Memorandum of Law

December 22, 2010

To: Jennie Boden, MCASA Executive Director
From: Lisae C. Jordan, Esquire
Re: Jane Doe Exams as a “Last Resort”

BACKGROUND

Sexual Assault Forensic Exams provide crucial evidence of sexual assault and help support successful prosecution of offenders. The reauthorization of the federal Violence Against Women Act of 2005 requires that states (including Maryland) provide survivors with a medical forensic examination free of charge or with full reimbursement without requiring the victim to report to law enforcement and/or participate in the criminal justice system as a condition of the payment or reimbursement. ¹

Maryland commonly uses the term “Jane Doe exam” to refer to the ability of a sexual assault survivor to obtain a forensic exam without reporting the exam to the police. A question has arisen regarding the timing of when a survivor must be informed of the alternative of having a Jane Doe exam. You have asked whether it is legally permissible to tell survivors about Jane Doe exams only as a “last resort” (i.e. if they refused to have an exam in conjunction with reporting to police).

¹ 42 U.S.C.A. § 3796gg-4(a) (1). U.S. Code Annotated, Title 42—The Public Health and Welfare, Chapter 46—Justice System Improvement, Subchapter XII-H—Grants to Combat Violent Crimes Against Women, Section 3796gg-4—Rape exam payments, (a) Restriction of funds, (1) In general. Nothing in this section shall be construed to permit a State, Indian tribal government, or territorial government to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such an exam, or both.” Available from http://www.ovw.usdoj.gov/docs/stop_violence.pdf
QUESTION PRESENTED – SHORT ANSWER

1) When should a sexual assault survivor be advised she or he has the option of having a “Jane Doe” exam?

A patient must be advised they have the alternative of having a Jane Doe exam prior to consenting to any forensic medical exam. The practice of providing this information as a “last resort” violates Maryland law and is contrary to the policies supporting enactment of VAWA’s Jane Doe provisions.

QUESTIONS PRESENTED – ANALYSIS

1) When should a sexual assault survivor be advised she or he has the option of having a “Jane Doe” exam?

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Federal Law – VAWA 2005

The “Jane Doe” provisions of VAWA state:

Rape exam payments, (a) Restriction of funds, (1) In general. Nothing in this section shall be construed to permit a State, Indian tribal government, or territorial government to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such an exam, or both. 42 U.S.C.A. § 3796gg-4(a) (1).

States must comply with these provisions to receive VAWA - STOP funding. In 2010, this was approximately $2.4 million. This funding supports a variety of services for sexual assault and domestic violence survivors, and training and support for law enforcement and prosecution of sexual assault and domestic violence cases.

Maryland Regulations

Maryland Department of Health & Mental Hygiene (DHMH) regulates payment for forensic exams and these regulations help bring Maryland into compliance with VAWA’s
Jane Doe provisions. COMAR 10.12.02. In relevant part, these include:

03.B. Sexual Assault.

(1) A sexual assault forensic examination shall be performed if: …

(b) Either:

(i) A police report has been filed with the appropriate law enforcement jurisdiction; or

(ii) A property-held number is assigned to the case in the event that a victim does not wish to file a police report immediately but still seeks to have evidence collected and held. (Emphasis added).

Additionally, sexual assault forensic exams (SAFEs), like any medical procedure, require informed consent by the patient. The DHMH regulations specifically recognize this (“The provider of services shall secure signed informed consent for examination and collection of evidence in cases of alleged rape or sexual offense…” COMAR 10.12.02.05, emphasis added).

“Informed consent” is defined in Maryland case law, and is the duty of a health care provider to inform a patient of material information, or information that a practitioner “knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure.” Sard v. Hardy, 281 Md. 432, 444 (1977). Failure to provide informed consent gives rise to a cause of action (i.e., gives a patient a basis to sue the provider).

JANE DOE EXAMS AS A LAST RESORT

a) Informed Consent

Various entities have suggested that when a sexual assault survivor presents at a hospital, they should first be advised to report the sexual assault to law enforcement and only told about the alternative of having a Jane Doe exam if they refuse to speak with police and/or are going to leave without having a forensic examination. This is contrary to the requirements of informed consent. Patients, including sexual assault survivors, must be advised of alternatives and their respective risks and benefits prior to making decisions about what procedures they wish to consent to. In the context of a sexual assault forensic exam (SAFE), this would require that the patient be informed of the options (1) to have medical treatment without preserving evidence, (2) to have medical treatment and have evidence collected, and (3) to have medical treatment and have evidence collected and report the incident to police. The patient must also be advised of the attendant risks and benefits of each option. For instance, a patient should be advised that if they decline to have any evidence collected, this could impair the State’s ability to successfully prosecute the perpetrator; similarly, patients should be advised that reporting the incident to law enforcement will allow investigation to begin and can increase the chances of
successful prosecution. Jane Doe exams have the benefit of preserving medical, forensic evidence from the survivor, but the risk of losing other crime scene evidence since the police are not being made aware of the location of the crime - patients should receive this information as well.

b) VAWA and Underlying Policies

In addition to offending Maryland’s law on informed consent, offering Jane Doe exams only as “last resort” is likely not compliant with VAWA. Withholding information regarding the Jane Doe option in effect requires the survivor to cooperate with law enforcement when the victim first presents, and only complies with VAWA if there is no other way to obtain forensic evidence. There is nothing in VAWA 2005 to suggest that it is acceptable to delay application of its provisions until a patient has refused to talk with law enforcement. Moreover, this practice contravenes the policies underlying the Jane Doe provisions.

VAWA 2005 included provisions regarding anonymous reporting (referred to as “Jane Doe” in Maryland) to meet the twin policy goals of enhancing survivor autonomy and increasing prosecutions for sexual assault. Allowing a survivor to choose when, how, and whether to report an assault to law enforcement helps re-empower a survivor following an assault.

The anonymous reporting provisions also increase evidence collection. Sexual assault prosecution often relies on SAFE evidence. Requiring a survivor to talk with law enforcement prior to the exam resulted in some survivors declining the exam and when some of these survivors later wished to help prosecute the sex offender, prosecutors were unable to do so because important evidence had been lost. Jane Doe procedures help avoid this scenario.

While data is still being developed, Massachusetts’ experience supports the supposition that a Jane Doe option will increase overall reporting of sexual assault to the police. In that state, survivors receiving forensic exams have not been required to provide their name to law enforcement or otherwise cooperate with police since 2001. A study of this practice showed that from 2001 to 2004, an average of 73% of the victims of sexual assault chose to make a formal report to police, compared to national averages, which range from 16% to 31%.² Analysis of military data also supports the value of Jane Doe reporting. Approximately 14% of service members who initially filed a restricted (confidential) report in 2008 later converted to an unrestricted (standard) report.³ Finally, and perhaps most importantly for MCASA, local experience also reflects these findings. At Mercy Hospital in Baltimore City, approximately 15% of survivors who originally

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received a Jane Doe exam later chose to report the sexual assault to police.

Imposing a requirement that Jane Doe exams be offered only as a last resort runs contrary to both policy goals of the VAWA anonymous reporting provisions. Withholding important information from a survivor dis-empowers rather than re-empowers the survivor. There is also no evidence to suggest that this practice is of any benefit to prosecution of sex offenders.

CONCLUSION AND RESOURCES

The option of Jane Doe reporting should be presented to sexual assault survivors as an alternative during informed consent process prior to a SAFE. Failing to do so violates Maryland’s law regarding informed consent, offends a survivor’s right to make decisions regarding her or his own body, and violates the underlying policy goals of VAWA.

EVAW (End Violence Against Women International, evawintl.org) provides technical assistance to states regarding compliance with Jane Doe reporting. Their materials include model forms for survivors considering reporting a sexual assault. These may be useful to jurisdictions seeking guidance in this area.

As always, please contact me with any questions, lisae.jordan.esq@gmail.com.