Forensic evidence collection: what are your legal obligations?

Responsibilities to sexual assault victims vary by state

The ED physician has three obligations to the sexual assault patient, any one of which can potentially lead to liability, according to Howard A. Peth Jr., MD, JD, an attending physician in the department of emergency medicine at Lake Regional Hospital in Osage Beach, MO.

"However, there aren't many cases where an ED physician has been sued for a breach in any of these areas," adds Peth. Here are the ED physician's obligations:

- To provide medical care and stabilizing treatment and identify any injuries resulting from the sexual assault;
- To arrange appropriate follow-up for medical issues, including diagnostic studies for sexually transmitted diseases (STDs) or emotional counseling; and
- To perform a forensic examination.

"That is more or less going to be dictated by the rape kit that you have, which comes from a local law enforcement agency," says Peth.

If a patient requests a rape examination, the physician should attempt to administer one if at all possible; this includes a "rape kit" to meet evidentiary requirements. If a kit is not stocked by the ED, law enforcement should be contacted to provide one. "Whenever a patient or family member comes in and requests a rape examination, you are going to notify law enforcement anyway, because they absolutely have to be involved at that point," says Peth.

If you don't have a rape kit, you are going to have problems collecting certain pieces of evidence. "One of the more important pieces of evidence that you are going to obtain nowadays is DNA testing," Peth says. "It could be that the victim is acquainted with the assailant, and DNA evidence could link that particular individual to other crimes. So that can be a very instrumental piece of evidence."

The rape exam does not substitute for your own medical treatment and stabilization, which will include testing for STDs and offering of postcoital contraceptive, says Peth.

"Your variation from standard procedures may vary upon the request of the patient, but you must get informed consent and informed refusal," says Peth. "This could be an instrumental evidence-gathering tool to identify who the assailant was, and you are losing that opportunity."

The ED physician's obligations are dual, to both the patient and to society. "Medical stabilization is the ED physician’s duty to the patient, and the evidentiary examination is the physician’s obligation to society," says Peth.

On the ED physician's part, this is more of an obligation to society than to the victim, so a lawsuit is not likely, says Peth. "If it involved egregious conduct like refusing to do an exam, I would imagine you could get into trouble, but I have never heard of a case like that," he says. "If you fail to diagnose an STD, the patient could theoretically sue you, but I am not aware of a single case where that has happened, either."

The patient alone determines whether the ED physician performs an evidentiary examination, through the consent process. "It is not within the purview of the physician or law enforcement to proceed with the evidentiary portion of the rape examination absent the patient’s consent," says Peth.

The ED physician’s evidentiary obligations include eliciting and documenting the pertinent historical details of the sexual assault, obtaining specimens for DNA and other laboratory analysis, and documenting...
the physical examination findings on the sexual assault forms included with the rape kit.

The ED physician may have more specific legal obligations for collecting forensic evidence from rape victims, depending largely on state law. “For example, Michigan requires hospitals to provide sexual assault evidence kits to any patient requesting one within 24 hours of the crime,” says Erin McAlpin Eiselein, JD, a health care attorney with Davis Graham & Stubbs in Denver, CO. “In the absence of a state law, a hospital does not have a legal duty to collect forensic evidence.”

The patient must always consent to forensic evidence collection. “If a patient does not want such evidence collected, the hospital has no independent duty to do so,” says Eiselein. However, there are recognized best practices in this area, and EDs not complying with these do risk liability, says Eiselein. These include use of Sexual Assault Response Teams (SARTs) or Sexual Assault Nurse Examiner (SANE) programs to provide maximum assistance to victims of sexual assault, including forensic evidence collection.

“When available, these programs allow ED physicians to treat the medical needs of the patient, and delegate the forensic evidence collection, which is a time-consuming task, to an expert,” she says.

Some states grant physicians statutory immunity from liability arising out of performing forensic evidence collection for sexual assault survivors. “So long as the hospital and physicians comply with internal policies on evidence collection, liability for a problem with the evidence collection, such as a lost kit, would be minimal,” says Eiselein.

EDs that do not have sexual assault evidence kits still have a variety of options. First, with the patient’s consent, they can contact the police or a rape crisis center, obtain a kit, and collect the evidence for the patient. “Second, and in compliance with EMTALA, the hospital can offer to transfer the patient to another hospital or medical facility that does perform sexual assault forensic evidence collection,” says Eiselein. “It is not unusual for communities to designate a particular hospital as a center for sexual assault evidence collection.”

Third, if the ED has a relationship with a SART or SANE, the on-call forensic nurse can be contacted to perform the collection.

Any dispute between the patient and other family members as to whether a forensic examination should be conducted must end with the ED following the patient’s wishes. “It ultimately is the patient’s decision and the patient must consent,” says Eiselein.

In Massachusetts, there are no specific laws that state the ED physician has a legal responsibility for collecting forensic evidence from rape victims. As a result, there will be no criminal liability if an ED physician in that state fails to do a rape exam, says Monique I. Sellas, MD, an attending ED physician and fellow in clinical forensic medicine at Massachusetts General Hospital in Boston.

“Unfortunately, that does not protect us from civil liability,” she says. “An ED physician can in fact be sued for failing to perform a kit or collect forensic evidence in a patient who alleges sexual assault.”

In October 2007, a Howard University student sued various Washington D.C. area hospitals and doctors for failing to provide a sexual assault evidence kit. “This appears to be especially troubling because Howard University Hospital, one of the defendants in this case, holds itself out as a regional center out of which a SANE program operates,” says Eiselein.

Unfortunately, not all EDs are equipped to handle a time-consuming task like a sexual assault evidence collection kit, such as community EDs with only single physician coverage overnight. “These kits can take two or three hours to complete,” says Sellas. “This would be an impossible task with only one physician covering the whole ED, as it would take them out of circulation from seeing potentially critically ill patients.”

Sources

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Also, the majority of ED physicians are not trained for this task. “Many do not know the ins and outs of proper documentation of history, documentation of injuries, how to perform forensic photography, or how to adequately collect evidence and follow the chain of command to submit the kits,” says Sellas. “Despite this, the task has fallen to us to perform these exams.”

SANE programs have been developed in many big cities to allow specially trained nurses to be called in to perform the exams, which does not impede patient flow through the ED. “However, these programs are not well developed everywhere,” says Sellas.

If a rape kit is not provided and the patient wants this done, they should be transferred to the nearest academic medical center where a kit and the staff to perform the exam are more readily available; or the ED should contact the local police department, crime lab, or department of public health to have a kit delivered, says Sellas.

Your ED must have a consistent procedure for treatment of sexual assault victims, says Brian Hunt, JD, a health care attorney at Dallas, TX-based Stewart Stimmel. “The ED physician should follow the health care facility’s policy and procedure regarding collection of forensic evidence,” says Hunt.

Your ED’s policy should include obtaining documented consent from the patient prior to providing the forensic medical examination and treatment. “If possible, the physician should collect the forensic evidence in the presence of law enforcement officers to preserve the chain of custody,” says Hunt.

In one Texas case, a patient sued a hospital, nurse, and medical director for failure to perform a rape exam, notes Hunt. “While it is conceivable that a physician could be sued for negligently performing a rape kit, such a suit would likely be unsuccessful,” he says.

When suing for medical negligence, a patient must show that a physician breached the applicable standard of care and that breach proximately caused injury to the plaintiff. “The likely ‘injury’ in this case — a more difficult criminal prosecution of the perpetrator — is almost certainly non-compensable,” says Hunt. “In other words, the plaintiff would have a difficult time showing that the physician’s negligence proximately caused him or her injury.”

Reference

CNE/CME Questions

10. According to the article on patient handoffs at shift change, the shift change process itself should be flexible and not routine, and is not the time to ask and respond to questions.
   A. True
   B. False

11. Which is true regarding liability risks of self-service computer kiosks used in EDs?
   A. Use of kiosks ensures compliance with the Emergency Medical Treatment and Labor Act (EMTALA).
   B. Kiosks cannot substitute for a medical screening examination.
   C. Nursing assessment decisions usually can be made solely based on information provided by patients.

CNE/CME Instructions

Physicians and nurses participate in this CNE/CME program by reading the issue, using the references for research, and studying the questions. Participants should select what they believe to be the correct answers, then refer to the answer key to test their knowledge. To clarify confusion on any questions answered incorrectly, consult the source material. After completing the semester’s activity, you must complete the evaluation form provided and return it in the reply envelope to receive a letter of credit. When your evaluation is received, a letter of credit will be mailed to you.

CNE/CME Objectives

After completing this activity, participants will be able to:
1. Identify legal issues relating to emergency medicine practice;
2. Explain how these issues affect nurses, physicians, legal counsel, management, and patients.
3. Integrate practical solutions to reduce risk into the ED practitioner’s daily practices.