

February 1, 2021

To:

Whom It May Concern Within The State Of Arkansas, USA

Prepared By:Ward Allen and Owen DeCleene of SDFI-TeleMedicine, at the request of Cathy Price of SDFI-TeleMedicine
Ward.Allen@SDFI.com**SUBJECT:**

Managing And Protecting Forensic Evidence, Including Digital Pictures And Videos, That Is Collected During A Forensic Medical Examination.

Notification to All Readers

This document was prepared as an electronic PDF. It contains links to external sources that contain direct source information and should be viewed on a device that can access the internet. All links connected to their destination as of the date shown above. Related source information has been extracted from those included links and summarized here for your convenience. When in doubt, refer to the original source of information offered.

Executive Subject Summary

Forensic evidence that is collected during a FME is not health information, health care, health data, a health care service or PHI and is therefore not subject to HIPAA rules. Evidence and the effort to collect evidence is not "health care" or a health care service.

There is no reason, justification or advantage to storing forensic evidence inside a primary medical record distribution system. Forensic evidence should be sequestered away from the primary medical record distribution system that uses a Medical Break Glass Policy to control PHI where PHI is, by description and definition, "Protected Health Information". The solution can be as simple as storing any evidence collected in a locked and controlled room, as is typically done with physical sexual assault kits before they are handed off to law enforcement where no one except the SANE coordinator and a back-up person has access. A medical record data distribution system cannot effectively be used as a forensic evidence locker.

Who pays for the forensic portion of the forensic medical examination matters. Who pays for what during a FNE legally defines what is medical and what is forensic. The state pays for the forensic portion of the examination and owns the evidence that is collected during the exam.

The most general purpose of a FME is to collect and gather evidence for use in a court of law. Otherwise the exam is a medical exam and is considered a health care service for health care. Health care services are subject to HIPAA rules. Identifiable forensic evidence is not subject to HIPAA rules.

Evidence collected during a forensic medical examination requires a complete and secure Legal Chain of Custody, as required by court systems around the nation. Medical Break Glass Policy and BAA's do not meet even the most basic requirements of a Legal Chain of Custody. A Forensic Nurse Examiner cannot testify that they had control of the evidence collected if the evidence is stored in a data distribution system or in medical records that they do not control, manage or understand beyond HIPAA user access.

HIPAA rules allow wide access to health information through business associates for various reasons. A "business associate" is a person or entity, other than a member of the workforce of a covered entity, who performs functions or activities on behalf of, or provides certain services to, a covered entity that involve access by the business associate to protected health information*. Evidence is not health information. A "business associate" is a subcontractor that creates, receives, maintains or transmits protected health information on behalf of another business associate. HIPAA's inclusion of a "business associate" eliminates Legal Chain of Custody.

* The term "Protected Health Information" is referenced 57 times within the page link shown below. "Evidence" is NOT mentioned.
<https://www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html>

State and Federal law requires that the forensic portion of the FME to be paid for by the state. FME's are only offered to victims of sex crimes and are offered free of charge, providing that the FME is done to gather evidence regarding a sex crime. That evidence is collected and intended for use in a court of law.

The choice to photodocument a sexual assault victim typically resides with the Forensic Nurse Examiner and the victim. Victim consent is required unless photodocumentation is state mandated. Many states do not mandate photodocumentation, yet every state pays for it if it is collected as part of the Forensic Medical Examination.

Not collecting photodocumentation evidence could easily be perceived as a bias unless a patient/victim refuses. By definition, the forensic portion of the FME, where a living person is examined and evidence is collected, should include a head-to-toe examination, documentation of biological and physical findings and collection of evidence. (*See Forensic Medical Examination (Federal)*).

Forensic evidence, including photodocumentation, must be protected and managed beyond Covered Entity, Medical Break Glass Policy and Business Associate Agreements. All forensic evidence collected during a forensic exam remains the property of the state organization that paid for the forensic portion of the FME and the SAK. The state organization that paid for the forensic portion of the FME and the SAK is the keeper of the forensic record, not the covered entity, a business associate, a SANE program or a forensic nurse examiner regardless of where the evidence rests or how long it rests before it is delivered to a Law Enforcement Organization, Law Enforcement Agency, a Crime Lab or the Prosecutor's Office through a Legal Chain of Custody.

General Subject Summary – Legal Chain of Custody vs Medical Break Glass Policy

A Medical Break Glass Policy does not supersede the legal requirement for a Legal Chain of Custody related to evidence collected during the forensic portion of a FME. Inserting forensic evidence into a medical record makes it inadmissible by default because a Legal Chain of Custody cannot be maintained inside a medical record data distribution system. A medical record data distribution system is by design, a controlled information distribution system. A legal chain of custody is exactly the opposite. A legal chain of custody is designed to eliminate access and the distribution of collected evidence, in preparation for its use in court.

SDFI Historical, Legal and Technical Information

SDFI was designed around the Federal Rules of Evidence and used primarily in hospitals, clinics and police departments around the nation. The SDFI System is updated and maintained with continued support from the medical community, the legal community and various technical experts within their respective fields. SDFI's primary purpose is to capture, store, send, maintain and deliver digital evidence to a LEA, a LEO, a crime lab or a prosecutor's office using accepted state and federal Legal Chain of Custody processes.

To ensure image evidence authenticity, SDFI was designed to capture RAW and JPG image file formats in their original size and format. Many EHR systems are not designed to handle RAW files, however, many EHR systems can and do handle small JPG image files. One real EMR technical concern involves the possible use of lossy irreversible image compression. If an EMR computer system applies irreversible image compression to digital images captured during a FME, that evidence would no longer be original. (*See Rules of Evidence – [Requirement of Original] (Federal and State)*)

SDFI images collected during the forensic portion of a FME are stored at the user's location in an encrypted data vault and typically on a covered entity's secure computer network system, separate from any primary medical record data distribution system. Evidence is **NOT** stored in the "cloud" nor does SDFI have access to evidence collected. This standard ensures a Legal Chain of Custody, through to any court.

ACRONYMS, DEFINITIONS, DESCRIPTIONS AND REFERENCES

PDF = Portable Document Format

FME = Forensic Medical Examination

PHI = Protected Health Information

BA = Business Associate

BAA = Business Associate Agreement

FNE = Forensic Nurse Examiner

EHR = Electronic Health Record

HIPAA = Health Insurance Portability and Accountability Act

SAK = Sexual Assault Kit

SANE = Sexual Assault Nurse Examiner



SAFE = Sexual Assault Forensic Examiner

SDFI = Secure Digital Forensic Imaging

LEA = Law Enforcement Agency

LEO = Law Enforcement Organization

RAW = Camera RAW files are uncompressed data files that contain unprocessed picture data. RAW files are original.

JPG = Joint Photographic Group. A compressed computer image file format. JPG files are not original.

DA = District Attorney

Sexual Offenses (State)

A.C.A. Chapter 5.14 – Sexual Offenses

5-14-103. Rape.

5-14-110. Sexual indecency with a child.

5-14-124. Sexual assault in the first degree.

5-14-125. Sexual assault in the second degree.

5-14-126. Sexual assault in the third degree.

5-14-127. Sexual assault in the fourth degree.

<https://advance.lexis.com/container/?pdmfid=1000516&crld=0c97644f-a262-4b1f-805b-dad3c14a6a68&func=LN.Advance.ContentView.getFullToc&nodeid=AAFAADAAAF&typeofentry=Breadcrumb&config=00JAA3ZTUONTIzYy0zZDEyLTRhYmQtYmRmMS1iMWlxNDgxYWMxZTQKAFBvZENhdGFsb2cubRW4ifTiwi5vLw6cl1uX&action=publictoc&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A4WVD-4YB0-R03N-R0JG-00008-00&pdtocfullpath=%2Fshared%2Ftableofcontents%2Furn%3AcontentItem%3A50XD-80G1-DY3X-63F1-00008-00&ecom=w53dkkk&prid=8af4daf3-9bae-4ce1-acb4-b0a632fc8470>

Legal Chain of Custody for the Sexual Assault Kits (State and Federal)

In summary, Chain of Custody, also known as Chain of Evidence, is a combination of procedures, processes and documents that identifies all persons who controlled, accessed and maintained the handling of forensic evidence throughout the collection, packaging, transfer and storage process, thus ensuring that all evidence remained intact and acceptable to both state and federal courts. FNE's must be ready and able to testify in court and prove beyond all reasonable doubt, that the evidence offered is the same evidence they collected.

Additionally, FNEs must be able to testify that there were in complete control of the forensic evidence at all times and that there was no unauthorized access and/or tampering while the evidence was under their control and in their custody.

<https://www.nsvrc.org/sarts/toolkit/5-9>

<http://www.sdfi.com/Exams.asp> (Review the entire video stored on this web page.)

Forensic Medical Examination (Federal)

The term "forensic medical examination" means an examination provided to a victim of sexual assault by medical personnel **to gather evidence** of a sexual assault in a manner suitable for use in a court of law.

(1) The examination should include at a minimum:

(i) Gathering information from the patient for the forensic medical history;

(ii) Head-to-toe examination of the patient;

(iii) Documentation of biological and physical findings; and

(iv) Collection of evidence from the patient.

<https://www.govinfo.gov/content/pkg/CFR-2017-title28-vol2/pdf/CFR-2017-title28-vol2-sec90-2.pdf>

Payment of Forensic Medical Exams – Forensic Evidence (State)

A.C.A. 12-12-403. Examinations and treatment — Payment.

(a) All licensed emergency departments shall provide prompt, appropriate emergency medical-legal examinations for sexual assault victims.

(b) (1) (A) All victims shall be exempted from the payment of expenses incurred as a result of receiving a medical-legal examination if the victim receives the medical-legal examination within ninety-six (96) hours of the attack.
(B) However, the time limitation of ninety-six (96) hours may be waived if the victim is a minor or if the Crime Victims Reparations Board finds that good cause exists for the failure to provide the medical-legal examination within the required time.



- (2) (A) This subsection does not require a victim of sexual assault to participate in the criminal justice system or to cooperate with law enforcement in order to be provided with a forensic medical exam or reimbursement for charges incurred on account of a forensic medical exam, or both.
- (c) (1) A medical facility or licensed healthcare provider that performs a medical-legal examination shall submit a sexual assault reimbursement form, an itemized statement that meets the requirements of 45 C.F.R. § 164.512(d), as it existed on January 2, 2001, directly to the board for payment.
- (2) The medical facility or licensed healthcare provider shall not submit any remaining balance after reimbursement by the board to the victim.
- (3) Acceptance of payment of the expenses of the medical-legal examination by the board shall be considered payment in full and bars any legal action for collection.

https://advance.lexis.com/documentpage/?pdmfid=1000516&crd=2dc1ba89-e2e1-4f59-8960-c41ae1b02c03&nodeid=AAMAACAAHAAFAAE&nodepath=%2FROOT%2FAAM%2FAAMAC%2FAAMAACAAH%2FAAMAACAAHAAF%2FAAMAACAAHAAFAAE&level=5&haschildren=&populated=false&title=12-12-403.+Examinations+and+treatment+%E2%80%94+Payment.&config=00JAA2ZjZiM2VhNS0wNTVLTQ3NzUtYjQzYy0yYWZmODJiODRmMDYKAFBvZENhdGFsb2FxiYCNsel0pllggpYkw9PK&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A4WPT-1DF0-R03J-W29J-00008-00&ecomp=c38_kkk&prid=10b3a94e-e9cf-4686-afae-0a0ed5108889

Arkansas Crime Victims Reparations Board

<https://portal.arkansas.gov/agency/departement-of-public-safety/crime-victims-reparations-board/>

Medical Record Retention and Preservation (State)

Adult patients 10 years after the last discharge, but master patient index data must be kept permanently.

Minor patients Complete medical records must be retained 2 years after the age of majority (i.e., until patient turns 20).

<https://www.healthit.gov/sites/default/files/appa7-1.pdf>

Statute of Limitations on Sexual Assault (Federal)

The Federal Statute of Limitations on most sex crimes is 10 or more years. Where children are involved, there is no Statute of Limitations.

<https://uscode.house.gov/view.xhtml?path=/prelim@title18/part1/chapter109A&edition=prelim>

Statute of Limitations for Sex Offenses, Sex Crimes or Sexual Assaults (State)

A.C.A. 5-1-109. Statute of limitations.

- (a) (1) A prosecution for the following offenses may be commenced at any time:
 - (D) Rape, § 5-14-103, if the victim was a minor at the time of the offense;
 - (E) Sexual indecency with a child, § 5-14-110;
 - (F) Sexual assault in the first degree, § 5-14-124;
 - (G) Sexual assault in the second degree, § 5-14-125, if the victim was a minor at the time of the offense;
 - (H) Incest, § 5-26-202, if the victim was a minor at the time of the offense;
 - (J) Transportation of minors for prohibited sexual conduct, § 5-27-305;
- (2) A prosecution may be commenced for a violation of the following offenses, if, when the alleged violation occurred, the offense was committed against a minor, the violation has not been previously reported to a law enforcement agency or prosecuting attorney, and the victim has not reached the age of twenty-eight (28) years of age:
 - (A) Sexual assault in the third degree, § 5-14-126;
 - (B) Sexual assault in the fourth degree, § 5-14-127;
- (b) Except as otherwise provided in this section, a prosecution for another offense shall be commenced within the following periods of limitation after the offense's commission:
 - (1) (A) Class Y felony [rape] or Class A felony [sexual assault in the first degree], six (6) years.
 - (B) However, for rape, § 5-14-103, the period of limitation is eliminated if biological evidence of the alleged perpetrator is identified that is capable of producing a deoxyribonucleic acid (DNA) profile;
 - (2) (A) Except as provided in subdivision (b)(2)(B)(i) of this section, Class B felony [sexual assault in the second degree], Class C felony [sexual assault in the third degree], Class D felony [sexual assault in the fourth degree, mitigated sexual assault in the second degree, sexual indecency with a child], or an unclassified felony, three (3) years.
 - (3) (A) Misdemeanor or violation, [mitigated sexual assault in the fourth degree] one (1) year.

https://advance.lexis.com/documentpage/?pdmfid=1000516&crd=1bbcef73-2187-4c03-9ce7-593272847a2a&nodeid=AAFAACAABAAB&nodepath=%2FROOT%2FAAF%2FAAFAAC%2FAAFAACAAB%2FAAFAACAABAAB&level=4&haschildren=&populated=false&title=5-1-109.+Statute+of+limitations.&config=00JAA2ZjIM2VhNS0wNTVILTQ3NzUtYjQzYy0yYWZmODJiODRmMDYKAFBvZENhdGFsb2FxiYCNseI0pIlgqYkw9PK&pdocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A4WVD-4KB0-R03N-60B1-00008-00&ecomp=c38_kkk&prid=550860bb-e4ac-4a74-97a6-d92e18be5864

Rules of Evidence – [Requirement of Original] (Federal)

“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required...”

<https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>

Rules of Evidence – [Requirement of Original] (State)

Arkansas Rules of Evidence. Rule 1001 – Definitions.

(2) Photographs. "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

<https://rules.arcourts.gov/w/ark/arkansas-rules-evidence#!fragment/zoupio-Toc1482302/BQCwhgziBcwMYgK4DsDWszlQewE4BUBTADwBdoAvBRABwEtsBaAfx2zgEYAWADgCYAZAAY+ASgA0ybKUIQAIokK4AntADka8REJhcCBUtUatOvSADKeUgCFVAJQCiAGQcA1AIIA5AMIPxpMAAjaFJ2UVEgA>

When and How State Sexual Assault Cases Go Federal - Step-by-Step Federal Sex Crimes Investigation and Litigation

With sex crimes, the accusation almost always begins on the local level. An alleged sex crime victim typically calls a local police department. Officers interview the accuser and, if they believe it's warranted, open an official investigation.

Law enforcement professionals might interview several people who have knowledge of the case's details, including the alleged perpetrator. The accused person may want to decline interviews and ask for counsel from a sex crime attorney to avoid inadvertently providing information that could be used against them. The right to stay silent and obtain the services of a lawyer is available to anyone in police custody.

If law enforcement officers decide evidence supports the claim that a crime has been committed, they will make an arrest and temporarily hold the accused person in jail. A court can grant bail if warranted, which means the arrested person can pay a bond fee and avoid jail while waiting to go to court.

At any time in the process, an alleged sex crime can appear to qualify for federal prosecution. *A local judge, law enforcement agency, or attorney might decide to enter it for consideration in federal court. Federal courts and federal prosecutors determine whether they want to take on the case. If they do, it will leave the hands of local law enforcement and prosecutors, and federal offices will take over.*

A federal sex crimes defense attorney works with federal law enforcement agencies and courts to produce evidence, witnesses, and other materials for the case, while prosecutors work on making their case against the accused at the same time. In some cases, an experienced sex crime attorney can get an investigation dropped, settle outside of court, or get a case handed down to local courts where it sometimes is easier to obtain reduced sentences or settlements when merited.

The standard for maintaining forensic evidence must meet or exceed federal expectations at all times.

<https://jsberrylaw.com/blog/the-difference-between-state-and-federal-sex-crimes-defense/>

Example Form - Patient Consent (See Addendum I.)

A victim of sexual assault must consent to a sexual assault examination and typically consents to the taking of photographs as part of the evidence gathering process as it relates to the prosecution of one or many assailants.

Example Form - Transfer of Evidence/Chain of Custody (See Addendum II.)

Chain of Custody and the Transfer of Evidence is crucial to any criminal case. Witnesses should expect to be cross-examined and questioned by criminal defense lawyers about how evidence was captured, handled, and transferred to ensure its authenticity based on State and Federal Rules.

FINAL SUBJECT NOTE:

If evidence is NOT collected during a FME in a manner suitable for use in a court of law, then the examination is not a FME. When that happens a “Forensic Medical Exam” becomes a “~~Forensic~~ Medical Exam” that would be best described as a health care service offered to a patient for health care purposes and billed accordingly. A medical exam is processed accordingly under HIPAA rules and regulations.

Sexual Assault Kits, including forensic reports, images and/or videos collected during a FME, should never part of a medical record data distribution system. If a patient requests a copy of **ANY** part of the forensic exam/report, images or evidence collected during the FME, the patient should be directed to the organization that paid for the Forensic Medical Exam.

ONLY the organization that paid for the FME has the authority to distribute the forensic evidence collected.

Knowingly distributing, mishandling and/or tampering with evidence is a crime and may be detrimental to the victim’s court case and to the covered entity that chooses to store evidence in a medical record data distribution system or distribute evidence to an alleged victim. By federal definition, The purpose of a FME is to “gather evidence of a sexual assault in a manner suitable for use in a court of law.” (Federal)

18 U.S.C. 1519

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

<https://www.govinfo.gov/content/pkg/USCODE-2010-title18/html/USCODE-2010-title18-partI-chap73-sec1519.htm>

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Two Addendums Included:

Addendum I - Patient Consent Form - Example

Addendum II - Transfer of Evidence/Chain of Custody Form – Example



Addendum I Patient Consent Form - Example

Step 1

Consent for Collection and Release of Evidence and Information

I, _____, freely consent to allow _____, _____
Name of Health Care Facility
and his/her medical and nursing associates to conduct a forensic examination, which includes the collection of evidence. This procedure has been fully explained to me and I understand that I may refuse any part of the examination. Clinical observation for physical evidence of both penetration and injury to my person will be done. Collection of other specimens and blood samples for laboratory analysis may be done per the events reported.

Patient Information:	
<ul style="list-style-type: none"> I understand that hospitals and health care facilities must report certain crimes to law enforcement authorities in cases where a victim seeks medical care. I have been informed that Pennsylvania law provides that a victim of a sexual offense shall not be charged for the costs of a forensic rape examination. I understand that "I" do not need to talk to law enforcement authorities directly if I choose not to, however I understand that the health care facility will provide the evidence of the forensic rape examination to law enforcement authorities. Options have been explained if "I" do not talk to law enforcement (medical treatment only, anonymous reporting). 	

Patient Consent: Please initial to the right to indicate agree/disagree for each statement	Agree	Disagree
Examination <ul style="list-style-type: none"> I understand that a forensic examination to collect evidence from the sexual assault may be conducted, with my consent, by a health care professional(s), to discover and preserve evidence of the assault. If conducted, the report of the examination and any evidence will be provided to law enforcement authorities. I agree that law enforcement can send the evidence to a laboratory approved by the Federal Bureau of Investigation (FBI) for CODIS access. The evidence will undergo testing analysis by the approved laboratory. I understand that I may withdraw consent at any time for any portion of the examination. I understand that I may withdraw consent for evidence testing by contacting the law enforcement agency investigating my case. 	_____	_____
Photographs <ul style="list-style-type: none"> I understand that collection of evidence may include photographing injuries and that these photographs may include the genital area. 	_____	_____
General Information <ul style="list-style-type: none"> I understand that evidence including photographs may be collected from this report for health and forensic purposes and provided to health authorities and other qualified persons with a valid educational or scientific interest for demographic and/or epidemiological studies. 	_____	_____

I fully understand the nature of the examination and the fact that medical information gathered by this means may be used as evidence in a court of law or in connection with enforcement of public health rules and law.

Print Name (patient) _____

Signature of Witness _____

Signature (patient) _____

Date _____

Time _____

Signature of Parent or Guardian/Relationship _____

Initials _____ Date _____



Addendum II Transfer of Evidence/Chain of Custody Form - Example

STEP 10 Transfer of Evidence/Chain of Custody Form

On _____ at _____ (am or pm) the following items were
(Date) (Time)

given to _____
(Police Officer)

of the _____
(Police Department)

Evidence Received

Check YES or NO for all items (if no, explain):

Photographs: CD YES NO _____

Other YES NO _____

Clothing (list): Shirt/Blouse YES NO _____

Pants/Slacks YES NO _____

Bra YES NO _____

Underpants YES NO _____

Jacket/Coat YES NO _____

Other YES NO _____

Sexual Assault Evidence Collection Kit: YES NO _____

Tampon/Sanitary napkin included: YES NO _____

Drug Facilitated Sexual Assault Kit: YES NO _____

Other evidence: YES NO

If YES, describe: _____

From: _____

Date: _____ Time: _____ am/pm

To: _____

Date: _____ Time: _____ am/pm

From: _____

Date: _____ Time: _____ am/pm

To: _____

Date: _____ Time: _____ am/pm

Initials

Date