

SALI

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July 1, 2012

To: Sexual Assault Program Directors, FNE Coordinators
From: Lisae C. Jordan, Esquire, SALI Director/MCASA General Counsel
Re: Mandatory Reporting and Forensic Nurse Examiners and Other Health Care Practitioners

This addresses the laws regarding mandatory reporting requirements for forensic nurse examiners working with victims of sexual assault and sexual abuse. It is an update of memos issued in 2003 and 2008.

Maryland has no general requirement for citizens (including health care practitioners) to report all sexual assaults or sexual abuse of adults. However, “sexual abuse” of children and certain categories of adults must be reported. This overview discusses when sexual abuse must be reported to law enforcement and the Department of Social Services. As always, MCASA member agencies and others should consult with their own attorneys regarding individual cases.

BRIEF SUMMARY

A. Adult Victims of Sexual Assault

- 1) Are health care practitioners, including forensic nurse examiners, *required/mandated* to report rape or other sexual offenses to law enforcement or other government agencies when the victim is an adult?

NO, with several important exceptions.

Sexual assaults committed against any of the following individuals are *required* to be reported (legal citations are listed in footnotes):

- a) Adults who fall under the legal definition of “vulnerable adult,” meaning an adult who lacks the capacity to care for her or his daily needs, [for instance, persons with serious mental retardation or dementia];¹

¹ Family Law Art. §14-302(a)-(d)

- b) Adults with mental illness who by reason of their mental or physical condition are unable to authorize disclosure and have no legal guardian or legal representative to authorize disclosure for them or who are under guardianship of the State;²
- c) Adults who are developmentally disabled;³
- d) Residents of nursing homes and similar institutions (including some small private homes where unrelated adults are cared for);⁴ and/or
- e) Residents of homes for emotionally disturbed children or adolescents.⁵
- f) Injuries caused in certain ways also must be reported. These are generally unrelated to sexual offenses, but could occur simultaneously with a sexual assault. They are (in all counties): gunshot wounds;⁶ certain burn injuries; and injury by moving vessel [boat].⁷ Additionally, injuries by automobile or lethal weapon, or by the individual in charge of the treating hospital, must be reported if they occurred in certain counties.⁸ The counties are:
 - Allegheny
 - Anne Arundel
 - Charles
 - Harford
 - Kent
 - Montgomery
 - Prince George's
 - Somerset
 - Talbot
 - Wicomico
- g) Sexual abuse of minors is discussed in detail below.

² Health-Gen. §4-307(k)(ii)(1) regarding recipient of information and other requirements, see also Cts. & Judicial §5-609. Disclosure under this section is to the state protection and advocacy program, Maryland Disability Law Center, telephone 410-727-6352.

³ Health-Gen. §7-1005(b)

⁴ Health-Gen. §19-347(b)

⁵ COMAR 10.07.04.05

⁶ Health Gen. §20-703

⁷ Health-Gen. 20-702

⁸ Health-Gen. §20-701

- 2) Are health care practitioners, including forensic nurse examiners, *permitted/allowed* to report rape or other sexual offenses to law enforcement or other government agencies when the victim is an adult, has not given permission to report, and does not fall under one of the exceptions listed above?

NO, confidentiality must be maintained.

B. Child Victims of Sexual Assault or Abuse

- 1) Are health care practitioners, including forensic nurse examiners, *required/mandated* to report rape, other sexual offenses or sexual exploitation when the victim is a child and the *perpetrator is a family member or other caretaker*?

YES. When the perpetrator is a family member or other caretaker, the rape, other sexual offenses, or sexual exploitation falls under the legal definition of child sexual abuse that must be reported. The State law defines child “sexual abuse” as “any act that involves sexual molestation or exploitation of a child by a parent or other person who has had permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member.”⁹

- 2) Are health care practitioners, including forensic nurse examiners, *required/mandated* to report rape or other sexual offenses when the victim is a child and the *perpetrator is NOT a family member or other caretaker*?

NO. If the perpetrator is **NOT** a family member or other caretaker, then reporting is **NOT** required.

- 3) Are health care practitioners, including forensic nurse examiners, *permitted/allowed* to report rape or other sexual offenses when the victim is a child and the *perpetrator is NOT a family member or other caretaker* and informed consent *has not* been obtained?

NO, but they may report with informed consent.

- 4) Are health care practitioners, including forensic nurse examiners, *required/mandated* to report statutory rape?

NO. If the perpetrator is **NOT** a family member or other caretaker, then the crime does not fall under the mandatory reporting law.

⁹ Fam.L.Art §5-701(x)(1); see also, § 5-701(b).

- 5) Are health care practitioners, including forensic nurse examiners, *permitted/allowed* to report statutory rape if informed consent *has not* been obtained?

NO. Confidentiality must be maintained.

- 6) Are health care practitioners, including forensic nurse examiners, *permitted/allowed* to notify parents, guardians or caretakers of minor patients if informed consent from the minor *has not* been obtained?

YES. Health care practitioners, including forensic nurse examiners, are *allowed* to notify parents, guardians or caretakers, but are *not required* to notify them.¹⁰

IN-DEPTH DISCUSSION

This section repeats the information above with more detailed discussion and legal authorities.

A. Adult Victims of Sexual Assault

In 1989, the Maryland Attorney General examined the question of whether health care professionals may report that an adult patient had been raped or sexually assaulted over the patient's objections. Based on both law and ethics, the Attorney General issued an opinion that they may **NOT**.¹¹ There were however, several exceptions to this general principle. Certain statutes require health care professionals to breach confidentiality and report abuse, including sexual assault.¹²

Sexual assaults committed against any of the following individuals are *required* to be reported:

- a) Adults who fall under the legal definition of "vulnerable adult," meaning an adult who lacks the capacity to care for her or his daily needs, [for instance, persons with serious mental retardation or dementia];¹³
- b) Adults with mental illness who by reason of their mental or physical condition are unable to authorize disclosure and have no legal guardian or legal representative to authorize disclosure for them or who are under guardianship of the State;¹⁴

¹⁰ Medical personnel may NOT, however, notify parents, guardians or caretakers regarding a minor's abortion.

¹¹ 74 Md. Op. Atty Gen. 128 (1989).

¹² The term "sexual assault" is used generically to refer to all sex crimes, including rape, sexual offenses, etc.

¹³ Family Law Art. §14-302(a)-(d)

¹⁴ Health-Gen. §4-307(k)(ii)(1) regarding recipient of information and other requirements, see also Cts. & Judicial §5-609. Disclosure under this section is to the state protection and advocacy program, Maryland Disability Law Center, 410-727-6352.

- c) Adults who are developmentally disabled;¹⁵
- d) Residents of nursing homes and similar institutions (including some small private homes where unrelated adults are cared for);¹⁶ and/or
- e) Residents of homes for emotionally disturbed children or adolescents.¹⁷
- f) Injuries caused in certain ways also must be reported. These are generally unrelated to sexual offenses, but could occur simultaneously with a sexual assault. They are (in all counties): gunshot wounds;¹⁸ certain burn injuries; and injury by moving vessel [boat].¹⁹ Additionally, injuries by automobile or lethal weapon, or by the individual in charge of the treating hospital, must be reported if they occurred in certain counties.²⁰ The counties are:
 - Allegheny
 - Anne Arundel
 - Charles
 - Harford
 - Kent
 - Montgomery
 - Prince George's
 - Somerset
 - Talbot
 - Wicomico

If an adult is sexually assaulted and does not fall under one of these exceptions, a health care practitioner **MAY NOT** breach confidentiality and report the assault without the patient's informed consent.

Confidentiality & Privilege

Communications between health care practitioners and their adult patients are generally *confidential*. The source of this principle is found in state and federal law and professional ethics. In Maryland, communications with certain health-care professionals are also *privileged*. This includes communications between patients/clients and psychiatrists and psychologists,²¹ psychiatric-mental health nursing specialists,²² licensed professional counselors,²³ and licensed social workers.²⁴ *Privilege* relates to whether a professional may testify about communications with a patient or client. *Confidentiality* prevents health care practitioners from sharing

¹⁵ Health-Gen. §7-1005(b)

¹⁶ Health-Gen. §19-347(b)

¹⁷ COMAR 10.07.04.05

¹⁸ Health Gen. §20-703

¹⁹ Health-Gen. 20-702

²⁰ Health-Gen. §20-701

²¹ Cts. & Jud. §9-109

²² Cts. & Jud. §9-109.1

²³ Cts. & Jud. §9-109.1

²⁴ Cts. & Jud. §9-121

information out of court and is conceptually separate from privilege. However, the Court of Special Appeals has found that if a communication is legally privileged, it also must be held confidential and could only be revealed with the patient's permission.²⁵

Maryland does not create a statutory privilege for other professions. For example, there is no general privilege between doctors and patients²⁶. However, doctors, nurses, and other health professionals work under ethical codes that prohibit disclosure of confidential health information, *see, e.g.*, the American Medical Association's Principles of Medical Ethics, "A physician shall respect the rights of patients, colleagues and of other health professionals and shall safeguard patient confidences and privacy within the constraints of the law;" American Nurses Association Code of Ethics, "The nurse safeguards the client's right to privacy by judiciously protecting information of a confidential nature."

Complicating matters further, there are separate rules regarding medical *records*. A patient's medical records must be kept confidential and may not be disclosed unless otherwise provided in the law or at the patient's direction.²⁷ Current regulations provide that if the Maryland State Police sexual assault kit is used to collect items of evidence, the evidence shall be submitted (and thereby disclosed) to the State Police Crime Laboratory.²⁸ In some cases, however, this will not disclose the identity of the survivor to law enforcement (see Jane Doe Exams, below).

Confidentiality and HIPAA

A federal law, the Health Insurance Portability Accountability Act²⁹ (HIPAA), has strengthened privacy protections for patients' health information. HIPAA applies only to "covered entities," namely health plans, health care clearinghouses, and health care practitioners who transmit any health information in electronic form in connection with a transaction covered by what is known as the "Privacy Rule."³⁰ A full description of HIPAA and the Privacy Rule is beyond the scope of this memorandum.³¹ However, forensic nurse examiners typically work in hospitals and clinics. These types of health care practitioners would generally qualify as covered entities under the Privacy Rule. Many rape crisis and recovery centers, on the other hand, do not fall within the definition of a HIPAA provider.

Under HIPAA, practitioners still must breach confidentiality and report sexual abuse where required by statute (see exceptions to confidentiality as listed (a)-(f) above), however, other breaches of confidentiality are ***prohibited unless the patient permits the disclosure***. Penalties for knowing disclosure of a patient's personally identifiable health information without permission are up to a \$50,000 fine, up to one year imprisonment, or both; if the offense is committed under false pretenses, the penalties increase to up to a \$100,000 fine, up to 5 years in

²⁵ *Shaw v. Glickman*, 45 Md. App. 718, cert. denied 288 Md. 742 (1980)

²⁶ *Butler-Tulio v. Scroggins*, 139 Md. App. 122 (2001)

²⁷ Health-General §4-302(a)

²⁸ COMAR 10.12.02.03

²⁹ P.L. 104-191, August 21, 1996

³⁰ For text of Privacy Rule, see <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacypolicy/>

³¹ See www.privacyrights.org/fs/fs8-med.htm for additional information and resources on HIPAA and privacy of medical records generally.

prison, or both; and if the offense is committed with the intent to sell, transfer or use the information for commercial gain, personal gain, or malicious harm, the penalties are up to \$250,000 fine, up to 10 years in prison, or both.³²

The U.S. Department of Health and Human Services (HHS) has provided further guidance regarding HIPAA's Privacy Rule and disclosure to law enforcement. Sexual assault was not specifically addressed, but domestic violence was. HHS noted that "under most circumstances, the Privacy Rule requires covered entities to obtain permission from persons who have been the victim of domestic violence or abuse before disclosing information about them to law enforcement."³³ Again, health care practitioners must obtain an adult victim's permission to disclose unless the circumstances fall under one of the statutory exceptions listed above (a)-(f).

Following HIPAA's enactment, there was significant confusion regarding reporting domestic violence. HIPAA allows states with mandatory reporting of domestic violence to continue to mandate reporting. Maryland *does NOT* mandate reporting of domestic violence and HIPAA *does NOT* change this. Therefore, for example, when a wife presents at hospital and reports that she has been raped or otherwise assaulted by her husband, HIPAA *does NOT* require reporting. In Maryland, HIPAA requires the patient's permission before disclosure may occur.

Jane Doe Exams

The federal Violence Against Women Act of 2005 required states to provide sexual assault victims with the ability to have a sexual assault forensic exam (SAFE) without reporting the crime to law enforcement.³⁴ Maryland regulations were changed to allow SAFEs with a "property held" number instead of a patient's name. These are often called anonymous or Jane Doe exams.

The issue of whether a sexual assault survivor may receive a SAFE without reporting to law enforcement is separate from other reporting requirements. For instance, if a patient reports sexual assault and is a resident of a nursing home, the case must be reported. This does not change because the patient wants a "Jane Doe" exam. Note however, that this does not mean that law enforcement must authorize the exam, only that the assault be reported.

B. Child Victims of Sexual Assault

As discussed above, confidentiality is the general rule for health care practitioners working with victims of sexual assault. When the victim is a minor, however, there are complicated rules governing when confidentiality must be breached and the assault or abuse must be reported to law enforcement and the Department of Social Services.

³² HIPAA, P.L. 104-191, §1177

³³ See, <http://www.hhs.gov/ocr/hipaa>, Questions and Answers, Answer ID 349, Disclosures for Law Enforcement Purposes.

³⁴ 42 U.S.C.A. § 3796gg-4(a) (1)

Mandated Reporter Law

Health practitioners, including forensic nurse examiners, are ***required/mandated*** to report rape or other sexual offenses when the victim is a child and the ***perpetrator is a family member or other caretaker***. The Maryland Family Law Article requires each health practitioner [including a nurse], police officer, educator or human services worker, acting in a professional capacity, to report abuse or neglect of a child. This is generally referred to as the “mandated reporter” law.³⁵

Nurses and other professionals covered under the mandated reporter law must orally report abuse to the local department of social services (DSS) or to the appropriate law enforcement agency if they have “reason to believe” the abuse occurred. Nurses who are acting as a staff member of certain institutions³⁶ must also report the abuse to the head of the agency. In addition to the oral report, the nurse or other professional must send a written report to DSS within 48 hours, with a copy to the local State’s Attorney.³⁷

The types of child sexual abuse triggering the mandated reporting law are defined in several related sections of the Family Law Article. As an initial matter, a child is a person under 18 years old³⁸ and “sexual abuse of a child” must be reported “whether physical injuries are sustained or not.”³⁹ Sexual abuse is defined by Family Law as “any act that involves sexual molestation or exploitation of a child by a parent or other person who has had permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member.”⁴⁰ Also per this statute, sexual abuse includes incest, rape, sexual offenses in any degree, sodomy, and unnatural or perverted sexual practices.⁴¹ These crimes are each defined by statute themselves. However, the language “sexual molestation or exploitation” suggests that “sexual abuse” also includes a broader set of sexual acts. Exploitation would include, for instance, using a child in pornography. Beginning in October 2012, sexual abuse will also explicitly include allowing or encouraging a child to engage in obscene or pornographic materials or prostitution and human trafficking of a child.⁴² Again, however, the acts must have been committed by a family member or other caretaker to trigger mandatory reporting.

Reportable child sexual abuse ***does not*** include abuse by someone other than “a parent or other person who has had permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member.” This does not mean reporting is forbidden, but it does mean ***informed consent is required*** before a report can be made.⁴³

³⁵ Fam.L.Art. § 5-704; Maryland also imposes a general reporting requirement on all persons to report suspected child abuse. Fam.L.Art. § 5-705

³⁶ These institutions are a hospital, public health agency, child care institution, juvenile detention center, school, or similar institution.

³⁷ Fam.L.Art. §5-704(b)

³⁸ Fam.L.Art. §5-701(d)

³⁹ Fam.L.Art. §5-701(b)(2)

⁴⁰ Fam.L.Art §5-701(x)(1)

⁴¹ Fam.L.Art §5-701(x)(2)

⁴² SB1082/HB860 (2012 Regular Session)

⁴³ Informed consent is an established concept in medical ethics and requires that patients be provided with information about the risks and benefits of actions proposed by health care practitioners and information about alternatives to those actions. Patients must then be permitted to make their own choices about which actions to pursue. See, e.g., T. Beauchamp and J. Childress, “The Principle of Autonomy,” in Principles of Biomedical Ethics 63

If a parent is acting as the personal representative of a minor child (for instance, when a mother brings her daughter to the hospital because of suspected child sexual abuse by a stranger), then the parent may consent to reporting to the police. However, there are three situations where a parent **would not** have the authority to consent to reporting:

- a. When the minor is the one who consents to care and the consent of the parent is not required under Maryland law (see further discussion, below);
- b. When the minor obtains care at the direction of a court or a person appointed by the court; and/or
- c. When the parent has agreed that the minor and health care practitioner may have a confidential relationship.

Regarding the first exception (i.e. when the minor has the authority to consent to treatment), the provisions of Maryland's Minor Consent Act,⁴⁴ permit minors to consent to treatment for a variety of health issues, including venereal disease, pregnancy, contraception, rape and sexual offenses.⁴⁵ Minors receiving treatment pursuant to these laws would have to give permission themselves in order for a health care practitioner to report a sexual assault **if the perpetrator was NOT** "a parent or other person who has had permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member." If the perpetrator **did** fall under that category (i.e., the parent or other caretaker was the perpetrator), sexual abuse **must be** reported - even if the victim objects.

Parental Notification

The Minor Consent Act permits, but **does not require**, licensed health care practitioners to inform parents, step-parents, guardians, and custodians of information about treatment needed or consented to by the minor. (There is an exception: information about a minor's abortion may NOT be disclosed when the minor is legally permitted to consent to the procedure herself.)⁴⁶ HIPAA does not change this. Confidential information about a minor may still be disclosed to these caretakers, even over the minor's objections. **Disclosure is not required**, however. If disclosure to the parent/guardian is made, the parent/guardian may choose to report the crime – parents/guardians are not required to maintain confidentiality.

(1979); generally, Medical Ethics: A Clinical Textbook and Reference for the Health Care Professions, (N. Abrams and M.D. Buckner, eds., 1983). Case law in Maryland has discussed the concept of informed consent for medical procedures as including a patient's willing uncoerced acceptance [consent] after adequate disclosure of the nature of the intervention, its risks and benefits, as well as disclosure of alternatives with their risks and benefits. *Bankert v. U.S.*, 937 F.Supp. 1169 (D.Md. 1996); see also, *Sard v. Hardy*, 281 Md. 432 (1977). See text, above, regarding when minors have the right to make their own choices.

⁴⁴ Health-General, §20-102

⁴⁵ A minor is a person under 18 years of age; there is no other age limit contained in the Minor Consent Act. Another law, Health-General §20-104, also allows minors age 16 and older to consent to treatment for mental or emotional disorders by a physician, psychologist, or clinic.

⁴⁶ Health-General, § 20-103

HIPAA also permits health care practitioners to refuse to treat a parent as a child's "personal representative" (i.e. the person who may receive information and consent on behalf of the minor) if the practitioner reasonably believes that this could endanger the child. Practitioners confronted with this situation should consult with their attorney.

Statutory Rape

"Statutory Rape" is not a term used in Maryland's criminal law, but is a generic term for prohibitions on certain sexual acts based on a person's age. Maryland's criminal law has age-based sexual crimes; they are found in sections of the second degree rape law and second, third and fourth degree sexual offenses.⁴⁷ Each of these offenses include prohibition of certain sexual conduct with persons under age 16 even if the minor consented. The available penalties and what is prohibited vary with the age of both parties and the acts themselves.⁴⁸

In any event, these "statutory" provisions are part of Maryland's criminal law and separate from the legal definition of child sexual abuse triggering mandatory reporting. A "statutory rape" or other age-based sexual offense, by itself, ***does not*** trigger the mandatory reporting law. Instead, mandated reporters must look to the Family Law Article provisions discussed above, *i.e.*, was the offense committed by a parent or family member.⁴⁹ If so, it must be reported; if not, confidentiality must be maintained.

Prior to the passage of HIPAA, some professionals advised that all potential "statutory rape" cases should be reported to law enforcement. It was suggested that a nurse or other health care professional need not ask a patient the age and relationship of a perpetrator, and that it should be left to the State's Attorneys' offices to determine the age and relationship of the people involved. Without commenting on this position, this type of reporting now appears to be prohibited under HIPAA. HIPAA permits disclosure ***only*** where state law affirmatively requires it. Health care practitioners risk violating HIPAA if they fail to inquire about the relationship between a minor and the person she or he is sexually involved with, and then uses this lack of information as the justification for breaching confidentiality and reporting. Penalties for violating HIPAA include fines and imprisonment and are discussed in more detail above.

Finally, it is useful to note that there would be serious detrimental effects for many minors if the law did require reporting of "statutory" offenses when the perpetrator is not a family or household member or "other person who has had permanent or temporary care or custody or

⁴⁷ It is a second degree rape or sexual offense to have sexual intercourse or commit a sexual act (oral or anal sex, or vaginal or anal penetration with an object) with a person under 14 if the person committing the act is at least 4 years older than the victim, Criminal Law Article §3-304, 3-305; a person is guilty of a sexual offense in the 3rd degree if the person engages in vaginal intercourse or a sexual act (oral or anal sex, or vaginal or anal penetration with an object) with another person who is 14 or 15 years old when the perpetrator is at least 21 years old, Criminal Law Article §3-307; 4th degree sexual offense involves vaginal intercourse between a 14 or 15 year old and a perpetrator who is four or more years older or a sexual act with a 14 or 15 year old, not covered by 3rd degree sexual offenses (generally this applies to 18-20 year old perpetrators), Criminal Law Article §3-308.

⁴⁸ *Id.* (see previous footnote).

⁴⁹ Fam.L.Art §5-701(x)(1)

responsibility for supervision of a child.”⁵⁰ If reporting is mandated, young women and men in sexual relationships with older persons would be discouraged from seeking counseling and reproductive health care. Additionally, this type of reporting would be unlikely to produce much benefit. These relationships are already prohibited by criminal law and, as discussed above, health care practitioners have the discretion to inform a minor’s parent or guardian regarding treatment. Balancing the risk of harm with potential benefits, violating minors’ confidential relationships with counselors and reproductive health care practitioners by extending the mandatory reporting law would do more harm than good. As a result, amendment of the law is not advised.

Neglect

In a limited number of cases, health care practitioners may be required to report a parent’s neglect if the parent fails to act appropriately in response to a sexual assault against a child. Health care practitioners, including forensic nurse examiners, are required to report child neglect to the Department of Social Services and, if acting as a staff member of certain institutions,⁵¹ to the head of the institution.⁵²

“Neglect” is defined as leaving a child unattended or “other failure to give proper care and attention to a child by a parent or other person who has had permanent or temporary care or custody or responsibility for supervision of a child, under circumstances that indicate:

- (1) that the child’s health or welfare is harmed or placed at substantial risk of harm; or
- (2) mental injury to the child or a substantial risk of mental injury.”⁵³

Mental injury is “the observable, identifiable, and substantial impairment of a child’s mental or psychological ability to function.”⁵⁴

This is a high standard. Health professionals considering breaking confidentiality and reporting neglect because of a parent or caretaker’s failure to respond to a child’s sexual assault should discuss the facts with their own counsel.

* * *

For more information regarding the contents of this memo, contact MCASA’s Sexual Assault Legal Institute at 301-565-2277 or Toll-Free at 877-496-SALI.

⁵⁰ Fam.L.Art. §5-701(x)(1)

⁵¹ These institutions are a hospital, public health agency, child care institution, juvenile detention center, school, or similar institution.

⁵² Fam.L.Art. §5-704(a)(2)

⁵³ Fam.L.Art. §5-701(s)

⁵⁴ §5-701(r)

