

Forensic Sciences Oversight Board has been busy, but is up for more

By: Kris Olson October 21, 2022

When Lawyers Weekly last checked in with the state's Forensic Science Oversight Board in early 2019, it was still stuck in the starting gate.

One of the most urgent tasks on the broad agenda of the board, which was convened as part of the 2018 criminal justice reform package, was to restore faith in the integrity of forensic evidence used in criminal trials understandably shaken by two drug lab scandals, along with issues with the Office of Alcohol Testing.

In the three and a half years since then, the board has not only made up for lost time but stands willing to have the Legislature put more on its plate, members made clear during the board's first "virtual summit" on Oct. 14.

"We have pretty comprehensively tried to take on the ambitious set tasks that were envisioned for this board," says Lisa M. Kavanaugh, director of the Committee for Public Counsel Services' Innocence Program and a forensic board member.

As it moved methodically through its enumerated duties under G.L.c. 184A, §6, the board has produced a number of reports, the first of which summarizes an audit of the facilities and practices being utilized for criminal forensic analysis in Massachusetts and the operation and management of the State Police crime labs, which the Legislature gave the board six months to complete.



That was followed in spring 2021 with a report to inform debate on the proposed expansion of the use of the statewide DNA database to include "familial" searches to solve cold cases, a matter on which the board urged caution.

"That report reflected our attempt to take an advisory role and deeply understand the forensic and policy implications of this proposal, and then make a series of recommendations to the Legislature that we hoped would influence how the statute developed," Kavanaugh says.

The ink was barely dry on that report when, on April 30, 2021, the board voted to initiate a probe into the integrity and reliability of an unregulated database of aggregated DNA records established by the Bristol County District Attorney's Office, a type of investigation that the Legislature had authorized under G.L.c. 184A, §6(d)(ii).



When the FBI compiled the national database known as the Combined DNA Index System, or CODIS, it did so with “considerable care,” according to retired U.S. District Court Judge Nancy Gertner, another forensic board member.

It was a worthy question, then, to determine the degree to which the creation and maintenance of Bristol’s database deviated from the FBI’s meticulously crafted standards, she adds.



The board had to forge on in the face of the Bristol DA’s Office refusal to participate in the investigation. That remains an outlier amid what has otherwise been across-the-board cooperation from the law enforcement and prosecutorial community, according to Kavanaugh.

“I do think I speak for the majority of the board in saying we were all pretty appalled at the lack of willingness on the part of the Bristol district attorney to voluntarily participate in our process,” Kavanaugh says. “But it is voluntary.”

The resulting report concluded: “In contrast with the highly regulated state DNA database that is overseen by the Crime Lab, it is unknown whether the Bristol District Attorney’s Office has any protocols and procedures in place to safeguard the confidentiality and security of genetic information in the database; to ensure the accuracy and reliability of that genetic information; to require minimal training, education or demonstrated competency to access and administer the database; or to utilize scientifically trained personnel to interpret DNA data and comparisons of profiles.”

The absence of those protocols and procedures was not only jeopardizing the privacy of people’s information in the database but also the Crime Lab’s accreditation status, the board added.

While the report recommended that the Legislature amend G.L.c. 22E, §10, to prohibit explicitly the aggregation of DNA records for inclusion in an external, unregulated DNA database, the ability to make such recommendations is the extent of the forensic board’s “teeth” at this point.

But one of the summit’s special guests, Lynn Robitaille Garcia, general counsel of the Texas Forensic Sciences Commission, offered a glimpse of what could be the board’s future.

In addition to enhanced investigatory powers with issues that arise in individual cases, the Texas commission has established a statewide lab portal system that serves as a clearinghouse for forensic evidence, which “pushes out” information to all parties to a criminal case. That enhances the chance that issues are flagged at the outset.

The Texas commission “has set the standard for what true, well-resourced forensic oversight can look like, both in terms of having a body that has the authority to command participation in investigation processes, which we lack, and also because they have become a real go-to resource for courts, for prosecutors, for defense lawyers — for all the people who should care about the integrity of forensic science,” Kavanaugh says.

Even though the Annie Dookhan and Sonja Farak scandals are very much part of the Forensic Science Oversight Board’s “origin story,” the question of what the board could do if the state learned of a similar scandal tomorrow has a less-than-satisfying answer.

“The answer is ‘not much,’ other than write a report and study, and we couldn’t even compel people to produce documents for us to review,” Kavanaugh says.

Uncovering the Farak scandal might still have required the diligence of defense attorneys to overcome prosecutors’ failure to meet their *Brady* obligations, but a stronger forensic board might have been able to help the system wrap its arms around the scope of the controversy, a process that took the courts years, Gertner notes.

“That would make a difference, and the boards that are successful are the ones who have that ability,” she says.

Whether to approach the Legislature with a request to expand its mandate — and resources — is a decision that the board will make in 2023, after the Governor’s Office has a new occupant, according to Kavanaugh. The Oct. 14 summit was designed in part to engage stakeholders in that conversation, she says.



But even with its current powers, the board “is a dramatic improvement over what we had before,” Kavanaugh says.

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