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# Investigating Sexual Assaults

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Concepts and Issues Paper

July 2005

## I. INTRODUCTION

### A. Purpose of Document

This paper was developed to accompany the *Model Policy on Investigating Sexual Assaults* developed by the IACP National Law Enforcement Policy Center. The paper provides essential background material and supporting documentation to provide a greater understanding of the developmental philosophy and implementation required for the model policy. It also addresses field investigative procedures and best practices for working with victims of criminal sexual violence.<sup>1</sup> This material is designed to assist law enforcement executives in tailoring the model policy to the requirements and circumstances of their own communities and agencies.

### B. Background

Estimates of the prevalence of sexual assault in the United States vary due to differences in data collection, definitions, and calculations. Based on numbers from the National Crime Victimization Survey (NCVS), 150 of every 100,000<sup>2</sup> women ages 12 and older were raped or sexually assaulted in 2003.<sup>3</sup> In 2003, the Federal Bureau of Investigation's (FBI) Uniform Crime Report<sup>4</sup> (UCR) statistics indicated a rate of 63.2 reported forcible rapes per 100,000 adult women. UCR estimates tend to be much lower for three reasons. First, the UCR data only include incidents that are reported to law enforcement. Second, the UCR definition of rape is more restrictive than the NCVS definition. Third, the NCVS definition is broader, including females ages 12 and over, whereas the UCR definition includes only adult women.

The article *Making Sense of Rape in America: Where Do the Numbers Come From and What Do They Mean?* (2004) explains that accurate estimates of rape are difficult to obtain because many rape victims are reluctant to disclose the experience to other people. Additional factors that hinder an accurate estimation include: different ways of defining and measuring rape; different population groups measured; different time frames; and different units of analysis in reporting statistics (i.e., within a given time frame, the number of people raped versus the total incidents of rape).<sup>5</sup>

Many victim advocates, law enforcement administrators, and

others have expressed concern about the limited definition of rape used by the UCR, arguing that it does not present an accurate picture of sexual violence in America. Specifically, the definition used by the FBI for the UCR limits rape to "the carnal knowledge of a female, forcibly and against her will." This definition excludes the following types of assaults:

- Those committed through the delivery of drugs or alcohol to the victim
- Those committed against victims who are incapable of consenting
- Those that involve anal intercourse, oral copulation, or penetration with a foreign object
- Those committed by female perpetrators or perpetrated against male victims
- Those committed by a blood relative
- Those perpetrated against child victims

Many argue that such a narrow definition contributes to the stereotype of sexual assault, leaving law enforcement professionals ill prepared to respond to the realistic dynamics of these crimes.

Contrary to the stereotype of "real rape" as an assault by a stranger committed with a weapon and a great deal of physical force, research and law enforcement experience demonstrate that the following represent some of the realistic dynamics of sexual assault crimes:

- Most sexual assault victims are acquainted with the suspect(s) in some way, yet they rarely expected intimacy with the suspect(s).
- Many women are victims of repeated rape and sexual assault.
- Most sexual assaults are not reported to law enforcement authorities.
- Men are even less likely to report their sexual assault to the police than are women.
- Victims rarely report to the police first; usually they go first to a close friend or relative, a health care provider, or a victim advocate.
- Victims often delay reporting a sexual assault for days, weeks, months, or even years, and many never disclose it to anyone, including their closest friends.
- The police are more likely to be notified of sexual assaults that are committed by strangers than by someone the victim

knows.

- Sexual assault perpetrators rarely use weapons and may not use physical force, relying instead on verbal threats, intimidation, and a victim's vulnerability. Victims' emotional reactions may include confusion, shame, and embarrassment.

- Victims may lie about specifics of the sexual assault because they fear that their actions may have contributed to the sexual assault.

- The trauma of victimization can increase chances for substance abuse, sleeping and/or eating disorders, mental illness, prostitution, suicide, and running away.

- Few victims are injured to the point that emergency medical attention is needed.

- Alcohol and drugs are involved in a high percentage of sexual assaults.

- Individuals who have been previously victimized may be unable to defend themselves due to the past trauma the assault triggers and the fear they experience during the current assault.

Because these realities of sexual assault differ dramatically from the stereotypes held by much of law enforcement and society in general, victims are often unwilling to report sexual assault for fear of not being believed or because they think they will be blamed for the crime. Victims often fear that their sexual assault report will not be believed or taken seriously because: (1) they knew their assailant; (2) they are related to or closely acquainted with the assailant; (3) they are intimidated by the assailant's position, power, or social status; (4) they engaged in drug or alcohol use; (5) they put themselves at risk by actions such as entering a stranger's automobile or apartment; (6) they have an arrest record or an outstanding warrant; or (7) they were engaged in illegal activity at the time of the offense. These same factors that deter victims from reporting have been demonstrated to influence the complaint-filing and charging decisions of police and prosecutors.<sup>7</sup>

In small communities and rural areas, many of these problems are further exacerbated. Victims in these communities often find themselves at great distances from law enforcement agencies, social services, and medical care facilities. Because victims in a smaller community may know law enforcement officers, they may calculate that it is too difficult to report the crime or call for support.<sup>8</sup>

Law enforcement professionals must work to help prosecutors and jurors understand the behavior of sexual assault victims and how it differs from the stereotype. If an attack involved no physical force, police can help explain a victim's submission out of fear by conducting a comprehensive interview in which the victim describes in detail what she was thinking and feeling during the assault. If the victim was incapacitated as a result of voluntary alcohol or drug use, law enforcement officers can help show why this is an issue of increased *vulnerability* rather than *culpability*.

There are a number of improvements that can be made in the investigation and prosecution of sexual assault crimes. Although some of these improvements are technological, most are actually results of a thorough police investigation, comprehensive interview techniques, and diligent work to establish rapport and trust with victims. Law enforcement agencies and investigators need to ensure that sexual assaults involving acquaintances and intimate partners are pursued as vigorously as those perpetrated by strangers.

It is important to remember that one of the most critical responsibilities of the responding officer and investigator is to

reassure the victim that he or she will not be judged and that the complaint will be taken seriously. Responding officers and investigators are expected to take a professional, victim-centered approach to sex crimes and to investigate these crimes in a manner that restores the victim's dignity and sense of control, while decreasing the victim's anxiety. Virtually all sexual assault victims want validation from the authorities that the crime occurred, and this may be a more critical element of a successful response and investigation than a criminal prosecution or conviction. Regardless of the investigative results, responding officers and investigators have the power to help a person heal from sexual assault.

## II. LEGAL BASIS FOR SEXUAL ASSAULT

For purposes of the policy and this paper, the term "sexual assault" will be used to refer to felony crimes of sexual violence. Although specific statutory definitions of sex crimes vary by state, most are conceptually similar and can be understood by analyzing their elements. This conceptual analysis must thus be supplemented with specific information from local definitions and statutes in the development of a policy for a law enforcement agency.

### A. General Elements of Felony Sexual Assault

In addition to the general elements of felony sexual assault (defined in the policy), some state statutes require that the act of sexual assault have an element of sexual gratification to constitute a criminal offense (e.g., the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires"). Unfortunately, this element has contributed to a misperception among some law enforcement professionals that ejaculation is a required element of a sexual assault offense. Although investigators and prosecuting attorneys need to question the victim about whether the suspect had an erection, made verbal comments of a sexual nature, ejaculated during the commission of the crime, or penetrated with a foreign object, many state statutes have been changed to recognize that much sexual violence is about humiliation and abuse rather than sexual gratification.

### B. Sexual Penetration versus Sexual Contact

Although the specific terminology and definitions vary, most state laws recognize a conceptual distinction between criminal sexual acts of penetration (of any orifice by body part or object) and other forms of criminal sexual activity short of penetration (e.g., fondling, grabbing, pinching). As a result, sex crimes investigators must also recognize this distinction to appropriately identify which type of offense is being reported by the victim in a particular case.

It is important to recognize that the violation of a victim may involve multiple offenses, including some combination of criminal sexual penetration and contact. Each count or charge must be identified independently. For the purposes of this paper, the following discussion will refer to crimes of felony sexual assault involving penetration. The discussion is equally relevant to crimes involving sexual contact.

### C. Investigative Strategy: Denial, Identity, and Consent Defenses

The framework provided in this paper is designed to help officers and investigators determine which category of sexual assault case they are handling, predict the defense most likely to be

raised, and guide an investigative strategy toward overcoming that particular defense. A well-thought-out investigative strategy can:

- Define what issues are likely to be raised in court
- Prioritize the probative value of evidence and its impact on the investigation
- Determine the probative value of statements made by the victim, witness, and offender

Investigators must remain flexible because defenses are not entirely predictable and may change—even during the course of a single investigation.

**1. Denial Defense.** When a suspect is charged with a sex crime, one primary element of the offense will always be the sexual act involved (whether sexual penetration or contact). Because the sexual activity constitutes an element of the offense, it therefore provides the grounds for one particular defense strategy—*denial*. If the suspect denies that the sexual activity took place, and he<sup>9</sup> can create reasonable doubt to that effect, it is likely that he will be acquitted of the charge(s). For this reason, the investigative strategy in every sexual assault case must first focus on establishing whether or not the sexual activity took place. Once the sexual activity is stipulated or proven (and is alleged to have been committed using force or threat), there are two additional defenses available to suspects.

**2. Identity Defense.** First, the suspect can raise a defense of identity. This defense is primarily used in cases where the suspect is a stranger to the victim. This defense can thus be characterized as, *“You’ve got the wrong guy. Someone else might have raped her, but it wasn’t me.”* In these cases, the investigative strategy is not that different from the one used with other crimes (such as burglary or robbery) because it focuses on a complete physical description of the suspect provided by the victim or other witnesses, as well as on any DNA or trace evidence linking the suspect to the victim or the crime scene. In any case where an identity defense might ultimately be raised, it is important for the investigator to first determine whether the suspect denies engaging in sexual activity with the victim. A suspect who initially denies the sexual contact may later switch to an identity defense, and this change should be documented.

**3. Consent Defense.** Alternatively, the suspect can raise a defense of *consent*. The consent defense has historically been used when the victim and suspect know each other to some degree. This defense usually stipulates that the sexual activity took place but argues that it did not involve force or threat. Because of sophisticated DNA and forensics techniques, the majority of people charged with a sex offense now claim a consent defense because identity can typically be established with a great deal of certainty. This defense can therefore be described as, *“Yeah, I had sex with her, but she wanted it, and it was great. I didn’t force her to do anything.”*

When a consent defense is raised, the investigation should focus primarily on evidence to establish that consent was absent and force or threat was present, including:

- A detailed account of the victim’s thoughts and feelings during the assault
- Information regarding the suspect’s size and strength, in comparison with the victim’s
- Evidence of physical or verbal resistance on the part of the victim
- Evidence of genital or nongenital injury
- Information regarding the environment in which the assault took place (e.g., an isolated area)

- Information regarding the victim’s post-assault behavior, including post-traumatic stress

Evidence of injury or physical resistance on the part of the victim can be useful in establishing that force or threat was present in the situation. On the other hand, **the absence of injury or resistance cannot be used as proof of consent.** In such cases, it can be particularly useful for investigators to document any information about the event that is inconsistent with the character of a consensual sexual act. For example, there are cases where the victim is unable to use a contraceptive or remove her tampon before the suspect forces his penis into her vagina. This type of behavior would not be typical of a consensual sexual encounter.

Although much of the evidence collected in a sexual assault case (such as biological and trace evidence) is traditionally used to identify the assailant, some of it can also be used to establish the presence of force and overcome a consent defense. For example, both the victim’s and suspect’s clothing should be examined for biological and trace evidence, as well as tears, missing buttons, or other signs of force. Similarly, blood can be analyzed to identify the donor, but it can also be used to corroborate the use of force. Photographs or video are especially critical to establishing the context of force if they depict the crime scene according to the first responding officer, including the condition of the site and the location of recovered evidence.

In a consent case, the issues at trial will likely focus on the victim’s and suspect’s behavior as well as their perceptions of events. They will also center on challenges to the victim’s credibility and how much risk the victim took.<sup>10</sup> Any evidence to corroborate the victim’s account can be useful, as well as any information that demonstrates inconsistencies between the victim’s and suspect’s descriptions of events. Such information can be particularly persuasive in addressing a consent defense, especially when both the victim’s and suspect’s accounts of events are entirely consistent up to the point of the sexual assault.

**4. Investigative Strategy Must Remain Flexible.** The defense will sometimes change the primary defense strategy—typically from identity to consent, once forensic evidence has established that the sexual act did take place and the person charged with the crime was involved. Successful sex crimes investigators need to recognize common theories of sexual assault offenses and strategize their investigation around the defense that is most likely to be raised, but they must be flexible in case an alternative charge is proffered or the defense strategy is something other than expected.

## D. Forcible Sexual Assault versus No Force Required

To constitute a criminal offense, the investigation must determine that the sexual activity in question was committed using *force or threat*, or identify whether the situation was one in which *no force is required*.

**1. Forcible Sexual Assault.** If force or threat is used to commit a sexual act, the elements of the offense are: (1) sexual penetration or contact and (2) force or threat. Few states recognize the presence or absence of consent by the victim. Although some states retain language that the sexual offense must be “against the will” of the victim, most have recognized that a lack of consent is implied by the presence of force or threat. In other words, when force or threat is present, it is assumed that the victim does not consent to the sexual activity in question. Consent is therefore generally defined as positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act and

transaction involved.<sup>11</sup>

Despite this general recognition that sexual activity is illegal if it involves force or threat, there remains no clear standard as to what exactly constitutes force or threat. Rather, the presence of force or threat must be determined by considering the entire context of the event.

**2. No Force Required.** There are situations in which sexual activity is criminal *in the absence of force or threat*. These include situations where the victim is legally viewed as unable to consent, either due to age or some type of incapacitation (e.g., disability, lack of consciousness, drug use). In these situations, a consent defense is precluded, so the investigative strategy should not focus on issues of force. Rather, the defense is limited to denying the sexual activity, disputing the status of the victim that renders the individual unable to consent, or claiming that the suspect did not know and could not reasonably have known about the status of the victim.

- **Unconscious Victim.** Clearly, a victim who is unconscious cannot legally consent to sexual activity. When a victim is unconscious, the elements of a sexual assault offense are as follows: (1) sexual penetration or contact and (2) an unconscious victim. A suspect can defend against this type of sexual assault charge by denying either that the sexual activity took place or that the victim was unconscious. In either case, the investigative strategy should focus on establishing both of these elements. The investigation does not need to focus on the issue of force, however, because the victim's lack of consciousness renders him or her unable to legally consent to sexual activity.

- **Incapacitated Victim.** Somewhat more difficult is the case in which the victim was incapacitated at the time of the sexual act. Incapacitation in this sense is typically due to alcohol or drug use, whether caused by voluntary consumption or covert administration by the suspect. However, incapacitation could also be a result of some other physical or mental cause. The elements of this type of sexual assault are as follows: (1) sexual penetration or contact and (2) an incapacitated victim. There is no clear legal standard for incapacitation. Many states require that the perpetrator administer the drug himself for the sexual act to constitute forcible rape or aggravated sexual assault.<sup>12</sup> Whether or not this requirement is present, the investigator must show that the perpetrator knew the victim was intoxicated and therefore unable to give informed consent.

In these cases, the defense is likely to focus on denying that the victim was incapacitated to the degree alleged by the prosecution, thereby denying the second element. Based on the victim's account, toxicology evidence, and interviews with witnesses, the investigator must demonstrate that the victim was so incapacitated that he or she could not legally consent to sexual activity. Even in cases where the prosecution has framed the case as one involving an incapacitated victim, the defense is likely to challenge this characterization, raise a more traditional consent defense, and use intoxication to challenge the victim's credibility.<sup>13</sup>

Although many states have added sections to their criminal statutes to clearly state that force is not required as an element of drug-facilitated sexual assault, prosecuting attorneys have argued in some situations that drugging a person is chemical restraint and, therefore, force. In that case, the prosecuting attorney may consider filing complaints on both charges.

- **Victims with a Disability.** As with other forms of incapacitation, there is often no clear legal standard for when a disability affecting cognition or communication renders an individual

unable to legally consent to sexual activity. Therefore, a determination must first be made as to whether the individual is capable of understanding and giving consent to sexual activity. As part of this process, the investigating officer will typically need to determine whether the victim has the ability to protect his or her rights to carry out normal activities. If the individual is determined to be *able* to legally consent to sexual activity, the behavior would constitute a criminal offense only if force or threat was present or if the victim was unable to legally consent to sexual activity for some other reason (e.g., incapacitation, age).

If the individual is deemed to be *unable* to legally consent to sexual activity due to a disability affecting cognition or communication, the elements of the sexual assault offense are: (1) sexual penetration or contact, and (2) evidence of disability. As with the incapacitated victim, issues of force and consent are not part of the elements of the offense and should not be part of the defense. Rather, the investigative strategy must focus on establishing that the sexual activity took place and that the individual has a disability affecting cognition or communication to a degree that he or she is unable to legally consent. There is also a possibility that an affirmative defense will be raised asserting that the suspect did not know of the victim's disability. The availability of this defense and the statutes governing its use vary by state.

- **Other Crimes with No Force Required.** Another major category of sexual assault offenses with no force required includes those involving victims who are unable to consent because of their age. All states have established an age before which an individual is recognized as not able to consent to sexual activity. The age of consent varies generally from 15-18 years throughout the United States. Most states also have additional statutes that constitute offenses on the basis of age combinations between the victim and suspect or a position of trust, authority, or supervision held by the suspect (e.g., teachers, coaches, clergy, counselors).

Many states additionally specify a number of situations in which no force is required for sexual activity to constitute criminal behavior. For example, some states prohibit specified sexual activity between patients and their doctors, psychotherapists, and other service providers; between inmates and correctional officers; and between caretakers and their dependents. Other statutes outlaw sexual activity perpetrated using a false representation of identity. Of course, states also prohibit sexual activity between family members, and these relations are typically spelled out in the code of criminal offenses.

### III. INVESTIGATIVE PROCEDURES

Officers and emergency communications personnel must use their professional judgment and follow state law and department policies in determining the proper response to a call involving sexual assault. Officer and victim safety must always be the first priority.

When responding to sexual assault calls, officers and communications personnel must make every effort to keep an open mind and refrain from judging the information obtained from the victim or reporting party. Each caller will respond differently, depending on his or her own background, personality, and the circumstances of the assault. For example, most sexual assault victims are female, but assumptions should be avoided if the caller is male.

#### A. Dispatcher or Call Taker Response

1. **General Protocol.** When a caller reports a sexual assault,

communications personnel need to elicit the initial facts of the situation and determine whether the victim or others are in life-threatening danger or in need of emergency medical attention. The call taker should dispatch emergency medical assistance as necessary.

Once the caller is identified as the victim of a sexual assault, the appropriate priority rating should be applied. Sexual assault reports should be handled as a priority even though it is common for a victim to delay reporting by hours or even days, and injuries at that point may not be life threatening. In addition, potential evidence deteriorates over time and may be intentionally destroyed by the offender. Medical treatment for sexually transmitted infections and pregnancy are also time sensitive and the victim will likely want to clean up (e.g., brush teeth, gargle, shower, or douche) as soon as possible.

Depending on the information obtained from the caller, the call taker and the first responding officer may need to coordinate multiple responses to several different locations (e.g., the location where the sexual assaults took place and any other locations where the victim and offender may have been prior to or following the sexual assault). Crimes may also involve more than one jurisdiction. Officers should follow agency policy concerning multi-jurisdictional case coordination.

**2. Obtaining Suspect Information.** If the call is about a crime in progress or a crime that just occurred, the call taker should obtain information from the caller to assist in identifying and apprehending the suspect. The call taker should inquire as to whether there is a relationship between the victim and suspect, if there is a history of violence, whether a weapon was involved, and whether the suspect possesses any weapons.

In order to minimize victim frustration, it is important for the call taker to explain that the questions being asked will not delay the dispatch of an officer to the caller's location.

**3. Evidence Collection Issues.** Officers and communication personnel must determine whether a sexual assault victim has bathed, douched, urinated, or made other physical changes (i.e., engaged in any activity that may have contaminated or destroyed probative evidence such as semen, saliva, hair). When doing so they must be mindful that sexual assault victims often feel ashamed or guilty because of something they did or did not do relating to the sexual assault. Victims may evade these questions or answer in the negative, because they are afraid to say that they did something "wrong." If the victim has not engaged in any of these activities, it is important for the dispatcher or call taker to request that the sexual assault victim not do so and to clearly explain the reason for the request. If the victim has taken any of these actions, the call taker must not communicate to the victim that such actions make it futile to report the crime to the police.

Victims of a drug-facilitated sexual assault may report black-outs, gaps in memory, and general uncertainty as to whether or not an assault occurred. Continued, patient questioning by the call taker is encouraged and can help elicit important details.

The call taker should ask the victim about the need to urinate. If the victim does need to urinate and cannot wait for the officers to respond with a urine collection container, the victim should be instructed to urinate in a clean jar or container with a lid. If the victim can wait, it is best for medical or law enforcement personnel to collect a urine specimen whenever possible.

Law enforcement agencies should establish protocols to preserve all sexual assault calls (911 and non-emergency contacts) and computer printouts even if there was a delay in reporting.

Tapes should be reviewed as part of the investigation and preserved for use by prosecutors during trial.

## **B. Initial Officer Response**

**1. Emergency Response.** After the scene is determined to be safe. The first responding officer on the scene should immediately make contact with the victim to assess whether the person is safe and to assure him or her that safety issues are the first priority. Emergency Medical Services (EMS) can be summoned to assess the victim's medical needs. Additional responding officers should begin a search for the suspect when appropriate.

If emergency medical attention is not needed, the victim can remain at the scene to assist in identifying the crime scene(s), witnesses, evidence, suspect(s), and so forth. Officers should advise the victim of his or her right to obtain a protection order.

**2. Notifying a Victim Advocate.** Before contacting the victim advocacy organization, the investigating officer must assess any special needs of the victim (inability to speak English, language difficulties, mental or physical impairment, need for an advocate of the same gender as the victim) and request an advocate accordingly.

As soon as possible, responding officers should notify a victim advocate to provide emotional support and help the victim make informed decisions throughout the investigative process. Victim service providers and advocates work both inside and outside the criminal justice system. As such, their titles and functions vary considerably. Whereas victim service professionals in a prosecutor's office are often referred to as victim or witness assistance coordinators, law enforcement agencies may use the title rape crisis specialist or rape crisis advocate. In community-based organizations, providers may call themselves rape crisis counselors, victim advocates, or service providers. One typical distinguishing difference is whether the advocate has counselor communication privilege. In most cases, advocates within the criminal justice system are not covered under counselor privilege laws because of their connection to the government. In contrast, community-based advocates typically do enjoy counselor communication privilege.

Specifically, privilege laws prevent counselors from testifying or being compelled to testify in court and many even extend that ban to written records. To provide guidance in this area, the Department of Justice (DOJ) has proposed model legislation defining "confidential communications."<sup>14</sup> The investigating officer must understand and respect the privacy of communications between a sexual assault victim and a victim advocate or other service provider. Although the advocate will likely include this in a discussion of rights with the victim, the message can be given by the officer to reassure the victim and communicate that each person responding understands and respects the roles of the other professionals. The victim's comfort and the most effective team approach should be considered priorities when evaluating possible responses and best practice.

Because communications may be privileged, investigating officers must understand that unless there is a written waiver, a victim advocate cannot disclose information from the victim, even if it would significantly impact the investigation or prosecution of the case. The role of the victim advocate in such a situation is to discuss with the victim the consequences of withholding or distorting information regarding the sexual assault and explore with the victim the possibility of discussing with the officer any fears regarding behavior such as drug abuse or giving a false report.

Regardless of how the victim service agencies are structured in a particular community, law enforcement agencies must work collaboratively to establish protocols regarding how and when a victim advocate will be notified when a sexual assault is reported. It is typically in the best interest of the victim that this notification take place as soon as possible so the victim can benefit from the support and information that is offered by an advocate. The presence of an advocate may also be beneficial for the investigative process.

The victim has the option to decline the services of the advocate and this decision must be supported by members of the responding team, including the investigating officer(s). Should the victim request an advocate at any point in the investigation, the investigating officer should facilitate the referral. If the victim declines assistance from an advocate, written referrals for additional avenues of support must be provided.

Absent exigent circumstances, family members and interested parties should not be used as interpreters prior to contacting the victim advocacy organization. Victim advocates should not be used as interpreters, because this places them in the position of assisting with the law enforcement investigation rather than focusing on their victim-support role. It is critical that law enforcement agencies work with victim advocacy organizations and others to explore ways to provide comprehensive services for special populations, including the hearing impaired and those who do not speak English. Because most states have not addressed interpretation needs, law enforcement agencies should develop policies to address this gap.

**3. Evidence Collection Issues.** Following the emergency response, officers must identify and secure the crime scene(s), making every effort to ensure that potential evidence is not contaminated or destroyed.

Responding officers must ensure that the crime scene is photographed prior to processing. The investigation of every sexual assault should also include a detailed diagram of the crime scene(s). Videotaping can be helpful—especially in the case of a complicated or extensive crime scene.

The process of identifying and collecting evidence is made more difficult by the fact that most victims will have left the location of the sexual assault by the time the crime is reported. All additional crime scene evidence and any clothing that the victim put on following an assault must be identified and collected.

**4. Identifying and Locating Witnesses.** Responding officers must next identify and isolate any potential witnesses to the sexual assault. If there are numerous potential witnesses (e.g., at a fraternity house, rave party, or nightclub), an officer should be assigned to monitor the witnesses and prevent them from talking to each other.

There may be any number of corroborating witnesses to aspects of the assault, such as a neighbor who heard a scream or a gas station attendant who noticed the victim crying in her car. The officer should identify and record the names of any witnesses who might have left the scene prior to his or her arrival. It is especially important that the victim be questioned about the first person she or he told about the sexual assault. This person must be identified and interviewed because such an “outcry witness” can be used to confirm the credibility of the victim. This can be particularly important in the case of a delayed report or a consent defense raised by the suspect.

**5. Additional Resources.** Victims should never be left unattended or left in the immediate area where the sexual assault occurred unless the first responding officers are handling a criti-

cal threat. The best practice when responding to sexual assault victims is to establish protocols and resources for additional emergency personnel at the crime scene once it is secured and the victim is safe. In small or rural communities, law enforcement agencies are encouraged to utilize the services of firefighters, EMS, police chaplains, and specially trained volunteers to assist the responding officer(s). If additional emergency personnel are responding to the scene, the victim should be notified of this immediately and steps should be taken at all times to protect the victim’s privacy and dignity.

### C. Preliminary Victim Interview

While the victim interview is one of the key components of a sexual assault investigation, it can also be one of the more challenging tasks for a criminal investigator. Victim advocates or rape crisis counselors can be particularly helpful to both the victim and the investigating officer by providing the victim with the emotional support and information needed to make informed decisions throughout the interview process. Every effort should be made by the investigating officer to contact a victim advocate as soon as possible in the process of responding to a sexual assault. The victim should be offered the option of having the victim advocate or other support person present during the preliminary and follow-up interviews. A spouse, boyfriend or girlfriend, or parent may not be the most appropriate support person to have present during an interview because the victim may hesitate to reveal all the details of the assault in front of someone with whom they are close. Victims may, however, be uncomfortable asking friends or family members to leave the interview. The investigator should privately address this with the victim and take action to support the victim’s wishes.

**1. Initial Response.** Sexual assault investigations should typically include both a preliminary and subsequent in-depth interview with the victim. In the initial response, the responding officer must first establish that a crime has occurred. At this time, only minimal information is needed to confirm that the victim is reporting a crime of sexual assault. However, the responding officer also needs to get enough information to establish the elements of the crime(s) and identify potential witnesses, suspect(s), evidence, and crime scene(s).

During this initial discussion with a sexual assault victim, the officer must determine whether the victim should receive an acute forensic examination and transportation to the designated medical facility if needed. The victim should be advised that the forensic examiner will collect all clothing that was worn during or immediately after the sexual assault and that a change of clothing should be available for after the examination.

**2. Preliminary Interview Protocol.** Opening remarks represent a critical point at which an officer must gain the victim’s confidence and let the victim know that a major part of the officer’s function is to provide assistance and protection. It is appropriate for the officer to express sympathy and an interest in the victim’s well-being. By doing this, the officer contributes to the immediate and long-term recovery of the victim and lays the foundation for mutual cooperation and respect on which a successful interview is built. The officer should communicate to the victim that a thorough investigation will be conducted using a team approach. It should be explained that other members of the Sexual Assault Response Team (SART) include advocates and medical personnel and that the officer will most likely need to ask the victim additional questions at a later time.

The preliminary interview of a sexual assault victim should

never take place in a public area (such as the waiting room or front counter of a police station), but rather in a private place free of distractions.

At some point during the preliminary interview, the officer must obtain contact information for the victim, especially because those victimized by sexual assault often make arrangements to stay with a friend or family member. The officer should also explain that this first interview is preliminary in nature and that a follow-up interview will be needed during the course of the investigation, either by the same officer or by a detective if the agency has an investigative bureau.

Throughout the interview with the victim, every effort should be made to use simple terminology. It may be necessary to ask the victim to describe the intimate parts of the male and female body and to assess the victim's knowledge of different types of sexual activity. Once this has been established, the victim may experience relief in having a common language to communicate the details of the assault to the investigating officer. When documenting the victim interview, it is especially important for investigating officers to preserve the victim's statements as they are first spoken. They should not be sanitized out of concern that the victim will be misunderstood or misrepresented.

**3. Writing the Report.** The investigating officer must complete a written report in all cases of sexual assault, regardless of whether an arrest is made. The officer should thus clearly document in very specific terms all facts and observations, including the physical and emotional condition of the victim. For example, the report should indicate that the victim was "tearful and trembling," rather than just "upset." Similarly, the officer should report that the victim's shirt was torn and a shoe was missing, rather than just describing the victim's appearance as "disheveled." This report should contain a copy of the forensic examination (if available), including diagrams specifying the nature and location of all injuries, complaint of pain or tenderness, and photographs of nongenital injuries.

**4. Protecting Victim Rights.** Privacy issues concern crime victims throughout the criminal justice process. As a result of highly publicized cases, where information was not kept confidential, many victims either decline to participate in the investigative process or participate only in a guarded way. Law enforcement officers must therefore make every effort to protect the confidentiality of the victim's information to the maximum extent possible by law and policy.

The investigator must ensure that victims are notified of their rights as a crime victim under state law, which may include the right to have their name withheld from public record; be notified of arrests, court dates, and parole or release dates; be present and to make a statement at proceedings; apply for crime victim compensation; and seek an emergency protection order. The victim also has a right to be free from harassment and intimidation by the suspect, and the investigator should explain the process for contacting law enforcement if those laws are violated. (The victim should be advised to call 911 in an emergency.) The victim should be provided with the crime report number, as well as contact information for the reporting officer (including identification or badge number) and lead investigator (or person handling the follow-up).

**5. Drug-Facilitated Sexual Assault.** Call takers, responding officers, and investigators should always ask sexual assault victims about any circumstances that may indicate the use of a drug to facilitate the sexual assault (e.g., whether the victim experienced any loss of memory, disorientation, severe illness, or hallu-

cinations). In doing so, however, investigators must clearly communicate to the victim that substance abuse does not justify the sexual assault. Law enforcement agencies are also encouraged to establish policies and protocols so that the victim's use of illegal drugs will not be referred for prosecution. This issue is discussed in detail in the section on sexual assault forensic examinations.

**6. Arrest and Prosecution Decisions.** In most situations, a sexual assault victim should not be asked during the preliminary investigation whether he or she wants to prosecute the suspect. **Decisions as to whether or not the victim wants to prosecute and whether there is sufficient evidence to warrant criminal charges against a suspect should be made only following a complete investigation.** If a victim is concerned about the issue of prosecution, this can be addressed during the preliminary interview.

In the case of an emergency response that results in an immediate arrest, the prosecuting attorney may have as little as 24-48 hours to present sufficient evidence to keep the suspect in custody. The victim's statement is usually critical in presenting this case. Officers should be discouraged from making an immediate arrest unless there is a reason to believe that the offender may flee the jurisdiction, destroy evidence, or is posing a danger to the victim or other members of the community. This allows the officer time to locate and interview any potential witnesses and to use investigative techniques such as pretext phone calls (where allowed by law). The rationale for the decision regarding arrest should be explained to the victim and any support people present. The investigator and advocate should together address safety issues, including comprehensive safety planning with the victim. They should also inform the victim, in the case of an arrest, that the suspect may be released on bond shortly afterwards.

**7. Delayed Reports.** Most victims of sexual assault postpone reporting the incident to the police or anyone else. The reasons are distinct for each individual and may include the victim's feelings of shame, embarrassment, shock, denial, self-blame, uncertainty regarding whether the event constitutes a sexual assault, fear of not being believed, concern regarding family members and friends finding out what happened, fear of the criminal justice system, and fear of the consequences and how they will affect the victim's life. Because of these many fears and concerns regarding reporting, officers must be patient with any hesitancy on the part of the victim during the preliminary interview.

Officers must remain sensitive to the fact that questions about the delayed report may lead victims to feel the officer does not believe their account of events or blames them for the assault. While the reasons for a delayed report need to be documented, a delay in reporting should be considered normal and not seen as evidence that the victim is lying about the assault. In fact, many state laws allow prosecution many years after the sexual assault. This is determined by the statute of limitations for the specific crime classification and the age of the victim at the time of the assault. Even when the statute of limitations has expired, a prosecutor can use the (previous) victim as a witness to corroborate another case still within the statute of limitations involving the same suspect. A delayed report should, therefore, never deter a thorough investigation.

#### **D. Forensic Examination of Sexual Assault Victims**

A timely, well-done forensic examination has the potential of addressing many of the concerns of sexual assault victims and can increase the likelihood that documentation of visible injuries and evidence collected will aid in the investigation and prosecu-

tion of sex offenders. Victim-centered care is paramount to the success of the forensic examination, and it is critical to adapt the examination and the care to the circumstances of each victim as much as possible.

**1. Alternative Community Models.** There are numerous models for conducting forensic examinations. In some communities, the hospital emergency department performs all sexual assault examinations. This practice can lead to delays and frustration (e.g., examiners not specially trained to work with sexual assault victims, victims triaged with other patients).

Many communities have developed a Sexual Assault Response Team (SART), a multidisciplinary team dedicated to timely, comprehensive attention to the medical and emotional needs of the patient as well as the forensic needs of the criminal justice system. As part of the movement toward SARTs, many communities' forensic examinations are now conducted by specially trained Sexual Assault Forensic Examiners (physicians) or Sexual Assault Nurse Examiners (SANEs) who are on call to respond to sexual assault victims. For more information on SANE or SART tools and resources see the Office on Violence Against Women Web site (<http://www.ojp.usdoj.gov/vawo>) or the Office for Victims of Crime Web site (<http://www.ojp.usdoj.gov/ovc>).

If a transfer from one health care facility to a facility designated for forensic examinations is necessary, an established protocol should be in place to minimize delays and loss of evidence while addressing victim needs.

At a minimum, health care facilities have an obligation to provide complete and appropriate services to patients disclosing a sexual assault. If the victim first disclosed the assault to law enforcement, arrangements should be made for the forensic examination to take place as soon as is practical. Although a victim may seek medical care without wanting law enforcement involved, some states have mandated reporting laws requiring that health practitioners notify law enforcement when a patient is treated for injuries resulting from a violent crime, including sexual assault. Victims should be encouraged to at least discuss the options available and what an investigation would entail; however, they cannot and should not be forced to talk to law enforcement.

**2. Time Guidelines.** Advancing DNA technologies continue to extend time limits for investigations due to the stability of the evidence and the sensitivity of new methods of testing, enabling forensic scientists to analyze evidence that was collected decades earlier. As a result, new guidelines are needed for investigators to determine when a forensic medical examination is appropriate.

Although many jurisdictions currently use 72-96 hours as a standard cutoff for collecting evidence following a sexual assault, evidence collection and the documentation of injury are often possible even beyond that time frame (up to 10 days following a sexual assault)<sup>15</sup> and should be encouraged in order to document injuries or if the victim is complaining of pain or bleeding. In the case of a sexual assault by a stranger, biological evidence and DNA may have a significant impact on the likelihood of holding the assailant accountable. In these cases, a forensic examination may be considered up to three weeks following a vaginal sexual assault, since evidence may still be recoverable.

Decisions to collect evidence should *never* be based on the characteristics of the victim or the assault (e.g., the victim is a drug addict, runaway, or prostitute). Rather they should be made on a case-by-case basis, guided by knowledge that time limits for obtaining evidence vary. If there is a question about the timeliness of a forensic examination, dialogue among forensic examin-

ers, law enforcement representatives, and forensic scientists should be encouraged to determine the potential benefits or limitations of collection. When a forensic examination is not authorized by law enforcement (for those states that require law enforcement to authorize the exam), sexual assault victims should always be encouraged to get medical attention, including testing for pregnancy and sexually transmitted diseases (STDs). Medical attention can address the physical health needs of the victim, and treatment for pregnancy or STDs may even provide evidence to corroborate an assault and support prosecution. The investigator can explore these possibilities, regardless of whether a forensic examination is conducted.

**3. Responsibilities of the Forensic Examiner.** The forensic examiner should document the victim's medical history, a history of the assault, and all injuries that are observed, and collect biological and trace evidence from the victim's body. Information gained from the history can guide examiners in determining whether and where there may be evidence to collect.

There is no reason for a law enforcement representative (even one of the same gender as the victim) to be present in the exam room. The forensic examiner will testify to the collection of evidence and the chain of custody. When findings from the medical examination are consistent with the account of events given by the victim, the forensic examiner should note in the report that findings are "consistent" or "congruent" with the victim's account. Definitive conclusions about the presence of forensic evidence should be made by a forensic scientist only after analysis in a crime laboratory. For example, the absence of injury or other visible findings should never be used to discredit a victim's account or conclude that a sexual assault did not occur.

**4. Addressing Victim Needs.** When a forensic examination is to be conducted, the investigating officer should offer to promptly notify a victim advocate and ask the victim if she or he would like anyone else to be called or notified, unless this may be considered harmful in the particular circumstances. The victim should be informed if there is concern that the presence of a particular individual during the medical history may influence the statements that he or she is willing to make or may be *perceived* as influencing the victim's statements. These individuals should not actively participate in the interview or examination process.

The investigator should explain to the victim the general examination procedure and inform the victim of the right to decline any or all parts of the examination. The investigator should also explain that declining part of the examination may negatively affect the thoroughness of the exam, the usefulness of evidence collection, and the effectiveness of the criminal investigation or prosecution of the case. Declining a particular procedure might also be used to discredit a victim if prosecution is pursued. The victim's decision to decline any part of the forensic examination, however, must always be respected.

**5. Release of Medical Records.** Hospital and medical records are confidential and generally require a subpoena for release. However, the victim has the right to sign a waiver releasing specific information or medical records. Investigators should obtain such a waiver whenever possible.

**6. The Team Approach.** Communication between the investigating officer and forensic examiners should remain open prior to and following the exam. Notes from before and after the forensic examination should then be compared. In this process, it is not unusual to discover that additional information was revealed during the forensic examination. Many victims will disclose acts to medical personnel that they might not immediately share with

law enforcement because of embarrassment.

If additional information is revealed, the investigating officer must discuss the new information with the victim. It is important for the officer to explain that he or she understands the victim's embarrassment and hesitation in disclosing the information, but that all the facts must be identified so that a thorough investigation can be completed. The examiner should also alert the reporting officer to visible forensic findings such as carpet fibers or other debris that might be connected to the crime scene. The examination findings must then be summarized in the preliminary report, specifically noting all significant information and injury.

**7. Drug-Facilitated Sexual Assault.** If a drug-facilitated sexual assault is suspected, it is critical that a urine sample be collected. Efforts should be made to add this step to the forensic examination procedure. Not all hospitals and forensic examination facilities have sexual assault evidence kits and even when they do, many such kits do not have urine specimen containers in them. It is critical that law enforcement work with victim advocacy organizations and others to establish protocols to address their response to illegal substance use on the part of the victim (which may come to light as a result of urine or blood testing) so that it does not compromise a sexual assault investigation. It is better to conduct a thorough investigation of a sexual assault crime than to prosecute victims for misdemeanor violations (driving under the influence, underage drinking, being under the influence of a controlled substance).

**8. Forensic Examinations without Law Enforcement Involvement.** If a victim reports directly to a medical facility or expresses a reluctance to report to law enforcement, it is imperative that the protocol involve meeting with a trained professional (such as a forensic examiner or victim advocate) to explain that the forensic examination is only one part of a thorough criminal investigation. Evidence should be preserved should the victim subsequently desire to proceed with criminal prosecution.

Blind reporting to law enforcement by victims can enable the collection of information about the sexual assault without initiating a full-scale police report and investigation, while preserving the option should the victim desire to proceed with criminal prosecution within the statute of limitations.

**9. Reimbursement for the Examination.** Some states acknowledge that the forensic sexual assault examination is evidentiary and, as such, law enforcement is required to pay for it. Using this model, law enforcement is generally required to authorize the examination and payment based on the history of the assault, state and local laws, and protocol. Under the Violence Against Women Act, a state is only entitled to funds under the STOP Violence Against Women Formula Grant Program if the state or another governmental entity incurs the full out-of-pocket cost of medical forensic exams for victims of sexual assault.<sup>16</sup> Policies and practices vary from state to state.

## **E. Follow-Up Victim Interview**

**1. Interview Protocol.** An in-depth follow-up interview should typically be conducted after the victim has been medically examined and treated and personal needs have been met (such as changing clothes, bathing, eating, and sleeping). Efforts should be made to conduct the follow-up interview in a neutral location that is convenient for the victim. When needed, transportation assistance should be provided. Officers can often conduct this follow-up interview at the hospital or other medical facility where the victim is being treated. This is appropriate as

long as the physical surroundings provide the necessary level of privacy and an environment of professional care to instill confidence in the victim. The victim may find the police department or the office of the prosecuting attorney very intimidating.

Depending on the circumstances of the assault, it may be best to schedule the follow-up interview for the following day. This is especially true in cases where the victim is still under the influence of drugs or alcohol, is injured, or has not had any sleep. Unless there are exigent circumstances requiring an arrest or identification, delaying the follow-up interview in these cases will generally enhance the investigation and the quality of information obtained. It is important for investigating officers to recognize that victims need time to begin to process the assault. Some victims may initially be unwilling or unable to participate in an investigation; however, with support from friends and family, the victim may be a viable witness at a later time.

Prior to the follow-up interview, the investigator should consult with the initial responding officer(s) and any other agency personnel who responded to the scene. As with the preliminary interview, the investigator should begin the follow-up interview with opening remarks expressing sympathy, updating any contact information for the victim, providing the investigator's contact information, and addressing the questions of any support people present. The investigator should then explain the purpose and scope of the interview and outline the victim's rights, including the right to confidentiality and freedom from harassment by the suspect. The investigator should also describe available resources and support organizations and encourage the victim to contact law enforcement should the suspect violate any existing criminal or court orders or if the suspect contacts the victim in any way.

As with the preliminary interview, the follow-up interview should be conducted avoiding legal jargon and in a nonthreatening manner that encourages conversation rather than resembling an interrogation. To begin, the victim should be allowed to describe what occurred in his or her own words without any interruption by the investigating officer.

During the interview, the investigator must be alert to new information or developments. If the victim's story differs from the originally reported facts or the facts as they were understood by the first responding officer, clarification should be sought. It should be understood that in some cases sexual assault victims may omit details from their initial description of the crime that they find embarrassing or deeply personal. Investigators should therefore expect a certain amount of reluctance on the part of the victim to describe unpleasant facts. The investigator should also explain that certain information must be discussed to establish the legal elements of the crime and pursue the investigation and potential prosecution.

**2. Develop an Investigative Strategy.** Prior to the interview, the investigator must develop an investigative strategy based on the nature of the assault and the possible defenses available to the suspect (e.g., denial, identity, and consent; *see II C*). Investigators should then seek strategies to address the key issues and consult with the prosecuting attorney, when necessary and appropriate. Because most defenses are based on consent, the victim should always be asked whether and for how long he or she has known the offender. If the two knew each other before the assault, the circumstances of their meeting and the extent of any previous relationship should be explored, particularly with respect to any prior sexual contact. Knowledge of previous sexual acts between the accused and the victim helps to establish the nature of the

relationship with the offender and prepare for prosecutorial obstacles.

The development of an investigative strategy will guide the interview questions and other evidence collection efforts to corroborate the victim, witness, and suspect statements and to note any discrepancies. The investigators should seek to:

- Verify any statements obtained from witnesses by the first responding officer(s).
- Obtain statements from witnesses not interviewed in the preliminary investigation.
- Rephotograph any nongenital injuries in order to document changes.
- Determine whether a search warrant is needed for any aspect of the investigation.
- Identify and contact others who may have been victimized by the suspect.
- Evaluate whether a pretext phone call is appropriate.

The determination of whether a pretext phone call is appropriate is based on the applicable laws of the state where the crime occurred as well as the locations of the victim and suspect, who may reside in different states and jurisdictions at the time of the investigation.

The investigator should also seek to communicate with personnel in other units in the agency as well as in other agencies to identify similarities or fact patterns that are consistent with other crimes (such as voyeurism or indecent exposure). It is important to seek information about other potential crimes by developing relationships with members of communities that are often closed to law enforcement, such as gay, lesbian, and transgendered populations; student bodies or associations; tribes; and other special cultural and religious populations.

**3. Evidence Collection and Recovery.** The investigating officer should follow department policy for evidence collection and forensic analysis testing by crime labs, and maintain consistent communication with the crime lab. The investigating officer should coordinate the prompt return of the victims' possessions.

**4. Referral for Prosecution.** Once a thorough follow-up investigation has been completed, it should be presented to the prosecuting attorney's office for review. The investigating officer should give the victim the name and contact information for the prosecutor assigned to the case and facilitate the first meeting between the prosecutor and the victim.

**5. Victim Needs and Notification.** As previously stated, it is imperative that law enforcement professionals coordinate with other relevant agencies, assistance organizations, service providers, and members of the SART to address the needs of the victim (which may include a follow-up forensic examination, medical testing, counseling, financial assistance, and guidance throughout the criminal justice process). The investigator should therefore work closely with victim advocates throughout the investigation and prosecutorial process to keep the victim informed when an arrest is made, a suspect is released from custody, or the prosecuting attorney decides not to file criminal charges against the defendant.

**6. When the Victim Is Unable to Participate.** It can be difficult for investigators when a victim is unable to participate in the investigation or the prosecutor declines to file criminal charges. However, it is important to recognize that prosecution may not be a viable option for all victims of sexual assault. Many victims feel that concerns about confidentiality, safety, and emotional well-being outweigh the risk and energy it takes to withstand the stress of an investigation and trial. Law enforcement is encour-

aged to respect a victim's decision about whether to be involved in criminal justice proceedings and is urged to offer continued assistance and referrals.

Investigators must remember that they can reopen a case within the statute of limitation if necessary. In some cases, an investigation may be warranted even if the statute of limitation has expired, if the prosecutor is able to use the suspect's prior acts to corroborate an offense.

## F. Drug-Facilitated Sexual Assault <sup>17</sup>

Sexual assaults have long been linked to the abuse of substances—primarily alcohol—that may decrease inhibitions and render the victim incapacitated or physically helpless. In addition to alcohol, the drugs most often implicated in the commission of drug-facilitated sexual assaults are GHB, Rohypnol, Ketamine, Ecstasy, and Soma, although others are used as well (including benzodiazepines and other sedative hypnotics). To facilitate a sexual assault, a drug is given to the victim surreptitiously by the suspect, or the victim may voluntarily take the drug recreationally (which could cause reluctance to turn to law enforcement). These drugs often render victims unconscious, an effect that is quickened and intensified when the drugs are ingested with alcohol. Because of the sedative properties of these drugs, victims often have no memory of an assault, only an awareness or sense that they were violated.

**1. Challenges of the Investigation.** Over the last several years, reports of drug-facilitated sexual assaults have increased. These cases present unique challenges to both police and prosecutors, and the responding officer plays a particularly crucial role—especially in the collection, identification, and preservation of critical perishable evidence. A victim of a drug-facilitated sexual assault may display a range of symptoms that could include memory loss, dizziness, confusion, drowsiness, slurred speech, impaired motor skills, impaired judgment, and reduced inhibition. The victim may also appear intoxicated or hung over.

**2. Conducting the Victim Interview.** When drugs or alcohol are involved, the victim may remember very little, if anything, about the sexual assault itself. The victim's account of the events may have large gaps, which makes it difficult to describe what occurred to the investigating officer. As a result, the victim may be extremely anxious during the course of the interview. Investigating officers must remain patient and maintain an open mind while listening to the events as the victim recalls them. Investigators must also remember that a victim whose memory is impaired due to the pharmacological effect of a drug may innocently and unconsciously seek facts to fill in the blank spots in memory. It is therefore critical that investigators and examiners avoid suggestive questions while conducting the interview.

During the interview, it is very important to have victims articulate how they felt or what they had been doing prior to losing consciousness. It is equally crucial to interview any witnesses who might have seen or spoken with the victim before, during, or after the assault. Often, it is the witness who can establish time frames, confirm unusual behavior, provide critical facts, and identify potential sources of information. Investigators must not wait for laboratory results before beginning an investigation nor should they rely on the drug screening to make the case. Because of frequent delayed reporting in these cases, a negative toxicology report should be expected, increasing the importance of witness interviews.

**3. Evidence Collection Issues.** When an investigating officer suspects that a sexual assault may have been facilitated with

drugs or alcohol, he or she should immediately determine the time frame of the incident. If it is suspected that the assault occurred within 96 hours (4 days), the investigator should promptly see that a urine sample is collected from the victim. The sooner the sample is collected the stronger the chance that a drug can be successfully detected in a crime laboratory or other laboratory specializing in toxicology. Victims should not be pressured to go to the hospital or to provide a sample for screening for illegal drug use.

Because there could be a need for multiple toxicology tests, it is important to obtain as much urine as possible (100 ml if possible), and the samples should not be combined. Officers or forensic examiners must carefully note the date and exact time each sample is obtained. If the sexual assault is thought to have occurred within 24 hours of the report, officers should obtain a 30 ml blood sample (in gray-top tubes) in addition to a urine sample. Biological specimens such as urine and blood should be refrigerated (not frozen) as soon as possible. They should not be kept at room temperature (e.g., in the trunk or glove compartment of a patrol vehicle or in a desk) for any length of time.

In cases where a victim is transported to the hospital because of needed medical attention, the law enforcement officers, with the victim's consent, should advise the medical staff to obtain additional blood and urine samples or retain samples taken for medical diagnosis.

Additional evidence that may be found in cases of a drug-facilitated sexual assault might be located in the suspect's residence, vehicle, place of employment, locker, and so forth. This evidence may include such items as the drugs themselves, ingredients used to make the drugs, drug or rape-drug literature and recipes, Internet correspondence, drug packaging and bottles, and photographs and videotapes of victims.

**4. Information for the Victim.** A full drug screening should be used to test for any and all drugs and alcohol in the victim's system at the time of the assault. The victim should be informed of the necessity of a full drug screening (to gain complete knowledge of any drugs and alcohol in the victim's body at the time of the assault, including recreational drugs, prescription drugs, and over-the-counter medications). These drugs may often interact with each other and, when taken together, may have an exponential effect on the victim's ability to function.

Investigators, examiners, and advocates must also emphasize to victims the importance of being forthcoming about all drug (prescribed and recreational) use so it is less likely to be used to discredit the victim at trial, and it is critical that this information not be used by law enforcement officers to dismiss the victim's report of the sexual assault.

If victims deny having engaged in recreational drug use, but test positive for a drug like cocaine or methamphetamine, investigators must not assume the victim is lying. Some assailants have administered drugs to victims, surreptitiously or by force, to mask another drug or to discredit victims who may decide to report to authorities. There have even been cases where the assailant applied cocaine or some other drug to the victim's anus or vagina or his own penis before sexually assaulting the victim.

## G. Contacting and Interviewing the Suspect

If the crime just occurred and there is a concern that the suspect will flee, destroy evidence, or pose a threat to the victim or the community, every attempt should be made to apprehend the suspect, and a curbside lineup should be arranged.

**1. Custodial versus Noncustodial Interviews.** Once the sus-

pect has been identified and detained, the investigating officer needs to determine if the suspect is under arrest or free to leave, as in a noncustodial situation. This decision should be based on guidelines from the local prosecuting attorney and agency policies. Noncustodial interviews are useful when investigating sexual assault and can allow more time to locate and interview witnesses and to employ investigative tactics (such as noncustodial interviews and pretext phone calls, where allowed by law and departmental policy), particularly because so many reports are delayed. A number of factors should be considered when determining whether an immediate arrest should be made, including the type of assault, protection of the victim and the public, the possible flight risk of the suspect, and the potential for the destruction of evidence. Factors that should not be considered include past sexual history or behavior of the victim, speculation that the victim will not prosecute, perceived credibility of the victim or the suspect, or the perceived likelihood of conviction.

**2. Conducting the Suspect Interview.** Regardless of whether the initial interview with the suspect is custodial or noncustodial, it is important to obtain an in-depth statement from the suspect in a nonthreatening manner. For example, the first responding officer may be one of the few people who have the opportunity to hear the suspect deny any sexual contact with the victim. With time, after considering the potential charges, however, most suspects quickly resort to a consent defense. Therefore, such a statement of denial is critically important to preserve in the exact wording of the suspect. Decisions about audiotaping or videotaping the interview should be based on state law and the policies of the prosecuting agency and investigating department.

If the suspect invokes the constitutional right to remain silent, investigating officers must still evaluate the circumstances of the assault to anticipate the suspect's defense strategy (e.g., the relationship between the victim and the suspect, whether evidence links the offender to the victim, whether a witness can link the offender to the victim or scene, whether evidence or witnesses can corroborate a lack of consent). These factors can guide the investigative strategy and evidence collection efforts, as well as the interpretation and relative importance placed on various pieces of evidence.

**3. Evidence Collection with the Suspect.** In all sexual assault cases, the investigating officer must evaluate the need for a search warrant to identify and collect evidence from the suspect, including any known photographs or video recordings as well as any of the victim's possessions in the suspect's home or vehicle (which are often overlooked). Law enforcement agencies are advised to work with the prosecuting attorney's office in advance to have templates available for such warrants.

## H. The Sexual Assault Forensic Examination of the Suspect

Although the recent trend toward specialized forensic examiners has focused on improving medical care for the victims of sexual assault, the issues surrounding the forensic examination of the suspects are often overlooked. Law enforcement agencies must therefore work with other agencies and community organizations to establish protocols regarding where the forensic examination of the suspect will take place, who will pay for it, and what steps will be involved. As with the forensic examination of the victim, the forensic examination of the suspect is evidentiary and should be considered an additional expense associated with the investigation.

**1. Protocol for Suspect Examination.** Immediately following the preliminary suspect interview, the investigating officer must

determine whether a forensic sexual assault examination should be conducted with the suspect. Factors to consider in that decision are the length of time since the assault occurred, the nature of the assault, whether the victim believes that he or she injured the suspect, and the likelihood that cells, fluid, or other types of biological or trace evidence were transferred from the victim to the suspect. Depending on the specific acts committed, the suspect could be the best source of probative evidence.

Based on state laws and department policies, a search warrant may be needed to collect evidence from the body of the suspect or even to collect the suspect's clothing. Even without probable cause or a court warrant, most jurisdictions recognize that an officer can obtain consent from a suspect for an examination. If the suspect consents to such evidence collection procedures, documentation of voluntary consent should be captured in the police report. Departments should consider having consent forms available for suspects to sign. Policies need to be developed to address law enforcement's role in the forensic exam of the suspect to include combative or dangerous suspects.

At the beginning of the forensic examination the investigating officer should provide the examiner with a summary of the assault, including the acts reported, the location, any physical identifying information provided by the victim or witness(es), and any potential injuries that the victim described inflicting on the suspect. Because the forensic examiner is an agent of the investigating officer, a *Miranda* warning must be provided to any suspect who is questioned while in custody. This includes questioning the suspect about his medical history (since the information will be used to evaluate any possible findings). The examiner should then obtain a medical history from the suspect, if possible. This history should include recent information on any anal or genital injuries, surgeries, diagnostic procedures, or medical procedures that may affect the interpretation of the current findings. Such information can help to avoid confusing preexisting lesions with current injuries or findings.<sup>18</sup> If the suspect invokes his or her right to remain silent, the examiner should bypass the medical history and continue the examination. If the suspect is not in custody, the investigator must clearly document that the suspect was free to decline any part of the examination and to leave at any time.

**2. Evidence Collection.** Forensic examination kits used on suspects differ slightly from standard rape kits used for victims. The forensic examination and kit for the suspect should include:

- External examination of the anal area.
- Chest or facial hair reference samples.
- Penile and scrotal swabs, which are especially critical when conducting a suspect forensic exam.

In addition to the collection of such biological and trace evidence, the forensic examiner should also record the suspect's vital signs and document (including through use of body diagrams and photographs) any visible injuries or complaints of pain.<sup>19</sup> Depending on the case history, urine and blood samples may be needed for toxicology or to counter potential defenses that might be raised by the suspect. DNA reference samples of blood and saliva should also be obtained.

During the forensic examination, all physical findings must be carefully documented, including any observable or palpable tissue injuries, physiologic changes, or foreign material (e.g., grass, sand, stains, dried or moist secretions). Unlike in the forensic examination of the victim, there should be no conclusion as to whether the findings are consistent with the history provided by the suspect. Both the examiner and attending officer should be

prepared to document any spontaneous statements made by the suspect regardless of whether the suspect is in custody or provided with a *Miranda* warning.

**3. Location of the Suspect Examination.** It is critically important to note that the victim and suspect examination must take place in different locations. It is simply not appropriate for suspects to be treated in the same location. Additionally, from a forensic evidence standpoint, it is important that every effort be made to avoid cross-contamination of evidence from the victim and suspect. This is an area that can be vulnerable to attack by the defense.

One possible solution is to have the suspect examined at the police department or other nonmedical facility in cases where the suspect is not injured and does not require medical care. The examiner<sup>20</sup> can respond directly to the police department, and the equipment and space needed to conduct the examination are minimal. Although there may be some added costs initially for police departments that host suspect examinations, they will likely benefit from a more efficient response and an increased likelihood that the examination will provide probative evidence that can be used to prosecute suspects.

## I. DNA Technology

The last decade has seen incredible advances in the evolution of DNA technology and its use in law enforcement investigation and prosecution. With the success of DNA technology with respect to sexual assault investigations, many law enforcement agencies have effectively linked cases and identified previously unknown assailants. However, many police agencies and investigators have also experienced frustration because of a severe shortage of crime laboratory resources. In many cases, evidence (such as clothing and evidence collected with sexual assault kits) has been destroyed when the statute of limitation expired.

Although these situations are certainly frustrating for police investigators, it can be devastating for victims. Public outcry has led to the enactment of legislation in many states to expand and sometimes eliminate the statute of limitations for sexual assault crimes. Some jurisdictions have enacted statutes allowing "John Doe warrants" to be issued using only a DNA profile as identifying information. In 2003, the federal government committed to providing 1 billion dollars over five years to clear a massive backlog of genetic samples nationwide. This DNA initiative is expected to help solve thousands of cold cases by processing DNA evidence from 350,000 crime scenes (including from sexual assault evidence kits) and 300,000 convicted offender samples that remain unevaluated.

As DNA technology improves and the investigative applications increase, law enforcement agencies must provide academy recruits and veteran officers with standardized, crime-specific policies, protocols, training, and resources to ensure an appropriate response and timely, thorough forensic evidence collection.<sup>21</sup>

## J. A Crime or a False Complaint?

Perhaps the most significant barrier to a successful sexual assault investigation and prosecution, and one that influences victims as well, is the powerful and pervasive myth that most sexual assault allegations are false. Estimates of false rape charges have varied widely, ranging from lows of .25 percent to highs of 80-90 percent. These discrepancies are a result of differences in perception, terminology, methodology of information gathering, and how a report is determined to be false.

The determination that a report of sexual assault is false can

be made only if the evidence establishes that no crime was committed or attempted. **This determination can be made only after a thorough investigation.** This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. **The determination that a report is false must be supported by evidence that the assault did not happen.**

1. **“Misinterpreted Behaviors.”** Some cases may be improperly labeled as false because they are not grounded in investigative facts, but rather in the particular reactions of the victim. For example, some factors that are typically responsible for false declarations are the:

- Victim’s delayed report
- Failure to locate the victim
- Failure to identify the assailant
- Lack of corroborating evidence
- Lack of cooperation by the victim or witnesses
- Report was filed in the wrong jurisdiction
- Discrepancies in the victim’s story
- Wrong address given by the victim
- Victim’s drunkenness
- Victim’s drug use
- Victim’s being thought of as a prostitute
- Victim’s sexual history
- Victim’s uncertainty of events
- Victim’s belligerence
- Victim’s failure to follow through with the investigation and prosecution
- Recantation by the victim<sup>22</sup>

These characteristics should not be seen as a basis for labeling a sexual assault report as false (or baseless) and, therefore, never having happened. Research has shown that many of these characteristics represent the realistic dynamics of and are common reactions to sexual assault. Even if aspects of the victim’s account of the incident are missing, exaggerated, or false, this does not automatically imply that the sexual assault did not occur.

2. **Case Coding.** The term “unfounded” is commonly defined as “lacking a sound base, groundless, unwarranted.” It is synonymous with another term often used by law enforcement in child abuse cases: “unsubstantiated.” Both terms are used to code and administratively clear sexual assault cases that are often mislabeled as “false allegations.” Police departments should make every effort to be aware of the implications of improperly clearing cases as unfounded and avoid doing so without a thorough investigation resulting in that determination.

It is important to note that the definition of “unfounded” is not the same in all law enforcement agencies, and certain definitions can lead to confusion and an inaccurate understanding of the scope of the crime. The UCR defines “unfounded” as “false or baseless.” Police departments routinely administratively clear a number of reports of sexual assault, perhaps mistakenly, in one combined category of “unfounded OR false.” Because of these varying definitions of “unfounded” among reporting agencies and the UCR, law enforcement professionals may have similar misunderstandings and inaccurately place false and unfounded reports in the same category.

The FBI reporting requirements make it clear that a case cannot be closed (administratively cleared) because an arrest is not made or the victim refuses to participate. There is an additional UCR category, “exceptional clearance,” which may only be used for cases in which the offender is identified but cannot be charged or the victim refuses to cooperate. It is critical that law

enforcement administrators evaluate current police decision-making practices regarding the clearance of sexual assault cases.

3. **False Reports.** When an investigation does support a false report, it is understandable that an investigating officer may feel frustrated or betrayed. Police supervisors and administrators are encouraged to recognize and reward officers for conducting thorough investigations that are based on the evidence and to support their conclusions and outcomes. If a suspect was identified, and possibly even arrested, for an allegation that was later determined to be false based on the evidence, the results of a complete investigation can exonerate a suspect rather than leave doubt in the minds of others.

## K. Polygraphs and Other Interrogation Techniques

Based on the misperception that a significant percentage of sexual assault reports are false, some law enforcement agencies use polygraphs or other interrogation techniques (including voice stress analyzers, SCAN) when interviewing victims. Victims often feel confused and ashamed, and experience a great deal of self-blame because of something they did or did not do in relation to the sexual assault. These feelings may compromise the reliability of the results of such interrogation techniques. The use of these interrogation techniques can also compound these feelings and prolong the trauma of a sexual assault. Some states have even enacted laws prohibiting the police from offering a polygraph examination to sexual assault victims or from using the results to determine whether criminal charges will be filed. A competent, evidence-based investigation will reveal the truth much more effectively than these interrogation tactics. Law enforcement agencies should establish policies to clearly state that officers should not require, offer, or suggest that a victim take a polygraph examination or submit to SCAN or voice stress analysis during the investigation stage.

On the other hand, there are some states and jurisdictions where polygraph examination is used strategically with sexual assault victims during courtroom proceedings. This tactic can be particularly useful in the case of a nonstranger sexual assault resulting in a consent defense, but it should only be used in the courtroom proceedings phase and not during the investigation. To illustrate, many defendants state that they will take a polygraph examination only if the victim will also take one at the same time. In addition, many defense attorneys will not allow the defendant to take a stipulated polygraph if the victim has already passed a polygraph or voice stress test. In this type of situation, it can sometimes be strategically beneficial in court to offer a polygraph examination of the victim. If stipulated to do so in court, the examiner may be allowed to testify as an expert at the trial. This strategy must be used only if the situation is discussed with the victim in advance, in the presence of a victim advocate or another knowledgeable support person.

## Endnotes

<sup>1</sup> For the purpose of the policy and this paper, those victimized by sexual assault are referred to as “victims” because this is the term most often recognized and used by professionals in the criminal justice system. Members of the medical community may refer to the same person as a “patient,” whereas rape crisis centers may prefer to use the term “survivor” or “client.”

<sup>2</sup> The estimate of 150 per 100,000 was calculated based on the rate of 1.5 per 1,000 people provided by the NCVS.

<sup>3</sup> Bureau of Justice Statistics, National Crime Victimization Survey (2003). Criminal Victimization, 2003. Bureau of Justice Statistics: Washington, D.C. Available at <http://www.ojp.usdoj.gov/bjs/abstract/cv03.htm>.

<sup>4</sup> Federal Bureau of Investigation (2002). Crime in the United States—2002. Federal Bureau of Investigation: Washington, D.C. Available at <http://www.fbi.gov/ucr/02cius.htm>. Normally the UCR defines rape rates per total population. In this part, US Census data were

used to base a rate on the female population.

<sup>5</sup> For more information on statistics on rape and sexual assault, see Kilpatrick, Dean G. (2004). *Making Sense of Rape in America: Where Do the Numbers Come From and What Do They Mean?* National Crime Victims Research Center: Medical University of South Carolina.

<sup>6</sup> Tracy, C.E., and Fromson, T.L. (2001, May 22). Call for Change in FBI Definition of Rape. Public letter to the Federal Bureau of Investigation. Women's Law Project, Philadelphia (<http://www.womenslawproject.org>).

<sup>7</sup> Kerstetter, W.A. (1990). "Gateway to Justice: Police and Prosecutor Response to Sexual Assaults against Women." *The Journal of Criminal Law and Criminology*, Vol. 81, No. 2, pp. 267-313. Spears, J.S. and Spohn, C.C. (1997). "The Effects of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases." *Justice Quarterly*, Vol. 14, No. 3, pp. 501-524.

<sup>8</sup> Lewis, S.H. (2003). Unspoken Crimes: Sexual Assault in Rural America. National Sexual Violence Resource Center, A Project of the Pennsylvania Coalition Against Rape. Available at <http://www.nsvrc.org>.

<sup>9</sup> For the purposes of the policy and this paper, the suspect in a sexual assault case will typically be referred to as male. While this terminology is problematic in that it excludes female sex offenders, it is used for simplicity in recognition of the fact that the vast majority of sexual assault perpetrators are men.

<sup>10</sup> Horney, J. and Spohn, C. (1996). "The Influence of Blame and Believability Factors on the Processing of Simple Versus Aggravated Rape Cases." *Criminology*, Vol. 34, No. 2, pp. 13-162.

<sup>11</sup> Dripps, D.A. (1992). "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent." *Columbia Law Review*, Vol. 92, No. 7, pp. 1780-1809.

<sup>12</sup> Falk, P.J. (2002). "Rape by Drugs: A Statutory Overview and Proposals for Reform." *Arizona Law Review*, Vol. 44, No. 1, pp. 131-212.

<sup>13</sup> Hammock, G.S. (1997). "Perceptions of Rape: The Influence of Closeness of Relationship, Intoxication, and Sex of Participant." *Violence and Victims*, Vol. 12, No. 3, pp. 237-246.

<sup>14</sup> According to the DOJ, "confidential communications are any information, whether written or spoken, which is transmitted between a victim...and a victim counselor in the course of the counseling relationship and in private, or in the presence of a third party who is present to facilitate communication or further the counseling process." Report to Congress, supra note 1, Model Legislation, 102 (A). The terms "victim," "victim counseling center," and "victim counselor" are also defined.

<sup>15</sup> Green, W., Kaufhold, M., and Schulman, E. *Sexual Assault Evidentiary Exam Training for Health Care Providers*. California Medical Training Center, University of California at Davis, Module 7, Page 45, Slide 100.

<sup>16</sup> 42 USC 3796gg-4.

<sup>17</sup> National Drug Intelligence Center and Sexual Assault Services Office (2003, May). *Drug Facilitated Sexual Assault Resource Guide*. Published by George Mason University and available by calling NDIC at (703) 362-6044 or George Mason University at (703) 993-4364.

<sup>18</sup> Green, W., Kaufhold, M., and Schulman, E. *Sexual Assault Evidentiary Exam Training for Health Care Providers*. California Medical Training Center, University of California at Davis, Module 7, Page 63.

<sup>19</sup> The California Office of Criminal Justice Planning has a state-approved forensic medical report for the suspect examination. The report is available online at <http://www.ocjp.ca.gov/medforms2/950.pdf>.

<sup>20</sup> Because of a severe shortage of nurses throughout the country and in view of the cost, some forensic examiner programs and police departments use licensed vocational nurses (LVNs) and Emergency Medical Services personnel to conduct the suspect examination, which reduces the cost of the suspect forensic examination.

<sup>21</sup> The National Institute of Justice has developed a brochure and training curriculum, in cooperation with the National Commission on the Future of DNA, titled "What Every Law Enforcement Officer Should Know About DNA Evidence. Best Practices for Identification, Preservation and Collection of DNA Evidence at the Crime Scene." (NCJ 182992) <http://www.ojp.usdoj.gov/nij/pubs-sum/000614.htm>. Both are extremely valuable resources for first responders and prosecutors.

<sup>22</sup> These factors were originally reviewed in Kanin, E.J. (1994). "False Rape Allegations." *Archives of Sexual Behavior*, Vol. 23, No. 1, pp. 81-93.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

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