

STATE OF WISCONSIN
Department of Justice

**ORDER OF
THE WISCONSIN DEPARTMENT OF JUSTICE
TO ADOPT RULES**

The Wisconsin Department of Justice (“DOJ”) finalizes an order to create ch. Jus 20, relating to the storage and processing of sexual assault kits.

The statement of scope for these rules, SS 067-22, was approved by the Governor on July 21, 2022, published in the Administrative Register, No. 800A2, on August 8, 2022, and approved by the Attorney General on August 19, 2022. DOJ submitted the final draft rules to the Governor on November 7, 2022. The Governor approved these rules on November 10, 2022.

**ANALYSIS PREPARED BY THE
WISCONSIN DEPARTMENT OF JUSTICE**

Statutes interpreted: ss. 165.775(1) to (5), Stats.

Statutory authority: ss. 227.11(2)(a) and 165.775(6), Stats.

Explanation of agency authority:

The promulgation of these rules is supported by ss. 227.11(2)(a) and 165.775(6), Stats.

Section 227.11(2)(a), Stats., provides:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency’s rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency’s rule-making authority

beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Section 165.775(6), Stats., was created by 2021 Wis. Act 116, § 2 and requires DOJ to promulgate rules to administer s. 165.775, Stats. Section 165.775(6), Stats., provides that “[t]he department shall promulgate rules to administer this section.” 2021 Wis. Act 116, § 2 provides, in pertinent part:

Section 2. 165.775 of the statutes is created to read:

165.775 Sexual assault kits. (1) . . .

(6) The department shall promulgate rules to administer this section.

These statutes and 2021 Wis. Act 116 expressly confer on DOJ the power to promulgate rules interpreting the provisions in s. 165.775, Stats., that are to be enforced or administered by DOJ to effectuate the purpose of those statutory provisions and the act, as long as the rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the promulgation of the rules is appropriate to comply with the Legislature’s direction that DOJ promulgate rules, as described in the preceding sections of this statement. DOJ further finds that the rules:

- do not exceed the bounds of correct interpretation of s. 165.775, Stats.;
- are authorized by the statutes and act described above and are not based on authority derived from any other statutory or nonstatutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of the specific requirements of s. 165.775, Stats., and 2021 Wis. Act 116 and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in s. 165.775, Stats.

For these reasons, the rules are authorized by ss. 227.11(2)(a) and 165.775(6), Stats., as created by 2021 Wis. Act 116.

Related statutes or rules: ss. 165.775, 165.776, Stats.

Plain-language analysis:

In 2021 Wis. Act 116, the State of Wisconsin established statutes governing the submission and storage of sexual assault kits, which contain evidence collected as part of sexual assault forensic examinations of victims. The law describes options provided to victims of sex offenses. Victims are provided a choice at the time of evidence collection to either report the sexual assault crime to law enforcement and have their kit submitted for processing, or not report the crime to law enforcement or have their sexual assault kit analyzed. The law also creates timeframes associated with notifications and transfers of the sexual assault kit between health care professionals, law enforcement agencies, and the Wisconsin State Crime Laboratories. The law prescribes timeframes for storage of sexual assault kits applicable to both law enforcement agencies (concerning kits associated with reported crimes) and the Wisconsin State Crime Laboratories (concerning kits associated with non-reported crimes). The rules are specifically intended to carry out the legislative intent of 2021 Wis. Act 116.

2021 Wis. Act 116 impacts the following DOJ criminal justice partners, specified in s. 165.775, Stats., as follows:

A. Health Care Professionals

Under s. 165.775(2)(a) and (b), Stats., health care professionals must either (1) notify a Wisconsin law enforcement agency within 24 hours after collecting a sexual assault kit from a reporting victim, or (2) submit a sexual assault kit within 72 hours after collection to the Wisconsin State Crime Laboratories for storage, when the victim chooses not to report the crime to law enforcement. The statute does not, however, define procedures for these practices. The rules develop a required practice and define processes for those criminal justice partners impacted by s. 165.775(2)(a) to (b), Stats., namely, health care professionals.

B. Law Enforcement Agencies

Under s. 165.775(3)(a) to (c), Stats., law enforcement agencies are directed to respond and take possession of a sexual assault kit (from a reporting victim) from health care professionals within 72 hours of being notified, and then must submit the kit to the Wisconsin State Crime Laboratories for processing within 14 days after taking possession of the kit. Additionally, the statute directs law enforcement agencies to submit a sexual assault kit to the Wisconsin State Crime Laboratories for storage when, prior to the submission of the kit to the crime laboratory for processing, a victim provides notification that they choose to revoke their consent and no longer want to proceed with the analysis of their kit. The statute does not, however, define procedures for these practices. The rules develop a required practice and define processes for those criminal justice partners impacted by s. 165.775 (3)(a) to (c), Stats., namely, law enforcement agencies.

C. Wisconsin State Crime Laboratories

Under s. 165.775(4)(a) and (b), Stats., the Wisconsin State Crime Laboratories is directed to take possession from health care professionals of a sexual assault kit from a victim who chooses not to report a crime to law enforcement and has not consented to have their kit analyzed. These provisions also direct the Wisconsin State Crime Laboratories to store the sexual assault kits received from these non-reporting victims for a period of ten years. During this ten-year storage period, the victim can choose to file a report of the crime to law enforcement and provide consent for the Wisconsin State Crime Laboratories to analyze their kit. Once the Wisconsin State Crime Laboratories receives notification of the report and consent for analyzing a victim's sexual assault kit from the investigating law enforcement agency, the kit would be removed from storage and processed. The statute does not, however, define procedures for these practices. The rules develop a required practice and define processes for those criminal justice partners impacted by s. 165.775(4)(a) to (b), Stats., namely, the Wisconsin State Crime Laboratories.

In addition to processes and procedures relating to specific DOJ criminal justice partners, 2021 Wis. Act 116 addresses post-processing sexual assault kit storage by law enforcement agencies. Specifically, under s. 165.775(5), Stats. law enforcement agencies are directed to take possession of a sexual assault kit from the Wisconsin State Crime Laboratories after processing is completed. The statute further prescribes a storage timeframe for the law enforcement agency: "notwithstanding s. 968.205, it shall securely store the sexual assault kit for a period of 50 years, or until the date of the expiration of the statute of limitations, or until the end of the term of imprisonment or probation of a person who was convicted in the sexual assault case, whichever is longer." s. 165.775(5), Stats. The rules develop a required practice and define processes for those criminal justice partners impacted by s. 165.775(5), Stats., namely, law enforcement agencies.

Consistent with the above information, the rules cover five subject areas, which are separated into different sections.

First, section Jus 20.01 describes DOJ's authority for promulgating the rules, with specific citations to the enabling act and statute.

Second, section Jus 20.02 includes four definitions of phrases that are used in the rules. These phrases, "health care professional," "reporting victim," "sexual assault forensic examination," and "sexual assault kit," are used in the rules to specify particular types of health care personnel, examinations, kits, and victims who will be impacted by the procedures that the rules establish. Defining these terms is important to readers of the rules because these defined terms are terms of art used in the field of law enforcement, and lay people would not necessarily be familiar with them. Further, the phrases "health care professional," "sexual assault forensic examination," and "sexual assault kit" are defined in the Wisconsin Statutes and should be defined consistently in the rules.

Third, section Jus 20.03 establishes procedures relating to the storage and processing of sexual assault kits pertinent to health care professionals. After conducting a sexual assault forensic examination where a sexual assault kit is collected, health care professionals are generally required to notify the law enforcement agency in the jurisdiction where the examination occurred within 24 hours after collecting the kit. But, when a victim chooses not to report a sexual assault to a law

enforcement agency and a sexual assault forensic examination has been performed on the victim, health care professionals are required to send the kit to the Wisconsin State Crime Laboratories within three days of collecting the kit.

Fourth, section Jus 20.04 establishes procedures relating to the storage and processing of sexual assault kits pertinent to law enforcement agencies. Law enforcement agencies must take possession of sexual assault kits within three days of being notified by the health care professional who collected the kit. Law enforcement agencies must submit a sexual assault kit from a reporting victim to the state crime laboratories for processing within two weeks of receiving it. If the law enforcement agency is informed that a reporting victim does not want his or her kit tested before it is submitted to the state crime laboratories, that law enforcement agency must submit the kit within two weeks to the state crime laboratories for storage. Law enforcement agencies must notify the state crime laboratories of a report from a victim of a sex offense to allow for the state crime laboratories to process a stored kit in the state crime laboratories' possession.

Lastly, section Jus 20.05 establishes procedures relating to the storage and processing of sexual assault kits pertinent to the state crime laboratories. The state crime laboratories must process sexual assault kits from reporting victims that are submitted by law enforcement agencies. The state crime laboratories must return processed sexual assault kits to the submitting law enforcement agency after processing the kit. The state crime laboratories must store submitted sexual assault kits from victims who have chosen not to report the sexual assault to a law enforcement agency for 10 years from the date of that the sexual assault forensic examination occurred. The state crime laboratories must destroy the sexual assault kit of a non-reporting victim who does not provide a delayed report of a sexual assault to law enforcement within 10 years of the date of the victim's sexual assault forensic examination.

Summary of, and comparison with, existing or proposed federal regulations:

Congress enacted the Survivors' Bill of Rights Act of 2016, which was signed into law on October 7, 2016. *See* 18 U.S.C. § 3772. This law gives sexual assault survivors several rights, including: (1) the right not to be prevented from, or charged for, receiving a medical forensic examination; (2) the right to have a sexual-assault evidence collection kit or its probative contents preserved, without charge, for the duration of the maximum applicable statute of limitations or 20 years, whichever is shorter; (3) the right to be informed of any result of a sexual assault evidence collection kit, including a DNA profile match, toxicology report, or other information collected as part of a medical forensic examination, if such disclosure would not impede or compromise an ongoing investigation; (4) the right to be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit; (5) the right to, upon written request, receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal of the sexual assault evidence collection kit; and (6) the right to, upon written request, be granted further preservation of the kit or its probative contents. 18 U.S.C. §§ 3772(a)(1)–(3)(B).

18 U.S.C. § 3772 generally addresses the same activities that the rules address, namely, the storage and processing of sexual assault kits and related evidence. However, the federal law is about

providing specific rights to crime victims; whereas the rules establish how the Wisconsin Department of Justice will administer and execute the statutes governing storage and processing of sexual assault kits, namely s. 165.775, Stats.

In 2021, a bill was proposed in Congress to enact the Survivors' Bill of Rights in the States Act of 2021. *See* Survivors' Bill of Rights in the States Act of 2021, H.R. 4978, 117th Cong. § 1 (2021). The bill was introduced in the U.S. House of Representatives on August 6, 2021. It would create an incentive for states to put in place laws that provide to sexual assault survivors the rights, at a minimum, under 18 U.S.C. § 3772. It would enable the U.S. Attorney General to make grants to those states equal to 10 percent of the average of the amount of funding of the three most recent awards that a state received under part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. § 10441 et seq., commonly referred to as the STOP Violence Against Women Formula Grant Program.

This proposed legislation involves grant funding, and the rules do not address grants or funding sources for sexual assault kit analysis.

Lastly, 32 C.F.R. § 114, addressing "Victim and Witness Assistance" in cases involving offenses by military personnel, establishes certain rights for sexual assault victims. These include the rights to: (1) have a "sexual assault evidence collection kit or its probative contents preserved, without charge"; (2) be informed of the result of such kits; (3) be informed in writing of policies governing the collection and preservation of such kits; (4) upon written request, receive written notification from the appropriate official with custody not less than 60 days before the intended destruction or disposal of the kit; and (5) upon written request, be granted further preservation of such kits or their probative contents. 32 C.F.R. § 114.6(b)(1)(xi), (xii), (xiii), (xiv), (xv).

These federal regulations generally address the same activities that the rules address, namely, the storage and processing of sexual assault kits and related evidence. However, the federal regulations are about providing specific rights to victims of particular crimes by military personnel; whereas the rules establish how the Wisconsin Department of Justice will administer and execute the statutes governing storage and processing of sexual assault kits, namely s. 165.775, Stats.

Comparison with rules in adjacent states:

Illinois: In Illinois, the Sexual Assault Evidence Submission Act governs sexual assault kit evidence collection, storage, and processing. 725 ILCS 202. It includes provisions addressing: the submission, analysis, and inventorying of evidence; reporting regarding sexual-assault cases; rulemaking regarding evidence; a sexual assault kit evidence tracking system; and other related provisions. 725 ILCS 202/10 to 202/50. Similarly, the Sexual Assault Incident Procedure Act, 725 ILCS 203, includes provisions regarding: victim notification; sexual assault incident policies; reports by law enforcement officers; third-party reports; victim notice; release and storage of sexual assault evidence; and release of other information. 725 ILCS 203/11 to 203/35.

Iowa: In Iowa, Iowa Code section 709.10 governs evidence of sexual abuse. It establishes a sexual assault kit tracking system. I. C. A. § 709.10.1.c., 2.–3., 8.–9. The law addresses how health care providers and law enforcement agencies are to collect, process, and document sexual assault kit evidence. I. C. A. § 709.10.4.–5. Law enforcement agencies are required to store the kit for a minimum of 15 years or, in the case of a minor victim, for 15 years after the minor reaches the age of majority. I. C. A. § 709.10.6. The law addresses disposal of sexual assault kits. I. C. A. § 709.10.7. It also addresses victim consent. I. C. A. § 709.10.11.a.–e.

Michigan: In Michigan, the Michigan Legislature enacted the Sexual Assault Kit Evidence Submission Act in 2014. This law governs sexual assault kit evidence collection, storage, and processing, and it includes provisions that specifically address the duties of health care facilities, written victim consent, notice to law enforcement agencies, the duties of law enforcement agencies, and destruction of sexual assault kit evidence. Mich. Comp. Laws. Ann. §§ 752.931–.935.

Minnesota: In Minnesota, Minn. Stat. § 299C.106 governs sexual assault kit handling, submission, and storage. Specifically, the law requires law enforcement agencies to retrieve unrestricted sexual assault examination kits from health care professionals within 10 days of receiving notice that the kit is available for transfer. Minn. Stat. § 299C.106, subd. 2. Within 60 days of receiving an unrestricted sexual assault examination kit, a law enforcement agency must submit the kit for testing to a forensic laboratory. Minn. Stat. § 299C.106, subd. 3. The law also mandates that a uniform consent form be developed and distributed and that a searchable database providing sexual assault victims with information on the status of their individual sexual assault examination kit be maintained. Minn. Stat. § 299C.106, subsd. 3a., 3b.

Summary of factual data and analytical methodologies: The rules are predicated on legal analysis by DOJ staff of the language and requirements of 2021 Wis. Act. 116 and s. 165.775, Stats. Based on that analysis, DOJ has determined that the rules are necessary for DOJ to carry out its responsibilities under 2021 Wis. Act 116 and s. 165.775, Stats.

Fiscal estimate: DOJ has prepared a fiscal estimate that is being filed herewith.

Effect on small business: The rules will have no effect on small businesses.

Agency contact person:

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Place where comments are to be submitted and deadline for submission: Comments were required to be submitted to the contact person shown above by October 13, 2022, the date the

public hearing on these rules was conducted. Information regarding accessing the public hearing was published in the Wisconsin Administrative Register.

TEXT OF THE RULE

SECTION 1. Chapter Jus 20 is created to read:

CHAPTER JUS 20

STORAGE AND PROCESSING OF SEXUAL ASSAULT KITS

JUS 20.01 Authority. The Wisconsin Department of Justice has promulgated these rules pursuant to the authority granted by s. 165.775(6), Stats.

JUS 20.02 Definitions. In this chapter:

- (1) “Health care professional” has the meaning given in s. 165.775 (1) (b), Stats.
- (2) “Reporting victim” means a person who reports to a law enforcement agency that he or she was sexually assaulted.
- (3) “Sexual assault forensic examination” has the meaning given in s. 165.775 (1) (d), Stats.
- (4) “Sexual assault kit” has the meaning given in s. 165.775 (1) (e), Stats.

JUS 20.03 Health care professional procedures. A health care professional shall:

- (1) Except as provided in sub. (2), after conducting a sexual assault forensic examination where a sexual assault kit is collected, notify the law enforcement agency in the jurisdiction where the examination occurred within 24 hours after collection of the kit.

(2) When a victim chooses not to report a sexual assault to a law enforcement agency, send a collected sexual assault kit to the state crime laboratories for storage within 72 hours after collection of the kit.

JUS 20.04 Law enforcement agency procedures. A law enforcement agency shall:

(1) Upon being notified by a health care professional of the collection of a sexual assault kit, take possession of the kit within 72 hours.

(2) Upon taking possession of a sexual assault kit under sub. (1), send the kit to the state crime laboratories for processing within 14 days.

(3) When, after taking possession of a reporting victim's sexual assault kit from a health care professional, but before submitting the kit to the state crime laboratories for processing, the reporting victim notifies the law enforcement agency that the victim does not want to proceed with the analysis of the kit, submit the kit within 14 days to the state crime laboratories for storage.

(4) Notify the state crime laboratories whenever a victim, after having first chosen not to report a sexual assault as provided in s. JUS 20.03(2) or notified the law enforcement agency that the victim does not want to proceed with analysis of the kit as provided in sub. (3), notifies the law enforcement agency that the victim does want to proceed with analysis of the kit.

JUS 20.05 State crime laboratories procedures. The state crime laboratories shall:

(1) Process sexual assault kits from a reporting victim that are submitted by law enforcement agencies.

(2) Return processed sexual assault kits to the submitting law enforcement agency after processing.

(3) Securely store submitted sexual assault kits from victims who have chosen not to report the sexual assault to a law enforcement agency for 10 years from the date that the sexual assault forensic examination occurred.

(4) If, after 10 years from the date that the sexual assault forensic examination occurred, a law enforcement agency does not notify the state crime laboratories of a report of a sexual assault as provided in s. JUS 20.04 (4), destroy the sexual assault kit.

SECTION 2. EFFECTIVE DATE. These rules take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2) (intro.), Stats.

(END OF TEXT OF THE RULE)