

Medical Hearsay Issue Sheet

I. ROLE OF THE SANE/SAFE NURSE

A. National Definition of a SANE/SAFE:

The 2004 National Protocol for Sexual Assault Medical Forensic Examinations define SAFEs as, "health care professionals who conduct the examination."

SANEs are defined as "registered nurses who received specialized education and fulfill clinical requirement required to perform these exams.

Additionally, SAFE and SANEs "are often used to more broadly denote a health care provider who has been specially educated and completed clinical requirement to perform the exam."

B. How do SANE/SAFE's define themselves:

The definition of the SANE/SAFE is crucial to the determination of the primary purpose of the sexual assault exam. The definition of the SANE/SAFE role will vary by jurisdiction and it must be clear that the SANE/SAFE is **not a branch of law enforcement** but an independent medical professional who has a two pronged responsibility to the community: (1) to provide access to comprehensive immediate care; and (2) also to facilitate investigations. The national protocol emphasizes a "coordinated community response," focusing on "victim centered care."¹

II. CRAWFORD OBJECTIONS

A. What is a Crawford Objection?

Crawford v. Washington, 541 U.S. 36 (2004) held that statements by witnesses that are testimonial are barred under the confrontation clause, unless witnesses are available and defendant had prior opportunity to cross examine, regardless of reliability.

In determining whether testimony is admissible under *Crawford/Davis*, first ask yourself two questions; (1) Is the statement testimonial? And (2) What was the primary purpose for obtaining a statement?

¹ *National Protocol for Sexual Assault Medical Forensic Examinations*, U.S. DEPARTMENT OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, 1, 3, 27 (2004), available at, <http://samfe.dna.gov/>.

B. Arguing Crawford: Argue in two steps ---

- (1) The Constitutional issue of confrontation
- (2) Traditional evidentiary analysis under state law.

C. Combating a Crawford Objection

You must combat a Crawford objection by first establishing a valid exception to hearsay, for example a statement made for purposes of medical treatment or diagnosis. Once you have established that there is an exception to the hearsay rule. Once the exception is established you must argue that the statement in question is testimonial or not testimonial.

Many of the reversals or determined errors in trial court decisions result from the prosecution's failure to show that an expert witness was (1) unavailable and (2) that the defense had an opportunity to cross examine that witness. Additionally, when dealing with out of court statements of a victim to a SANE/SAFE, do not take for granted the need to establish the exception to hearsay for purposes of medical diagnosis or treatment, under 803(4).

Sufficient guarantees of trustworthiness are no longer admissible under *Crawford* to admit hearsay on its own but they should not be discounted completely. You should still argue the policy behind the exception to the medical hearsay as being the motivation of a patient to speak truthfully to their medical provider. This will be especially helpful prove up that there is an exception for medical hearsay.

III. DAVIS --- TESTIMONIAL VS. NON TESTIMONIAL

A. Under Davis v. Washington, 547 U.S. 813 (2006)

Testimonial	Non-Testimonial
When circumstances objectively indicate that there is no such ongoing emergency and the primary purpose of the interrogation <i>is to establish or prove past events</i> potentially relevant to criminal prosecution.	When made in course of investigation and the primary purpose of interrogation <i>is to assist police in an ongoing emergency.</i>
<i>Examples:</i>	<i>Examples:</i>

Where a statement is non-testimonial, the Confrontation Clause does not prevent the admission of the evidence under an exception to hearsay rule, for example the medical hearsay exception, and there is no need to complete the analysis of whether the defendant was given the opportunity to cross-examine the witness.

Where a statement is testimonial hearsay, the confrontation clause is implicated and you must prove two things to get the evidence admitted:

- The unavailability of the witness
- That the defense had a prior opportunity to cross-examine the witness.

You will not be able to admit evidence under the notion of reliability, previously the law under *Ohio v. Roberts*, where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one prescribed by the Constitution, confrontation.

B. SANE/SAFE as Non-Testimonial: *The following cases reflect instances where a SANE/SAFE was permitted to testify to out of court statements made by the victim. One consistent factor in cases where the testimony of the nurse examiner was allowed is that the examination was conducted in accordance with hospital procedure and that any statements were made during the ordinary course of conducting a medical examination. Another consistent factor is the definition of the role of the nurse examiner, the way he/she conducts their examination (i.e. are the police present or are they working under law enforcement protocol), and the way in which he/she described what they are doing (i.e. collecting evidence or forwarding the investigation).*

- **State v. Stahl, 855 N.E.2d 834 (Ohio 2006):** The State is seeking to introduce a statement of the victim made to a nurse practitioner during an emergency-room examination, where the victim identified her perpetrator in the presence of a police officer. The Court reversed and held that the statements made to the nurse practitioner were non-testimonial. The statements made to the nurse, in this case, were made in the ordinary course of conducting a medical examination. “In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations.”
- **State v. Slater, 939 A.2d 1105 (Conn. 2008):** Victim made statements to nurse and physician in the emergency room regarding her assault, that she had been forced into a car, forced to have oral and vaginal sex with a man she did not know, and who punctured her hand with a large knife. The physician administered a rape kit and the DNA taken during that exam was matched with the defendants. The victim did not identify or accuse the defendant during her examination. The victim died before trial and the defendant objected to admission of the statements under the Confrontation Clause. The fact that a rape kit was administered does not eviscerate the medical treatment purpose of the exam. Every statement made by the victim to the nurse and physician was related to treatment.
- **People v. Garland, 777 N.W.2d 732 (Mich. App. 2007):** The victim in this case had been out at a bar with the defendant, her sister, and another friend the night of the rape. The victim and her sister went home and fell asleep and the victim woke up to find the defendant having sex with her. The morning

after the assault the victim went to the hospital and was directed to a not for profit organization that provides free and confidential services for sexual assault victims. The Court held that the victim's statements to the SANE were non-testimonial because, under a totality of the circumstances, her statements were made separate from any police interrogation, the nurse's taking of the history was critical to treatment given that there were no outward injuries, and even though the nurse examiner does turn over information, her examination is separate from any police interrogation.

- **People v. Spangler, 285 Mich.App. 136, 774 N.W.2d 702 (2009):** establishing the test for determining whether a victim's statements to SANE were testimonial or not. The test is whether, under a totality of the circumstances, the situation *objectively* indicates that the statements would be available for use in later prosecution or that medical treatment was not the primary purpose.
- **Danzy v. State, 553 So.2d 380 (Fl. App. 1989):** The defendant was staying with his girlfriend at the time of the incident and the girlfriend's sister was also at the apartment recovering from a back injury caused by a car accident. The defendant was helping the victim into a recliner when he sexually assaulted her. The victim then ran out the door and fell down the stairs, reinjuring her back. The victim went to the emergency room for her renewed injuries. The Court stated that, "the doctor specifically testified that he believed it was important to find out why his patient was in obvious distress." The Court applied the same analysis to the statements made to the nurse examiner. Even though the victim initially came in to the hospital for a back injury, she was visibly upset and was urged to recount the incident by the doctor.
- **People v. Vigil, 127 P.3d 916 (Colo. 2006):** Father's friend assaulted his 7 year old son one night when the two men and another were drinking. The father found Vigil in his son's bedroom and his son told him that Vigil had "stuck his winkie in his butt" and that he was hurt. The child was taken to the hospital and the doctor performed a victim sexual assault kit. The Court held that the treatment by the doctor was for the sexual abuse and that the child's statements were non-testimonial. Even though the doctor was a member of the child protection team an objectively reasonable person would not have believed that his statements would be available for later use at trial.

C. SANE/SAFE as Testimonial: *The following cases reflect instances, in which courts found that a victim's statements to a SANE/SAFE were testimonial. Much of the time the reasoning behind the court's ruling are that the victim has already been treated once or twice by another physician or nurse. Another critical factor is, as mentioned above, the way in which the examination is conducted and explained to the victim.*

- **Medina v. State, 143 P.3d 471 (Nev. 2006):** Medina was visiting a friend who lived in Ryer's (victim) apartment complex. Medina talked himself into Ryer's apartment and then he raped her. Ryer was found by a neighbor the next day and taken to the emergency room and Adams, a certified SANE nurse, conducted a sexual assault examination. The Court held that the

statements made to Adams were testimonial because Adams was a “police operative.” Adams testified that her job was to gather evidence for possible use in later prosecutions and that is a violation of the Confrontation Clause, where the victim passed away prior to trial and there was no opportunity to cross-examine.

- **State v. Cannon, 254 S.W.3d 287 (Tenn. 2008):** An 82 year old woman was raped at her home by a man she had seen walking past her house and who she then gave water too. The victim told the police that the perpetrator forced his way into her home, covered her face with a pillow and raped her. She was taken to the hospital, examined and stabilized. The nurse’s testimony was excluded and held to be testimonial for a couple of reasons: the victim had been examined and stabilized prior to seeing the Nurse, the training of the SANE by law enforcement and the District Attorney on how to question victims and collect and preserve evidence, and finally the Court ruled as it did because of the way the Nurse explained her role to the victim and the examination as an investigation with the police officer present. The Tennessee Court did not create a blanket rule. They laid caution for precedent that made such an assumption in the dicta.
- **Hartsfield v. Kentucky, 277 S.W.3d 239 (Ky. 2009):** Hartsfield reached a plea agreement with the State on multiple counts of sexual assault. The State appealed and the defendant sought discretionary review. The issue in the case regards a motion in limine, made by the State to determined the admissibility of the SANE nurse’s statements. A SANE nurse, in this case, has two roles: (1) to provide medical treatment and (2) to gather evidence. They are brought in on sexual assault cases, specifically, at the request of the police or prosecuting attorney. The Court held that the role of the SANE was to collect evidence and to discover what happened in the past and not to treat the patient for an ongoing emergency.
- **State v. Miller, 208 P.3d 774 (Kan. App. 2009):** Defendant Miller was a neighbor of the 4 year old victim and her family. Miller stayed at the house one night and sexually assaulted the victim who complained the next day to her mother and grandmother of pain and that she did not want Mr. Miller to come back. Her mother took her to the hospital to be examined and the Court held that the statements were testimonial because an objective witness would know that the statements made to a SANE could be used during a later prosecution.
- **State v. Ortega, 175 P.3d 929 (N.M. Ct. App. 2007):** Mother overheard her then boyfriend and a friend making comments about being the “first to do” the 8 year old. She asked her daughter who eventually told her she had been sexually molested by the boyfriend and his friend. Mother brought the child to the emergency room where she was examined by a SANE for any immediate injuries and to collect evidence. The Court held that statements made to the SANE were testimonial because the need for medical treatment had ended. They held that he primary purpose of the examination was to prove some past fact for use at trial rather than to assist the victim with a medical emergency. Much of this opinion focuses on the fact that the victim

did not require any treatment but the examination was conducted to develop and preserve evidence.

IV. OBJECTIONS

A. Identification of Perpetrator

There is some discrepancy as to whether the identification of the perpetrator will be allowed. Some courts do allow the identification of the perpetrator as made to a medical professional when such identifications are relevant to medical diagnosis or treatment. The reasoning behind this admission is the need to protect patients from future harm where they may know their perpetrator or be living in the same household. Incidents of domestic violence present a similar problem to physicians in treating patients as does child sexual abuse. The treatment of domestic violence involves psychological as well as physical treatment and where the perpetrator is living in the household, this information is reasonably pertinent to the diagnosis and treatment of the patient.

- **United States v. Joe, 8 F.3d 1488 (10th Cir. 1993):** Husband runs over wife and neighbor while they were trying to escape one of his drunken rages. The wife had been treated previously for an alleged rape and the issue is whether the statements she made to the physician then are admissible. The Court focuses on whether the statement was reasonably pertinent to medical diagnosis or treatment. Specifically, the Court stated, "The identity of the abuser is reasonably pertinent to treatment in virtually every domestic sexual assault case." Applying the analysis of the physician's responsibility to prevent future abuse where the abuser is a member of the family or household and identification would help to protect a victim, the Court held the evidence was non-testimonial and admissible.
- **United States v. Renville, 779 F.2d 430 (8th Cir. 1985):** Renville was convicted of two counts of sexual assault of his 11 year old step daughter. The victim was examined several weeks after allegations were made and she was in the care of a foster family. The Court holds the statements to be admissible for purposes of identification where the child's motives were nothing more than a patient responding to a physician's questions during treatment.
- **Colvard v. Com, 309 S.W.3d 239 (Ky. 2010):** Two young girls were assaulted in their bedrooms by their neighbor. Immediately after the two girls reported the assault to their mother, the incident was immediately reported and the girls were given medical examinations for a sexual assault. The Court held in this case that they were no longer recognizing the identification of a perpetrator as pertinent to medical treatment to fall under the purposes of medical diagnosis or treatment for hearsay. The analysis of

the court determines that it is not reasonably conclusive that statements identifying a perpetrator, by young children, was for the purposes of medical treatment or diagnosis.

- **Com v. DeOliveria, 849 N.E.2d 218 (Mass. 2006):** Victim was anally raped by her mother's boyfriend. Abuse was reported by a day care worker, leading to an investigation by social services and the ultimate medical assessment for sexual abuse. The Court held that the medical exception to hearsay does not extend to testimony that goes to the guilt of the defendant, for example identification, only symptoms and conditions made to them for purposes of medical diagnosis or treatment.

B. Explanation/Narrative of Events

Part of the job of nurses and doctors is to assess, not only the physical but psychological trauma of their patients.

- **State v. Janda, 397 N.W.2d 59 (N.D. 1986):** Defendant Janda was convicted of gross sexual imposition. The Court held that medical examinations can be for the purpose diagnosing and treating physical injuries just as much as diagnosing whether the victim of a sexual assault has suffered psychological trauma. There is occasion where such a narrative is reasonably pertinent to the diagnosis and treatment.
- **People v. Matuszak, 687 N.W.2d 342 (Mich. App. 2004):** Defendant was convicted of first and third degree criminal sexual conduct. The Court held that the description of the rape and the injuries were well within the parameters of 803(4) for purposes of medical treatment. They did not identify the assailant and described the injuries received.
- **State v. Lopez, 175 P.3d 682 (Ariz. App. Div. 2008):** Following the sexual assault, the victim was transported to the hospital where was examined by a SANE. The nurse testified that "looking for injury is the main purpose" of the sexual assault examination and collecting evidence for police is another purpose. She also testified that, during the examination, she asks the person what happened during the assault to determine "where to look for injury." The Court held that the statements were admissible and relevant to diagnosis and treatment. Additionally, the Court applies a two part test for applying the exception for medical hearsay: (1) whether "the declarant's apparent 'motive ... [was] consistent with receiving medical care' "; and (2) whether it was " 'reasonable for the physician to rely on the information in diagnosis or treatment.' "
- **State v. Romero, 156 P.3d 694, 141 N.M. 403 (2007):** Defendant's wife was found dead in their bed and he was convicted of domestic violence and murder. The victim made a statement to a SANE weeks after an incident, in which she relayed a narrative of the assault. The Court held that, although the narrative was made during the course of

treatment, the statements of specific acts were not admissible. The Court would have required a different kind or level of redaction to admit the statement into evidence.

V. THE *IRON SHELL* TEST --- "REASONABLY PERTINENT"

United States v. Iron Shell, 633 F.2d 77 (C.A.S.D 1980) --- For whether a statement is "reasonably pertinent" to diagnosis or treatment requiring that (1) declarant's motivation in making the statement is consistent with the rule; and (2) the content of the statement is of the type a reasonable medical professional would rely on in making diagnosis treatment and decisions.

VI. CONCLUSION

The state law varies on the extent to, which it allows medical hearsay to be admissible. The challenge comes up, not necessarily in the hearsay exception, but in bringing together the exception with the non-testimonial factors of the statement to maintain admissibility. For a statement to be admissible, where the declarant is unavailable, it must be made in course of investigation and the primary purpose of interrogation is to assist police in an ongoing emergency.

The role and local and self definitions of SANE/SAFE nurses is a crucial factor in determining admissibility of statements made to nurse examiners in sexual assault cases. As many of the cases above illustrate, where policies and testimonies for SANE/SAFEs is to assist law enforcement, the courts are less inclined to extend the medical hearsay exception. However, where it is made clear in the policy, to the patients, and on the stand that the primary role of the nurse examiner is to treat the patient, the courts have allowed for the medical hearsay exception and overcome the Crawford objections.