiality of any tests paid for under this section.

Emergency Contraception

17 States and D.C. requires hospitals to provide information about emergency contraception

13 States require hospitals to dispense emergency contraception to sexual assault survivors

Guttmacher Institute

VAWA confidentiality

- **Victim service providers** funded by VAWA may not “disclose, reveal, or release” identifying victim information regardless of whether the information is encoded, encrypted, hashed, or otherwise protected
- Exceptions
 - Court mandate
 - Statutory mandate
 - Release
- If the first two, then notify affected victims and protect privacy as much as possible

Confidentiality- waivers

- Must be time limited, informed, written, victim-centered
- Waiver can not be a condition of service
- For minors, parent or guardian can sign and the minor- but not the abuser of the child or the other parent. If a minor can receive services without a parent or guardian then ok to sign release without parent or guardian.

State Laws Advocate Confidentiality Laws

- Many states have specific laws that protect confidentiality of relationship between advocates and survivors

You Need to Know:

- Does your state protect the relationship?
- How is relationship defined (who is considered to have relationship)?
- What is protected ?

Federal Health Care Laws That Impact Sexual Assault Survivors

- Health Insurance Portability and Accountability Act (HIPAA)
- Emergency Medical Treatment and Active Labor Act (EMTALA)
- Affordable Care Act

What is HIPAA ?

- Health Insurance Portability and Accountability Act
- Congress passed in 1996
- Mandate to come up with privacy regulations
- Rules promulgated by DHHS

What Kind of Information does HIPAA Cover?

All Individually Identifiable Health Information
in All Forms

- Electronic
- Written
- Oral
- Any other

How Does HIPAA Effect the Health Care Consumer ?

- Patient will receive education on privacy rights.
- Patient will be given access to medical records.
- Patient will give consent before information is released.
- Patient will have recourse if privacy protections are violated.

HHS Fact Sheet

What Kind of Information can Patients Receive Under HIPAA?

- Copy of the medical records
- Record of everyone who has been given access to their medical records.

Patient Access to Records

45 CFR **164.524**

- (1) Right of access. Except as otherwise provided in paragraph (a)(2) or (a)(3) of this section, an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set [\[1\]](#), for as long as the protected health information is maintained in the designated record set, except for:
- (ii) Information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding [\[2\]](#);

This does not apply to SANE records. This applies to records created by defendant health care provider.

Who must comply with HIPAA?

- Health Plans
- Health Care Clearinghouses
- Health Care Providers

Definition of Health Care

- ***Health care*** means care, services, or supplies related to the health of an individual. *Health care* includes, but is not limited to, the following:
- (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and
- (2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.

When Can A Health Care Provider Release Information?

- Consent (May become optional)
- Authorization
- Federal or state law mandates release of information

Consent to Release Information is Assumed When the Following Occurs

- Treatment
- Payment
- Operating the practice

When Does A SANE Need An Authorization?

Release Medical Records to:

- Law enforcement
- Crime lab
- Toxicology lab
- Prosecutor
- Rape crisis/advocacy
- Any disclosure to non-health care provider

How Long Is An Authorization Effective?

- Authorization should be time limited.
- Patient can revoke authorization at any time.
- Revocation must be made in writing.
- Health care provider is not responsible for any release of information prior to the revocation.

Emergency Medical treatment and Active Labor Act

- Applies to hospitals who have an Emergency Department and accept Medicare patients (98% of hospitals)
- Applies to Critical Access Hospitals with a dedicated ED
- Originally created to provide access to emergency care and to prevent patient dumping

EMTALA Requirements

- Medical Screening Exam
- Stabilization of Emergency Condition
- Appropriate Transfer
- Cannot delay treatment or examination to inquire about insurance or payment
- Obtain or attempt to obtain informed refusal for exam, care or transfer

Medical Screening Exam

“An MSE is the process required to reach, with reasonable clinical confidence, the point at which it can be determined whether the individual has an EMC or not. An MSE is not an isolated event. It is an ongoing process that begins, but typically does not end, with triage. “

Source CMS – Interpretive Guidelines 2009

Triage

Triage entails the clinical assessment of the individual's presenting signs and symptoms at the time of arrival at the hospital, in order to prioritize when the individual will be seen by a physician or other qualified medical personnel (QMP).

Source CMS – Interpretive Guidelines 2009

Minors and EMTALA

A minor (child) can request an examination or treatment for an EMC. The hospital is required by law to conduct the examination if requested by an individual or on the individual's behalf to determine if an EMC exists. Hospital personnel should not delay the MSE by waiting for parental consent. If after screening the minor, it is determined that no EMC is present, the staff can wait for parental consent before proceeding with further examination and treatment.

Can A SANE Perform an MSE?

A hospital may, if it chooses, have protocols that permit a QMP (e.g., registered nurse) to conduct specific MSE(s) if the nature of the individual's request for examination and treatment is within the scope of practice of the QMP (e.g., a request for a blood pressure check and that check reveals that the patient's blood pressure is within normal range).

Source CMS – Interpretive Guidelines 2009

Affordable Care Act Section 1557

Nondiscrimination provision of the Affordable Care Act. Prevents discrimination against

- Race
- Color
- National Origin
- Sex
- Age
- Disability

1557 New Rules

- Prohibiting denial of health care or health coverage based on an individual's sex, including discrimination based on pregnancy, gender identity, and sex stereotyping.
- Requiring covered entities to make electronic information and newly constructed or altered facilities accessible to individuals with disabilities and to provide appropriate auxiliary aids and services for individuals with disabilities.
- Requiring covered entities to take reasonable steps to provide meaningful access to individuals with Limited English Proficiency. Covered entities are also encouraged to develop language access plans.
 - <http://www.hhs.gov/about/news/2016/05/13/hhs-finalizes-rule-to-improve-health-equity-under-affordable-care-act.html>

Sex Discrimination

- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping.
- Women must be treated equally with men in the health care they receive and the insurance they obtain.
- Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
- Individuals must be treated consistent with their gender identity, including in access to facilities. However, providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender.
 - <http://www.hhs.gov/sites/default/files/1557-fs-sex-discrimination-508.pdf>

Limited English Proficiency

- Covered entities are prohibited from using low-quality video remote interpreting services or relying on unqualified staff, translators when providing language assistance services.
- Covered entities are encouraged to develop and implement a language access plan to ensure they are prepared to take reasonable steps to provide meaningful access to each individual that may require assistance.

Affordable Care Act

Non-profit Hospital Community Benefit

- Requires non-profit hospitals to perform a community health needs assessment every three years.
- Hospital must adopt an implementation strategy that addresses the identified health needs.

OVW funding for SANE/SART

- STOP Formula Grant Program
- Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (Also call the Improving Criminal Justice Responses Program)
- Rural
- Campus
- Grants to Tribal Governments
- Note re: SASP (sexual assault advocacy but not SANE/SART)

See the OVW website at www.justice.gov/ovw

Federal funding for forensic exams

- Refer back to VAWA forensic compliance
- 42 USC 10607- federal investigating agency responsible to pay for exams
- VOCA compensation
- VOCA assistance- new rule allows to the extent that other funding sources such as State appropriations are insufficient

Resources

- Emergency Contraception Laws: Guttmacher Institute
https://www.guttmacher.org/sites/default/files/pdfs/spibs/spib_EC.pdf
- National Center for Victims of Crime: Victim Rights Amendments
<https://victimsofcrime.org/our-programs/public-policy/amendments>
- Community Benefit Policy Brief Hilltop Institute
<http://www.hilltopinstitute.org/publications/HospitalCommunityBenefitsAfterTheACA-StateLawLandscapeIssueBrief6-March2013.pdf>