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Victims & the right to privacy *Jessie Forand; Messenger Staff Writer*

Editor's note: Part one of a two-part series discussing the use of medical and school records in sexual offense court cases focused on the view of the prosecution.

Part two focuses on the defense's view.

ST. ALBANS - Sex offense cases are emotional, often controversial, and no doubt difficult for all involved. The fact that victims must face the real possibility of having aspects of their personal lives revealed in court adds to the stress.

Prosecutors, as seen in part one of this report, say they resist efforts to make what they view as unnecessary intrusions into victim's lives - such as the use of school, medical, and other records. Victim's advocates also are on the front lines helping their often-fragile clients cope with situations in which private matters can be laid out like an open book.

But there is another side of the story.

William **Cristman**, a St. Albans defense attorney and Vermont Association of Criminal Defense Lawyers president, said personal records and information are brought into cases for numerous reasons.

First, he said, there is a "substantial problem" with false accusations of sexual assault and misconduct.

Cristman referenced a 1994 report by Eugene Kanin, Ph.D., who studied police records in a small metropolitan community during a nine-year period. The municipal police department used for Kanin's work in that community gave both complaining witnesses and the accused the opportunity to undergo polygraph examinations.

Cristman said the findings showed that 45 of 109 total rape accusations - or 41 percent - were false.

The question remaining, said Chrisman, was: Why?

More research was done and records were reviewed and, also according to **Cristman**, it was found that there were three functions served by false rape allegations: providing an alibi for someone behaving badly, to get revenge against someone (most often, **Cristman** added, that "someone" was a person, who the alleged victim, oddly enough, felt was not paying attention to the accuser; or for sympathy and attention.

Kanin's paper, however, is not without its critics.

A 2008 review essay titled "The Duke LaCrosse Case: Exploiting the Issue of False Rape Accusations," noted that Kanin's work is not a research study. It only puts forth the opinions of police officers, states that review.

The essay noted, too, that Kanin himself "cautioned against the generalizability of his findings from a single police agency handling a relatively small number of cases."

Cases in point **Cristman** insists, however, that access to victim's records could have a dramatic impact on the outcome of a sexual assault prosecution.

In a Vermont case *State v.*

Rehkop, **Cristman** noted, a teacher at a school for the deaf was accused of sexual assault on a minor.

He maintained his innocence throughout and went to trial.

An alleged victim's school records were obtained by the defense.

Those records showed that the complaining witness had gone to counseling for lying, **Cristman** said.

The defense attorney then tried to get access to the alleged victim's counseling records. Those are considered "highly privileged" and are therefore legally protected.

Cristman said the attorney met the usual stonewall.

His client was convicted, and the attorney appealed, his argument based mostly on the denial of those records.

The Vermont Supreme Court ruled in this case that there was a reason to get the records and that the attorney should have been given access to them.

Rehkop's conviction was overturned.

In trying his cases, **Cristman** uses as an expert witness, Dave Mantell, a professor at New York's John Jay College who wrote a chapter in the Handbook of Clinical Psychology Vol. II - Children and Adolescence titled, "Ethical and Legal Issues."

Mantell's work discusses alternative explanation for children's statements.

Those alternatives, **Cristman** explained, include deliberate falsehood, misinterpretation of innocent contact as sexual, and coaching by a parent or guardian. These issues often arise in the context of bitter divorces.

Though he said the state calls record collection a "fishing expedition," **Cristman** views them as a discovery tool.

"The idea is not to embarrass anyone. There are competing interests and it is terribly embarrassing for everyone involved, both the complaining witness and the defendant. They're both placed under a harsh spotlight," **Cristman** said.

Sought after records are not always obtained.

Sometimes judges rule against allowing them.

School records are confidential, but can be obtained.

Records from the Dept. of Children and Families (DCF) can be used, but the State typically opposes those, **Cristman** said. Those might show a history of making allegations and prior victimization, which

might result in hypersensitivity.

Cristman also recalled a case he tried last fall. He opted not to divulge names so as to protect the privacy of those involved.

In that case, a child had made allegations against an adult. **Cristman** successfully obtained school records and he said they proved to be very important.

Before getting those records, **Cristman** received an investigation report in which an interview of the child was discussed. That interview raised issues in all three areas of concern, he said: there were questions about misinterpretation of innocent conduct; the child's statements were inconsistent and did not seem spontaneous; and the child's mother had undergone a falling out with the accused. It seemed to **Cristman**, as if the mother had coached her child.

The defense lawyer said his client's description of the incident was one of having only checked the child for bedwetting, something the alleged victim commonly did. The accused was a caretaker for the child.

Cristman said that although the investigator was not someone with "an ax to grind," issues raised during the initial investigation were not further pursued.

It is the state's job, he argued, to make sure that things are done properly.

He added that investigation units are federally funded because so much importance is placed on these cases, and that the state has resources, he believes, to perform more thorough investigations.

"The job of the state's attorney, or the district attorney, as it's called in some places, is to see that justice is done. The 'low life' criminal defense attorneys, their job is just to get their guy off," he said if common stereotypes.

The state's attorney, he continued, should serve as a minister of justice.

"The problem with these cases is when the state does not do their job. They have an obligation to investigate the trustworthiness or the truthfulness of the person who is making the claims," he said.

Children and adolescents, **Cristman** continued, are historically known to be more prone to make false statements, due to their lack of maturity or simply to please a parent.

"Some children lie an awful lot," he said.

In this particular case, **Cristman** said it was clear after obtaining school records that the child - the alleged victim - was frequently disciplined for bad behavior and lying. There also was a pattern of antisocial behavior laid out in the records.

"This is where we get into the issue of deliberate falsehood," **Cristman** said.

"Of course we don't know why people are untruthful, or deliberately untruthful, but obviously when it is established that they have a history of being untruthful, then that is an issue."

Criminal records can be used to gather insight into adults, but **Cristman** said, but that is not the case with children. He added that society views children as less culpable for their acts even though they may do something that might be criminal behavior for someone older.

"Children don't have good judgment. They don't have an adult understanding," he said.

Burden on the state **Cristman** believes it is the state that should obtain all the victim's records and use them to vet complaining witnesses before determining whether to press charges against the accused.

"I understand that it's incredibly stressful on the complaining witness in a case like this, but it's a lot more stressful if they go through a trial and if they go through a protracted battle. That is a lot more stressful than if the State did some investigation and said, 'Well maybe this is not a case that we want to bring,'" he said.

Cristman added that he does not think a complaining witness is helped by within the court process either. He said many cases that go to trial should not.

He argued, too, that it is also hard for the person accused.

"Their lives come apart," he said.

The accused in the child sexual allegations became a pariah in his community.

It was made clear he would be fired from his job if convicted of anything involving sexual misconduct. He lived under "intrusive" conditions of release, prohibited from seeing his own nieces and nephews, said **Cristman**.

The lawyer said the child involved in this case had an unhappy childhood, had not been well cared for, and had a long history of behavioral problems.

When the child was in care of the accused, **Cristman** said, the child's bedwetting subsided, as did disciplinary referrals at school. In obtaining such referrals, information not needed for the case was redacted, as **Cristman** said the court is sensitive to these issues.

The accused was found not guilty in a trial.

The records made up about half of the case in favor of the accused, **Cristman** said. The other half, with which he took issue, was alleged faults in the forensic interview.

"Records are not an end to themselves, they are also a source that leads to other evidence," he said.

For example, teachers, whose names were found on the records, ended up testifying at a trial.

While the State argued previously that his could harm the child, **Cristman** had not agreed.

One teacher took the stand and admitted the child had a problem with lying, but also said she loved the child.

There is and will likely never be an answer that satisfies all sides in the ongoing debate about use of victim's personal records.

For some, the records are another evidentiary tool and for others an invasion of privacy. Unless sex crimes and allegations of sex crimes cease, the debate will no doubt continue.