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Legal Considerations on a Sexual Assault Victim's Right to an Advocate

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***Editor's Introduction:** Although SAR does not usually publish articles of this length, we believe this article addressing the benefits of an advocate for a sexual assault victim, warrants publication in its entirety in one issue. It includes a history of a sexual assault victim's right to an advocate in one jurisdiction—our nation's capital—and the motivating factors and rationale for the final language in the D.C. legislation. It then explores the similarities and differences in legislation across the country. It concludes with recommendations for further research and practice.*

Arguments for an Advocate's Presence

Interviews with law enforcement are a necessary but difficult part of the criminal justice system response to sexual assault. Police are trained to ask direct questions to obtain evidence and clear testimony (Maier, 2008; Martin, 2005). Sexual assault victims, on the other hand, display a range of emotions and reactions, and may not be able to clearly communicate the details of the crime (Campbell, 2012). Direct questioning sometimes occurs at the expense of a victim's feelings, particularly when an officer lacks an understanding of a victim's mental and emotional state (Campbell, 2005; Maier, 2008). As a result, victims may become hesitant to cooperate (Campbell, 2012). One victim recalled that her "experience with the D.C. police made [her] feel victimized twice" (Council of the District of Columbia [hereinafter D.C. Council], 2013a).

Many published guidelines for interviewing sexual assault victims include language describing a victim's state of mind and instruct officers to "[s]how understanding, patience, and respect for the victim's dignity and attempt to establish trust and rapport" (Internat'l Assoc. of Chiefs of Police, 2005b; Ill. Law Enforcement Training & Stds. Bd. Exec. Inst., 1996; Missoula

Police Department, 2013; The National Council for Women and Policing, 2001; Department of Justice, Office of Victims of Crime [hereinafter DOJ OVC], 2008). However, officers' actual practices and demeanor suggest that a disconnect exists between policy and practice (Rich & Seffrin, 2012). Additionally, some jurisdictions lack clear guidelines, leaving the format and tone of investigations to an officer's discretion (Lord & Rassel, 2002). Officers handling the questioning of a sexual assault victim as they might any other crime may diminish the effectiveness of the interview (Rich & Seffrin, 2012).

Forensic sexual assault nurse examiners (or SANEs) and other medical personnel are another resource for victims, either for those obtaining an exam in the course of a police investigation or for those who choose to bypass reporting to police and request an exam independently. The forensic examination is invasive yet critical to processing a sexual assault case. SANEs are trained to examine the victim, collect evidence, and provide treatment and/or referrals for medical and psychological care. They also assist law enforcement and attorneys with understanding the type of victimization experienced, the victim's health care needs, and the reasons for reporting or not (Littel, 2001; Taylor, 2002). Past studies have demonstrated a positive association between forensic examinations, filing charges, and conviction (McGregor, Du Mont & Myhr, 2002). Unlike some interactions with law enforcement, victims' experiences with SANEs tend to be positive (Campbell, Wasco, Ahrens, Sefi & Barnes, 2001; Erickson, Dudley, McIntosh, Ritch, Shumay & Simpson, 2002; Fehler-Cabral, Campbell & Patterson, 2011). Research also suggests that SANEs tend to have a better working relationship with advocates than law enforcement (Littel, 2001).

The D.C. Experience

In 2013, Human Rights Watch (HRW) published a 196-page report on the inadequate handling of sexual assault cases by the Metropolitan Police Department (MPD) of the District of Columbia (HRW, 2013a). Their analysis found that MPD did not properly investigate or document cases. In addition, HRW reported that cases were closed prematurely, misclassified, or downgraded, and that MPD overused administrative closures and exceptional clearances, mistreated victims, and discouraged reporting (HRW, 2013a).

Subsequent to the publication of the HRW report (Report), D.C. Councilmember Tommy Wells, Chairperson of the Committee on the Judiciary and Public Safety, contracted the law firm of Crowell & Moring to conduct an independent investigation into the Report's findings. Its investigation found flaws in the Report's methodology, omission of some facts, a lack of information concerning MPD's current practices, and repeated use of eight victims' stories which may have made a few cases seem like more (Crowell & Moring, 2013). It also found errors in MPD investigation practices and determined a need for improved communication with sexual assault victims as well as for more officer training. In June 2013, HRW published a rebuttal to the Crowell & Moring report that defended its methodology and data analysis strategies (HRW, 2013b).

Ultimately, the conclusions of both the Report and the Crowell & Moring investigation became a "catalyst for positive change" (Crowell & Moring, 2013). Both HRW and Crowell & Moring recommended establishing a task force, passing legislation giving the right to an advocate during police interviews and forensic examinations, retaining an independent consultant to evaluate practices around sexual assault,

and implementing oversight (HRW, 2013a; Crowell & Moring, 2013). During the course of these investigations, MPD implemented changes to improve its response to sexual assault cases. For example, MPD formalized its role in the District's Sexual Assault Response Team (SART), improved investigations into "drug-facilitated sexual assault," implemented trainings on a victim-centered approach, and made personnel changes to their Sexual Assault Unit (Lanier, 2012).

The Sexual Assault Victim Rights Amendment Act: Passage and Scope

Based on recommendations by HRW and Crowell & Moring, Councilmember Wells introduced the "Sexual Assault Victim Rights Act Amendment of 2014" (SAVRAA) (D.C. Council, 2014). The bill contained several elements to furnish more support for victims, including codifying necessary

qualifications such as training standards and supervision requirements (Id.).

Confidential communications between a victim and a sexual assault victim advocate is a related issue the legislation addresses, defining "confidential communication" as "information exchanged between a victim and sexual assault victim advocate during the course of the advocate providing counseling, support, and assistance to a victim" and includes the advocate's records pertaining to the victim and services provided (Id.). The confidentiality afforded to communications and relevant records is a recurring issue in developing a formal structure for the victim-advocate relationship. SAVRAA contains exceptions to confidentiality that include when a victim provides written permission, or when state or court rules so require, and where the victim is filing a lawsuit against the advocate or program. Exceptions to confidentiality also exist to facilitate delivery of services

members of law enforcement, attorneys, and the government (D.C. Council, 2013a). Mayor Vincent Gray expressed strong support for a victim's right to have an advocate present during "hospital examinations and law enforcement interviews." (Gray, 2014). After votes by the City Council, April 8, 2014, and May 6, 2014 (D.C. Council, 2013b; Slifer, 2014), the bill was signed into law on June 4. The projected implementation date is September 4, 2014 (D.C. Council, 2013b).

State Provisions Vary on an Advocate's Presence

Currently, 13 states and the District of Columbia include advocate provisions within their victims' rights laws: California, Florida, Illinois, Iowa (victim counselor), Louisiana, New Jersey, New York, Montana, Oregon (personal representative), Pennsylvania, Tennessee, Texas, and Washington (personal representative) (AEquitas, 2011; Nat'l Crime Victim Law Inst., 2013; Whitman, 2013). Most of these existing statutes identify interviews, exams, or other proceedings where an advocate or support person may be present:

- **California.** An advocate is a "sexual assault victim counselor" or an advocate working in a center as defined by code (Cal. Evid. Code § 1035.2; Cal. Penal Code § 13835). The victim advocate or a "support person" may be present "at any interview by law enforcement authorities, district attorneys, or defense attorneys" (Cal. Penal Code § 679.04). The support person may be excluded from the interview, but not the advocate.
- **District of Columbia.** A crime victim has the right to "[b]e notified of any available victim advocate..." (D.C. Code § 23-1901).
- **Florida.** The presence of an advocate is restricted to discovery depositions, testimony, and forensic medical exams related to a sexual offense (Fla. Stat. § 960.001(1)(q); Fla. Stat. § 960.001(1)(u)).
- **Illinois.** An advocate or other support person of the victim's choice may be present at court proceedings subject to the rules of evidence, (Ill. Cons. Art. I. § 8.1(9)).
- **Iowa.** The statute covers "victim counselors," not advocates, but their right to be present at "any proceedings related to the offense," including "examinations ... in an emergency medical facility" is formalized (Iowa Code § 915.20).

The D.C. bill furnishes more support for victims by codifying the necessary qualifications of, and access to, sexual assault victim advocates, and by protecting the confidentiality of communications between victims and advocates.

qualifications of, and access to, sexual assault victim advocates, confidentiality of communications between victims and advocates, faster processing of rape kits and attention to the rape kit backlog, information-sharing with victims, and increased accountability of MPD's handling of sexual assault cases and citizen complaints (Collective Action for Safe Space, 2013; D.C. Council, 2014; DeWitt, 2014; Wells, 2014). The proposed bill required the presence of an advocate during forensic exams and interviews with law enforcement, defense attorneys, and prosecutors. However, the bill as enacted only requires a sexual assault victim advocate be present during any "medical, evidentiary, or physical examination" as well as during interviews with law enforcement (D.C. Council, 2014), pending future research. Going forward, law enforcement officials and SANEs will be responsible for summoning an advocate prior to the interview or examination (Id.). SAVRAA also defines "sexual assault victim advocate" and outlines necessary

to victim, protect the victim from risk and injury, and compile anonymous information for research purposes (Id.).

The bill also requires timely processing of sexual assault forensic examination kits, addresses who should pay for the kits, addresses the rape kit backlog, and sets forth information-sharing obligations.

The final element of the SAVRAA legislation implements oversight procedures and increases accountability and effective responses. A task force will be established to make recommendations based on best practices. In addition, an "independent external consultant" will be hired for one year to review cases as well as existing MPD training, practices, and protocols regarding response to sexual assault (Wells, 2014). The bill also codified a Sexual Assault Response Team (SART) and gave the Office of Victim Services the opportunity to establish its own Sexual Assault Victim Rights Task Force to make recommendations (Id.).

A hearing held on December 12, 2013 allowed testimony from victims, advocates,

- **Louisiana and New York.** Advocates are “directly and immediately related to the interviewing of the victim,” within the context of a “private setting” (La. Rev. Stat. § 46:1844; NY Exec. Law § 642).
- **Montana.** A victim may have a “victim advocate present when the victim is interviewed about the offense” (Mont. Code Ann. § 46-24-106).
- **New Jersey.** Information regarding advocacy “shall” be given to a victim prior to an exam by medical personnel or an interview by law enforcement (N.J.S.A. § 52:4B-22), but whether the advocate can be present is not addressed.
- **Oregon and Washington.** The advocate (or other person chosen by the victim) is referred to as a “personal representative” (Or. Rev. Stat. § 147.425(d); Wash. Rev. Code Ann. § 70.125.060). The representative may be present at “phases of the investigation ... at which the victim is entitled or required to be present” (Or. Rev. Stat. § 147.425(3)). In Oregon, a “health care provider, law enforcement agency, protective service worker or court may not prohibit a personal representative from accompanying a victim...” (Or. Rev. Stat. § 147.425(4)). Washington’s statute calls for “reasonable effort” to ensure that a “crime victim advocate” is present at “any prosecutorial or defense interviews with the victim, and at any [related] judicial proceedings” (Wash. Rev. Code Ann. § 7.69.030).
- **Pennsylvania.** The right to an advocate is limited to hearings defined under 42 Pa. Cons. Stat. § 6336 (court hearings).
- **Tennessee.** The statute includes a “crime victim advocate,” but only mentions his or her presence at “defense interviews with the victim” (Tenn. Code Ann. § 40-38-115).
- **Texas.** The statute does not legislate a right to an advocate generally, but does “offer the ... opportunity” to have one present during a forensic medical exam (Tex. Crim. Code Ann. art. 56.045).
- **Wyoming.** There appears to be a pending amendment to the victims’ rights statutes giving the right to an advocate during questioning by law enforcement, but it is yet to be ratified (AEquitas 2011; Wyo. Stat. § 1-40-203).

Of these, eight states specifically provide for a victim advocate during a medical or physical examination. California, New Jersey, New York, and Texas require victims

to be notified of the right to an advocate by the medical personnel (Cal. Penal Code § 264.2(b); N.J.S.A. § 52:4B-52(h); N.Y. Pub. Health Law § 2805-I(3); Tex. Crim. Code Ann. § 56.045). Florida, Iowa, Oregon, and Washington established the right for a victim to have an advocate; however, the victim must request this support (Fla. Stat. Ann. § 960.001(1)(u); Iowa Code Ann. § 915.20(1); Or. Code (147.425; Wash. Rev. Code Ann. § 70.125.060).

Exceptions to the Right to an Advocate

Some state statutes provide for exceptions to a victim’s right to an advocate, a potential obstacle to absolute access. In Tennessee and Washington, for example, the advocate cannot cause “unnecessary delay in the investigation or prosecution of the case” (Tenn. Code Ann. § 40-38-115; Wash. Rev. Code Ann. § 7.69.030). In California, the exception applies to a “support person,” but not a qualified advocate (Cal. Pen. Code § 679.04). In Louisiana and New York, the advocate “shall be present” unless excluded by the victim (La. Rev. Stat. § 46:1844; N.Y. Exec. Law 642 (McKinney)). In Oregon, the personal representative may be excluded if they are seen to “compromise the process” (Or. Rev. Stat § 147.425). Texas allows the SANE to exclude a sexual assault advocate from the exam if they are perceived to interfere with an (emergency medical situation) (Tex. Cr. Code Ann. § 56.045).

In D.C., the original SAVRAA bill included an exception that would allow interviewers and medical staff to prohibit an advocate’s presence if they perceived it as “detrimental” to the proceeding (D.C. Council, 2014). However, in response to testimony and recommendations of groups such as the D.C. Rape Crisis Center (DCRCC), the Committee removed the condition as it was seen to render the “right to an advocate ineffective” (Wells, 2014; DCRCC, 2013). Limited research exists as to whether this type of exception has been challenged or overturned in other cases.

Other Issues

Other obstacles related to sexual assault victim advocates include determining what constitutes a law enforcement interview and at what point an advocate can become involved. Some departmental guidelines instruct officers to have a preliminary conversation with victims to gather immediate, necessary information and an in-depth conversation later to

obtain a full account of events. Often, procedures direct responding officers to reach out to an advocate in the early stages of an investigation (Internat’l Assoc. of Chiefs of Police, 2005a; Ill. Law Enforcement Training & Stds. Bd. Exec. Inst., 1996; Missoula Police Department (MPD), 2013), but this does not always happen. Whether an advocate should be present for all victim-officer interactions, and, if so, how and when the advocate should be called is still questioned. If it is the officer’s responsibility to summon an advocate, as proposed in D.C.’s SAVRAA, the decision and reason to do so has to be established; this can only be accomplished through preliminary conversations with a victim.

The SAVRAA legislation also requires that sexual assault victims be given access to an advocate, but how these advocates will be selected and the standards for training and certification have not yet been determined (Hessell-Gordon, 2014). MPD has an existing relationship with the Network for Victim Recovery D.C. (both members of D.C.’s SART) that provides trained, paid staff members as case managers (or advocates) to work with victims (MPD, 2014). However, advocate standards are not formalized beyond what is written in the bill (Nnamdi, 2014).

In addition, interviews with attorneys have different legal considerations than those with law enforcement (Di Caro, 2013). The liberty to interview victims without advocates present is directly connected to the advocate’s legal status. The presence of an advocate may break privilege under third-party rules (Black’s Law Dictionary, 2002). Additionally, it may be more useful to have an attorney present representing the victim’s interests rather than an advocate who does not hold a law degree and is not actively practicing law (D.C. Council, 2013a; Wells, 2014). Testimony around the SAVRAA bill illuminated some of these concerns. Renata Kendrick Cooper of the U.S. Attorneys Office suggested that the presence of an advocate may potentially “interfere in the investigative process” (Wells 2014; D.C. Council, 2013a). Therefore, the Committee ultimately decided to limit SAVRAA’s applicability to law enforcement interviews and forensic examinations and to exclude attorney interviews from the provision requiring an advocate.

The Question of Confidentiality of Communications

In many cases, unless the advocate has a law or mental health degree and is actively

practicing law or is licensed as a mental health practitioner, communications and records are not fully protected (KY Domestic Violence Assn., 2008). Some states, such as Arizona and New Jersey, have taken steps to ensure that privilege laws apply to victim counselors or advocates (DOJ OVC, 2002). Colorado and Illinois have instituted absolute privilege for communications with a provider with very limited exceptions (Colo. Rev. Stat. § 13-90-107(k); 735 Ill. Comp. Stat. § 5/8-802.1(d)). More commonly, state laws require some exception such as *in camera* (or in chambers) review to determine whether certain records should be disclosed; e.g., California, Connecticut, Florida, Georgia, Hawaii, Illinois (except rape crisis personnel), Iowa, Kentucky, Louisiana, Maine and others. A court may also order disclosure, such as in Kentucky and Michigan (The Confidentiality Institute, 2014). Other excep-

or protected communications (The Confidentiality Institute, 2014). Two states cover advocates under statutes on attorney-client privilege (Nat'l Crime Victim Law Inst., 2013). In Georgia, communications with prosecutor-appointed victim assistance personnel is privileged. In Kentucky, communications with a court-appointed special advocate can be kept confidential. Other states do not protect advocate confidentiality at all. D.C.'s SAVRAA contains exceptions that include statutory requirements or voluntary authorization of the victim (D.C. Council, 2014).

Dynamics Among the Players

The dynamics among law enforcement, SANEs, and advocates play an integral role during a sexual assault investigation. An officer may feel constrained by the presence of a third party during the interview, leading to a less productive inter-

and concerns are addressed (Lonsway & Archambault, 2007; The National Center for Women and Policing, 2001; Ofc. of the Atty. General of Texas, 1998). When advocates are available to provide important emotional and logistical support and follow-up care (Maier, 2012b; Littel, 2001), law enforcement can focus on the tasks necessary to proceed with an investigation. In one study, rape victims who worked with advocates reported receiving more services and experiencing less "secondary revictimization" (Campbell, 2006).

Defining respective operational responsibilities of law enforcement personnel, forensic examiners, and advocates can eliminate overlap (Cole & Logan, 2008; Payne, 2007) and ensure that every logistical step in a sexual assault case is covered. As one detective stated, "[t]he job of advocates is to believe the victim's story whereas the job of the investigator is to prove it" (The National Center for Women and Policing, 2001). At the D.C. Council hearing in December 2013, a representative from the Baltimore Police Department testified about the positive effects of advocates, including improvements to "quality of investigations," higher satisfaction, and lower rates of unfounded complaints (D.C. Council, 2013a; Wells, 2014).

Sexual assault remains a pervasive yet significantly underreported crime (Black, Basile, Breiding, Smith, Walters, Merrick, Chen & Stevens, et al. 2011; Truman & Planty, 2012). Victims are reluctant to report due to stigma, fear of revictimization, and safety concerns (Campbell & Johnson, 1997; Kilpatrick, Edmunds & Seymour, 1992; PA Coalition Against Rape, 2013). Tension among members of the criminal justice system and advocates has a negative impact on services provided to victims. And, there persists a societal perspective on violence against women, a "rape culture" where sexual assault is not taken seriously (Burt, 1980; Hamblin, 2014).

Important arguments for making sexual assault advocates more accessible to victims are raising the impetus to report sexual violence and better support victims during an investigation. An advocate's presence may enable a sexual assault victim to feel more in control, be comforted, and ensure that victims receive pertinent information about the investigation. This is beneficial to law enforcement, attorneys, and forensic examiners. Rather than identifying advocates as a threat to authority, criminal justice and medical personnel should capitalize on experienced advocates' familiarity with

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tions include reporting abuse of children or vulnerable adults and the "duty to warn" of harm to self or others (Callanan, 1996; Joo, 1995; Rape, Abuse, and Incest National Network, 2014).

The constitutional rights of the offender are another barrier to confidentiality protections for victims. There is some controversy about whether statutory privileges that keep victim records confidential affects a defendant's right to a fair trial. Due to the Confrontation Clause of the Sixth Amendment providing offenders with the right to confront their accuser, some believe that the defendant or defendant's attorney has a right to examine relevant records and communications. To resolve this issue, it is important to counterbalance the defendant's need to examine records with the privacy rights of the victim and potential costs to public safety (Callanan, 1996; Joo, 1995).

State statutes vary as to when and whether a sexual assault advocate is granted a statutory definition of a counselor (with privilege) or has its own designation. Some states define an advocate or a counselor, and some do not differentiate among advocates, counselors,

action and a potentially negative impact on an investigation. SANEs and advocates may perceive police behavior as revictimizing through questioning, insensitivity, and failure to investigate (Maier, 2008; Maier, 2012a). Some advocates find that medical practitioners contribute to revictimization (an issue that can be alleviated by implementing SANE programs) (Maier, 2008). However, SANEs sometimes report that advocates disrespect them (Patterson & Pennefather, 2014). Advocates may also question whether law enforcement or medical personnel are causing distress to a victim, leading to conflict in the interaction (Lonsway & Archambault, 2007).

Conclusion

Law enforcement and SANEs have distinct responsibilities in the criminal justice process, and the presence of a sexual assault advocate may be beneficial to both parties. Advocates can provide a victim with information on police and exam procedures, assist officers and SANEs in understanding the mental and emotional state of the victim, and ensure that the victim's questions

sexual assault. The presence of advocates throughout the criminal justice process could contribute to increasing the number of successfully prosecuted sexual assault cases (The Nat'l Judicial Ed. Program, 2001).

However, it is imperative that jurisdictions establish specific standards for qualifications, credentials, training, supervision, experience, and confidentiality privileges of advocates. Further, standards regarding procedures and policies such as rape kit processing, training, specialized teams, and oversight are important to incorporate within comprehensive policy responses.

Recent efforts, such as those undertaken by the Council of the District of Columbia with the SAVRAA legislation, underscore the importance of sexual assault as a social problem, but also highlight existing weaknesses in the criminal justice system response. Targeting these and other issues at a broader level will contribute to improving sexual assault victims' experiences with reporting and processing sexual assault cases.

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