



Maryland Sexual Assault Evidence Kit Policy and Funding Committee

COMAR 02.08.01–.04 (2020)

FREQUENTLY ASKED QUESTIONS

The General Assembly directed the Office of the Attorney General (OAG) to adopt regulations to support the uniform statewide implementation of MD. CODE, Crim. Proc. § 11-926 *et seq.* (2020), which establishes the state’s victim notification, testing, and sexual assault evidence kit (SAEK) retention requirements.

Originally adopted in October 2018, OAG recently updated its regulations to: (1) incorporate the new statewide testing criteria which went into effect on January 1, 2020; and (2) memorialize the Sexual Assault Evidence Kit Policy and Funding Committee’s (SAEK Committee) newly established Untested Kit Review process—an independent process to review law enforcement decisions not to test a SAEK—pursuant to Sections 11-927(e)(1)(viii) and (f) of the Criminal Procedure Article.

The SAEK Committee issues the below guidance to assist law enforcement agencies (LEAs) and other stakeholders in successfully implementing the new regulations. If you have additional questions, please contact Zenita Wickham Hurley, SAEK Committee Chair at zhurley@oag.state.md.us.

1. If the victim wishes to remain anonymous, who is responsible for advising the victim of their right to file a criminal complaint at a future time pursuant to COMAR 02.08.02.02(A)?

As a best practice, health care providers, such as forensic nurse examiners, should advise victims who wish to remain anonymous of their right to file a criminal complaint at a later date. This responsibility rests with health care providers because in most instances, victims will first convey their intent to remain anonymous to the health care provider. It is then critical for the health care provider to inform the victim that they can file a complaint and activate the case at a later date.

Although this responsibility generally rests with health care providers, it in no way prevents LEAs from advising Anonymous victims of their right to file a complaint. For example, if an LEA is contacted by a victim who wishes to remain anonymous, the LEA may advise the victim of their right to activate the case.

The Governor’s Office of Crime Prevention, Youth, and Victim Services in collaboration with the Maryland Hospital Association, Maryland Coalition Against Sexual Assault, Maryland State Police, and other members of the SAEK Committee are working to develop a template form that



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will list the relevant laws and policies governing SAEKs, including an Anonymous victim’s right to file a criminal complaint. The template document will also provide the victim with a list of resources. It is intended that health care practitioners will provide this form to victims at the time of the sexual assault forensic exam. This will help ensure that victims are informed of the laws governing the handling of SAEKs in Maryland and meet the mandate of COMAR 02.08.02.02(A).

2. Should an LEA test a kit when the victim has withdrawn consent for analysis?

No, consistent with MD. CODE, Crim. Proc. §11-926(e)(3), an LEA should not submit a sexual assault evidence kit for testing if the victim does not consent to analysis. This prohibition extends to those cases where consent was originally given or implied, but later withdrawn. The key consideration is that the victim’s withdrawal of consent to test must be clearly documented in the record.

There are several ways to document a victim’s declination to have their kit tested. Effective October 1, 2020, LEAs are prohibited from presenting victim’s with “waiver of rights forms”—forms that purport to relieve the agency of an obligation to the victim or define the scope of the investigation or prosecution of the alleged sexual assault.¹ Thus, LEAs may not document the victim’s withdrawal of consent to test by presenting the victim with a form indicating such. However, agencies may document a victim’s withdrawal of consent for analysis in other ways, including videotaping or otherwise recording victim interactions, as well as documenting the case file.

If the victim makes clear that they do not want their kit tested and this decision is adequately documented, then the kit should not be tested, per MD. CODE, Crim. Proc. §11-926(e)(3) (2020). Sometimes, when a victim is nonresponsive or does not wish to cooperate with the investigation, law enforcement will characterize this as a withdrawal of consent to test. However, a declination to participate in the investigation is not equivalent to a withdrawal of consent to test. Maryland does not require law enforcement to obtain a victim’s consent for testing prior to submitting a SAEK for analysis. Maryland has long operated on the presumption that if a victim obtains a sexual assault forensic exam and proceeds with filing a police report, then the victim consents to having their kit tested. In the absence of a clear statement to the contrary, the kit should be tested.

¹ S.B. 807 (2020)