The following questions were submitted during a webinar entitled *Challenging Victims: The Delicate Dynamics of Drug and Alcohol Facilitated Sexual Assault.* The presentation was given by Wendy Patrick, JD, PhD and Herb Tanner, Jr., JD. The questions were adapted for a more general audience, and responses were written Dr. Patrick and Mr. Tanner, with contributions and additional resources provided by EVAWI.

Our jurisdiction doesn't allow anyone else in the room during police interviews except for advocates. What is the best way to move towards a joint interview and approach this subject with our police?

Wendy Patrick: Consolidating interviews (for example, having police and prosecutors in the same meeting) can potentially save the victim unnecessary additional interviews. Many victims feel re-traumatized when they have to tell the same story over and over, when we could have consolidated the interview process. However, sometimes this will be unworkable, for example, when a health care provider is taking a medical history or a psychologist is conducting an interview, with privacy protections or legal privilege. Yet whenever possible, discussion within your jurisdiction about the interviews that can be consolidated is preferable.

EVAWI: Many jurisdictions have pursued a goal of reducing the number of unnecessary professional contacts with sexual assault victims. This can help reduce trauma and frustration, for example, when the victim explains what happened in detail to the responding patrol officer, only to be asked to start over again when the detective shows up. Or when victims are asked to explain what happened to people who really don't need to know (e.g., the hospital clerk, teacher, or the principal of a school, before law enforcement is called). Victims should not be asked to repeat themselves, simply because people want to know what happened or because the victim is being "handed off" due to a shift change, job rotation, etc. On the other hand, this does not mean that investigators should be reluctant to conduct follow-up interviews during the course of the investigation, as additional evidence and information is uncovered. In fact, such follow-up interviews are necessary to conduct a comprehensive investigation.

In addition, some communities have implemented a policy of having the law enforcement investigator and the Sexual Assault Forensic Examiner (physician, SANE, or other nurse) conduct their preliminary interview together. This type of joint interview can improve communications between the professionals involved and it can potentially reduce the number of redundant questions asked of the victim. It also reinforces the team concept and can help the victim to feel that the various professionals are working together to provide the best and most coordinated services possible.

When such a joint preliminary interview is conducted, however, it must be clear to everyone (including the victim) that detailed interviews will still need to be conducted separately by each of the different professionals. This is because the detailed interviews conducted by the investigator and SAFE have a different purpose.

For example, the purpose of a medical interview is to:

- Obtain information about what sexual acts were committed to perform a comprehensive medical forensic examination and to collect biological evidence samples;
- Obtain information about physical injuries to document use of physical force and for medical examination and treatment purposes; and
- Determine whether the medical forensic findings are consistent with the history, and to provide this information to law enforcement officers.

The purpose of an investigative interview is to:

- Obtain the sexual assault history; and
- Obtain a detailed description of the events (e.g., who, when, what, where, and how).

Quoted verbatim from the California SART Manual published by the California Clinical Forensic Medical Training Center (2001, p. 43).

For more information on the topic of joint interviews, please see the OLTI module on *Interviewing the Victim: Techniques Based on the Realistic Dynamics of Sexual Assault*.

In both military and civilian systems, victims can access services like health care and victim advocacy, without triggering the full investigative process. From a law enforcement perspective, how important do you think this is – both for victims to get the help they need, and also so they might be in a better position to report later on?

Herb Tanner: The practice of allowing restricted reports in the armed services, and programs like You Have Options (which allow victims to report a sexual assault and decide later whether to participate in a complete investigation) are relatively recent developments. They certainly show promise, but empirical research is needed to assess their effectiveness and impact. Anecdotally, it looks like victims may be more likely to report and participate in the criminal justice process when they are given complete information and time to consider his or her options. It makes sense that at least some of the victims making this choice would not have reported at all had they not been given these options. In that sense, it's a positive outcome for law enforcement; we wouldn't have heard about those cases had the victim not received the help and support right away without the pressure of deciding whether to participate in the criminal justice system.

EVAWI: For more information on alternative reporting options, we offer a comprehensive training module entitled, *Reporting Methods for Sexual Assault Cases.* This module is available as a downloadable document in our Resource Library. However, the interactive version of the training module in the OnLine Training Institute (OLTI) includes review exercises, practical applications, and an end-of-course test. After passing the test, participants can print a personalized certificate of completion.

The following resources offer additional information to learn more about the You Have Options Program (YHOP) and other alternative reporting options.

Training Bulletin series on *Alternative Reporting Methods*

Webinar on *Opening Doors: Alternative Reporting Options for Law Enforcement and VAWA Forensic Compliance*

Webinar on *Alternative Reporting Options for Sexual Assault: An Overview of the You Have Options Program (YHOP)*

EVAWI Anonymous Reporting Protocol: a set of templates to help communities implement a multidisciplinary protocol for victims to anonymously report their sexual assault to law enforcement.

Website for the You Have Options Program (YHOP)

How do you balance an honest explanation of the criminal justice process for victims, without overwhelming them?

Wendy Patrick: Rapport building cultivates a sense of trust and comfort within which we can gauge victim receptivity and readiness to learn about the criminal justice process and what to expect moving forward. Law enforcement professionals and victim advocates with good skills at reading people can help identify signs that the victim is feeling overwhelmed (if the victim does not voice such feelings) and other negative emotions that might indicate the need for a break or other comfort measures.

I'm a sexual violence advocate, and lately I am meeting clients who froze during their sexual assault and did not clearly express a verbal "No." They might have cried throughout the attack, or given other non-verbal cues that should have been attuned to. In your professional experience, what are the chances of conviction in this scenario?

Wendy Patrick: While it is impossible to guess at the chances of conviction in any particular case, victims are not necessarily discredited by the fact that they did not verbalize a clear "no." Prosecutors frequently use expert witnesses to explain the trauma suffered during and after sexual assault and its impact on victim behavior. The victim can also help to explain why he/she did not resist physically or verbally, and many jurors understand the practical reasons why victims may not say "no clearly" (e.g., fear, love, loyalty, confusion, and trauma).

Herb Tanner: It is actually quite rare for humans to actually say the word "no" in most circumstances, including unwanted sexual activity. Yet those communications are generally understood as a refusal. So it's not an issue of whether the victim communicated "no," but whether the perpetrator accepted it. The juror education process begins with jury selection and prosecutors can devise questions that have a chance of bringing out juror attitudes about consent and educating potential jurors about what refusal really looks like in the real world.

You are right to note that this is not an easy set of circumstances for investigators and prosecutors who have to overcome mistaken beliefs about how a lack of consent is

communicated. But it can be done. And we know what the chances of conviction are if we never bring the case to trial.

What is the likelihood of obtaining a conviction when a victim is drunk or under the influence of another drug (e.g. weed) at the time of their sexual assault?

Wendy Patrick: Intoxication affects victims' perceptions, behaviors, memories, and credibility (for example, if they have difficulty recounting details of the assault). This can make it more difficult to prove a case in court. Nonetheless, there are often witnesses, video footage, or other evidence that can be used to prove the case, even if the victim does not remember the assault. Remember, the Brock Turner case was a sexual assault witnessed by two exchange students walking by. Corroborative evidence improves our chances of proving a case involving an intoxicated victim.

Herb Tanner: Here again, every case is unique and it's impossible to predict the outcome of any case. When police and prosecutors say that the likelihood of conviction is low in a particular case, that probably reflects their personal experience with similar cases. However, there is a lot that can be done to increase the likelihood of conviction. As Dr. Patrick notes above, prosecutors must use the evidence from a thorough investigation to corroborate the victim's level of intoxication and frame it as a vulnerability that was exploited by the defendant.

How do we prepare for the inevitable double standard defense, where the defendant says he was too drunk to know better? For example, we might have a video of a victim who is obviously too impaired to consent, but the defendant says, "Well I was too impaired to know the difference."

Wendy Patrick: Cases where consent is at issue hinge on credibility and circumstantial evidence. Actions speak louder than words. For example, in cases where defendants claim intoxication, this does not give them a pass on responsibility. Cases like this are analyzed like any other case, by comparing a defendant´s behavior and statements. A corroboration-based investigation is needed, to find other witnesses, leads, or information to help prove the case.

Herb Tanner: One thing to consider is whether the defendant's intoxication is even a valid defense. In many states, the defendant's reasonable belief that the victim consented is not a defense. In those jurisdictions, the level of the defendant's intoxication is, or should be, irrelevant. The prosecution must prove either that the defendant used force, fear, threats or coercion to sexually penetrate the victim, or that the victim was too impaired to validly consent, or the victim was physically helpless and unable to communicate an unwillingness to act.

I don't know if the defendant's level of intoxication is a relevant circumstance in places where a reasonable belief that the victim consented is a defense. It seems implausible that "I was too drunk and didn't know the difference" would be a legitimate defense. After all, that would excuse the behavior regardless of the victim's level of intoxication.

Whether it's a legal defense or not, however, jurors do sometimes consider defendants less culpable as their level of intoxication increases. Conversely, and perversely, victims are often

seen as *more culpable* as their level of intoxication increases. Confronting that means doing a thorough investigation of the defendant's actions before, during, and after the sexual assault. For example, the investigation might show that a male defendant was not heavily intoxicated, that he saw a person who was vulnerable, that he acted to increase that person's vulnerability and destroy their credibility (e.g., he gave the person more alcohol), and that he deliberately isolated the victim and exploited these vulnerabilities.

I won't pretend that it's easy to prosecute a case like this, but law enforcement officers conduct thorough investigations, and prosecutors secure convictions in these types of cases every day.

We've seen cases where the victim exhibited signs of being very affected by a drug following the sexual assault, but nothing shows up on the medical testing. Have you experienced this, and how do you handle it?

Wendy Patrick: Yes, we sometimes have cases involving this type of fact pattern. Often, delayed disclosure prevents a blood or urine sample from being collected within the timeframe for detection. Yet even when a victim reports right away, and toxicology samples are obtained as part of the medical forensic examination, the sample still may not be tested for all the types of intoxicants that could have been ingested, either voluntarily or involuntarily.

Depending on the type and scope of the medical forensic examination, blood or urine may only be obtained for purposes of health care, and hospital-based laboratories and medical service laboratories may have assays that don't detect smaller quantities of certain drugs. This is because the purpose of this test is for diagnosis and treatment, not prosecution. The question is whether the toxicology levels are dangerous for the individual's health and how to provide treatment, not whether the victim was incapacitated. In that type of scenario, law enforcement can take the initiative to obtain a sample for a toxicology laboratory if the victim reports being involuntarily drugged, or if the victim voluntarily ingested a drug, and the sample is obtained soon enough after the assault.

EVAWI: To assist law enforcement with identifying laboratories capable of testing for these drugs, the Society of Forensic Toxicologists (SOFT) Drug-Facilitated Sexual Assault (DFSA) Committee created a document with the recommended maximum detection limits for common DFSA drugs and metabolites in urine samples.

Herb Tanner: Even when law enforcement obtains a blood or urine sample from the victim very soon after the assault, some drugs may still not be detected in forensic laboratories. It's important to know what the law is in your jurisdiction, particularly what is required to prove a drug-facilitated sexual assault. Most laws do not require the prosecution to prove *what drug was used*, but simply to establish that the victim was incapacitated by some substance. This means that the case is proved using mostly circumstantial evidence. (Keep in mind that circumstantial evidence can be quite powerful. It is not some lesser form of evidence.)

For example, if a victim reports experiencing a level of intoxication after one drink that is out of proportion to what one would expect, we should question whether another intoxicant is present. A toxicologist can explain to the jury that, given certain variables, a person would not

experience extreme intoxication after just one drink. Therefore, another substance must have been ingested. The toxicologist does not necessarily need to know what that substance is, because they will testify that something other than one drink must have been ingested to cause the symptoms described by the victim.

When investigators suspect that some substance was covertly administered to the victim (e.g., slipped in a drink), attention needs to focus on the suspect's statements and actions. If probable cause can be established to obtain a search warrant of the suspect's home, we might find the drug, its precursors, or drug paraphernalia. In addition, there may be other victims who describe similar experiences with the same suspect. It all begins with listening carefully to the victim's account and conducting a thorough investigation. The prosecution then has to use the circumstantial evidence to re-create the reality of the crime for the judge or jurors.

Can you comment on the campaigns, seen on both campuses and military installations, which suggest that if the victim was drinking at all, that makes it rape?

Herb Tanner: The issue of consent is complex when alcohol is involved, and this is perhaps more fraught on college campuses than other places. I think that when campuses define consent in this way it actually creates more problems than are solved. For one thing, that simply doesn't recognize the reality of human social interaction, on or off campus. Students have told me that once they hear this they tune out everything else, because it is simply too divorced from reality.

As a prosecutor, I am troubled by the difference between how the criminal law treats voluntary alcohol intoxication and how student conduct codes define consent and misconduct. Make no mistake, colleges are free to define sexual misconduct in any way they feel is most consistent with Title IX and the educational purpose of the institution. But misconduct often becomes conflated with sexual assault, confusing everyone. If misconduct is going to be defined as sexual activity with someone who has had any alcohol, then the students should be told that the criminal law defines consent and sexual assault very differently.

How do I address the attitudes (when teaching prevention strategies) that people who drink, sometimes excessively, are somehow complicit in their own victimization?

Wendy Patrick: When teaching prevention strategies, the attitudes you mention might be addressed by encouraging your audience to view excessive drinking as part of a risk assessment analysis, not a "blame" game. Anything that increases vulnerability to assault is a risk factor, but it is not legally considered "contributory negligence" (to borrow a phrase from tort law) in criminal court. Jurors need to be educated that an intoxicated victim deserves the same justice as a sober victim; the law does not distinguish between classes of victims in sexual assault cases. It is our goal to ensure that jurors to not make that unfair distinction either.

Herb Tanner: We flip the concepts of judgment and responsibility in sexual assault cases in a way that we don't do in any other case. For example, a person may have exhibited poor judgment by getting drunk, but the responsibility for any crime still rests solely on the

perpetrator. I like to use examples for jurors (and anyone else) of what it would be like if we treated other crimes like sexual assault. One example: Because I live in a rural community, my neighbors often do not lock their doors when they are away. But if we catch a burglar in my neighbor's house, do we let them go and say to the neighbor, "Well, what did you expect when you left your door unlocked?" What does it mean to not lock your door? It's a judgment call, and it means you are contributing to your vulnerability. But what does your vulnerability mean? Nothing, unless there's someone out there who is willing to exploit it.

The bottom line is this: People are often extremely willing to say that sexual assault is "different," without explaining how or why. Yet it is different mostly in our willingness to readily assign blame to victims who exercise what we might perceive as poor judgment. There may be many reasons for such willingness. Acknowledging that the victim's judgment does not make the victim responsible means recognizing that we are all vulnerable, no matter how good a life we lead. That's not an easy thing to do, so we protect ourselves by saying bad things cannot happen to us because we would never make the bad judgment calls about drinking made by a victim. Flipping judgement and responsibility also fits neatly into the mistaken belief that most sexual assault complaints are false. The victim has to explain or excuse her "poor judgment", so the victim chooses to make a false report of rape to explain why she got drunk and had sex and the belief that most reports are false. There are ways to challenge that mistaken belief directly, but not in the courtroom. So we have to educate jurors by analogy.

EVAWI: For more information on common misconceptions about sexual assault victims and false reports, see our OnLine Training Institute (OLTI) module entitled, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault.*

I work at a university and students are often sexually assaulted by "a friend" when they are inebriated. Many students report no marks and have no memory of the assault. Typically, they wake up naked, and have no recollection of what happened when they "come to," so they struggle to connect the pieces that they were sexually assaulted. In cases like this, what exactly would law enforcement look at? Please keep in mind that students do not always come to the conclusion that they have been assaulted.

Wendy Patrick: Law enforcement investigators look for circumstantial evidence of sexual assault, since direct evidence (a direct account/ observation of the defendant's actions) is often missing. This can include documentation from a medical forensic exam, statements from other witnesses, video from security cameras, photographs, etc. In court, circumstantial evidence is as powerful as direct evidence in proving the crime. Again, remember that the Brock Turner case involved a victim who was unconscious, yet two exchange students passing by witnessed the crime.

Herb Tanner: It is important to remember that the search for evidence continues, even if we don't find someone who actually witnessed the sexual assault. In addition to any circumstantial evidence that can establish the suspect's predatory behavior before and after the assault, there might be other compelling evidence based on how the victim behaves after the assault. Did the victim leave school? Miss or fail exams? Withdraw from friends and family? Increase

substance use? There are many reactions that we see among sexual assault victims that are inconsistent with the experience of having consensual sex.

I am wondering whether a female can perpetrate an alcohol-facilitated rape upon a male, in a scenario where they get the male intoxicated in order to violate them?

Wendy Patrick: Women are convicted of sexual assault in the same way that men are – based on evidence that their behavior meets the elements of a criminal offense. Modern laws are typically phrased without respect to gender. For more information, please see the database of state laws offered by RAINN (Rape, Abuse, and Incest National Network).

Are you seeing victims with PTSD, chronic pain, or other illnesses that put them at higher risk for sexual assault – both because they are medicated (even if they are not drinking or using recreational drugs) and/or because perpetrators identify their fragility. They may also be engaging in risky sexual behaviors and/or placing their trust in the wrong people. These victims may be okay with initial sexual contact, but then say "no." How are you seeing them viewed?

Wendy Patrick: Yes. The conditions you mention render a victim vulnerable, and there are always perpetrators looking for vulnerable victims who will not resist an assault, or will be seen as having credibility challenges (e.g., due to the physical or emotional condition). I have had many cases where defendants have actively sought out such victims, knowing they will be unlikely to be believed due to their condition or medication regimen – particularly when using any type of medication that causes drowsiness, confusion, or other altered mental states.

Can you discuss the issue of consent for a medical forensic exam when the victim is incapacitated?

Wendy Patrick: You will have to refer to your state laws on issues of consent to medical forensic exams under this condition.

EVAWI: The following is an excerpt from our OLTI module, *Successfully Investigating Sexual Assault Against Victims with Disabilities.* For more information, please see the module.

General principles of informed consent

When evaluating the question of whether or not someone can consent to a medical forensic examination, it is important to keep in mind that the doctrine of informed consent is based on two principles. First, any individual has a right to determine what happens to his or her own body. Second, it is the duty of the clinician performing any procedure to provide the patient with enough information to choose between the procedure versus any alternate treatment options, and to evaluate the risks, benefits, and likelihood of success or failure for each option (Pierce-Weeks & Campbell, 2008).

There are many times when a person is unconscious or severely incapacitated due to alcohol or drugs (either prescribed or recreational), but a sexual assault is suspected and a medical

forensic exam is warranted. The typical response in such a situation is simply to wait to conduct the exam until the person has sobered up and regained their capacity to consent. The determination of when the victim is capable of consenting to the exam will be made by the health care provider, not law enforcement.

However, other options are available, as they are in cases where the victim has a severe cognitive disability, rather than incapacitation due to drugs or alcohol.

Generally speaking, there are three approaches. First, law enforcement may be able to obtain the consent of a legal guardian. Second, the health care professional may be able to conduct certain components of the examination and treatment in response to a medical emergency. Third, there are certain situations where a victim under the age of 18, or a dependent adult, is taken into protective custody – typically when the suspect is a legal guardian or caregiver for the victim. In this situation, the protection agency (e.g., Adult Protective Services, Child Protective Services) and/or the investigator might have the legal authority to authorize a medical forensic examination. Each of these scenarios is discussed below.

Obtaining consent from others

In cases where a person with a disability is unable to provide informed consent to a medical forensic examination, the most straightforward response is to obtain consent from the person's legal guardian. However, if there is no guardian, or if the victim's legal guardian is the suspect in the case, law enforcement can obtain a court order or warrant to have a medical forensic examination conducted in a non-emergency situation. Investigators are encouraged to consult with their prosecuting attorney's office as early as possible when faced with such a situation.

On our website, we have posted a sample affidavit for a search warrant to obtain a medical forensic examination that can be used as a template for situations where there is no legal guardian for the victim or the victim's legal guardian is a suspect in the case.

A health care provider may also determine, in her/his professional opinion, that evidence collection is in the patient's best interest. This determination is typically made in a situation where the victim is incapable of providing informed consent due to a longer-term medical condition or permanent disability – and evidence may be lost if it is not collected right away (e.g., the patient is going in for surgery, or getting a Foley catheter). In this scenario, it is widely considered to be permissible for the health care provider to collect and document forensic evidence, including clothing, hair, and swabs from skin and orifices. The Indiana Senate even introduced a bill to codify this presumption of implied consent in such a situation. On January 7, 2014 they introduced Senate Bill 255 to clarify that health care providers can conduct a medical forensic examination without the consent of the patient, if the patient is unconscious, the provider has a reasonable suspicion that the patient may be the victim of a sex crime, and a person authorized to give consent on behalf of the patient is unavailable or suspected of being the perpetrator of the crime.

When evidence is collected because it is believed to be in the patient's best interest, or based on concerns that emergency medical treatment will potentially destroy biological evidence, it

should be stored at the medical facility until consent can be obtained from the patient or the legally authorized guardian, or until power of attorney or a court order can be provided. At that point, the evidence can be transferred to law enforcement

Emergency medical care

Most forensic examinations are not considered medical emergencies. However, some situations do require emergency medical care, and treatment will generally be provided by a health care professional any time the potential harm from the failure to treat is greater than the treatment. Consent for medical treatment is inferred, for example, when a person is found unconscious, or when an emergency necessitates immediate treatment to prevent serious harm or death (Pierce-Weeks & Campbell, 2008).

It is important to keep in mind, however, that this is not an evidentiary issue. Rather, it is an ethical and moral responsibility that health care providers have toward their patients. While any evidence obtained without the patient's consent in such a situation will most likely be admissible in court, the purpose of an examination conducted in such a situation is to provide *medical treatment,* not to collect evidence. In the absence of a state law stating otherwise, hospitals and health care providers (including forensic examiners) do not have a legal duty or obligation to collect forensic evidence.

No forced examinations

Unfortunately, there are times when family members or other authorities might want to force a medical forensic examination when the victim is not consenting or is clearly uncomfortable with the procedure. This is never an acceptable practice, as clearly stated in the *National Protocol for Sexual Assault Medical Forensic Examinations:*

> *In all cases, the medical forensic examination should never be done against the will of patients. Responders should not touch patients or otherwise perform exam procedures without their permission* (Office on Violence Against Women, 2013, p. 44).

Health care providers also cannot be forced to conduct an exam, or be required to collect certain types of evidence. Although a warrant might authorize the collection of certain evidence, it does not mandate that this will happen or identify that a certain person must do it. In at least two high profile cases, however, emergency room nurses have been arrested when they refused to collect forensic evidence.[1] Again, this is never an acceptable practice as the health care provider is under no legal obligation to collect evidence in any type of scenario.

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[1] *Justice Served*, by Robin Hocevar, posted June 2, 2010 on the Advance Healthcare Network for Nurses.

Salt Lake City nurse arrested for refusing request for patient's blood. *ABC News Videos,* September 2, 2017.

Mayor shares update on nurse arrest investigation. Good 4 Utah, September 13, 2017.

Develop policies and protocols in advance

While many professionals have expressed concern about these issues, and a few programs have developed policies to address them, most forensic examiners struggle with the question of what to do when a patient is unable to consent to a medical forensic exam and a surrogate is not available to provide consent on the patient's behalf (see, for example, Eiselein, Hunt, Peth & Sellas, 2008). Scenarios such as those outlined above should be considered and discussed in advance, so written policies and practices can be developed before the need for them arises. It is critical to take multidisciplinary perspectives into account during this process, so this task is best undertaken within the context of a Sexual Assault Response and Resource Teams (SARRTs). Policies must also ensure that victims with disabilities have the same rights as other victims to have an advocate or other support present to accompany them during the examination.

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