



MEDICAL FORENSIC SEXUAL ASSAULT EXAMINATIONS

What Are They, and What Can They Tell the Courts?

By Lynn Hecht Schafran

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Rape is an epidemic crime with grave consequences for victims female and male and those who identify as transgender. Few victims report and even fewer see the inside of a courtroom. When a sexual assault case does come to trial, there are often expectations about the kinds of injuries a "real" rape victim sustains, how the victim will present on the witness stand, the kind of medical evidence that will be offered and by whom, and what the medical evidence can "prove." These expectations are often

at odds with reality and undermine fairness in the trial process.

Role of the Sexual Assault Nurse Examiner (SANE)

The findings of a medical forensic sexual assault examination and the testimony of a specially trained sexual assault nurse examiner (SANE) can provide useful information to help the judge and jury reconstruct the events at issue. However, there are important legal limitations on the scope of SANE testimony, as well as

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limitations as to what the examination findings can actually prove.

The medical forensic sexual assault examination is first of all a medical examination focused on the patient's immediate, short-term, and long-term health and safety needs, physical and mental. The examination integrates evidence collection into the medical examination because combining these steps is best practice from the viewpoint of patient-centered care, sparing the patient from a subsequent long and harrowing examination if she decides to report to law enforcement. SANEs report that many, if not most, of their patients want medical care, but do not engage with the criminal justice system.

Optimally, the examination is conducted by a specially trained healthcare provider. This may be a registered nurse or nurse practitioner—hence SANE. If the trained examiner is a physician or physician's assistant, the term is SAFE (sexual assault forensic examiner). SANEs complete rigorous classroom and clinical training based on guidelines developed by the International Association of Forensic Nurses (IAFN). The field is constantly evolving, and SANEs participate in extensive continuing education.

SANE programs emerged in response to the poor treatment rape victims encountered in hospital emergency rooms. Although victims are instructed not to bathe or urinate after an assault in order to preserve evidence, victims were often made to wait for hours because their cases were not seen as urgent. Uneducated medical staff asked victim-blaming questions and did not understand that absence of bodily injury did not mean the victim was not profoundly injured psychologically. Untrained medical personnel were inept at evidence collection and sometimes resentful of the complex, hours-long examination and detailed documentation required.

SANE programs were first established in the 1970s and flowered in the 1990s. Today there are approximately 700 programs, far fewer than needed. Many communities cannot afford to establish or maintain SANE programs, and many victims are still examined by whoever is on duty in

the ER. Researchers are trying to address this unmet need with telemedicine.

Components of the Medical Forensic Sexual Assault Examination

Understanding what a medical forensic sexual assault examination entails is crucial to understanding the value and limits of testimony from a SANE or SAFE in a sexual assault case. The following section provides an overview of the examination process as specified in the *National Protocol for Sexual Assault Medical Forensic Examinations*, developed by the U.S. Department of Justice Office on Violence Against Women.

The patient is first examined, assessed, and treated for immediate, acute medical needs. If the patient reports circumstances indicating drug-facilitated rape, urine and blood samples are collected immediately. Each step of the examination is recorded on a comprehensive Sexual Assault Assessment Form, usually specific to the jurisdiction. The SANE must obtain informed consent to begin the medical examination and then separately for each subsequent step, including evidence collection and releasing evidence to law enforcement. The patient may consent to one part of the examination but not another, and may withdraw consent to the examination, or any step of it, at any time. For example, she may consent to the SANE swabbing an area where the assailant licked her, in order to obtain a DNA sample, but refuse consent to photographing her internal injuries.

After the examination is complete, the patient is asked whether she wishes to release the kit to law enforcement or have it stored for possible future release. If she wants it stored, she must be told for how long the hospital in her jurisdiction will store the evidence collection kit before destroying it so that she knows how long she has to make a decision about reporting to law enforcement.

Patient's Demeanor and History

After attending to the patient's immediate medical needs, the SANE records the patient's orientation, general appearance, behavior, and responsiveness to

questions. Ascertaining the patient's orientation—does she know the date? the president's name?—is essential to determining whether she can give informed consent. If the patient is confused and not responsive to questions, it may mean that she was drugged and that urine and blood samples should be collected.

Next the SANE takes the patient's detailed medical history. This is essential for guiding the examination, understanding examination findings, and administering prophylactic medications at discharge. For example, reproductive/genital surgery and health conditions affect the appearance of genital structures; medications prescribed at discharge may interact negatively with medications the patient is currently taking.

SANE Documentation of the Patient's Account of the Assault and the Assailant

The SANE records the patient's account of the assault because, once again, it guides the medical examination, evidence collection, treatment provided, and discharge planning. The SANE's role is not to investigate on behalf of law enforcement to determine the veracity of the victim's account. SANEs make no judgment as to the veracity of a patient presenting with a complaint of sexual assault or the patient's account of the assault. Taking patients at their word is not unique to sexual assault cases. It is the basis for the medical hearsay exception, which assumes that patients tell their healthcare providers the truth because it is in their own best interest to do so.



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The SANE records the circumstances surrounding the assault: date and time, physical surroundings during the assault, whether the patient had the ability to give consent, consumption of drugs/alcohol. How did the assailant compel submission: overt threats to harm the patient or others, implicit threats based on a history of violence against the patient, threats with weapons, or physical force such as grabbing, hitting, slamming, biting, torture, or strangulation? The SANE next records the specifics of the assault. Are there areas of the body where the assailant bit, licked, or spat on the patient that should be swabbed for DNA? Was there oral penetration, which would require mouth swabs? Was there anal penetration, requiring an anogenital exam? The SANE also documents information about the assailant: name, if known; relationship to the patient; number of perpetrators if more than one. Knowing who the assailant was is essential for discharge and safety planning.

Head-to-Toe Assessment

Using visual inspection and palpation, the SANE conducts a head-to-toe, front-to-back assessment of the patient's physical condition based on the patient's account of the assault and areas where pain is noted. Using body maps, the SANE documents, draws, and photographs any injuries observed, from tenderness to trauma, including location, size, shape, color, swelling, redness, tears, abrasions, and bruising.

Visible physical injury findings can range from none to severe. Bruising, tearing, abrasions, swelling, and petechiae (small red or purple spots from minor capillary bleeds) may be seen in external and internal injuries. Pain, alone and/or with activity and decreased range of motion, is an injury symptom patients commonly describe after a sexual assault, even in the absence of visible injury.

Contrary to stereotype, rape victims rarely sustain severe physical injuries. In a large-scale, national study funded by the National Institute of Justice, only six percent of drug-facilitated/incapacitated rape victims and 16 percent of forcible rape victims reported serious physical injuries.

Most rapists employ only instrumental violence, meaning the minimum threat or force needed to make their victims submit. Often victims do not resist because fear-induced psychophysical states render them passive or paralyzed: in a freeze (deer in the headlights); in a dream-like state called dissociation in which the victim relinquishes all initiative and struggle; or literally paralyzed by tonic or collapsed immobility. Some victims make a strategic decision not to resist because they fear severe physical injury or death, or to protect someone else, such as a child, who has been threatened. The absence of genital injuries is discussed below.

Detailed Genital Assessment

SANEs are trained to examine both female and male sexual assault victims. The SANE examines the patient's external genitals, anus, vagina, and cervix for injury, utilizing aids to accurate visualization as described below. Using genital maps of external and internal genitalia, the SANE documents and describes any injuries, again noting location, size, and appearance. The principal aids to visualizing and recording genital injuries are the colposcope with photographic capabilities, the digital camera, and Toluidine blue dye.

- Colposcope: A magnification device used to view possible external and internal genital injuries, such as abrasions and lacerations, that are difficult to see or easily missed with the naked eye.
- Digital camera: Many SANE programs use a digital camera only. Photographing genital injuries is controversial because of the risks to patient privacy.
- Toluidine blue dye: This is a staining technique in which dye adheres to small areas of abraded skin and microlacerations, resulting in identification of otherwise invisible injuries.

Many female victims have no genital injuries when they are examined due to factors such as the elastic, muscular, anatomical structure of the vagina; healing that occurs between the assault and reporting; and the victim's age and health.

Sexual Assault Forensic Evidence Kits

Kits are known by various names such as sexual offense evidence collection kits (New York) and sexual assault evidence kits (New Mexico). The kit is a cardboard box or large envelope containing the equipment and containers needed to collect and store the biologic and nonbiologic evidence from the patient's body and clothing.

Kit contents vary by state and locality and are periodically updated to reflect new evidence collection techniques. A typical kit includes precise instructions for each step and storage; bags and sheets of paper for evidence such as victims' clothing; swabs for collecting fluids from lips, cheeks, thighs, vagina, anus, and buttocks; combs to collect hair and fibers; envelopes for hair and fibers; blood collection devices; and documentation forms. The SANE changes gloves between each step to avoid cross contamination of evidence. She places each type of evidence in its own bag or bundle and, as she goes along, seals and labels each item with the type of evidence collected, the date, and her initials.

Time Frames for Evidence Collection

New techniques are constantly expanding the time frames for evidence collection. Until recently, the standard evidence collection cutoff time was 72 hours from the assault. Now many jurisdictions have cutoff times of 120 or 134 hours (five to seven days). Traces of certain drugs can now be detected in a urine sample up to 120 hours after an assault. New DNA technologies are also enabling forensic specialists to analyze DNA from sexual assault examination kits and other types of evidence long in storage, often due to the failure of police departments nationwide to test these kits in a timely manner.

Discharge and Safety Planning

An essential part of the medical examination is the discharge plan, which SANEs prepare for sexual assault victims as they do for all patients. SANEs provide these patients with treatment to prevent sexually transmitted infections and pregnancy and instructions for wound care,

if needed. If there was strangulation, the SANE explains the serious sequelae that may emerge after discharge, ranging from the need for speech therapy to brain damage. The SANE makes recommendations for follow-up examinations, counseling, advocacy services, and safety planning. Referrals for follow-up and counseling are extremely important because of the significant physical and mental health consequences of sexual violence, ranging from chronic pain to suicide. Victims have described rape as “soul murder.”

Part of discharge planning is safety planning to ensure patients are going to an environment where they will be safe and receive any necessary follow-up care. When taking a rape victim’s account of the assault, SANEs ask about her relationship to the perpetrator in order to craft a plan specific to the patient’s health and safety needs. The victim of an intimate partner rape may need a referral to a domestic violence shelter or help to identify another safe place to which to return. Because intimate partner sexual assault presages increasing physical and sexual violence and potential lethality, individualized safety planning for these patients is critical.

SANE Testimony

The SANE’s role is to be an objective, neutral healthcare professional prepared to testify for the prosecution or defense. A SANE may testify as a fact witness, a fact and expert witness, or an expert witness only. As a fact witness, the SANE may relate the patient’s account of the assault under the medical hearsay exception, not for the truth of it, but to explain how the account guided the SANE’s medical examination, evidence collection, and discharge planning. The exception for statements made for medical diagnosis or treatment generally applies to statements made by a patient to a SANE during a medical forensic sexual assault examination or a follow-up. If the patient is not available to testify, there may be challenges to the SANE’s testifying as to the patient’s account of the sexual assault. This is addressed below (see page 16) under “The Ultimate Issue of Fact” in

the discussion of *Crawford v. Washington*.

As a fact witness only, the treating SANE may testify about anything observed or said during the examination or follow-up but may not offer an opinion as to the causation of any injuries observed. After describing her own training and experience, the treating SANE testifies about what she did and what she observed in each step of the examination including:

- patient’s demeanor at start of and during exam;
- patient’s appearance and that of her clothing when she arrived;
- why patient was asked to undress while standing on an evidence collection sheet;
- bagging clothing for evidence collection kit;
- head-to-toe and front and back examination and findings;
- photographs of any external injuries;
- genital examination and findings;
- use of Toluidine blue dye, colposcope, and/or digital camera to better visualize and record possible genital injuries; and
- why and how the SANE swabbed certain body parts for fluid evidence and how she dried and stored those swabs for collection.

A SANE testifying as a fact witness only may testify, for example, about bruises observed at various sites on the patient’s body and explain that she asked the patient to return for a follow-up examination to more accurately document the bruising because bruises are not fully visible until a few days after the causation event. The SANE may not testify that in her opinion the bruises were caused by blunt force trauma.

The SANE as an Expert Witness

A SANE’s qualifications to be an expert should be assessed from the standpoint of actual experience and currency in the field, rather than academic degree. SANEs are sometimes challenged because they are not doctors, but a SANE who has conducted multiple medical forensic sexual assault examinations, participates in

continuing education, and uses the latest equipment is an expert. An ER or private doctor who lacks specialized training and has conducted only a few of these examinations is not, nor is an inexperienced SANE. Because many jurors assume that medical evidence must be presented by a doctor, or that doctors are always more knowledgeable than nurses, judges should allow time for whichever party is proposing the SANE as an expert to fully elicit her credentials before the jury during qualification.

If the treating SANE is qualified as an expert, she may testify as a fact witness about anything said or observed during the examination and, as an expert, offer a limited opinion as to the cause of any injuries observed. For example, if the examination revealed bruises on the patient’s body, a treating SANE qualified as an expert may offer an opinion that the bruises were caused by blunt force trauma. Though the SANE cannot opine as to the ultimate issue of fact (discussed below), she can testify as to whether or not an observed injury is consistent with the patient’s account of the assault and with the injuries related to sexual assault described in the medical literature. An expert SANE may also explain aspects of the medical forensic examination that may be puzzling to judges and jurors. She may explain, for example, that it is common for a sexual assault victim to delay reporting or seeking medical care, to display nervous laughter or no emotion at all during the examination, and to have no physical or genital injuries after the assault.

A nontreating SANE qualified as an expert may offer an opinion on the examination findings and explain puzzling aspects of the examination, in response to hypothetical questions based on the facts offered in evidence, as the following example demonstrates.

Q: Now, I want to ask you a hypothetical question. For purposes of this question, assume the following facts. Patient is a 24-year-old woman who presents at the ER with complaint of rape 12 hours before the

examination. Patient stated that perpetrator held her down by the shoulders, bit her left breast and forcibly penetrated her vagina with his finger and penis. The following injuries were noted: 5 cm abrasion on left breast consistent with bite mark, erythema on the right labia majora, 2 mm laceration on the posterior forchette.

Based on your education, training, and experience, are you able to form an opinion to a reasonable degree of scientific certainty about whether the injuries observed are consistent with the history of the assault the patient gave? What is that opinion? Can you explain why you formed that opinion?

A nontreating expert SANE may also be called to testify in a case in which there was no medical forensic examination because the victim either never sought medical treatment or sought treatment after the cutoff time for a forensic examination. The SANE can minimize the “CSI effect”—the expectation that extensive forensic evidence will be presented that can help “prove” whether or not a sexual assault was perpetrated—by explaining that many victims live in communities that cannot afford to establish or maintain SANE programs, or in rural communities with no access to medical care. She can explain that victims often do not seek medical care because they fear the police, fear not being believed, or fear being deported. Victims assaulted by someone they know may require time to come to grips with the fact that someone they trusted, such as a friend or intimate partner, betrayed them. An expert SANE can also help fact finders understand counter-intuitive victim behavior that may have been an issue in the case, behavior such as delayed reporting, post-assault contact with the perpetrator, or why the victim displayed a flat affect while testifying.

The Ultimate Issue of Fact

Whether testifying as a fact witness or an expert, SANEs may never offer an opinion

as to a defendant’s guilt or innocence. This is the ultimate issue of fact for the judge or jury to decide. “Rape,” “sexual assault,” and “consent” are legal conclusions, not medical diagnoses that can be determined from a medical examination. Cases in which the SANE has stepped over the line have resulted in mistrials, reversals, and remands. In *State v. Hudson*, 2009 Wash. App LEXIS 1358 (E.D. La. 2011), the defendant appealed his third-degree rape conviction for anal rape on the grounds that the trial court improperly allowed two SANEs to opine as to his guilt. The examining SANE documented deep vaginal and anal lacerations, but neither she nor her supervising SANE, who also testified, limited their opinion to whether the victim’s injuries were caused by blunt force; they testified that the sexual encounter was not consensual, which was the only disputed issue. The appellate court asserted that the nurses’ “sole reason” for believing that the victim did not consent was that the sex must have been extremely painful. Such reasoning was not based in medical or any other specialized knowledge that was beyond the average layperson. The judgment was reversed and remanded for a new trial.

DNA Analysis and Testing for Drug-Facilitated Rape

A SANE is not a DNA expert. She collects swabs and samples from which a DNA laboratory determines whether DNA is present and, if possible, to whom it belongs.

A SANE is not a toxicologist and cannot say whether a patient had drugs in her system. When a drug-facilitated rape is suspected, the SANE takes blood and urine samples for a laboratory to analyze. The SANE may testify as to the aspects of the examination that led her to suspect drug-facilitated rape; for example, the patient’s having no memory of the time between swallowing a drink handed to her at a party and waking up in a parking lot. The SANE may answer questions such as whether there are drugs that can cause memory loss. She can explain the protocol for collecting samples for a toxicology screen in her jurisdiction.

In *Bullcoming v. New Mexico*, 564 U.S. 36 (2011), a DWI case involving a blood alcohol test, the U.S. Supreme Court ruled that only the laboratory technician who performed the analysis can testify as to the findings. For sexual assault cases, this ruling applies to laboratory tests for DNA and for drugs administered in drug-facilitated rapes.

What Can a Sexual Assault Medical Forensic Examination “Prove”?

A medical forensic sexual assault examination cannot determine whether or not a sexual assault was perpetrated. It cannot “prove” source or causation of injury. It can provide objective documentation of examination findings that, when considered in the context of all the evidence, will assist the judge and jury in reconstructing the events in question and determining whether or not there was a sexual assault. The limitation on how much a medical forensic sexual assault examination can tell the court is not only due to the fact that “rape” and “sexual assault” are legal conclusions, not medical diagnoses. Often, some or all of the examination findings can be interpreted by the prosecution and defense as having different theories of causation, as the following examples demonstrate.

Nongenital Injuries

Imagine a situation in which the patient has no memory of the time between ingesting a drink handed to her in a club and waking up in a parking lot. In response to the SANE’s questions about her voluntary alcohol consumption, the patient reports having several drinks before the drink in question. In response to the SANE’s question as to whether she vomited, the patient reports that she vomited copiously. The SANE’s examination of the patient’s mouth reveals that the back of the upper part of the mouth called the soft palate was very reddened and appeared to be irritated.

During trial, the prosecutor elicits the information about redness and irritation from the SANE, who has been qualified

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as an expert, and asks if she has an opinion as to the cause. The SANE responds that the findings are consistent with blunt force trauma. The prosecutor thus creates the implication that the patient was subjected to forced oral penetration by the defendant's penis. On cross-examination, defense counsel asks the SANE if the redness and irritation at the back of the patient's throat could also have been caused by her copious vomiting and the acid coming up from her stomach. The SANE replies that it could.

This is as much as the SANE is able to tell the court based on the examination: the redness and irritation on the patient's soft palate are, in the SANE's opinion, consistent with blunt force trauma, but they may also have been caused by copious vomiting. It is now up to the prosecution and defense to integrate the SANE's testimony into the narrative each presents in its closing, placing it in the context of all the other facts addressed. The jury—or, in a bench trial, the judge—decides which explanation of this particular injury to the patient they find most credible.

Genital Injuries

The medical forensic sexual assault examination can document findings, if any, of injury to external and internal genitalia. But injury itself is not definitive for sexual assault; the types, quality, or location of injury does not necessarily allow SANEs to differentiate injury from assault from injury from consensual sex. The majority of anogenital injuries identified on exam are nonspecific, meaning they could have been caused by either consensual or nonconsensual contact. On occasion, the SANE may note injuries difficult to ascribe to consensual contact, such as deeply seated lacerations in the vaginal vault or extensive injury requiring surgical repair. But even then the SANE, who must have been qualified as an expert, can only comment on whether or not the injuries are consistent with the patient's account. Research is ongoing with volunteer heterosexual couples

examined shortly after consensual vaginal-penile intercourse to determine whether and where they have tears, bruising, or other genital injury and to compare these findings with data from injury patterns recorded for women subjected to non-consensual vaginal-penile penetration.

Confrontation Clause Issues:

Crawford v. Washington

If the SANE's patient is unavailable or unwilling to testify and be cross-examined, may the SANE testify as to the patient's account of the assault under the medical hearsay exception? *Crawford v. Washington* and its progeny established rules for when such testimony is and is not permissible for Confrontation Clause purposes. This is rarely a problem in adult victim sexual assault cases because prosecutors rarely go forward without the victim/witness. However, if, for example, the victim/witness is seriously ill or dies before trial, whether the SANE may testify depends on whether the court characterizes the victim/witness's account of the assault to the SANE as "testimonial" or "non-testimonial." "Testimonial" means the statements were made for the primary purpose of establishing past events in furtherance of a future prosecution. "Non-testimonial" means the statements were made for the purpose of receiving help in an emergency. When a SANE is perceived as acting as an arm of the law, the victim/witness's statements will usually be considered "testimonial." When a SANE is perceived as acting as a healthcare provider for whom the forensic evidence collection is secondary, the victim/witness's statements will usually be considered non-testimonial. If the victim/witness refuses to testify because of threats from the alleged assailant if she does so, her statements may be admissible under the doctrine of forfeiture by wrongdoing.

■ In *State v. Stahl*, 11 Ohio St. 3d 286 (2005), the patient died before trial from causes unrelated to the rape. The SANE's testimony about her examination made clear that she was first and foremost conducting a medical examination. The patient's statement was held to be non-testimonial and the

SANE was permitted to testify about the patient's account of the assault.

■ In *State v. Bennington*, 264 P.3d 440 (Kan. 2011), the court held that because the Sexual Assault Comprehensive Arrest Form the SANE utilized during the examination was developed by local law enforcement, the patient's statements were testimonial and the SANE could not testify as to the patient's account of the assault.

The Importance of SANE Testimony

Although a SANE's testimony is limited in scope, nothing better demonstrates the importance of admitting expert SANE testimony to educate a jury and promote fairness in deliberations than what might be called a tale of two judges. Several years ago, a Bronx sex crimes prosecutor wanted to call an expert SANE to explain that the victim's absence of injuries in the case at bar did not mean she had not been raped. The judge refused to allow it on the ground that injury was not an element of the crime. The jury acquitted and told the prosecutor that the absence of injury was a key point in their decision. Recently, a Virginia judge presented a judicial education program for the new judges in her state based on the National Judicial Education Program's publication *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case*. A few weeks later, one of these new judges told her that he had just presided in his first sexual assault case, and, had he not attended her program, he would not have believed the victim was a victim because she did not have the terrible physical and genital injuries he had always believed were the hallmark of nonconsent. ■