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See Also

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Response

Improving Forensic Science Through State Oversight: The Texas Model

The Honorable Juan Hinojosa* & Lynn Garcia**

In *Improving Forensic Science Through State Oversight*, Ryan Goldstein argues that regulation of forensic science, particularly oversight of crime laboratories, is best handled by the states.¹ In this response, we highlight the work of the Texas Forensic Science Commission (the “Commission” or “TFSC”) to support Mr. Goldstein’s argument. We also demonstrate why Professor Jessica Gabel’s characterization of the TFSC as a “doomed attempt[.]”² at forensic oversight is inaccurate and baseless. We echo Mr. Goldstein’s observations regarding the potential risks of relying on federal oversight, including the current lack of political will for reform efforts at the national level. Finally, we offer suggestions regarding how the federal government might play an effective role in supporting the states and responding to the recommendations set forth in the National Academy of Sciences report,³ especially as they relate to certification of forensic examiners, research, and validation of forensic methods.

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1. Ryan M. Goldstein, Note, *Improving Forensic Science Through State Oversight*, 90 TEXAS L. REV. 225, 234 (2011).

2. Jessica D. Gabel & Ashley D. Champion, Response, *Regulating the Science of Forensic Evidence: A Broken System Requires a New Federal Agency*, 90 TEXAS L. REV. SEE ALSO 19, 21 (2011), <http://texasrev.com/sites/default/files/seealso/vol90/pdf/Gabel.pdf>

3. See generally NAT’L RES. COUNCIL, NAT’L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter NAS REPORT].

I. TFSC Core Mission: Investigating Allegations of Professional Negligence and Misconduct in the State's Accredited Crime Laboratories

A. *Legislative Background*

In May 2005, the Texas Legislature created the Commission by passing House Bill 1068 (the “Act”).⁴ The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the TFSC.⁵ The Act took effect on September 1, 2005.⁶ It requires the TFSC to “investigate, in a timely manner, any allegation of professional negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility, or entity.”⁷ The Act also requires the TFSC to: “(1) develop and implement a reporting system through which accredited laboratories, facilities, or entities report professional negligence or misconduct; [and] (2) require all laboratories, facilities, or entities that conduct forensic analyses to report professional negligence or misconduct to the Commission[.]”⁸ Like most other states, Texas requires its crime laboratories to be accredited.⁹

The term “forensic analysis” is defined in the Texas Code of Criminal Procedure as “a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action.”¹⁰ The statute excludes certain types of analyses from the Commission’s jurisdiction, such as latent fingerprint analysis, a breath test specimen, and the portion of an autopsy conducted by a medical examiner or licensed physician.¹¹ The statute does not define the terms “professional negligence” and “professional misconduct,” though the Commission has defined those terms in its policies and procedures.¹²

4. See H.B. 1068, 79th Leg., Reg. Sess. (Tex. 2005).

5. *Id.* § 1.

6. *Id.* § 23.

7. TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(a)(3), available at <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

8. *Id.* § 4(a)(1)–(2).

9. *DPS Crime Lab Accreditation Program*, TEX. DEPARTMENT PUB. SAFETY, <http://www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm>.

10. TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4), available at <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

11. For a complete list of statutory exclusions, see *id.* arts. 38.35(a)(4)(A)–(F), 38.35(f), available at <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

12. TEX. FORENSIC SCI. COMM’N, POLICIES AND PROCEDURES 3–4 (2012) [hereinafter ANNUAL REPORT], available at http://www.fsc.state.tx.us/documents/D_PoliciesandProcedures041312.pdf.

The Commission has nine members—four appointed by the Governor, three by the Lieutenant Governor and two by the Attorney General.¹³ Seven of the nine commissioners are scientists, and two are attorneys (one prosecutor and one criminal defense attorney).¹⁴ The TFSC’s presiding officer is designated by the Governor.¹⁵

B. *Complaints and Self-Disclosures*

The TFSC receives complaints from a variety of sources, including but not limited to incarcerated individuals and their families, advocacy organizations like the national Innocence Project and the Innocence Project of Texas, and former laboratory employees.¹⁶ The Commission also receives self-disclosures from laboratory directors and section supervisors who have discovered significant, material non-conformances in their laboratories. The Commission encourages laboratories to report non-conformances that may rise to the level of negligence or misconduct by using an electronic form and accompanying guidance set forth on the TFSC’s website.¹⁷

The TFSC’s policies and procedures outline the process by which it determines whether to accept a complaint, as well as the process used to conduct an investigation once a complaint or self-disclosure is assigned.¹⁸ Investigations are typically led by a panel consisting of three Commission members and supported by Commission staff.¹⁹ The ultimate result of an investigation is the issuance of a final report.²⁰

C. *The Commission’s Investigative Approach*

The Commission’s investigative process contains some or all of the following elements: (1) document collection (electronic and paper); (2) document review and follow-up collection as necessary; (3) targeted audits of laboratory electronic case management systems if appropriate; (4) analysis of key data; (5) interviews (on-site and/or by telephone) of laboratory personnel and management; (6) meetings with state and local officials to ensure appropriate communication of information (*e.g.*, the lab’s national accrediting body, affected prosecutors, local and/or state elected

13. TEX. CODE CRIM. PROC. ANN. art. 38.01 § 3(a), *available at* <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

14. *Id.*

15. *Id.* § 3(c).

16. *See* TEX. FORENSIC SCI. COMM’N, ANNUAL REPORT 15–18 (2012) [hereinafter ANNUAL REPORT], *available at* <http://www.fsc.state.tx.us/documents/TFSCAnnualReport2012.pdf>.

17. *Lab Disclosure Form*, TEX. FORENSIC SCI. COMMISSION (Nov. 4, 2012), <http://www.fsc.state.tx.us/documents/LABD.pdf>.

18. *See* ANNUAL REPORT, *supra* note 12, at 6–9.

19. *Id.* at 8–9. The Commission currently has two full-time staff, a general counsel and a commission coordinator.

20. *Id.* at 9.

officials, etc.); (7) retrospective re-examination of evidence; (8) deliberations regarding negligence and misconduct findings; (9) recommendations for corrective action and other improvements (sometimes at more than one stage of the investigation); and (10) follow-up on corrective actions as necessary.²¹

Commission staff maintains regular communication with the following interested stakeholders as appropriate: (1) ASCLD-LAB or other applicable national accrediting body; (2) Texas Department of Public Safety (responsible for state-level accreditation);²² (3) City, County and/or State officials responsible for the laboratory; (4) affected prosecutors and/or defense counsel; (5) complainants; (6) affected crime laboratories; and (7) state organizations involved in advocacy, education and training on criminal justice issues.²³

II. The Value of State Experimentation: The Texas Model

Without repeating the observations and recommendations made in the Commission's various investigative reports,²⁴ we focus below on improvements and lessons learned through the TFSC investigation process. Specifically, we highlight practical gains that would not have been realized through accreditation alone or through a top-down mandate by the federal government. The TFSC experience confirms that while certain aspects of the accreditation mission of ASCLD-LAB and other national accrediting bodies may overlap with issues raised during a TFSC investigation, "[a]ccreditation is just one aspect of an organization's quality assurance program."²⁵ Many elements of the legislature's objective in creating the TFSC would not have been achieved through the ASCLD-LAB accreditation process alone.

In addition, as the NAS Report notes, though the "vast majority of criminal law enforcement is handled by state and local jurisdictions, these entities are often sorely lacking in the resources (money, staff, training, and equipment) necessary to promote and maintain strong forensic science laboratory systems."²⁶ Thus, it is critical that regulatory oversight and corrective action is comprehensive and independent without so burdening the laboratories that the risk of undisclosed error is *exacerbated* rather than *improved* by the oversight. The TFSC is in a unique position to work

21. See generally *Complaint Status/Disposition Reports*, TEX. FORENSIC SCI. COMMISSION, <http://www.fsc.state.tx.us/complaints>.

22. *DPS Crime Lab Accreditation Program*, TEX. DEPARTMENT PUB. SAFETY, <http://www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm>.

23. Examples of such agencies in Texas include but are not limited to the Texas Criminal Justice Integrity Unit, the Texas Commission on Indigent Defense, and the Innocence Project of Texas.

24. TFSC investigative reports are posted upon release at: <http://www.fsc.state.tx.us/complaints/>.

25. NAS REPORT, *supra* note 3, at 195.

26. *Id.* at 6.

collaboratively with a diverse range of stakeholders *before, during and after* a particular investigation to ensure a thorough and reliable review while simultaneously realizing economic efficiencies, forensic development opportunities, and possibilities for strategic partnerships. The same opportunities simply could not be realized by a federal agency exercising regulatory authority from across the country in Washington, DC.

As Mr. Goldstein notes, “state officials bear responsibility for the failures of the state’s forensic science laboratories. State officials are accessible to those directly affected by reform, such as forensic scientists and state police, and to state citizens who support the criminal justice system by paying taxes and serving on juries.”²⁷ A few illustrative examples of reform efforts by the State of Texas through the TFSC are discussed below.

A. *Cost-Effective Retroactive Review of Evidence: Beyond Accreditation*

One of the most significant and potentially controversial aspects of the Commission’s statutory authority is its ability to impose a requirement for retrospective re-examination of evidence beyond the particular non-conformance in question.²⁸ In most TFSC investigations to date, affected law enforcement agencies, prosecutors, complainants, and advocacy and defense organizations agree that some level of re-examination is important to ensuring public confidence in the laboratory’s work. Retroactive retesting of evidence beyond the particular non-conformance in question may not be required by ASCLD-LAB, as long as the laboratory demonstrates appropriate corrective action for the particular non-conformance as specified in the laboratory’s policies and procedures. However, the Commission’s experience has shown that to ensure public confidence in the overall integrity of a laboratory’s work, additional retesting is often critical. The Commission plays the primary leadership role in setting appropriate parameters for re-examination.

The first time the Commission required retrospective re-examination by a crime laboratory was during the El Paso Police Department Crime Laboratory (“EPPDCL”) investigation.²⁹ During that investigation—which began with the filing of a complaint by the national Innocence Project in September 2011 and ended with the issuance of a final report in July 2012—the forensic analysis of one of three controlled substance analysts was called into question.³⁰ The Commission determined the most prudent course of action was to re-examine every non-marihuana case worked by this analyst

27. Goldstein, *supra* note 1, at 234.

28. TEX. CODE CRIM. PROC. ANN. art. 38.01 § 4(b)(2)(A), *available at* <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

29. *See generally* TEX. FORENSIC SCI. COMM’N, EL PASO POLICE DEPARTMENT CRIME LABORATORY INVESTIGATION (2012) [hereinafter EPPDCL REPORT], *available at* <http://www.fsc.state.tx.us/documents/FINAL-EPPDReport082312.pdf>.

30. *Id.* at 4, Ex. H.

during the course of her tenure at the laboratory.³¹ By working in partnership with various laboratories within the Texas Department of Public Safety system, the Commission achieved re-examination of every case in a cost-effective manner. The laboratory, City officials, and El Paso District Attorney were cooperative throughout the retesting process.³²

Under similar circumstances, the TFSC required retrospective re-examination of certain evidence called into question by a former laboratory employee during the TFSC's investigation of the Austin Police Department Crime Laboratory's ("APDCL") drug chemistry section.³³ The Commission first attempted to achieve retesting through collaboration with other agencies.³⁴ At the time, the Texas DPS had requested that it not be sent the evidence because the laboratories within the DPS system were overloaded with their own casework demands.³⁵ The TFSC investigative panel then sought the assistance of the United States Drug Enforcement Agency's ("DEA") Southwestern regional laboratory in Dallas.³⁶ As the NAS Report notes, while state and local jurisdictions are often sorely lacking in funding resources, "[b]y comparison, federal programs are often much better funded and staffed."³⁷ Though the local DEA laboratory director was entirely receptive to the Commission's request for assistance, the agency's chief counsel in Washington, DC refused to allow the director to assist the Commission with its request, citing a general policy against performing such services.³⁸

The investigative panel then considered other laboratories accredited under Texas law and determined that NMS Labs in Willow Grove, Pennsylvania would be a viable choice due to the timeliness with which it is able to conduct retesting.³⁹ APDCL agreed with this approach, and APD leadership agreed to pay for the retesting. The Travis County District Attorney also supported retesting.⁴⁰ The Commission worked with NMS to establish a fairly priced service agreement, thereby making the proposition of retesting more economically feasible than it otherwise might have been.

In both the EPPDCL and APDCL cases, evidence retesting confirmed the original reports issued by the laboratories. However, the retesting was a critical element of ensuring a comprehensive and independent investigation

31. *Id.* at 8, Ex. H.

32. *Id.*

33. TEX. FORENSIC SCI. COMM'N, AUSTIN POLICE DEPARTMENT CRIME LABORATORY CONTROLLED SUBSTANCE INVESTIGATION 12–13 (2012) [hereinafter APDCL REPORT], available at <http://www.fsc.state.tx.us/documents/APDFinalReport102312.pdf>.

34. *Id.* at 12.

35. *Id.*

36. *Id.*

37. NAS REPORT, *supra* note 3, at 6.

38. APDCL REPORT, *supra* note 33, at 12.

39. *Id.* at 13.

40. *Id.*

of the laboratory's work in each case. It is likely that retrospective re-examination will continue to be an important component of TFSC investigations in the years to come.

B. Investigative Independence and Random Review Methods

The TFSC recognized early in the investigative process that ASCLD-LAB's review of non-conformances would necessarily be limited to an examination of the laboratory's compliance with specific accreditation standards. Accreditation assessments are designed to be extremely thorough and detailed; a good example is the review conducted by the ASCLD-LAB lead assessor in the EPPDCL case.⁴¹ However, ASCLD-LAB and other accrediting agencies still operate within the specific confines of their published accreditation standards, while the Commission has a greater obligation to ensure public policy concerns are addressed. For example, in the EPPDCL case, the Commission was concerned about a lack of scientific leadership in the laboratory, and determined the most prudent course of action was to conduct separate on-site interviews of laboratory staff and management. The Commission was then able to recommend a course of action for the future of the laboratory in collaboration with responsible local authorities.⁴² The Commission also required a follow-up audit led by subject matter experts.⁴³ The audit included an evaluation of the actual authority of the quality manager and a consideration of whether the examiners truly understood and absorbed changes made under the lab's corrective action plan in response to the ASCLD-LAB lead assessor's draft report.⁴⁴ In the weeks following the audit, DPS and the Commission's investigative panel requested case files at random from EPPDCL, to ensure concerns regarding the quality of certain spectral data were resolved.⁴⁵

Another example of the importance of random review beyond what is required by the accrediting bodies occurred during the course of a self-disclosure filed by the Tarrant County Medical Examiner's Crime Laboratory.⁴⁶ In that case, a senior forensic biologist discovered a material non-conformance when she retrieved a sexual assault kit from storage for the purposes of performing further testing on the kit.⁴⁷ The evidence in the kit had already undergone initial serological screening, which included an acid phosphatase test to determine the presence or absence of spermatozoa.⁴⁸

41. EPPDCL Report, *supra* note 29, at 5–6.

42. *Id.* at 11, 20.

43. *Id.* at 16–18.

44. *See id.*, Ex. M.

45. *Id.* at 18.

46. *See* TEX. FORENSIC SCI. COMM'N, TARRANT COUNTY MEDICAL EXAMINER'S OFFICE CRIME LABORATORY SELF-DISCLOSURE 5 (2012), available at <http://www.fsc.state.tx.us/documents/FinalReportTCME101712.pdf>.

47. *Id.*

48. *Id.*

The senior forensic biologist retrieved the kit from storage in response to a request for DNA testing by the prosecutor in the case.⁴⁹ Upon retrieving the evidence, she noticed the seals on two of the items in the kit were not broken.⁵⁰ This raised an immediate red flag because the analyst who conducted the serological screening indicated negative acid phosphatase results on *all* samples.⁵¹ This deviation would not have been identified during technical review, as technical review focuses on whether the documentation in the case file is sufficient to support the results issued by the analyst. As one element of its corrective action plan, the laboratory instituted a review program under which random evidentiary audits will be performed, thereby adding an additional level of possible detection and deterrence.⁵² Because the Commission publishes reports for each investigation detailing the approach taken, other laboratories are able to use the practices suggested to strengthen their own quality system, and to address non-conformances as they arise.

The Commission has also used its report drafting process to call attention to scenarios in which crime laboratories have achieved or fallen short of “best practices” in certain areas of forensic analysis or policy, beyond what might be required under a particular accreditation standard.⁵³ For example, the Commission often refers to national Scientific Working Group guidelines when determining whether a laboratory’s approach is optimal, offering recommendations where appropriate to elevate the laboratory’s performance over the long-term.⁵⁴ Because the Commission has strong relationships with stakeholders, it is able to effectively communicate expectations statewide. For example, the Texas Association of Crime Laboratory Directors, which meets twice per year, invites the Commission’s staff to provide an update and report on lessons learned from investigations and self-disclosures, so that laboratories may anticipate issues before they arise. This approach increases government transparency while encouraging laboratories to engage in an open dialogue and proactively address issues.

C. *Developing an Effective Working Protocol with ASCLD-LAB*

By maintaining strong lines of communication with ASCLD-LAB, the Commission has developed a clear understanding of the limits of the accrediting body’s role in evaluating non-conformances. During both the EPPDCL investigation and the APDCL investigation, the ASCLD-LAB Executive Director participated in Commission meetings in Austin, providing

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 10.

53. *See* EPPDCL REPORT, *supra* note 29, at 18; *see also* APDCL REPORT, *supra* note 33, at 26.

54. *See* EPPDCL REPORT, *supra* note 29, at 18.

members with the opportunity to ask specific questions regarding the scope of the accreditation process in each case. This interaction allowed the TFSC to focus its efforts on areas that are critical to ensuring a thorough investigation but would not have been addressed directly by ASCLD-LAB (*e.g.*, retrospective re-examination, notice process, laboratory leadership and culture, statewide best practice development, long-term implications for other laboratories in Texas, etc.)

Because the Commission maintains strong communication with ASCLD-LAB, it is also able to incorporate ASCLD-LAB's follow-up initiatives as part of its report recommendations. For example, in the EPPDCL case, the Commission recommended that the laboratory participate in an enhanced surveillance visit within one year of the date on which ISO accreditation was granted.⁵⁵ In the APDCL case, the Commission required the laboratory to submit to random reviews of rush cases in disciplines other than controlled substance to ensure reporting practices in those sections were compliant with laboratory protocols and ASCLD-LAB standards.⁵⁶ Effective coordination between ASCLD-LAB and the Commission helps ensure independent and comprehensive investigations while maximizing efficiencies.

During the ADPCL investigation, the TFSC investigative panel and ASCLD-LAB's case manager conducted parallel on-site interviews during the same two-day window to maximize thoroughness and minimize disruption in the laboratory.⁵⁷ This approach provided a further opportunity for information sharing, and allowed for an extremely comprehensive review in a high-volume discipline (controlled substance), which would have been more difficult to achieve if the two agencies had conducted interviews in isolation.

After the interviews were finished, each agency conducted its own independent deliberations and issued separate reports and recommendations. Though the parallel-interview approach was appropriate and helpful in this particular case, there may be cases in the future for which separate site visits are the preferable course of action (*See* discussion of EPPDCL investigation above). As Mr. Goldstein notes, states are in a position to "experiment with new or nontraditional forms of oversight."⁵⁸ Using a parallel interview model as a component of TFSC investigations while retaining independence in the deliberation process is one example of such flexibility and experimentation.

55. *Id.* at 22.

56. APDCL REPORT, *supra* note 33, at 14.

57. *Id.* at 13.

58. Goldstein, *supra* note 1, at 234.

D. Working with Prosecutors and Local Government Officials

Prosecutors affected by challenges to the integrity and reliability of forensic analysis often play a critical role in ensuring appropriate stakeholders are informed of the potential scope and significance of issues raised. Before the TFSC accepted the EPPDCL complaint for investigation, the City of El Paso had already posted the ASCLD-LAB assessment report and probation letter on its website.⁵⁹ Shortly after the posting, the El Paso District Attorney obtained a list of cases worked by the EPPDCL from March 2006 (when the laboratory was first accredited) through July 2011. The District Attorney's Office researched the addresses for each defendant or defense attorney who represented a defendant on the list. The office then drafted and mailed individual notices informing each defendant or defense attorney of the probationary status of the laboratory. The notice included a link to ASCLD-LAB's full assessment report, which was posted on the District Attorney's website as well as the laboratory's website. In addition, the District Attorney's office participated actively in the Commission's site visit in December 2011, as well as Commission meetings in Austin in January and April 2012. Through various meetings and telephone conversations with the Commission, the District Attorney's office and city officials developed a clear understanding of the potential impact of the issues raised by ASCLD-LAB and the Commission.

Similarly, in the APDCL investigation, the Commission maintained regular communication with the Travis County District Attorney, providing periodic updates regarding the investigation's status. The District Attorney posted notice of the complaints against the APDCL on the local defense association's blog and contacted individual attorneys in cases for which potential material concerns were raised.⁶⁰ The District Attorney also checked in regularly with Commission staff to assess whether any investigative developments could possibly trigger requirements under *Brady v. Maryland*.⁶¹

After a self-disclosure filed by the DPS crime laboratory in Houston involving thirty-six counties around Houston, the Texas District and County Attorneys' Association ("TDCAA") was the first to provide guidance to its members regarding how to handle the close to 5,000 controlled substance cases potentially affected by the non-conformance.⁶² Dozens of prosecutors

59. EPPDCL Report, *supra* note 29, at 10.

60. The District Attorney's public statement is available from the *Austin American Statesman* at <http://alt.coxnewsweb.com/statesman/pdf/01/011212crimelabA.pdf>. The Austin Criminal Defense Lawyer Association's private forum is located on its website, <http://www.acdla.com/ClubPortal/ClubStatic.cfm?clubID=84&pubmenuoptID=294>.

61. 373 U.S. 83 (1963) (holding that the prosecution in a criminal case withholding material evidence violates the defendant's due process rights).

62. See *ALERT: DPS Houston Regional Crime Lab Issue*, TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION (Apr. 27, 2012), <http://www.tdcaa.com/announcements/alert-dps-houston-regional-crime-lab-issue>.

affected by the disclosure are still working to assess potential ramifications, but the TDCAA's involvement and recommendations provide a road map for handling similar issues in the future. The Commission has also consulted with affected prosecutors to ensure open communication as counties struggle to address potential consequences. Because the Commission is a state agency, it is uniquely positioned to engage in the type of outreach needed to address concerns at many levels of the criminal justice system. Community outreach is not a component of ASCLD-LAB's mission, and it is difficult to envision how a federal agency in Washington, DC could effectively achieve this goal.

E. Collaborative Efforts to Achieve Effective Notice for Defendants

While it is extremely important to ensure effective communication with prosecutors affected by problems in forensic science, it is also critical to ensure that effective notice is provided to defendants and defense counsel when problems arise, especially in high-volume disciplines such as controlled substance analysis. This challenge has been a significant focus area in the DPS–Houston disclosure discussed above. Though affected prosecutors have moved aggressively to notify defendants, they have limited ability to ascertain whether their notice attempts have been effective. In addition, while DPS has offered retesting to anyone who makes a request,⁶³ without effective notice many defendants will not know retesting is even an option, or how to request it. During a public panel meeting in October 2012, Commissioners wrestled with the question of how defendants, especially indigent defendants, would receive actual notice and/or request re-examination of evidence in their cases. Court-appointed attorneys often do not represent their clients beyond the final disposition, and are unlikely to step forward to assist their former clients once the cases are resolved. This leaves many defendants without information or resources necessary to request retesting.

To address this issue, TFSC staff is working collaboratively with the Texas Commission on Indigent Defense, the Innocence Project of Texas, the Texas Criminal Defense Lawyers Association, the Texas District and County Attorneys Association, the Montgomery County District Attorney's Office, the Houston District Attorney's Office, and the Houston Public Defender's Office to develop an approach to notification that addresses the concerns raised. Through its work with these agencies, the Commission is developing a protocol to serve as a model for future cases. Moreover, by bringing interested agencies together, the TFSC has the opportunity to further strengthen stakeholder relationships across the state.

63. *Id.*

F. Scientific Leadership, Transparency, and Organizational Culture

Neither ASCLD-LAB's *Legacy* nor its *International* program standards require that a laboratory director have any particular scientific background: rather, they require that someone in the organization with appropriate authority have such a background.⁶⁴ In its EPPDCL report, the Commission expressed significant concern regarding the lack of scientific leadership at the EPPDCL from 2006 to 2011.⁶⁵ The EPPDCL was an extremely small organization with no more than three examiners, including the quality manager, during most of the period in question.⁶⁶ While the scientific qualifications of a director in a larger laboratory with multiple forensic disciplines may be less critical than his or her managerial or organizational skills, in a small laboratory like the EPPDCL, the director's scientific qualifications and ability to rely on sound scientific principles in decision-making becomes far more critical.

TFSC members felt it was appropriate to recommend that *any* director retained by the laboratory be scientifically trained and qualified in the discipline in question. City leadership, including the District Attorney, understood and appreciated the need for this requirement, and the discussion raised awareness regarding the importance of strong scientific leadership in all crime laboratories, regardless of whether they are funded by the city, county, state, or federal government. Because the Commission's membership includes at least some scientists who have experience in running crime laboratories, members recognize when particular factual circumstances require certain scientific qualifications in leadership positions that may not be addressed by the broader, more generally applicable accreditation standards.

G. Encouraging Laboratory Self-Disclosure

One of the most effective approaches to crime laboratory oversight is a robust laboratory self-disclosure program. Of note, the two most recent TFSC investigations have involved laboratory self-disclosures. The advantages of self-disclosure can be significant. First, investigations resulting from self-disclosure often incorporate corrective action immediately—sometimes even before the Commission has an opportunity to evaluate the facts of the case. Because the laboratory steps forward first, the investigation typically is resolved faster than when the laboratory is reacting to a complaint filed by an outside person or entity.

The Commission does not have the authority to impose administrative sanctions on individual analysts or crime laboratories. In cases involving

64. For additional information about ASCLD accreditation programs, see *Programs of Accreditation*, AM. SOC. OF CRIME LAB. DIRECTORS LAB. ACCREDITATION BD., http://www.asclclab.org/programs/prgrams_of_accreditation_index.html.

65. See EPPDCL REPORT, *supra* note 29, at 20.

66. *Id.* at 5.

criminal activity or misconduct, the local district attorney has discretion to pursue a criminal indictment against an offending analyst. As a practical matter, crime laboratories with disclosures pending before the Commission do not hesitate to take disciplinary action (up to and including dismissal) against analysts who have engaged in negligence or misconduct. The Commission's public discussion of material nonconformances, report-drafting process, and close communication with accrediting bodies encourages crime laboratories to handle problems in a serious and timely manner. It is difficult to envision how additional administrative penalties (such as fines) would help, given that laboratories are already strapped for resources and struggling to meet law enforcement demand in numerous disciplines.⁶⁷ Arguably, administrative remedies could act as a deterrent if universal certification of examiners were required (similar to the licensure requirements of the Texas State Bar or Medical Board), but that requirement does not yet exist, either in Texas or nationally.⁶⁸ As a result, laboratory self-disclosure will be a critical—if not the most critical—component of the Commission's oversight authority for the foreseeable future. Developments in this area will be especially evident as the Commission continues to establish itself as a credible, thorough, and fair investigative agency.

H. Resolving Interpretive Dilemmas to Ensure Statewide Consistency

During the APDCL investigation, an issue was raised regarding a discrepancy in identifying marijuana vs. hash (material other than marijuana containing tetrahydrocannabinols) from laboratory to laboratory across Texas.⁶⁹ Because the two categories fall within different penalty groups under Texas law,⁷⁰ the level of punishment assigned to an individual could vary significantly based on whether a forensic report identifies the material in question as marijuana or material other than marijuana containing tetrahydrocannabinols ("THC").

The notion that an individual arrested with a substance in one Texas county could face a different penalty than an individual arrested with the exact same substance in another county was disconcerting to Commissioners and other stakeholders in the community. As a result, the Commission concluded that there is a need "for legal clarification as to what constitutes marijuana and/or tetrahydrocannabinols in Texas."⁷¹ The Commission is in the process of coordinating a Texas Technical Working Group ("TTAG")

67. Shannon Wolfson, *DNA Testing Demand Delays Justice*, KXAN (November 20, 2012), <http://www.kxan.com/dpp/news/investigations/dna-testing-demand-delays-justice>. Tony Phlohetski, *DPS Labs Face Backlog in DWI Blood Tests*, AUSTIN AMERICAN STATESMAN (December 6, 2012), <http://www.statesman.com/news/news/state-regional-govt-politics/dps-labs-face-backlog-in-dwi-blood-tests/nTPg8/>

68. NAS Report at 215.

69. APDCL REPORT, *supra* note 33, at 7.

70. *Id.*

71. *Id.* at 14.

consisting of discipline-specific experts, to offer guidance on the issue. The TTAG may also address other key issues affecting the discipline, without duplicating the work of the national Scientific Working Groups. The Commission will continue to consult with the Texas District and County Attorneys' Association and the Texas Criminal Defense Lawyers' Association to encourage their involvement in this discussion. Because classification of controlled substances under the Texas Penal Code is fundamentally a state issue, an agency like the TFSC is in the best position to marshal the resources necessary to resolve the issue in a collaborative manner.

I. Resolution of Willingham/Willis Complaint (Arson)

In their response, Ms. Gabel and Ms. Champion refer to the TFSC as a “failed attempt” at regulatory oversight, citing the Commission’s handling of the Willingham/Willis complaint as evidence.⁷² Such a broad-based dismissal of the agency is unfounded and disconnected from reality, especially considering that various attempts to achieve federal-level oversight have failed to yield any concrete results to date. Moreover, the sweeping criticism of the TFSC does not consider the many important complaints and disclosures that do not make national headlines. It also neglects to consider that the recommendations generated in the final report of the Willingham case have positioned Texas as a leader in improving the quality and reliability of fire and arson investigation. The discipline of arson investigation has undergone significant transformation over the last two decades as experts have learned more about the way fire behaves. This phenomenon has affected arson investigators in *every state*. However, *no other state* is taking such proactive measures as Texas. The Texas State Fire Marshal’s Office (“SFMO”) has embraced all recommendations issued by the Commission relevant to the agency’s duties.⁷³ Examples of SFMO initiatives in response to the report include:

- Establishment of a Science Advisory Workgroup consisting of state and national experts to assist the agency with ongoing peer review of arson cases.
- Retroactive review of arson cases in collaboration with the Innocence Project of Texas.
- Extensive classroom and live-burn training exercises for members of the SFMO staff taught by internationally recognized experts.

72. . Gabel & Champion, *supra* note 2 at 21.

73. Letter from State Fire Marshal Chris Connealy to members of the stakeholder community (Oct. 3, 2012), *available at* <http://www.sffma.org/pdfdocs/miscpdfs/Forensic%20Science%20Update.pdf%2010-3-12.pdf>.

- Creation of the Texas Fire Investigation Forums including 8-hours worth of classes plus a half-day of open discussion on fire and arson investigation for investigators across the state. The forums repeat every few months in different areas of the state.
- A multi-association statewide plan for enhanced professional development beyond current certification requirements.
- Partnerships with the Harris County Fire Marshal's Office and Plano Fire Department to offer additional classes on NFPA-1033 and report writing.

Through the combined efforts of the SFMO and its local partners, Texas provides a strong model for other states looking to review or improve the quality of forensic investigation in the fire and arson disciplines. This is another example of development that is most effectively achieved through state and local collaboration.

III. Forensic Development as a Component of a State Forensic Agency's Mission

In addition to the Commission's investigation program, Commissioners focus significant time and resources on proactive forensic development activities. For example, in June 2012, the Commission co-hosted a forensic science conference with the Texas Criminal Justice Integrity Unit to provide free continuing education training for lawyers, judges and scientists in a wide range of forensic disciplines. In addition, the Commission hosted a stakeholder roundtable discussion during which law enforcement, defense counsel, prosecutors, judges, scientists, legislators and advocacy organizations discussed the following subject areas: (1) education and training of scientists, lawyers and judges; (2) certification of forensic examiners; (3) quality and timeliness of forensic services; (4) strategies for improving quality and consistency of forensic reporting and testimony; (5) research and reliability of methods; (6) ethical dilemmas in forensic science; (7) addressing pseudo-science in Texas courts; and (8) independence of crime laboratories in Texas.

After gathering data from the stakeholder roundtables, the Commission issued a report describing recommendations made in each subject area.⁷⁴ Commission staff is currently working to implement the recommendations by focusing on strategic priorities. The first priority is dissemination of a statewide survey to identify: (1) the status of examiner certification in each Texas laboratory; (2) methods used by laboratories to encourage certification; (3) an assessment of funding devoted to continuing education and training; and (4) current experience with research and development in

74. See generally TEX. FORENSIC SCI. COMM'N, STAKEHOLDER ROUNDTABLE REPORT (2012), available at <http://www.fsc.state.tx.us/documents/StakeholderRoundtableReport-June62012.pdf>.

partnership with universities. Additional priorities include the creation of a statewide joint venture to establish a forensic science training academy (both virtual and live training opportunities are under consideration), establishment of discipline-specific TTAGs (*see* discussion on marijuana classification issue above), and establishment of a database including information on academic departments already engaged in forensic science research. The Commission is also working to establish a business case in support of adequate funding for Texas crime laboratories.

IV. Opportunities for Federal-State Collaboration

On September 14, 2012, the White House Subcommittee on Forensic Science (SoFS) hosted a meeting of state forensic oversight bodies. The meeting provided an opportunity for state agencies to share their experiences and to learn about reform efforts underway at the national level, including an upcoming white paper regarding the efforts of various interagency working groups (“IWGs”). The paper should be published sometime in the next year, and the reaction of states to it will be critical to successful implementation. However, because of the limitations on disclosure of information under the Federal Advisory Committee Act, it is difficult for those who are not members of SoFS to predict the range of issues that will be addressed by the paper, and how the recommendations may impact states. While it is clear that tremendous work has been invested by the IWGs, it is unclear what the specific outcomes will be or when state agencies will be informed of those outcomes. In the meantime, it would be helpful if SoFS would continue to encourage information-sharing between various state forensic oversight bodies, and to create additional opportunities for states to connect on key issues.

In addition to facilitating state agency communication and providing funding for backlog reduction, there are opportunities for the federal government to assist state forensic laboratories without shifting investigative and oversight authority to Washington. For example, as Professor Giannelli notes in his response, there is a real need for foundational research in support of many common forensic techniques, including but not limited to “fingerprint examinations, firearms (ballistics) and toolmark identifications, and also questioned document comparisons, hair analysis, and bitemark identification.”⁷⁵ Further, “basic research can be both time-consuming and expensive, and the underfunding of crime laboratories has been chronic.”⁷⁶ As a result, it is difficult for laboratories facing significant backlogs to engage in the type of research recommended in the NAS Report. Though the TFSC is in the beginning stages of encouraging new partnerships

75. Paul C. Giannelli, Response, *Forensic Science Reform*, 90 TEXAS L. REV. SEE ALSO 29, 30 (2011), <http://texasrev.com/sites/default/files/seealso/vol90/pdf/Giannelli.pdf> (footnotes omitted).

76. *Id.* at 30–31 (quoting Paul C. Giannelli, *Forensic Science: Why No Research?*, 38 FORDHAM URB. L.J. 503, 508 (2010)) (footnotes omitted).

between laboratories and universities in Texas that may result in significant research efforts, it would be helpful to have funding support for research initiatives that would benefit crime laboratories nationwide.

Another area in which the federal government may provide assistance is in examiner certification. While many in the forensic science community support the theoretical concept of certification for all examiners, it is difficult to envision how and when national certification bodies will be ready to handle certification of every examiner in every crime laboratory in every state. Guidance in this area would be extremely helpful for states seeking to achieve 100% certification of examiners.

V. Final Comments

This response highlights the Texas experience as support for state-based oversight of forensic laboratories. However, the Commission's ability to effect change is not without limitation. For example, there are a number of forensic disciplines that are exempt from accreditation by law.⁷⁷ The Commission also does not have jurisdiction in civil cases or in cases where parole status depends upon forensic analysis.⁷⁸ The Commission's work is limited to forensic analyses conducted or entered into evidence on or after September 1, 2005.⁷⁹ The Commission does not have enforcement, subpoena, or rulemaking authority. The information it receives during the course of any investigation is dependent upon the willingness of concerned parties to submit relevant documents and respond to questions posed.

As the TFSC continues to work hard to demonstrate a thorough, diligent and fair approach to oversight, it is likely that legislators will continue to support and clarify the Commission's mission over time. There is no question that while efforts at the federal level remain slow and mired in politics, state agencies such as the TFSC move forward in a deliberate and relatively nimble manner, adjusting where necessary to ensure an efficient and effective approach to crime laboratory oversight.

As states like Massachusetts face tragic scandals in their crime laboratories,⁸⁰ the forensic science community is reminded that abuses can occur in any state, regardless of size or geographic location. Though the

77. These exemptions include, *e.g.*, latent print examination, breath alcohol analysis, and the portion of an autopsy conducted by a medical examiner. TEX. CODE CRIM. PROC. ANN. arts. 38.35(a)(4)(A)–(F), (f), <http://www.statutes.legis.state.tx.us/Docs/CR/pdf/CR.38.pdf>.

78. *Id.* art. 38.35(a)(4)(E)–(F).

79. See GREG ABBOTT, RE: INVESTIGATIVE AUTHORITY OF THE TEXAS FORENSIC SCIENCE COMMISSION 2 (2011), available at <https://www.oag.state.tx.us/opinions/opinions/50abbott/op/2011/pdf/ga0866.pdf>.

80. Milton J. Valencia, *Top Judge: Mass. Crime Lab Scandal Could Have Substantial Impact on Cases in Federal Court in Boston*, BOSTON.COM (Oct. 11, 2012), <http://www.boston.com/metrodesk/2012/10/11/top-judge-mass-crime-lab-scandal-could-have-substantial-impact-cases-federal-court-boston/d676gzECY2t6rTFXb6D86H/story.html>.

number of potentially affected cases may seem overwhelming, especially in high-volume forensic disciplines like controlled substance analysis, state oversight bodies provide a much-needed framework for addressing crises as they arise. The states are also uniquely positioned to encourage broad-based initiatives to protect against recurrence. An effective state forensic science agency will have fostered strong relationships between stakeholders in the forensic science community well before a crisis occurs, thereby allowing the government's response to be quick, comprehensive and timely while maximizing possibility for long-term improvements.

In closing, it is worth noting the TFSC's budget is \$250,000 per year.⁸¹ The Texas model demonstrates that it is possible to provide effective oversight through independent investigation, sharing of existing resources, and proactive collaboration with stakeholders without creating a large and expensive bureaucracy. While the Commission certainly has some limitations, by observing and integrating the lessons learned through each investigation, the agency has experienced consistent and positive forward momentum. And there are many reasons to believe those positive strides will continue in the years to come.

81. ANNUAL REPORT, *supra* note 16, at 9.