



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

Josh Kaul
Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

DATE: January 11, 2024

TO: Richard Champagne
Acting Senate Chief Clerk
Room B20 Southeast, State Capitol
Post Office Box 7882
Madison, WI 53707-7882

Edward A. Blazel
Assembly Chief Clerk
17 West Main Street, Room 401
Madison, WI 53703

FROM: Josh Kaul, Attorney General
Wisconsin Department of Justice

**SUBJECT: Notice and Report for Final Draft Form of Proposed Rule
Clearinghouse Rule 23-044 – chapter Jus 21 (relating to the tracking of
sexual assault kits in sexual assault cases)**

Pursuant to s. 227.19 (2), Stats., the Department of Justice (DOJ) is submitting for legislative review the attached proposed rule in final draft form for Clearinghouse Rule 23-044, creating chapter Jus 21, relating to the tracking of sexual assault kits in sexual assault cases. DOJ submitted the final draft rule to the Governor on November 29, 2023. The Governor approved the final draft rule on December 14, 2023. The analysis required under s. 227.14 (2), Stats., is included in the proposed rule. Also attached is the Fiscal Estimate & Economic Impact Analysis and the Rules Clearinghouse report and comments.

Basis and Purpose

DOJ is promulgating the rule in chapter Jus 21, relating to the tracking of sexual assault kits in sexual assault cases, to comply with s. 165.776 (6), Stats, which states: “The department shall promulgate rules to administer this section.”

Public Hearings

On October 25, 2023, DOJ held a public hearing on the proposed rule. There were no comments received at the public hearing or in written form; therefore, DOJ did not make any changes to the proposed rule in response to comments.

Changes to the Analysis or Fiscal Estimate

DOJ revised the analysis to indicate the deadline for comments of November 1, 2023, (the date specified in the notice for the October 25, 2023, public hearing), and to reflect modifications DOJ made to the rule in response to the Rules Clearinghouse's comments. DOJ made no other changes to the analysis or fiscal estimate.

Responses to Rules Clearinghouse

The Rules Clearinghouse made recommendations and comments relating to the following:

Statutory Authority: DOJ removed the reference to s. 227.11 (2)(a), Stats., as recommended by the Rules Clearinghouse.

Form, Style and Placement in the Administrative Code: DOJ responds to the Rules Clearinghouse's comments as follows.

Comment 2.a.:In the rule summary, review and revise the plain language analysis to provide a present tense summary of the text of the proposed rule, rather than what the rule "would" do.

DOJ's response: DOJ adopted this recommendation.

Comment 2.b.: Throughout the proposed rule, various references are made to "the required fields defined by the Wisconsin Sexual Assault Kit Tracking System". However, s. 165.776 (3) (a) and (b), Stats., require entry of "information required in the department's rules". While such fields may vary over time depending on the specific electronic technologies used by the department to comply with s. 165.776 (2), Stats. (which requires the department to use electronic technologies to allow continuous, ongoing access to certain information), it may be helpful to identify certain minimum required information

by rule, rather than defer that requirement wholly to the system's defined fields. For example, the department could consider clarifying that a health care professional must, at a minimum, enter the date of receipt or other data points contemplated by the language of s. 165.776 (2) (a), Stats.

DOJ's response: DOJ did not make a change to the draft rules in response to this comment. As the comment observes, the required information fields may vary over time. Not specifying particular fields in the rule provides desired flexibility.

Comment 2.c.: In s. Jus 21.03, the designation for sub. (1) should be removed, as it is the only subunit in the section. Whenever a unit is divided into smaller subunits, at least two subunits must be created. [s. 1.10 (1) (a), Manual.]

DOJ's response: DOJ adopted this recommendation.

Comment 2.d.:Section Jus 21.04 (2) references situations in which a sexual assault kit does not contain the system's barcodes. However, ch. Jus 21 does not contain any other provisions addressing the administration of such barcodes. Because s. 165.776 (4), Stats., requires the department to promulgate rules to administer the tracking system, it may be appropriate for ch. Jus 21 to include, at a minimum, a requirement that the barcodes be used as part of the tracking system.

DOJ's response: DOJ removed the language "and where the kit does not contain the Wisconsin Sexual Assault Kit Tracking System barcodes" from s. Jus 21.04(2) of the draft rules in response to this comment.

Comment 2.e.: Section Jus 21.04 (3) and (4) both require a law enforcement agency to notify the state crime laboratories of certain information to either "assist" or "allow" the state crime laboratories in updating information in the system. The department could consider including an affirmative obligation for the state crime laboratories to enter such updates among the requirements applicable to the state crime laboratories under s. Jus 21.05.

DOJ's response: DOJ did not make a change to the draft rules in response to this comment. DOJ did not see a basis to impose specific obligations on the state crime laboratories.

Comment 2.f.: In s. Jus 21.04 (4), the abbreviation “s.” should be inserted before the reference to “Jus 20.03 (2)”.

DOJ’s response: DOJ adopted this recommendation.

Comment 2.g.: To avoid redundancy, the department could consider reorganizing s. Jus 21.05 with an introductory statement that reads, “The state crime laboratories shall enter the information for a sexual assault kit in the required fields defined by the Wisconsin Sexual Assault Kit Tracking System in all of the following circumstances:”.

DOJ’s response: DOJ adopted this recommendation.

Comment 2.h.: Under s. 165.776 (2), Stats., one of the purposes of the tracking system is to provide a victim access to information about the status of any sexual assault kit that the victim has provided. Specifically, the statute requires that the database allow a victim to anonymously track, and receive information relating to, the location and status of the victim’s kit. However, ch. Jus 21 does not contain any provisions regarding victims. While s. 165.776 (2), Stats., does not cross-reference the rulemaking authority under sub. (4), as done in sub. (3), it seems the general rulemaking authority under sub. (4) applies, as rules may be necessary to administer a victim’s access afforded under the statute.

DOJ’s response: DOJ revised the draft of s. Jus 21.01 in response to this comment to address both DOJ’s authority to promulgate the rules and the purpose for the rules.

Adequacy of References to Related Statutes, Rules and Forms: DOJ responds to the Rules Clearinghouse’s comments as follows.

Comment 4.a.: Throughout the proposed rule, the department could consider cross-referencing the authority for kit transfers under ch. Jus 20. For example, in s. Jus 21.05 (3), consider adding “as required under s. Jus 20.05 (2)” immediately prior to the comma.

DOJ’s response: DOJ revised the proposed rules as recommended by the Rules Clearinghouse in the second sentence of comment 4.a. DOJ did not adopt the recommendation in the first sentence of comment 4.a., as it was not necessary to include such cross-references.

Comment 4.b.: In s. Jus 21.05 (4), the department may consider an additional cross-reference to the alternate storage periods contemplated under s. 165.775 (5), Stats., to govern tracking system entries for the circumstances addressed in that provision.

DOJ's response: DOJ did not adopt the recommendation in comment 4.b. because s. 165.775 (5), Stats., is about when a law enforcement agency takes possession of a sexual assault kit, not when the state crime laboratories take possession of a sexual assault kit. It therefore would not be appropriate to include a cross-reference in s. Jus 21.05(4) to s. 165.775 (5), Stats.

Clarity, Grammar, Punctuation and Use of Plain Language: DOJ responds to the Rules Clearinghouse's comments as follows.

Comment 5.a.: In s. Jus 21.03 (intro.), the plural term "health care professionals" should be revised to the singular. When regulating classes of people, the obligation to comply with the regulation is on each individual member of the group, not the group as a whole. [s. 1.05 (1) (c), Manual.] The same comment applies in s. Jus 21.04 (intro.) to the plural term "law enforcement agencies".

DOJ's response: DOJ adopted this recommendation.

Comment 5.b.: In s. Jus 21.03 (1), consider inserting "reporting" immediately prior to "victim's" in order to use the defined term created in s. Jus 21.02 (2).

DOJ's response: DOJ did not adopt this recommendation because the victim in question could be either a reporting or non-reporting victim.

Comment 5.c.: In s. Jus 21.04 (2), consider replacing the term "evidence" with the term "sexual assault kit", a term defined as "evidence collected from a sexual assault forensic examination".

DOJ's response: DOJ addressed this comment by swapping the word "it" for "the evidence" in the draft language of s. Jus 21.04(2).

Richard Champagne
Edward A. Blazel
January 11, 2024
Page 6

Final Regulatory Flexibility Analysis and Response to SBRRB

The proposed rule does not have an effect on small businesses, as defined in s. 227.114 (1), Stats. Therefore, DOJ did not submit the proposed rule to the Small Business Regulatory Review Board (SBRRB), and a final regulatory analysis is not required.