End Violence Against Women International
(EVAWI)

Should We "Test Anonymous Kits?"

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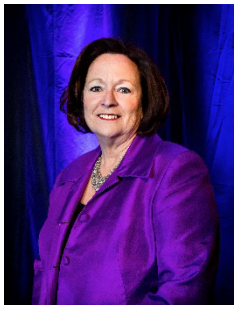

Sgt. Joanne Archambault (Retired, San Diego Police Department) is the Chief Executive Officer for EVAWI. In 2003 prior to founding EVAWI, Sgt. Archambault worked for the San Diego Police Department for almost 23 years, in a wide variety of assignments. During the last 10 years of her service, she supervised the Sex Crimes Unit, which had 13 detectives and was responsible for investigating approximately 1,000 felony sexual assaults each year. Sgt. Archambault has provided training for tens of thousands of practitioners, policymakers and others – both across the country and around the world. She has been instrumental in creating system–level change through individual contacts, as well as policy initiatives and recommendations for best practice.

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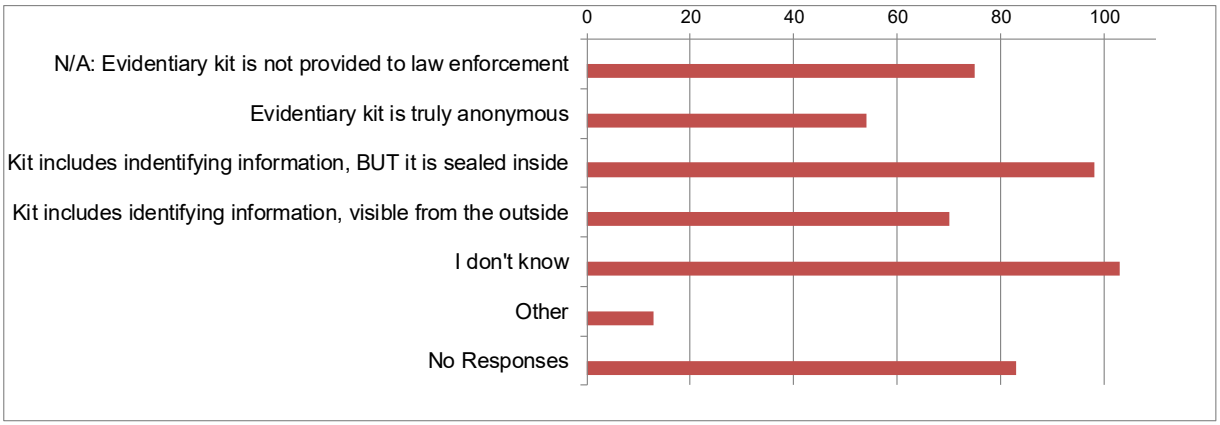
We are frequently asked whether communities should be "testing anonymous kits," and this training bulletin is dedicated to answering this question. However, before we can do that, we need to take the question apart and examine several problems with the way it is framed. We will first explore problems with the terminology and concepts surrounding both "anonymous" and "testing kits."

What Do We Mean by "Anonymous?"

When people talk about "anonymous kits," they are typically referring to the evidence collected and documented during a medical forensic exam with a victim who has not yet personally reported to law enforcement.[1] In this type of situation, the victim is certainly not anonymous to the nurse, and may not even be anonymous to law enforcement. The term "anonymous" is therefore used to reflect the assumption that the victim's identity will not be associated with the evidence, whether it is stored at the exam facility or by law enforcement (including a crime laboratory or police property room).

The most obvious concern with this terminology is based on the fact that the evidence is not typically anonymous, at least not in most jurisdictions. While some communities have established procedures to truly protect the anonymity of such evidence (e.g., using completely de-identified bar code technology), this is not the case in most areas of the country where identifying information about the victim is either visible on the outside or sealed inside the evidentiary kit. For example, in an informal survey EVAWI conducted in 2012 with 496 multidisciplinary professionals involved in sexual assault response, very few indicated that the evidence stored by law enforcement was "truly anonymous."

If law enforcement is provided with the evidentiary kit, is it anonymous? Or does it include identifying information about the victim?



[1] In jurisdictions with medical mandated reporting, the sexual assault may have been reported to law enforcement by the health care provider (or other third party). However, in this scenario the victim has not yet personally talked with law enforcement regarding the report.

In fact, even if the evidence itself does not include identifying information for the victim, anonymity still remains a false promise when there are associated procedures that include the victim's name (e.g., in jurisdictions where a governmental agency pays for the exam, or Crime Victim Compensation funds are used). This may explain in part the high percentage of survey respondents who said they did not know what the procedures were in their community or did not respond to the question at all.

We believe the use of the term "anonymous" thus reflects the continuing confusion about the requirements of the forensic compliance provisions of the Violence Against Women Act (VAWA). While many people believe VAWA requires jurisdictions to offer victims anonymous evidence collection and storage, this is not the case. Rather, VAWA requires jurisdictions to offer sexual assault victims access to a medical forensic examination (1) free of charge and (2) regardless of whether or not they decide to participate in the criminal justice process.

Is Anonymity the "Right Answer?"

The term is also frequently used to reflect the simplistic assumption that anonymity is the "right answer" for evidence storage and any procedure that includes identifying information for the victim is somehow "wrong." While total anonymity is something that communities can strive to implement for their evidence storage procedures, it is not required to achieve the letter, nor the spirit, of VAWA forensic compliance. The noble purpose of the law is to increase access for victims – to a medical forensic examination, and then in turn, to the criminal justice system and other community resources. If a community has procedures in place that actually work to ensure that victims have this access, while protecting their privacy and honoring their power of self-determination, the noble purpose of VAWA is met, and total anonymity is not necessary. As we discuss below, the critical question is not whether law enforcement professionals can identify these victims; the question is what they would do about it if they did.

What Term Should We Use?

In our early writing on the topic, we advocated for agencies to implement a protocol for anonymous reporting. However, as innovation and reform has continued, it has become clear to us that the emphasis on anonymity has masked the more important questions of **what will happen to a report once it is made.** We have therefore shifted toward a more general language of "alternative reporting options," which may include anonymity for victims, non-investigative responses from law enforcement, and/or other components designed to increase victims' access and participation.

For the purpose of this training bulletin, we use the term *non-investigative report*, which refers to the practice that sexual assault reports will not generally be investigated or prosecuted against the victim's wishes, meaning the victim will be allowed to determine if and when an investigation will proceed. This may seem counterintuitive for law enforcement to allow victims to decide whether or not their sexual assault report will be investigated, but many agencies have formal policies or unwritten practices that respect

a victim's wish to not proceed with the investigation. The goal is to encourage more victims to come forward and provide information while reducing unnecessary trauma.

How About "Testing Kits?"

Similarly, when people talk about "testing kits," they are usually referring to the submission of evidence to a crime laboratory. The assumption is that crime laboratory personnel will (1) examine biological samples collected during the medical forensic exam (e.g., vaginal, oral, or anal swabs), (2) identify any foreign DNA profiles (not belonging to the victim or a consensual partner), and (3) submit any foreign profiles into a DNA databank. Again, there are several concerns with this set of assumptions.

First, there is an almost exclusive focus on biological samples and the goal of identifying foreign DNA profiles. When people refer to a "kit" they typically mean biological samples, because they think the purpose of an exam is to "collect DNA." Yet there are many other forms of evidence collected during an exam besides biological samples – many of which could be more critical to advance the case, including photographs of injuries, documented statements, clothing, etc. This point is emphasized by Dr. Patrick O'Donnell, supervising criminalist of the DNA Unit at the San Diego Police Department Crime Laboratory. In about one-quarter of the sexual assault cases where evidence is handled by his crime laboratory, a foreign DNA profile is located on the victim's clothing rather than the swabs from a medical forensic examination. Therefore, a significant percentage of DNA evidence comes not from the "kit" itself, but rather from the clothing that is collected along with the biological samples taken from the victim.

The second problem is related to the first; there are many ways to analyze these different types of evidence, but again people tend to focus exclusively on the identification of foreign DNA profiles. This is typically what people mean when they refer to "testing." Third, there are significant concerns with the idea of analyzing any evidence associated with a restricted report and then submitting any foreign profiles to a DNA databank. We will turn our attention to this point shortly.

A Better Question, and the Answer

So, based on the discussion so far, the question should actually look more like this:

> *What should we do with the evidence associated with an alternative reporting options, such as non-investigative reports? (In other words, a medical forensic examination conducted with a victim who has not yet personally reported to law enforcement.) Should we submit the evidence to a crime laboratory to analyze in an attempt to identify a foreign DNA profile? And if any foreign DNA profiles are identified, should they be submitted to a DNA databank (whether local, state, or national)?*

While the question becomes much longer when it is worded like this, the answer can still be concise. In short, the answer is "no."

This is clearly the position of the US Department of Justice, Office of Violence Against Women (OVW):

> *Submitting non-investigative SAKs to a forensic laboratory for testing, absent consent for the victim, should not be a standard operating procedure for a law enforcement agency. (OVW, 2017, p.4).*

Three reasons are given for this position:

- Testing a kit before the victim has made a report to law enforcement undermines the victim's prerogative to decide if and when to engage with the criminal justice system.
- Testing a kit without the victim's express consent either to submit the kit or to report the assault to law enforcement is not an advisable way to cultivate community trust.
- Funding for testing SAKs is not unlimited, and grant funds should be directed to activities that promote accountability for offenders and justice and healing for victims (OVW, 2017, p.5, 7 & 8).

Resource:

For more information on OVW's position, please see the white paper entitled: *Sexual Assault Kit Testing Initiatives and Non-investigative Kits* published in January 2017.

It is also EVAWI's position that evidence associated with a non-investigative report should not be submitted to a crime laboratory for analysis, and foreign DNA profiles should not be identified, let alone submitted to any DNA databank. There are three main reasons for this, and we will separate them out for discussion.

1. Victims Have Not Consented

First and foremost, victims who make a non-investigative report have not typically consented to having their evidence analyzed. In fact, this training bulletin could simply start and end with that sentence. Unless this issue is specifically addressed in the informed consent process, there is no consent to submit this evidence to the crime laboratory for analysis.

This raises the question of exactly what victims have consented to, when an exam is conducted in association with a non-investigative report. It is critical for the members of a community's Sexual Assault Response and Resource Team to explore this question by examining the information victims are given and the forms they are asked to sign for this

type of exam. The protocol and documentation may need to be revised to ensure that the consent procedures are appropriate.

It also helps to think about what would happen next. If the evidence associated with a non-investigative report is submitted to a crime laboratory, which then identifies a DNA profile and enters it into CODIS (Combined DNA Index System) – whether in a local, state or national database – it could result in a "hit" (a match) to a DNA profile from another case. Then, law enforcement will likely be very motivated to pursue an investigation, especially if the match is for a prior sexual assault offense, indicating that the suspect is most likely a repeat offender. At this point, law enforcement could end up pressuring victims to participate in the process – perhaps highlighting the risk posed by the perpetrator to our communities and other potential victims. Yet this type of coercion is what forensic compliance and alternative reporting protocols were designed to prevent, by allowing victims to report whatever information they are capable of at the time. The goal is to provide an opportunity for collecting time-sensitive evidence while victims take the time they need to evaluate their options and decide how to proceed.

This point is addressed in our training module on forensic compliance, in the OnLine Training Institute (OLTI):

> *While the letter of the law does not specifically prohibit the evaluation or testing of evidence [in this situation], the lack of language on this subject is not intended to condone this practice. That is, compliance with the spirit of the law is clear – to preserve victims' option of engaging the criminal justice system if and when they choose to actively participate. On this basis alone, best practice is to refrain from evaluating or testing evidence until the victim has elected to participate in the process of an investigation and prosecution (Lonsway, Huhtanen & Archambault, 2013).*

Many people have thought that a main purpose of VAWA forensic compliance was to create an opportunity to develop foreign DNA profiles and submit them into CODIS. The idea was that victims who were initially unsure about criminal justice participation would be informed if a DNA profile was developed and there was a hit in CODIS. At that point, victims would then be motivated to report to law enforcement and participate in the investigation and prosecution of the suspect(s). However, this is based on a misunderstanding of the requirements for submission to CODIS as well as the fact that many victims do not want to engage in the criminal justice system, regardless of whether there is a foreign DNA profile identified. It also assumes that the person whose DNA was identified is actually the suspect rather than a consensual sexual partner. We will explore this final point regarding consensual sexual partners in its own section.

2. No Crime Report Has Been Documented

Second, no crime report has been documented by law enforcement at this point. Again, Dr. Patrick O'Donnell summarizes the issue succinctly:

> *The fundamental problem with testing these kits is that until a victim is willing to participate in a discussion with law enforcement there is no documentation that a crime has been committed.*

As highlighted in this quote, a fundamental function of law enforcement is to determine whether an incident meets the legal elements of a criminal offense. If so, it will be recorded ("scored") as a crime report. This determination can only be made, however, based on the findings from a law enforcement investigation, including a detailed interview with the victim. It cannot be accomplished by health care providers and victims in the context of a medical forensic examination; this is not their role.

The reality is that there are many situations where victims legitimately believe they have been sexually assaulted, but the incident does not meet the legal elements of a crime. This does not necessarily mean that the report is a false allegation, because health care providers and victims are not trained nor required to have any specialized expertise in the elements of criminal offenses. It also does not mean to imply some attitude that: "You can't say you were raped until law enforcement says you were raped." It is in fact perfectly appropriate for health care providers to refer to an incident as a sexual assault based solely on the victim's disclosure, for the purpose of conducting a medical forensic examination. As health care professionals so often point out, this is the equivalent of treating a patient for stomach pain if they present with a complaint of stomach pain.

The problem arises if the evidence collected and documented during the examination is submitted to a crime laboratory for analysis. This represents a situation of "putting the cart before the horse." In no other situation would the crime laboratory analyze evidence before law enforcement has determined that a crime has been reported.

This is because it is also not the function of a crime laboratory to establish that the legal elements of a crime have been met, or to identify who might be a possible suspect. Yet some experts have pointed out that our language has contributed to this misconception by referring to the "evidence" associated with a non-investigative report; at this point, it is better to simply think of it as a set of biological samples. Until law enforcement is able to conduct an investigation and interview the victim, we do not know if these samples actually constitute evidence, because we do not know if the elements of a criminal offense have been met. We also do not know whether the samples come from a suspect or a consensual sexual partner. Yet it is almost inevitable that the person who is identified as the biological contributor will be presumed to be a suspect in the case.

This issue was also raised by Dr. O'Donnell, who asked how this reverse-ordered process might potentially bias the criminal justice response. If a possible suspect is identified through DNA before an investigation is conducted or a victim statement is taken, this may very well influence the victim's statement when it is ultimately taken. It will also likely influence the course of the investigation and prosecution. Then if the case goes to trial, it will also likely provide the defense with ammunition to attack the credibility of the victim as well as the objectivity of the investigation and prosecution.

There is also another possibility, which is that the report of sexual assault is a false allegation. Research suggests that approximately 2-8% of all sexual assault reports to law enforcement are false allegations (Lisak, Gardinier, Nicksa & Cote, 2010; Lonsway, Archambault & Lisak, 2009).

Once again, the concern is that no law enforcement investigation has been conducted, and no victim statement taken, so there is no basis for law enforcement to make appropriate decisions regarding the documentation of a crime report, the course of an investigation, or the analysis of evidence. There is also no opportunity to evaluate whether a foreign DNA profile represents a suspect in a sexual assault investigation versus a consensual sexual partner. Until such an investigation has been conducted, this evidence (or "samples") should not be submitted to a crime laboratory for analysis and any foreign profiles that might be identified have no place in a DNA databank.

3. Consensual Partners Have Not Been Excluded

The third reason for not submitting forensic evidence associated with a non-investigative report to a crime laboratory (and then entering any foreign DNA profiles into a databank) is because consensual sexual partners have not been excluded. This issue is explained in an article we wrote for *Sexual Assault Report* on the role of DNA evidence in a sexual assault investigation:

> *Consensual partners should be excluded before submitting forensic DNA profiles in CODIS. This requires asking victims sensitive questions about consensual sex they might have had in the past few days and identifying any consensual partners. These partners should then be contacted, and a DNA reference standard obtained, to exclude their DNA profile and ensure that they are not entered in CODIS. It is easy to imagine a scenario where this is not done, and the forensic DNA profile submitted to CODIS is actually the victim's husband or partner – and not the person who perpetrated the sexual assault. At the very least, this constitutes a troubling violation of the consensual partner's privacy.*
>
> *Worse, the investigator might be led to believe that the foreign DNA profile belongs to the person who committed the crime – and that by submitting it to CODIS, there will be a match within the Convicted Offender Database. The failure to get a "hit" might then lead investigators to believe the suspect is not in the CODIS database when, in reality, the profile does not belong to the perpetrator at all; it is from the victim's consensual partner. Depending on the policies and practices of the law enforcement agency, it might even mean that investigators would decide not to employ more traditional techniques that might lead to identifying the correct suspect (e.g., searching for registered sex offenders in the area, conducting witness interviews). DNA analysis will never serve as a replacement for the traditional investigative techniques that develop the type of evidence that is needed to support successful prosecution of sexual assault.*

> *Even more concerning is the fact that the profile may result in a "hit," if the consensual partner was convicted or arrested for a prior offense requiring their profile to be entered into CODIS. Of course, the victim may not have known this fact, and learn about it as a result of the sexual assault. Then if a prosecution ensues, it will be the direct result of the investigation into the victim's current sexual assault. It is not difficult to imagine how stressful this might be for a victim to deal with, on top of the sexual assault itself* (Archambault & Lonsway, 2011).

Conclusion

It is certainly understandable that there is confusion and misunderstanding surrounding this topic, because it is a complicated area that is often misrepresented in media coverage as well as public and even professional discourse. We hope this training bulletin has clarified some of the complex issues involved.

For more information, please see the following OnLine Training Institute modules:

Reporting Methods for Sexual Assault Cases

The Earthquake in Sexual Assault Response: Implementing VAWA Forensic Compliance

References

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