Consent for Forensic Sexual Assault Exams

Executive Summary

Senate Bill 205 was introduced by Senator George Barker during the 2012 Regular Session of the Virginia General Assembly. This bill sought to address situations in which victims of sexual assault are unable to provide consent for a sexual assault examination due to unconsciousness, mental incapacity or being under the age of 18. The bill passed the Senate, but was referred to the Crime Commission for study by letter from the House Courts of Justice Committee.

The issue of consent to a forensic sexual assault exam has not been widely discussed in legal or public policy academic literature. In normal circumstances, medical personnel must obtain informed consent from a patient before providing medical care. In emergency situations, when consent cannot be obtained from the patient, medical personnel can use "implied consent," but generally only for care to prevent serious harm or death. Forensic sexual assault exams are not considered medical care, but rather evidence collection, which is why practitioners have differing opinions as to whether current consent procedures are sufficient or more precise legislative approval for the exam is required.

The primary exam for a sexual assault is the Physical Evidence Recovery Kit (PERK). The PERK exam collects and preserves the physical manifestations of the sexual assault. Most forensic sexual assault exams are performed by a Forensic Nurse Examiner (FNE), who has specialized training in evidence collection from injuries. Often, these FNEs also have a Sexual Assault Nurse Examiner (SANE) certification, which focuses on the collection and preservation of evidence from a sexual assault. FNEs often work a regular nursing job, but may work as a FNE outside of their normal nursing duties, and frequently testify in court.

In Virginia, informed consent applies to medical care, as does implied consent. There is no specific provision that allows medical personnel to perform a forensic sexual assault exam on a person who cannot consent. There are, however, provisions in the Code of Virginia that allow judges to approve medical care for persons who are incapacitated; provide care for persons under the custody of community service boards; and, for juveniles to be taken under custody either under a removal order or an emergency removal. All of these provisions could theoretically be used to authorize a forensic sexual assault exam for a person unable to consent. Of the other 49 states, only 11 states have statutes that address the issue of consent to a forensic sexual assault exam: ten of these states mandate consent for the exam, and Maine allows exams to be performed on unconscious victims in "exigent" circumstances. Six of these states allow a minor to consent to an exam.

As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December 5, 2012, meeting:

Recommendation 1: Create a new section in the Virginia Code that would allow a forensic exam to be conducted on a victim unable to consent, but only if the procedure is approved by a second, independent medical professional in a manner similar to that of Va. Code § 54.1-2983.2, which describes the procedure by which an independent physician can authorize medical procedures when a patient is unable to give consent.

Recommendation 2: Create a new section in the Virginia Code to allow for photographs and x-rays to be taken of adults suspected of being abused, similar to Va. Code § 63.2-1520, which applies to children.

Background

Senate Bill 205 (SB 205) was introduced by Senator George Barker during the 2012 Regular Session of the General Assembly.[1] This bill sought to address situations in which victims of sexual assault are unable to provide consent for a sexual assault examination due to unconsciousness, mental incapacity or being under the age of 18. The bill passed the Senate of Virginia, but was referred to the Crime Commission for study by letter from the Virginia House Courts of Justice Committee. Specifically, SB 205 proposed the following modifications to the Code of Virginia:

- Modify Va. Code § 37.2-1104 to allow a judge to approve the collection of forensic evidence, when a sexual assault is suspected, from an adult unable to make an informed decision;
- Modify Va. Code § 54.1-2969 to permit a minor, 14 years or older, to consent to a forensic evidence exam for suspected sexual assault; and,
- Modify Va. Code § 63.2-1520 to allow for the collection of forensic evidence from a minor child without the consent of a parent or guardian.

The issue of conducting a forensic sexual assault exam when the alleged victim cannot provide consent to the exam has not been written about extensively, and there are very few articles concerning the subject. One article clearly identifies the problem: forensic sexual assault exams fall into a grey area between providing care and collecting evidence.[2] Under normal circumstances, when a patient enters a hospital or seeks medical care, medical care personnel must obtain informed consent from the patient before providing treatment.[3] Basically, informed consent provides "the patient with enough information to ensure the patient's ability to choose the procedure based on knowledge of the necessity of the procedure, alternate treatment options, risks, and likelihood of success or failure."[4] If a patient comes into the hospital, unable to consent, then the doctrine of "implied consent" permits medical personnel to provide emergent medical care, but generally only to prevent serious harm or death.[5] A sexual assault exam, however, is not part of routine or emergent care; it is primarily a method for collecting evidence.[6] The concern, since a sexual assault examination involves touching the person, including taking vaginal or anal swabs, is that by doing the exam without

consent, medical personnel could be open to a civil lawsuit, or face criminal charges.[7] The U.S. Department of Justice's National Protocol for Sexual Assault Medical Forensic Examinations suggests that state laws should be followed regarding consent and access to the exam when medical personnel are presented with a situation involving vulnerable adult patients or minors who have been sexually abused.[8] While there may be a valid concern for not doing an exam, if an exam is not completed within 72 hours of an assault, much of the biological evidence could be degraded and of little use in any subsequent criminal prosecution.[9] Accordingly, there is a split in the field as to whether current implied consent laws are sufficient to proceed with a forensic sexual assault exam, or whether a legislative solution is required.[10]

While most emergency doctors or nurses can perform a forensic sexual assault exam, this examination is typically carried out by a FNE. A FNE is a registered nurse who has specialized forensic training in treating crime victims and collecting evidence of a crime, to include sexual assault.[11] They are trained in injury recognition and legal matters associated with evidence collection, and FNE nurses often testify in subsequent criminal cases.[12] These nurses often perform the FNE function in addition to their regular nursing job.[13] In Virginia, FNEs can either conduct exams for a hospital, at the request of law enforcement or a Commonwealth's Attorney, or as part of a Sexual Assault Response Team (SART).[14] According to the Virginia Chapter of the International Association of Forensic Nurses, there are approximately 100 FNEs in Virginia. A FNE may also obtain a SANE certification, which involves 40 hours of classroom study, and a practical, clinical component.[15] A SANE certification tests the nurse's proficiency in obtaining medical forensic history, a detailed physical and emotional assessment, written and photographic documentation of injuries, collection and management of forensic samples, and providing emotional and social support and resources.[16]

The typical or frequent examination used for victims of alleged sexual assault is the PERK examination.[17] The PERK examination kit in Virginia is issued by the Department of Forensic Science (DFS) to hospitals, and then returned to DFS for analysis.[18] This examination focuses on collecting a detailed medical history of the alleged victim, collecting and preserving the physical evidence of an assault, such as victim's clothing, blood, dried secretions, tissue, semen or other bodily fluids, fingernail scrapings, vaginal or penile swabs, hair samples, and anal or perianal swabs.[19] According to DFS, they received a total of 2,832 PERK kits for analysis over the past five fiscal years (Fiscal Years 2008-2012), for an average of 566 kits received each year.

Legal Analysis

Virginia, like every other state, requires medical care personnel to obtain informed consent from patients before providing treatment. Basically, the patient must be warned of the dangers or negative consequences, and alternatives to the treatment or procedure.[20] Likewise, implied consent is also permitted in Virginia for emergency situations where the patient is unable to provide consent.[21] Furthermore, there is also statutory authority for a physician to proceed with medical care without express consent from the patient if there is concurrence from an independent capacity reviewer, or if the patient is "unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition."[22] The

Virginia Code does not address what constitutes informed consent; however, there is a statutory definition of capacity for informed consent that is applicable to advanced medical directives:

> "Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment, to make an informed decision about providing, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision.[23]

Under Virginia law, there is currently no specific authorization for a forensic sexual assault examination or PERK exam to be performed on an alleged victim without express consent.

While no specific authorization exists for situations where a victim of sexual assault cannot consent to an examination, there are some Code sections that theoretically could be used to authorize a sexual assault examination without express consent. A judge may order the temporary provision of care with a showing of probable cause that an adult is unable to consent to treatment for a mental or physical disorder.[24] Similarly, a magistrate may authorize emergency custody of a person incapable of making an informed decision as a "result of a physical injury or illness and that the medical standard of care indicates that testing, observation, and treatment are necessary to prevent imminent and irreversible harm."[25] Additionally, medical personnel may provide medical care to patients under the care of the Department of Behavioral Health and Developmental Services or a community services board when the delay may "adversely affect recovery."[26] It is also possible to obtain a search warrant to authorize a forensic sexual assault exam on a victim that cannot consent because the statutory language for search warrants is broad enough to allow a search of any "object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime."[27]

With regard to juvenile victims, especially when there is concern that the parent or guardian may be responsible for sexually assaulting the minor, there are a few provisions under the Virginia Code that could allow for a sexual assault exam without the consent of the parent or guardian. An emergency removal order under Va. Code § 16.1-251 can be used to extricate a child from abusive conditions and place him in temporary custody. A child may also be taken into custody by physicians, child protective workers, or law enforcement, without the consent of parents or guardians, where there is suspected abuse and if the "evidence of abuse is perishable or subject to deterioration before a hearing can be held."[28] And finally, minors 14 years or older may

make health care decisions for themselves, although statutorily limited to medical decisions regarding the treatment of infectious or venereal diseases, birth control or family planning, outpatient care for substance abuse, and outpatient care related to the treatment of mental illness or emotional disturbance.[29] Depending on the circumstances, a forensic examination might fit into one of these categories.

An additional concern with forensic sexual assault exams is compliance with the federal Violence Against Women Act (VAWA).[30] Specifically, VAWA requires that states offer medical forensic sexual assault exams at no cost to the victims, but also that victims are not required to participate in the criminal justice system.[31] Virginia law complies with this requirement of VAWA, as Va. Code § 19.2-165.1 states "all medical fees expended in the gathering of evidence through physical evidence recovery kit examinations…shall be paid by the Commonwealth" and victims are not "required to participate in the criminal justice system or cooperate with law-enforcement authorities in order to be provided with such forensic medical exams."[32]

Crime Commission staff examined what the other 49 states do in regard to consent for a forensic sexual assault exam. There are only 10 states that statutorily require consent from the victim before the exam can be performed: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Missouri, Nebraska, Ohio, and Wyoming.[33] Only Maine allows for the performance of a sexual assault exam on a victim, without consent, although in a very limited set of circumstances:

> If an alleged victim of gross sexual assault is **unconscious** and a reasonable person would conclude that exigent circumstances justify conducting a forensic examination, a licensed hospital or licensed health care practitioner may perform an examination in accordance with the provisions of this section. A forensic examination kit completed in accordance with this subsection must be treated in accordance with Title 25, section 3821 and must preserve the alleged victim's anonymity. In addition, the law enforcement agency shall immediately report to the district attorney for the district in which the hospital or health care practitioner is located that such a forensic examination has been performed and a forensic examination kit has been completed under this subsection.[34]

The Maine statute only allows an examination without consent if the victim is unconscious, and does not address any other situations where a victim might be unable to consent. With regard to child victims, there are six states that permit a minor to consent to a sexual assault exam.[35] In Kansas, Kentucky, and Ohio, the consent to the examination is not subject to "disaffirmance" by a parent or guardian.[36] And in California, in cases of "known or suspected" child abuse, consent is not required from the parents or guardians.[37]

Additional Issue

In the course of the study, staff held informal interviews with FNEs across Virginia. During these discussions it was pointed out that under current law, FNE's are permitted to take photographs and x-rays of child victims of suspected abuse, without consent of the parents or guardian, during a medical examination.[38] Additionally, these photographs and x-rays may be used in subsequent legal proceedings.[39] As the FNEs explained, there is no authorization under the Code that allows photographs and x-rays to be taken of adult victims, without consent, of suspected abuse. Often, FNEs will examine adults who suffer from Alzheimer's, dementia, or some medical condition that precludes the adult from consenting to medical treatment. Many of the FNEs indicated that a similar provision in the Code for adults would be very helpful in parallel situations where abuse is suspected with adult patients.

Conclusion and Recommendations

While there has been little attention paid to the issue of forensic sexual assault exams for victims who cannot consent, it does present a distinct problem for medical personnel. Normal procedures for obtaining consent cannot be used, but medical personnel may instead rely on implied consent. The difficulty with using implied consent is that a forensic sexual assault exam is primarily an evidence collection procedure and not one designated to provide medical treatment. Therefore an exam performed without permission could possibly expose medical personnel to both criminal and civil liability. However, if exams are not performed on a victim within a relatively short time period, the evidence, because of degradation, may not be useful in a prosecution.

Virginia does not have a specific statutory authorization for medical personnel to perform a forensic sexual assault exam on a victim who cannot consent to the exam. There are, however, a few statutory provisions that, at least in theory, could provide the basis to proceed with a forensic sexual assault exam for both adults and minors when express consent cannot be obtained. There are 10 states that require express consent from a victim before a forensic sexual assault exam may be performed, and only one state, Maine, that allows an exam on a person who is unconscious. In interviews with FNEs, an additional issue was identified that would allow FNEs to take photographs and x-rays of incapacitated adults without permission, just as photographs and x-rays are allowed to be taken of children during examinations without permission of parents or guardians under Va. Code § 63.2-1520.

As a result of the study effort, the Crime Commission endorsed the following recommendations at its December 5, 2012, meeting:

Recommendation 1: Create a new section to the Virginia Code that would allow a forensic exam to be conducted on a victim unable to consent, but only if the procedure is approved by a second, independent medical professional in a manner similar to that of Va. Code § 54.1-2983.2, which describes the procedure by which an independent physician can authorize medical procedures when a patient is unable to give consent.

Senator George Barker introduced Senate Bill 1006 and Delegate Charniele Herring introduced House Bill 2120 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. These bills were passed by both the Virginia Senate and Virginia House of Delegates as amended, and signed by the Governor.[40]

Recommendation 2: Create a new section to the Virginia Code to allow for photographs and x-rays to be taken of adults suspected of being abused, similar to Va. Code § 63.2-1520, which applies to children.

Senator George Barker introduced Senate Bill 997 and Delegate Charniele Herring introduced House Bill 2122 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. These bills were passed by both the Virginia Senate and Virginia House of Delegates as amended, and signed by the Governor.[41]

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[3] Id. at 107.
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] U.S. DOJ, A National Protocol for Sexual Assault Forensic Medical Examinations; Adults and Children (2004).
[9] Va. DCJS, "SEXUAL ASSAULT RESPONSE TEAMS (SART): A MODEL PROTOCOL FOR VIRGINIA, p. 35 (2011).
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[11] International Association of Forensic Nurses, What is a Forensic Nurse, http://iafn.org/displaycommon.cfm?an=1&subarticlenbr=137.
[12] Id.
[13] Id.
[14] Va. DCJS, *supra* at note 9, p. 35.
[15] International Association of Forensic Nurses, Sexual Assault Nurse Examiners, http://iafn.org/displaycommon.cfm?an=1&subarticlenbr=546.
[16] Id.
[17] Pierce-Weeks, *supra* at note 2, p.106.
[18] Va. DCJS, *supra* at note 9, p. 35.
[19] U.S. DOJ, *supra* at note 8, p. 65.
[20] Tashman v. Gibbs, 263 Va. 65, 73 (2002).
[21] Washburn v. Klara, 263 Va. 586, 590 (2002).
[22] VA. CODE ANN. § 54.1-2983.2(B) (West 2012).
[23] VA. CODE ANN. § 54.1-2982 (West 2012).
[24] VA. CODE ANN. § 37.2-1104 (West 2012).
[25] VA. CODE ANN. § 37.2-1103 (West 2012).
[26] VA. CODE ANN. § 54.1-2970 (West 2012).
[27] VA. CODE ANN. § 19.2-53(4) (West 2012).
[28] VA. CODE ANN. § 63.2-1517 (West 2012). However, a hearing under Va. Code § 16.1-251 is required within 72 hours. Id. Decisions for medical care under § 63.2-1517 are permitted by Va. Code § 54.1-2969(A)(2)(ii).
[29] VA. CODE ANN. § 54.1-2969(E) (West 2012).
[30] Lonsway, Kimberly A. & Archambault, Joanne, REPLY TO ARTICLE "RECEIVING A FORENSIC MEDICAL EXAM WITHOUT PARTICIPATING IN THE CRIMINAL JUSTICE PROCESS: WHAT WILL IT MEAN?," Journal of Forensic Nursing, 78-88 (2010).
[31] 42 U.S.C.A § 3796gg-4(d) (West 2012).
[32] VA. CODE ANN. § 19.2-165.1(B) (West 2012).
[33] CAL. PENAL CODE § 13823.11 (West 2012); CONN. GEN. STAT. ANN. § 19a-112a (West 2012); 410 ILL. COMP. STAT. ANN. 70/5 (West 2012); IND. CODE ANN. § 16-21-8-3 (West 2012); KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012); MO. ANN. STAT. § 595.220 (West 2012); OHIO REV. CODE ANN. § 2907.29 (West 2012); and WYO. STAT. ANN. § 6-2-309 (West 2012).
[34] ME. REV. STAT. tit. 24, § 2986 (West 2012).
[35] 410 ILL. COMP. STAT. ANN. 70/5 (West 2012); KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012); MO. ANN. STAT. § 595.220 (West 2012); OHIO REV. CODE ANN. § 2907.29 (West 2012); and WYO. STAT. ANN. § 6-2-309 (West 2012).
[36] KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012).
[37] CAL. PENAL CODE § 13823.11 (West 2012).
[38] VA. CODE ANN. § 63.2-1520 (West 2012).
[39] Id.
[40] 2013 Va. Acts. ch. 532, 441.
[41] 2013 Va. Acts. ch. 464, 442.