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Secretary

**Forensic Science Oversight Board (FSOB)**  
Meeting Minutes

**Scheduled:** July 26, 2021 10:00am-2:00pm, Microsoft Teams

**Members in Attendance:**

Chairwoman Kerry Collins (Undersecretary for Forensic Science)  
Sabra Botch-Jones (Forensic Science Expertise)  
Dr. Robin Cotton (Forensic Laboratory Management 1)  
Lucy A. Davis (Clinical Quality Management Expertise)  
Judge Nancy Gertner (New England Innocence Project)  
Anne Goldbach, Esq. (Committee for Public Counsel Services)  
Clifford Goodband (Expertise in Statistics 2)  
Lisa Kavanaugh, Esq. (MA Association of Criminal Defense Lawyers)  
Adrienne Lynch, Esq. (MA District Attorneys Association)  
Dr. Ann Marie Mires (Academia, Research Involving Forensic Science)  
Professor Timothy Palmbach (Forensic Laboratory Management 2)  
Gina Papagiorgakis (Expertise in Statistics 1)  
Nancy Rothstein (Nominee from Attorney General's Office)

**Members Not in Attendance:**

Vacant seat (Cognitive Bias Expertise)

The chair called the meeting to order at 10:02 AM. A quorum was present.

**1. Minutes Approval**

- a. Approved.

**2. Sexual Assault Evidence Collection Kit (SAECK) Testing Legislation**

- a. Pending legislation in Massachusetts that involves forensic science and the Massachusetts State Police Crime Laboratory (MSPCL) forensic testing is brought to the FSOB for their review and input.
  - i. The conference report and governor's amendment letter were circulated to the FSOB re: amendment to section 2a of chapter 5 of the acts of 2019.
  - ii. The proposed amendment to the budget seeks to test SAECKs that have been brought to the MSPCL and have been partially tested or not tested at all. These SAECKs were not part of the Criminal Justice (CJ) Reform Bill of 2018. The SAECKs there were subject to the CJ Reform legislation were kits that were never submitted to the MSPCL. As part of CJ Reform, the MSPCL identified what was in the MSPCL inventory to cross-reference and identify what the local law enforcement agencies did not submit to the MSPCL and generated lists of SAECKs that had been submitted to the MSPCL. About 6000+ kits are now subject to the proposed amendment. The SAECKs may have been tested through criminalistics and most of them did not go through full

DNA testing because testing and what to test resides with law enforcement officials and District Attorney's Offices. These are not kits that have been set aside and forgotten about by the MSPCL and rather are kits where a conscious decision has been made by law enforcement agencies or the District Attorney's Offices to stop testing at a certain point. This has been documented by the MSPCL. When the MSPCL went through the 2018 inventory of kits in their possession and cross-referenced the list with law enforcement, they identified kits that could benefit from DNA testing. The MSPCL in conjunction with EOPSS met with the District Attorney's Offices in the fall of last year and supplied them with the list of kits in their jurisdiction that could benefit from testing to allow the District Attorney's Offices to go through those cases and determine whether or not they wanted to proceed with DNA testing.

- iii. The proposed amendment as currently written does not take into account Chapter 278a which is the post-conviction evidence retention law. Some of these kits were part of prosecution where there was a conviction due to other evidence that was tested. If there is testing that must be done on post-conviction evidence, the 278a law requires the District Attorney and the defense attorney either agree or submit to a court the request to have the testing done. The testing, per the 278a law, must be done by an outside laboratory.
  - iv. The proposed amendment as currently written does not take into account the quantity limited (QLIM) cases that are involved with any type of DNA cases. QLIM evidence is when the samples in the SAECK are so limited in quantity that the sample would be destroyed during testing. The MSPCL will not test QLIM evidenced unless there is a signed authorization letter by the District Attorney's Office, a court order, or a defense attorney is notified and can be present at the testing. The MSPCL is working to identify how many of the 6000+ SAECKs that are subject to the proposed amendment, are QLIM. LIMS does not always identify what could be a QLIM case, some of the kits had criminalistics completed and some did not, therefore, some of the cases will need a manual review to determine if they are QLIM or not.
  - v. The proposed amendment requires the MSPCL to test 6000+ kits within 180 days. MA's CJ Reform Bill of 2018 requires the MSPCL to test SAECKs within 30 days which is well above the national standard. The MSPCL added staff to comply with the law. The MSPCL complies with the law with a current turnaround time of 30 days. The proposed amendment's timeline is aggressive and will require the MSPCL to outsource to BODE, an outside laboratory the MSPCL contracts with, who estimated it would take three years to test the 6000+ kits not the 180 days as required in the proposed amendment. The other laboratory that the MSPCL has a contract with, DNA Labs International, is unable to take kits at the moment because they are in the process of moving.
- b. T. Palmbach asked who proposed the amendment and why. The amendment was first proposed by State Representative Natalie Higgins of Leominster, the senate reviewed the amendment and proposed changes, and then the amendment and its proposed changes were sent to a conference committee. T. Palmbach asked which constituent groups went to the representative. EOPSS has not been consulted directly with any survivor groups and is only aware of what has been presented through media reports.
  - c. A. Goldbach asked if the proposed amendment is still with the conference committee or if it's been reported out. The proposed amendment came out of the conference committee with language that was sent to the governor. The governor amended the language to include QLIM and existing 278a protocols. The proposed amendment is now with the legislature who will either accept the amendment and revisit the language or override the governor's amendment.
  - d. L. Davis asked if anyone has asked the MSPCL how long it would take, what is the status, what undue burden or additional burden it would place on the MSPCL, and has the legislature received an impact statement.
    - i. There has been communication about the MSPCL's capacity to do this and remain in compliance with the current turnaround time of 30 days. EOPSS is doing its best to educate and identify what is feasible for forensic testing.
    - ii. T. Palmbach stated that BODE is not cheap and it would be a shame for the MSPCL to get away from the more important mandate requiring testing for 30 days. He asked if there is supplemental funding being recommended because testing the 6000+ SAECKs would not be cheap even if the MSPCL outsources to BODE. The current proposed amendment only sets aside \$8 million. It is

unclear how much testing will cost because the scope and breadth of the kits that will be tested are unknown. For instance, if the amendment exempted kits identified as QLIM and 278a, the number of kits that would undergo testing would be reduced.

1. L. Davis stated that \$8 million seems sufficient but \$8 million for 6000 kits is about \$1200 per kit which is the usual price BODE charges for this type of analysis. The \$8 million only covers the physical testing and ignores about 40% of the work that has to be done by the MSPCL which includes doing a full paper review of all of the data coming back from BODE to confirm everything is correct, and go through their accredited procedures concerning entry into the database including reviewing the samples that need to be entered into CODIS to ensure they meet the CODIS requirements. BODE was also asked to include testimony in their price quote which increased the price to over \$2000 per kit and estimated 3 years to complete testing.

### 3. Subsection (d) Update

- a. Middlesex County District Attorney Marian Ryan sent a letter to the FSOB in response to a request for feedback regarding the subsection (d) report (letter available upon request). This request was sent to all of the District Attorneys, the Massachusetts District Attorneys Association (MDAA), the American Civil Liberties Union (ACLU), and the Massachusetts Association of Criminal Defense Lawyers. No other comment, feedback, or request to present was received. Any stakeholders in attendance were encouraged to present or offer feedback during the meeting.
  - i. L. Davis expressed disappointment that no one else wants to discuss the investigation even though there was a desire to issue a minority report. She stated that the FSOB has demonstrated that this process is not antagonistic and the board is interested in an open discussion to hear all sides of the issue. She expressed confusion at some of the stakeholders' impulse to engage in an oppositional process instead of participating in a discussion and taking part in fixing the problems. She explained that it is troubling to her as a citizen and a member of the board that government agencies in Massachusetts are not willing to talk to the FSOB, which makes her concerned about the politics involved.
  - ii. Members of the FSOB thanked and commended District Attorney Ryan for stepping forward. L. Davis stated that she would like to add a recommendation, echoing District Attorney's Ryan's suggestions, to recommend that the District Attorneys or MDAA engage in a conversation with the MSPCL to discuss the issue and possible ways to meet the needs identified by District Attorneys without undue burden for the MSPCL. She stated that in other states District Attorneys fund a laboratory that does not have the personnel to complete a task needed by the District Attorneys need and in Massachusetts, the District Attorneys could fund a Y-STR database housed under the MSPCL.
  - iii. L. Kavanaugh echoed L. Davis' concerns. She stated that the report could include the FSOB's efforts to get different perspectives in the historical section of the report. She stated that the District Attorneys' unwillingness to communicate with the FSOB demonstrates the politicization of what should be a scientific inquiry. She mentioned that she suspects this is also probably the case with the proposed SAECK amendment. L. Kavanaugh and A. Mires agreed with L. Davis' suggestion about a conversation between the District Attorneys and the MSPCL. The report could acknowledge the need for dialogue and the FSOB's concern that dialogue has not happened. She expressed that if elected officials are trying to urge the MSPCL to do a form of testing that is not currently happening, that should be a dialogue and not an order. She added that the FSOB is a conduit for this kind of conversation to take place because it is a board that is made up of people from multiple parts of the system and is intended to be independent and not tied to outcomes in particular cases. The FSOB is uniquely situated as a board to help ensure that dialogues occur in a way that is respectful of the scientific integrity of the laboratories and safeguards the laboratories from being co-opted by law enforcement or prosecutorial objectives that are inconsistent with scientific concerns. The report identifies concerns from a scientific standpoint with how much less precise and discriminating Y-STR profiles are, therefore, from a scientific standpoint, there are inherent and significant limitations with what the MSPCL can reasonably be required to do concerning Y-STR databasing. She stated that it is worth having this dialogue openly rather than

in the context of a grand jury edict or an effort to operate outside of the existing regulations that govern the MSPCL's activities.

1. L. Kavanaugh checked Senator Gobi's Familial DNA Bill 1595. She expressed that the FSOB would need to propose additional modifications to the bill's amendment of 22e because the bill does not modify section 10 and instead adds a subsection. The FSOB will draft a friendly amendment within the subsection (d) report. EOPSS to let EOPSS legislative director know that FSOB will submit amendments via the subsection (d) report.
  2. A. Mires stated that the Familial DNA Bill does include the possibility of a genealogy search. She stated that L. Kavanaugh is correct that the language in the bill only covers unregulated databases in terms of Familial DNA. A. Mires will reach out to Senator Gobi's legislative team to see if they are receiving amendments and will inform Senator Gobi of the FSOB's timeline.
- b. The working group awaits feedback from board members and agreement on recommendations. The executive summary has not been drafted. The working group will receive feedback through August to be voted on at the September meeting.
  - c. L. Davis gave an overview of what is happening in other states re: Y-STR testing. Many states determined that it would be cost-prohibitive and have decided to stop this testing or conduct the testing on a request-only basis.
    - i. R. Cotton expressed that L. Davis' overview sums up the concern that the Y-STR search turns into a familial DNA search specifically because the Y-STR search is limited and states that have conducted this search did not find it to be wonderful.
  - d. T. Palmbach asked if the report should include that forensic genealogy needs to be a topic of study or if it is inferred in what has already been stated. R. Cotton responded that it should not be added because it is too big even though T. Palmbach is correct in anticipating that the FSOB will likely visit the topic of genealogy soon. She explained that it is related but it is a separate discipline and the FSOB may need to consult with genealogy experts. L. Davis added that the report should acknowledge that genealogy may be necessary with Y-STR testing. L. Kavanaugh added that it could be added to the recommendations.
    - i. A. Lynch informed the FSOB that the BODE website hosts a seven-part series webinar on genealogy: [www.bodetech.com/pages/webinars-workshops](http://www.bodetech.com/pages/webinars-workshops).
  - e. L. Kavanaugh highlighted the fifth recommendation on page 21 of the report and asked what needs to happen procedurally to amend the FSOB's enabling statute (fifth recommendation) to convey to the legislature the FSOB's concerns of the board's lack of enforcement authority.
  - f. A. Mires raised the possibility of removing the Attorney General recommendation. She stated that the FSOB does not have that power and that the FSOB should discuss the viability of the recommendation at the moment. The FSOB does not want to be punitive or accusatory.
    - i. L. Kavanaugh explained the purpose of the recommendation. She expressed that it is to convey the severity of the problem. She explained that where the FSOB lacks authority, the Attorney General does have the authority. The FSOB can advise and make recommendations. L. Kavanaugh asked for feedback on a way to convey how troubled the FSOB is by the Bristol County District Attorney's approach, without insisting on a way to take action but rather make the recommendation to the Attorney General.
      1. N. Gertner agreed that the recommendation is not punitive but instead enforces the problems outlined by the FSOB.
      2. L. Davis offered a rewording suggestion.
    - ii. L. Kavanaugh stated that the FSOB could consider making recommendations to other outside entities. The FSOB could urge other stakeholders to take action such as organizations acting on behalf of impacted individuals (i.e. ACLU) or organizations that represent individuals that gave an exclusionary sample.

#### **4. Public Comments**

- a. Stakeholders in attendance were asked to provide feedback.
- b. No public comments.

#### **5. Follow-up on Previous Presentations**

- a. Hair Microscopy Project (L. Kavanaugh)

- i. The Hair Microscopy Project working group has not sent out the letter urging District Attorneys to participate in the project. This letter will be sent to the District Attorneys. L. Kavanaugh will address any potential next steps at the September meeting.
- 6. **Topics Not Reasonably Anticipated Within 48 Hours of the Meeting**
  - a. The September 24<sup>th</sup> agenda will focus mainly on subsection (d) report.
  - b. L. Davis announced that the American Society of Crime Laboratory Directors' annual three-day meeting will be held August 23-26 in Boston.
    - i. ASCLD.org
    - ii. <https://na.eventscloud.com/website/16907/>
  - c. L. Kavanaugh informed the board that she and District Attorney Ryan are co-chairing a newly established task force within the Massachusetts Bar Association that is focused on training prosecutor's offices in establishing Conviction Integrity Review Units. The initial focus of the task force will be on providing training for District Attorney's Offices that need guidance to establish a Conviction Integrity Unit. The working group that prepared the best practices for conviction integrity talked about the intersection of wrongful convictions and forensic science. There may be areas of overlap or opportunities for the FSOB to engage the task force in the future.