

STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED RULES

Rule No.: Wis. Admin. Code ch. Jus 9.

Relating to: Procedures and standards for the collection, handling, submission, retention, storage, DNA analysis, and use of biological evidence from sexual assault crime scenes and from sexual assault victims.

1. Description of the objectives of the rules:

The State of Wisconsin Department of Justice proposes to make additions and amendments to Wis. Admin. Code ch. Jus 9, which governs the procedures for the submission of human biological specimens to the Department of Justice crime laboratories for DNA analysis, the analysis of such specimens, the maintenance of a data bank of DNA analysis data, and the use of the DNA data bank.

The proposed additions and amendments to Wis. Admin. Code ch. Jus 9 will relate to procedures and standards for the collection, handling, submission, retention, storage, DNA analysis, and use of biological evidence in cases of alleged or suspected sexual assault, where the biological evidence is obtained from the crime scene or from a forensic examination of the sexual assault victim. The proposed rule will cover both cases in which no suspect in the sexual assault has been identified and cases in which a suspect in the sexual assault has been identified.

The proposed rule will cover matters related to biological evidence obtained from a sexual assault crime scene or from a sexual assault victim. Matters related to biological specimens that are or have previously been obtained from an individual convicted of or arrested for a crime are covered by existing provisions of Wis. Stat. ch. Jus 9 and are not part of the scope of the currently proposed rule.

The proposed rule will cover the following subject areas:

- The collection and handling of biological evidence by a law enforcement agency or by a health care professional from a sexual assault crime scene or from a sexual assault victim.
- The information and options about which victims of alleged or suspected sexual assault must be notified by law enforcement personnel, health care professionals, and sexual assault service providers.
- The submission to the crime laboratories of biological evidence that has been obtained by a law enforcement agency or by a health care professional from a sexual assault crime

scene or from a sexual assault victim, including the circumstances in which such evidence must be sent to the crime laboratories, who is responsible for submitting such evidence to the crime laboratories, and the time requirements for such submissions.

- The retention, storage, and DNA analysis by the crime laboratories of biological evidence that has been obtained from a sexual assault crime scene or from a sexual assault victim, including the circumstances under which such evidence will be stored or destroyed.
- The use, for law enforcement and criminal justice purposes, of the DNA analysis of biological evidence that has been obtained from a sexual assault crime scene or from a sexual assault victim.
- Protecting the confidentiality of the personal identifying information of sexual assault victims from whom biological evidence has been obtained, and the circumstances under which such information can or cannot be released to law enforcement.

2. Description of existing policies relevant to the rule and of new policies proposed to be included in the rule and an analysis of policy alternatives; the history, background and justification for the proposed rule:

Under a variety of Wisconsin Statutes, certain persons are required to submit biological specimens to the crime laboratories in DOJ for DNA analysis. In 2013 Wisconsin Act 20 and 2013 Wisconsin Act 214, the State of Wisconsin substantially revised those statutes. On September 20, 2015, DOJ promulgated permanent administrative rules that repealed and recreated Wis. Admin. Code ch. Jus 9 to accommodate those statutory changes.

In addition to the statutes that require certain persons to submit a personal biological specimen to the crime laboratories, there are also two statutory provisions that specifically address matters related to biological evidence that is obtained not from such persons, but rather from a sexual assault crime scene or from a sexual assault victim.

First, under s. 165.77(7), Stats., in any case of alleged or suspected sexual assault, if a Wisconsin law enforcement agency or a health care professional collects evidence, the agency or professional shall follow the procedures specified in DOJ rules promulgated under s. 165.77(8), Stats., and the DOJ crime laboratories shall, in a timely manner, perform DNA analysis of any biological specimens submitted to them.

Second, under s. 175.405, Stats., in any case of alleged or suspected sexual assault, if a Wisconsin law enforcement agency collects evidence upon which DNA analysis can be performed, and the person who committed the sexual assault has not been identified, the agency shall follow the procedures specified in DOJ rules promulgated under s. 165.77(8), Stats., and shall, in a timely manner, submit the evidence it collects to the DOJ crime laboratories.

The rule proposed here will carry into effect the legislative policies in ss. 165.77(7) and 175.405, Stats., by establishing specific procedures, time limits, and standards for the collection, handling,

submission, retention, storage, DNA analysis, and use of biological evidence in cases of alleged or suspected sexual assault, where the biological evidence is obtained from the crime scene or from a forensic examination of the sexual assault victim.

3. Statutory authority for the rule (including the statutory citation and language):

A. Section 165.77(7), Stats.

Whenever a Wisconsin law enforcement agency or a health care professional collects evidence in a case of alleged or suspected sexual assault, the agency or professional shall follow the procedures specified in the department's rules under sub. (8). The laboratories shall perform, in a timely manner, deoxyribonucleic acid analysis of specimens provided by law enforcement agencies under sub. (2). The laboratories shall not include data obtained from deoxyribonucleic acid analysis of those specimens in the data bank under sub. (3).

B. Section 165.77(8), Stats.

The department shall promulgate rules to administer this section.

C. Section 175.405(2), Stats.

Whenever a Wisconsin law enforcement agency collects, in a case of alleged or suspected sexual assault, evidence upon which deoxyribonucleic acid analysis can be performed, and the person who committed the alleged or suspected sexual assault has not been identified, the agency shall follow the procedures specified in s. 165.77 (8) and shall, in a timely manner, submit the evidence it collects to a crime laboratory, as identified in s. 165.75.

4. Estimate of the amount of time that state employees will spend to develop the rule and of other resources necessary to develop the rule:

It is estimated that state employees will spend approximately 180 hours on the rulemaking process for the proposed rules, including research, drafting, and compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rule:

The proposed rule may affect the interests of law enforcement agencies, prosecutors, health care professionals, sexual assault service providers, and victims in cases of alleged or suspected sexual assault.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule:

The activities regulated by the proposed rules are affected by the federal Violence Against Women Act (VAWA) (codified in part at 42 U.S.C. §§ 13701–14040). Under the 2005 and 2013 reauthorizations of VAWA, states are required to pay for the cost of sexual assault forensic examinations and victims cannot be required to pay the initial cost of those examinations and then seek reimbursement. VAWA also requires states to pay for the examinations regardless of whether the victim has reported the crime to law enforcement.

The activities regulated by the proposed rules are also affected by the Sexual Assault Survivors' Bill of Rights Act of 2016, P.L. 114-236 (October 7, 2016). That Act gives sexual-assault victims a basic set of rights under federal law and provides increased transparency and support around the keeping and testing of sexual assault kits in federal criminal cases.

The rights provided under the Act apply to sexual assault cases tried in federal courts and crimes that occur across state lines, in a maritime jurisdiction, in the military, on tribal lands, and on federal property, including national parks, federal prisons, or other federal institutions. The rights provided under the Act, therefore, will apply in some, but not all, sexual assault cases in Wisconsin.

The Act ensures that sexual assault victims in federal cases may not be prevented from, or charged for, receiving a medical forensic examination; that they must be informed of any forensic or medical test results derived from such an examination, provided such disclosure will not impede or compromise an ongoing investigation; that the evidence gathered from such an examination shall be preserved without charge for 20 years or the duration of the applicable statute of limitations, whichever comes first; that victims may request to be notified 60 days before the evidence is destroyed and may request that the evidence be preserved for a longer period of time; and that victims shall be informed in writing of policies governing the collection and preservation of such evidence. 18 U.S.C. § 3772(a).

In addition to the specific rights afforded to sexual assault victims in federal cases, the Act also authorizes federal grants to states for the development of procedures to assist health care facilities, law enforcement agencies, and other entities providing services to sexual assault survivors with written notice regarding

(1) the right not to be charged fees for or otherwise prevented from pursuing a sexual assault evidence collection kit;

(2) the right to have a sexual assault medical forensic examination regardless of whether the survivor reports to or cooperates with law enforcement;

(3) the availability of a sexual assault advocate;

(4) the availability of protective orders and policies related to their enforcement;

(5) policies regarding the storage, preservation, and disposal of sexual assault evidence collection kits;

(6) the process, if any, to request preservation of sexual assault evidence collection kits or the probative evidence from such kits; and

(7) the availability of victim compensation and restitution.

42 U.S.C. § 10603f(b).

The activities regulated by the proposed rules are also affected by the federal statutes and regulations that govern the Combined DNA Index System (“CODIS”), which is the program of support for state and local criminal justice DNA databases operated by the Federal Bureau of Investigation, pursuant to 42 U.S.C. § 14132 and 28 C.F.R. Part 28. CODIS includes the National DNA Index System (“NDIS”), a national database that contains DNA analysis data contributed by forensic laboratories at the federal, state, and local levels. The use of DNA profiles created by the state crime laboratories under the proposed rules will include cross-matching those profiles against data contained in the NDIS.

Forensic laboratories participating in NDIS are required to be accredited by a nationally recognized forensic science association, to undergo an external audit every two years to demonstrate compliance with quality assurance standards established by the FBI, and to disclose DNA samples or analyses only in accordance with federal privacy requirements. *See* 42 U.S.C. § 14132(b)(2) and (3). Access to NDIS is subject to cancellation if the quality control and privacy requirements are not met. 42 U.S.C. § 14132(c).

7. Anticipated economic impact of proposed rules.

The proposed rules will have a negligible effect on the economy as a whole because the programs affected by these rules are not large enough to impact the economy of the entire state.

The proposed rules are expected to have little or no economic impact on non-governmental persons and entities.

Implementation costs for the proposed rules should be minimal. There may be some increase in the amount of biological evidence transmitted to the state crime laboratories by law enforcement agencies and some increase in the number of DNA analyses conducted by the state crime laboratories. The economic impact of any such increases, however, should be minimal because the proposed rules are expected to be consistent with existing procedures for the transmission and analysis of biological evidence.

Contact Person: Assistant Attorney General Thomas C. Bellavia, (608) 266-8690