



## Rape Kits and Defense Litigation

When a defendant faces rape charges, there are several things to keep in mind when building a criminal defense case concerning rape kits. When speaking about these kits, it is essential to consider precisely how the evidence is gathered and stored and about the issue of chain of custody.

The first thing to remember is that rape kits can help build a strong defense case, depending on the details of the case. For a defendant who is wrongly accused, the evidence found in a rape kit can undermine the allegations, whether because the defendant's DNA is not found in the rape kit or because the rape kit does not support the alleged victim's allegations. Defendants can therefore use the rape kit results to their advantage.

The training of the nurse who performed the kit collection may, if necessary, be brought into question. If the nurse was not specifically trained as a Sexual Assault Nurse Examiner (SANE), they might not have had the skills and knowledge necessary to perform the exam correctly. And, even if they were trained as a nurse examiner, there may have been a mistake in how the exam was performed and the evidence collected and sealed. For example, we have litigated cases where the internal and external collection swabs were sealed in the same bag. Therefore, all swabs were contaminated with the defendant's DNA profile. Since the victim's allegations included penetration, the swabs (and any obtained DNA profile) were excluded.

Another common issue we see is how the SANE determines whether genital injury exists in an alleged victim. There are multiple genitalia visualization tools at a SANE's disposal (digital cameras, colposcopes, toluidine blue dye (TBD)); however, the consistent utilization of these adjuncts varies. For example, TBD is a blue medical dye that gets absorbed into areas of broken skin and wounds. All SANEs visually inspect patients, but not all utilize a magnifier, and, in our experience, even fewer use TBD. When reviewing a SANE's examination, it is common to see "no injuries noted regarding the genitalia." This is accurate because they did not see any injuries with the naked eye based on their visual inspection. However, when we review the visualization techniques utilized and see that a magnifier, camera, or TBD were not used, it impedes our ability to verify or refute any rape kit findings. A defense attorney should not overlook this information.

Another point to consider is that establishing the chain of custody is essential when a rape kit is involved. Due to the risk of tampering and contamination, gaps in the chain of custody can make it so that prosecutors do not have a compelling case in offering a rape kit into evidence. As legal nurse consultants, we have analyzed defense cases where the evidence kits were not routinely sealed until a peer review of the paperwork was completed. This delay would be hours, days, or weeks after collecting evidence. In these cases, the kit was often sealed by a SANE who was not involved with the evidence collection or case; therefore, the evidence was considered mishandled and exposed to tampering or contamination.

These are all issues that can be explored in building a defense against rape charges where a rape kit is at issue. At Trifecta Legal Nurse Consulting, we have a dedicated team of SANE legal nurses who decipher rape kit results and explore any relevance with rape kit collection, storage, and chain of custody.