

**Texas Forensic Science Commission
Minutes from November 3, 2017 Quarterly Meeting in Austin, Texas**

The Texas Forensic Science Commission met at 8:00 a.m. on Friday, November 3, 2017 at the Omni Austin Southpark Hotel, 4140 Governors Row, Austin, Texas 78744.

Members of the Commission were present as follows:

Members Present: Bruce Budowle
Mark Daniel
Nancy Downing
Jasmine Drake
Sheree Hughes-Stamm
Pat Johnson
Sarah Kerrigan
Jarvis Parsons

Members Absent: Jeffrey Barnard, MD

Staff Present: Lynn Garcia, General Counsel
Leigh Savage, Associate General Counsel
Jody Koehler, Senior Scientific Advisor
Kathryn Adams, Commission Coordinator

Review and adopt minutes from August 2, 2017 Clark (Harris Co. IFS, HPD, Harris Co. Sheriff's Department; GSR, DNA, Blood Spatter) #16-40 case Investigative Panel, August 17, 2017 Complaint Screening Committee meeting, and August 18, 2017 Forensic Science Commission Quarterly meeting.

MOTION AND VOTE: *Parsons moved to adopt the August 18, 2017 Commission quarterly meeting minutes draft with edits to reflect Downing's changes. Downing seconded the motion. The FSC unanimously adopted the motion.*

MOTION AND VOTE: *Drake moved to adopt the August 17, 2017 Complaint Screening Committee meeting minutes draft. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Staff will bring a revised version of the Clark Investigative Panel minutes for review and adoption at the Commission's February quarterly meeting.

Discuss the applicability of the Rules of Judicial Administration, Rule 12, the Open Meetings Act and the Public Information Act to Commission activities under the Commission's new administrative attachment to the Office of Court Administration; presentation by David Slayton, Executive Director of the Office of Court Administration.

David Slayton gave a presentation to the Commission on the Rules of Judicial Administration because the Commission is now part of the judicial branch as an agency of the Office of Court Administration. Under the Rules of Judicial Administration, the Commission must comply with

Rule 12 which includes the requirements for ensuring public access to records. Members discussed their intent to continue to comply with the notice, posting and public participation requirements of the Open Meetings Act to ensure transparency.

MOTION AND VOTE: *Daniel moved to direct staff to draft an internal policy stating the Commission shall continue to comply with the requirements of the Open Meeting Act. Johnson seconded the motion. The FSC unanimously adopted the motion.*

MOTION AND VOTE: *Daniel moved to ensure Commission records are available to the public through compliance with Rule 12 with two additional qualifications: 1) licensing examination results and pass/fail rates will be subject to disclosure; and 2) the licensing examination format, questions and related materials will be kept confidential to ensure the integrity of the examination.*

Office administrative update (FY2017 budget close; FY2018 budget status report; status of transition from Sam Houston State University to the Office of Court Administration; update regarding content management software ALIS required for the FSC Licensing Program; introduction of new Commission employee—Senior Scientific Advisor; OCA MOU with SHSU).

Garcia gave an update on outstanding administrative items. She explained she is working with the Office of Court Administration to finalize an agreement with the licensing software vendor. Members reviewed the FSC's closing budget for FY2017. The Commission expended 97% of its funds in FY2017. Garcia introduced the Commission's newest staff member, Senior Scientific Advisor, Jody Koehler. Koehler has over 20 years of experience as a DNA analyst, technical supervisor and manager. She is also a lead assessor for ANAB.

The Commission was required by the 85th Legislature in its transition to the Office of Court Administration to draft a Memorandum of Understanding addressing any outstanding property items, personnel transfer, funding, etc., from Sam Houston State University to the Office of Court Administration. Garcia reported the MOU has been completed and signed.

Discuss and consider pending complaints and laboratory self-disclosures as well as new complaints and self-disclosures received through October 19, 2017.

Complaints and Disclosure Pending from August 18, 2017

1. No. 17.04; Gefrides, Lisa (Houston Forensic Science Center)

This complaint alleges the HFSC's biology section is not adequately identifying and controlling contamination during testing of biological evidence.

The HFSC submitted a large volume of material to the Commission in response to its request for information, some of which is data for which expert review is needed. Commissioners assigned Koehler to review the material and report back to the Commission at its next quarterly meeting.

MOTION AND VOTE: *Daniel moved table the complaint until Koehler has the opportunity to review the new material. Drake seconded the motion. The FSC unanimously adopted the motion.*

2. No. 17.13; Hill, Anthony (Max Courtney; Crime Scene Reconstruction)

Anthony D. Hill alleges crime scene reconstructionist Max Courtney gave scientifically insupportable analysis and testimony that led to Hill's wrongful conviction for capital murder.

Dawn Boswell, Chief of Tarrant County's Conviction Integrity Unit, reported she has not yet received the Unit's form back from Mr. Hill. Adams sent Mr. Hill another Unit form with instructions to return it to the Tarrant County District Attorney's Conviction Integrity Unit.

MOTION AND VOTE: *Daniel moved to dismiss the complaint since it has been referred to the Tarrant County Conviction Integrity Unit. Parsons seconded the motion. The FSC unanimously adopted the motion.*

3. No. 17.45; DPS Tyler (Seized Drugs/LIMS)

The DPS regional laboratory in Tyler disclosed an incident in which a controlled substance report was issued on May 17, 2017 as "Contains Methamphetamine," when the data showed that the substance was actually Cocaine. The error was not caught during technical review.

Greg Hilbig, Lab Director at DPS – Tyler was asked at the August 18, 2017 meeting to provide a screenshot of the LIMS system demonstrating what the tech reviewer saw when the case was reviewed. Hilbig provided the screenshot and explained to the Commission the laboratory's new policy concerning technical review sign off.

Members discussed requesting guidance from statistics advisor Cliff Spiegelman on assessing the number of cases that must be reviewed retroactively to establish a certain confidence interval.

No motion was taken because the Commission had already voted to issue a no further action letter at the Commission's August 18, 2017 meeting.

Disclosure Received as of October 19, 2017

4. No. 17.53; Houston Forensic Science Center (Latent Print Comparison)

The Houston Forensic Science Center ("HFSC") submitted a self-disclosure describing a case in which a latent print examiner made a false exclusion on a set of latent prints.

The false exclusion was missed by both the verifier and analyst. Members discussed published research regarding false exclusions in latent prints. Tim Strong, manager of HFSC's latent print section, addressed the Commission. The laboratory reviewed the examiner's casework for the previous year and determined a false exclusion rate of 4%, which falls below the average rate for latent print analysis.

Garcia reported on a NIST Error Symposium presentation given by Peter Stout, HFSC CEO and President. Stout's presentation included a description of HFSC's efforts with respect to establishing confidence intervals for retroactive case reviews in response to nonconformities. Stout is also currently implementing blind testing in the laboratory. Strong is doing the same in the latent print section. Garcia recommended inviting Stout to the next Commission meeting to discuss the initiatives he has implemented at HFSC with regard to confidence intervals and blind testing.

MOTION AND VOTE: *Daniel moved to issue a no further action letter to the laboratory. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Discuss status of crime laboratory accreditation program, including accreditation non-conformances received since August 2017 quarterly meeting. Consider whether to exempt non-human DNA analysis. Discuss whether to exempt crime scene reconstruction analytical disciplines (including but not limited to blood spatter analysis) from the accreditation requirements. Discuss attorney general opinion request regarding whether postmortem toxicology is subject to Commission accreditation requirements.

Savage reviewed laboratory non-conformances reported this quarter in accordance with the Commission's accreditation requirements. None of the non-conformances warranted further review by staff or the Commission and all were satisfactorily resolved by the laboratories.

Members discussed whether non-human DNA analysis (aka wildlife biology) should be exempt or subject to Commission accreditation and licensing requirements. Members agreed an exemption is not warranted as the discipline has always been subject to accreditation in Texas and there are crimes involving non-human DNA. Staff explained that with respect to licensing, the discipline will have its own knowledge based competency requirements and a provision stating that analysts are not subject to FBI-QAS requirements.

Members discussed whether to exempt crime scene reconstruction analytical disciplines from accreditation requirements, particularly bloodstain pattern analysis. Garcia explained bloodstain pattern analysis is not exempt from accreditation requirements based on the administrative rule originally published by DPS and subsequently adopted by the Commission. However, we know bloodstain pattern analysis evidence from unaccredited practitioners is being admitted in Texas criminal cases. The Commission should assess whether bloodstain pattern analysis should continue to be restricted to accredited entities only. If that approach is not practical/desirable then the Commission should identify what types of requirements should be imposed for entities and individuals performing bloodstain pattern analysis in Texas. The options could include anything from education and training requirements to requirements for peer review, proficiency testing, best practices in analytical work or testimony, etc.

Garcia suggested inviting experts in the discipline to speak about BPA, similar to what the Commission did for fire scene investigation and forensic odontology. Members agreed. Staff will reach out to suggested experts and invite them to the hearing.

Garcia reviewed the Commission's Attorney General Opinion request related to whether postmortem toxicology is subject to Commission accreditation and licensing requirements. Staff

will report back at the Commission's next meeting if they receive an answer from the Attorney General's Office.

Review and adopt draft rules mirroring the Commission's complaint and disclosure process published in its Policies and Procedures to comply with Administrative Procedures Act requirements.

Savage reviewed with Commissioners and staff a draft of administrative rules that mirror the Commission's complaint and disclosure process as outlined in its current policies and procedures.

MOTION AND VOTE: *Kerrigan moved to publish the rules as drafted. Downing seconded the motion. The FSC unanimously adopted the motion.*

Discuss progress on project to standardize sexual assault kits.

Downing reported that a meeting of the statewide task force on the standardization of sexual assault kits is set for January 8, 2018. She received a positive response from the SANE (sexual assault nurse examiner) community regarding standardization of the kits and will report back regarding the January 8th meeting at the Commission's February quarterly meeting.

Review and adopt revised draft of Commission Policies and Procedures.

Garcia reviewed revisions to the Commission current policies and procedures, including an addition to give staff discretion to dismiss complaints not related to physical evidence, such as forensic hypnosis, since the Commission has no jurisdiction to review those complaints. Other non-material edits were also reviewed and accepted by Commissioners.

MOTION AND VOTE: *Downing moved to adopt the Policies & Procedures draft. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Staff will edit the Policies and Procedures again for review at the next quarterly meeting to reflect deliberations regarding the requirements of the Open Meetings Act and Rule 12 of the Rules of Judicial Administration.

Update on statewide & Co.-based defense triage projects for DNA mixture review.

Trudy Strassburger, Deputy Director of the Capitol Area Defenders Network, provided an update on APD's DNA review project. Strassburger reported several cases from APD were sent recently to UNTHSC-CHI for reinterpretation. An update on results of the reinterpretation will be provided at the Commission's next meeting.

Dawn Boswell provided a brief update on Tarrant County's DNA mixture review project. The DA's office CIU is expecting to receive an additional 31 outstanding re-analysis reports. She will provide a further update at the Commission's next quarterly meeting.

Discuss licensing advisory committee program, including adjudication of public comments and updates from October 26, 2017 Licensing Advisory Committee meeting. Review final revisions to proposed licensing program rules (including changes resulting from comments). Discuss feedback from survey on general forensic exam topics. Discuss Code of Ethics for Forensic Analysts.

Members reviewed revisions to the licensing program rules since the last quarterly meeting, outstanding questions and comments.

Members discussed whether toxicology technicians and firearms technicians should fall under the same licensing requirements, which are less extensive than analysts who engage in testing and/or interpretation. Members agreed to allow a modified general forensic exam for both categories as well as adopt a lower licensing fee. Kerrigan recommended spelling out the SWGTOX guidelines instead of referencing SWGTOX in the text of the rules because the SWG's have been disbanded. Staff will edit the rules to reflect this recommendation.

Members and laboratory representatives discussed the coursework requirements for toxicologists after January 1, 2019—particularly that toxicology analysts (both testing and interpretation) hired after January 1, 2019 must fulfill the specific coursework requirements originally set forth by SWGTOX and now incorporated into the Commission's rules. Kerrigan pointed out that these standards are higher than what most laboratories are likely operating under currently and inquired regarding the community's feedback on the potential impact on the hiring of experienced lateral candidates after January 1, 2019. Dr. Teresa Gray from the Harris County Institute of Forensic Sciences expressed agreement that the standards as currently written could adversely impact a laboratory's ability to hire experienced candidates from out of state after January 1, 2019 if those candidates do not meet the specific coursework requirements.

Most of the comments related to toxicology the Commission received were related to requirements for current examiners. Staff will circulate the rules again for comment and will solicit input on this specific issue and report back at the Commission's next quarterly meeting.

Members discussed adding a blanket exemption from the licensing requirements for technicians who may handle evidence but whose work is limited to tasks such as aliquoting. Staff will revise the rules and bring the new draft to Commissioners at their next meeting.

Members discussed a letter received from the United States Department of Justice (“DOJ”) requesting exemption from the licensing requirement for federal analysts. After discussion, members suggested proposing modified requirements for federal analysts if certain conditions are met. Suggested conditions are that the Department agrees to: 1) report all instances of professional misconduct by federal analysts to the Commission so the Commission may initiate the process for revoking the licenses of those individuals' licenses; 2) comply with Texas' Code of Professional Responsibility for Forensic Analysts; 3) certify that all federal analysts receive training and competency testing in knowledge-based competency subject areas identified by the Commission as appropriate for the analysis particular forensic disciplines; 4) provide an explanation of the existing training provided to federal analysts in the subject areas covered by the Texas general forensic exam; and 5) any federal analyst who testifies in Texas state court agrees to do an online

training on current Texas jurisprudence regarding disclosure requirements under the Michael Morton Act. Staff will draft a letter to the DOJ proposing these requirements and report back at the Commission next quarterly meeting.

Garcia reviewed the proposed Code of Professional Responsibility for Texas forensic analysts and laboratory management. Garcia explained the draft is modeled in part after the Code of Professional Responsibility published by the National Commission on Forensic Science. Garcia suggested distributing the draft to the Texas Association of Crime Lab Directors ("TACLD") for comment.

MOTION AND VOTE: *Parsons moved to adopt the draft Code of Professional Responsibility for Forensic Analysts and Crime Laboratory Management and send it to TACLD for comment. Drake seconded the motion. The FSC unanimously adopted the motion.*

Savage will incorporate the Code into the latest draft of the licensing rules.

Savage reminded members that substantive changes to the licensing rules are required to be re-posted and have a comment period. New comments will need to be adjudicated so the timeline for finalization of the rules will be extended.

MOTION AND VOTE: *Daniel moved to adopt the most recent draft of the rules to include the Code of Professional Responsibility. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Members were referred to a proposed fee schedule. An application fee \$120 application fee, \$100 annual fee, \$100 temporary license fee and a \$75 provisional license fee were discussed. Fee amounts were based on the number of licensees (current estimate is 700) and the cost to administer the program. Fees for other comparable health professions were considered and compared. Members suggested incorporating the lower fee for technicians discussed earlier in the meeting.

MOTION AND VOTE: *Downing moved to accept the fee structure as proposed, including a modified, lower fee for technicians. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Members briefly discussed progress on development of the general forensic licensing exam. Subject matter experts are working on gathering study materials for candidates to review prior to taking the exam. The exam will be based from the study materials. The exam will be proctored by each laboratory. Additional updates will be provided at the Commission's next quarterly meeting.

Update from investigative panel regarding Harris Co. Institute of Forensic Sciences (Toxicology, Blood Alcohol) #16.48.

Garcia gave a presentation outlining the key issues identified by the investigative panel. Commissioners discussed whether to make a professional negligence or misconduct finding against the analyst (Fessessework Guale) with respect to misrepresentation of her credentials.

Members also discussed whether to make a professional negligence or misconduct finding against Guale for failing to competently explain analytical concepts in testimony, particularly with respect to retrograde extrapolation.

Members reviewed the Commission's definitions of professional negligence and misconduct. The panel contacted Guale's attorney but received no response. The Commission has no ability to compel an analyst to speak to the Commission which makes intent difficult to assess. The investigative panel and other Commission members agreed that Guale's misstatements, inconsistencies and confusion with respect to retrograde extrapolation testimony constituted professional negligence.

MOTION AND VOTE: *Kerrigan moved to direct staff to draft a final report reflecting a finding of professional negligence against Guale based on her misstatement of credentials and failure to competently explain analytical concepts in testimony. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Members also discussed whether to make a professional negligence or misconduct finding against laboratory management for failing to check Guale's diploma against her application, CV, and Statement of Qualifications and for failure to monitor Guale's testimony sufficiently to appreciate the problems with respect to her technical understanding/expression of key scientific concepts in toxicology, particularly regarding retrograde extrapolation.

A representative from the Harris County Institute of Forensic Sciences, Michal Pierce, addressed the Commission and provided an explanation of past hiring practices, including why Guale's diploma might not have been compared to her application, CV or SOQ. Pierce also explained changes to the hiring process that have been implemented since that time.

MOTION AND VOTE: *Kerrigan moved to issue no negligence finding on part of laboratory management, but to emphasize in the Commission's final report the lack of attention to detail regarding the comparison of credentials and review of the analyst's transcripts. Parsons seconded the motion. The FSC unanimously adopted the motion.*

Drake recused herself from deliberation and vote on this issue of the complaint.

Garcia will work on a draft report and bring it to the Commission's next meeting.

Update from investigative panel regarding findings of fact, conclusions of law and order by Judge Herbert B. Dixon in United States v. Torney, correspondence with NMS counsel and consideration of appropriate next steps under art. 38.01 TEX. CODE CRIM. PROC.

Members discussed the makeup of the review team which will include Jody Koehler, the Commission's Senior Scientific advisor, Jack Ballantyne, DNA expert from the University of Central Florida, and Timothy Sliter, DNA expert from the Southwestern Institute of Forensic Sciences. The group will visit the laboratory and interview staff.

Garcia will send a letter to NMS's counsel regarding next steps in the investigation.

MOTION AND VOTE: *Parsons moved authorize Barnard to approve payment to Dr. Ballantyne for investigative fees within the Commission's investigative budget. Drake seconded the motion. The FSC unanimously adopted the motion.*

Update from investigative panel regarding combined Clark (Harris Co. IFS, HPD, Harris Co. Sheriff's Department; GSR, DNA, Blood Spatter) #16-40 case and Bryan (Robert Thorman; Blood Spatter) #16.56 case.

Members discussed BPA expert Bob Henderson's report on the bloodstain pattern analysis in the case. Members agreed to table further discussion on the issue until after the hearing on bloodstain pattern analysis. Members discussed the GSR analysis and related testimony, including Dr. Spiegelman's observations. Staff will draft a report after the accreditation issues are considered at the bloodstain pattern analysis hearing.

As to the complaint filed on behalf of Joe Bryan, Henderson expressed significant concern with the bloodstain pattern analysis. The complainant also requested a review of the serology work performed by DPS. Koehler will review the request, work with DPS to address the issues raised therein and report back to the Commission at the next meeting.

Update from investigative panel regarding Houston Forensic Science Center Self-Disclosure (Crime Scene) #17.22.

Garcia reported that staff plans to work with Judge Hervey on training for crime scene investigation. The Commission is also required by the 85th Legislature's HB-34 to publish a written report evaluating the standard procedures used in processing a crime scene, the quality of crime scene investigations, the availability and adequacy of training and continuing education provided to crime scene investigators and to develop any legislative recommendations regarding improvements to crime scene investigation procedures and training. The Commission will conduct a study in the matter and is required to publish a report by December 1, 2018.

Update from investigative panel regarding DPS Garland (Blood Alcohol) #17.28

Garcia explained staff has requested the OIG report from DPS in the matter. An update and draft report on this item will be provided at the Commission's next meeting.

Discuss letter to ANSI/ASQ regarding the scope and purpose of ANAB audits and accreditation.

Garcia summarized her recent discussion with ANAB Vice President, Pam Sale. Garcia and Koehler will review ISO 17011 (the standard governing accrediting bodies) and report any observations back to the Commission at the next quarterly meeting.

Discuss letter to NMS regarding the issue of interns performing casework. Members reviewed correspondence from Dr. Middleberg regarding the laboratory's use of "interns" for casework.

Members concluded the clarifications provided by Dr. Middleberg were sufficient to allay concerns expressed at the last quarterly meeting.

Review and adoption of Bitemark Case Review final report.

Garcia described the scope and makeup of the bite mark case review team. At the review team's last meeting, three cases (Patterson, Salazar and Doud) were designated for notification. Members reviewed transcript excerpts and proposed notifications. The panel presented a draft a report reflecting findings from the case review.

MOTION AND VOTE: *Parson moved to adopt the draft Bite Mark Report for release and to approve notification letters for Patterson, Salazar and Doud. Drake seconded the motion. The FSC unanimously adopted the motion.*

Update from Texas Association of Crime Laboratory Directors.

No specific update was given here. Members of the TACLCD made comments throughout the meeting.

Report from Austin meeting with Japanese criminal justice representatives working on forensic reform in Japan.

Garcia reported on a meeting held on September 18 with a Japanese delegation of attorneys. The delegation was interested in learning about how the FSC operates and what its functions are. Johnson attended and reported he received questions via email after the meeting.

A delegation from Khazakstan is visiting in December. A report will be provided at the next FSC meeting in February.

Consider proposed agenda items for next quarterly meeting.

Schedule and location of future panel and quarterly meetings.

The Commission will meet again February 2 and April 13 for its first two quarterly meetings in 2018.

Hear public comment.

No specific public comment was provided during this agenda item but comment was provided throughout the meeting as noted.

Adjourn.

