

Texas Forensic Science Commission – Licensing Advisory Committee Minutes from July 10, 2017 Meeting

The Licensing Advisory Committee of the Texas Forensic Science Commission met at 10:00 a.m. on Monday, July 10, 2017, at the Stephen F. Austin building, 1700 North Congress Ave., Suite 172, Austin, Texas 78701.

Members of the Committee were present as follows:

Members Present: Greg Hilbig, Chair
James Miller
Robert Sailors
Timothy Sliter
Chris Heartsill
Thomas Ashworth
Michael Ward
Keith Hampton

Staff Present: Lynn Garcia, General Counsel
Kathryn Adams, Commission Coordinator

Review and adoption of minutes from May 25, 2017 meeting.

MOTION AND VOTE: *Sliter moved to adopt the May 25, 2017 meeting minutes draft. Heartsill seconded the motion. The Committee unanimously adopted the motion.*

Administrative update (update on any outstanding reimbursements or other administrative items from staff; update on software programs and implementation progress).

Members and staff briefly discussed whether there were any outstanding reimbursement requests from Committee members.

Garcia and members discussed using software provided through the Office of Court Administration ("OCA"), the Commission's new administrative attachment, to maintain data for the licensing program. The OCA has a contract with a software provider for development of software for their own licensing programs. Garcia and staff will work with OCA staff to determine whether the system the OCA uses for its licensing functions will work for the Forensic Analyst Licensing Program as well. Staff will provide an update on any developments related to the software for the licensing program, including the cost of the program, at the Committee's next meeting.

Review and discuss published rules for the Licensing Program and recommendations regarding the adjudication of public comments received.

Members reviewed and addressed each comment received from the public during the comment period for the proposed licensing program rules.

Members discussed a comment requesting the LAC change or tweak the definition of forensic analyst to discourage individuals from performing technical reviews on disciplines or sub-disciplines for which they have never been qualified to conduct analysis. The definition of forensic analyst is straight the statute; any change would need to come from Legislature.

Members discussed a comment that FEPAC allows for distance learning and strictly online degrees should not be allowed. The LAC believes the most prudent course is to rely on FEPAC's assessment of which academic programs merit recognition instead of discounting online programs outright.

Members discussed a comment that coursework requirements should be the same and consistent discipline to discipline. The Committee believes that is not possible as each discipline is fundamentally different. The accreditation requirements are evidence of this.

Members discussed a comment that there is no need to make statistics mandatory. The LAC and FSC fundamentally disagree with this comment. Members emphasized that there have been many examples of recent issues arising involving misunderstanding of fundamental statistical principles including but not limited to the use of probabilistic statements in testimony (DNA CPI stat; hair microscopy; GSR, etc.).

Members discussed the comment that Fellows and Diplomates of the American Board of Forensic Toxicology ("ABFT") should be exempt from the examination requirement when applying for the license and also that Fellows and Diplomates should be able to submit their annual continuing education ("CE") documentation for ABFT to count towards Commission requirements as well. Members believe the ABFT exam does not target the same subject areas as the Texas general forensic exam. This is particularly true in the Texas law-specific areas such as article 39.14(h) of the Texas Code of Criminal Procedure (*aka*, the Michael Morton Act). Moreover, the statute only allows the Commission to recognize a certification examination "to the extent the Commission determines the content required to receive the certification is substantially equivalent to the contents required" under subsection 4-a(d)(1)(D)." The LAC does not believe toxicologists who are ABFT certified should be exempt from the Texas general forensic examination because of the differences in scope and subject matter covered in the respective examinations. However, in recognition of the value of certification and acknowledging the challenging nature of the ABFT examination, the LAC discussed the possibility of offering a master level license (*see* art. 38.01 4-a(b) for statutory authority to establish classifications of licenses) for individuals who are certified by ABFT. With respect to the comments regarding CE, it is highly likely the same CE accepted by the ABFT will be acceptable to the Commission, with the exception of the ethics/disclosure coursework which is Texas-specific and will be required for renewal during each CE cycle.

Members discussed a comment that the licensing requirements are a violation of a defendant's right to call an unlicensed expert witness on his or her own behalf and that the rules are an unconstitutional (and/or statutorily *ultra vires*) interference with a defendant's right to use the Texas Rules of Evidence in defending his or her innocence. Garcia explained this is both (1) a misreading of the statute; and (2) an issue for the Legislature and/or Texas courts to resolve. The application of the licensing requirement tracks the application of the accreditation requirement. If a court allows a defense expert to testify on an issue and that expert is not from an accredited crime laboratory, he/she does not need to be licensed. The rule only applies to analysts from accredited crime laboratories.

Members discussed a comment that imposing the SWGTOX Appendix A requirements is problematic, because it sets up a discrepancy between the rules imposed on in-state examiners vs. out-of-state examiners. Members noted this was a common objection and made changes to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation.

Members discussed a comment that the currently contemplated fee (\$100-150) is too high. The Commission has not yet posted a proposed rule on the fee, so adjudication of this will happen when the rule is posted.

Members discussed a comment that some seized drug analysts have biology degrees, which would mean the chemistry requirements would write them out of a job. Further, the way the chemistry courses are described are too narrow to accommodate some of the analysts' chemistry coursework. Members made changes to 651.2017 to reflect this concern. Specific chemistry courses were replaced with current education requirements under accreditation. However, post January 1, 2019, requirement remains "a minimum of sixteen semester credit hour (or equivalent) college-level courses in chemistry above general coursework from an accredited university."

Members discussed a comment that Breath Alcohol scientists should be included in the licensing program document (and on the required accreditation lists), as they testify as "toxicologists" just as much, or more than blood alcohol analysts. The Commission has no authority under current law to include breath alcohol in the licensing program.

Members discussed a comment that the licensing program should not apply to postmortem toxicology, because postmortem toxicology is an "expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action." Postmortem toxicology is testing ordered by a physician (the Medical Examiner). Members believe there is some ambiguity in the statutory language so the LAC recommended the Commission seek an opinion from the Attorney General's office.

Members discussed a comment that the educational credentials for toxicology should be generally consistent with those proposed for seized drugs and materials (Trace). Due to the nature of the work performed by toxicologists, the commenter believes that the specific course requirements should be broadened somewhat for toxicologists to include biological courses as well as chemistry courses. Members suggested the following change:

Section 651.207(c)(2)

(B) Toxicology. An applicant for a Forensic Analyst License in toxicology must have completed general or introductory level coursework in chemistry and a minimum of twelve additional semester hours (or equivalent) of coursework including a combination of organic, analytical, and instrumental chemistry; biochemistry; toxicology; medicinal chemistry; molecular biology; pharmacology; and physiology.

Members discussed a comment that Section 651.207(c)(5)(A) states applicants must be routinely proficiency-tested in accordance with the laboratory's accrediting body proficiency testing requirements, and Section 651.206(2) acknowledges that some individuals who draw

conclusions, make interpretations, or tech review casework may be licensed but may not be proficiency tested. Commenters want to ensure that these two sections do not create a conflict and that it is expected that some staff will seek licensure who are not currently proficiency tested. Members suggested that one option is to change Section 651.207(c)(5)(A) to read: An applicant must meet the proficiency testing requirements of the laboratory's accrediting body, but this may not be necessary since the law already says "successful completion of proficiency testing *to the extent required for crime laboratory accreditation.*"

Members discussed a comment that DNA analysts in non-human DNA disciplines are exempt from the QAS document by ANAB. The reasoning they give is that the QAS document is written for those who use CODIS. Non-human DNA crime labs would never use CODIS so compliance with the QAS is waived for accreditation. Commenters asked the LAC to consider adding a qualifier in this section to allow for this waiver in the nonhuman DNA discipline for the education requirement. Members edited §651.207 to add language for non-human DNA analysts similar to what is written for forensic biology screeners.

Members discussed the concern that non-human DNA analysts may be subjected to knowledge-based competency requirements for human DNA analysts and areas in which they are not proficient. The LAC plans to revise the knowledge-based competency requirements to include a list of training areas specific to non-human DNA analysis.

Members discussed a comment that the temporary license category is vague and confusing, especially for out-of-state trace analysts who do not work a high volume of cases but whose cases may extend over a long period of time. The Committee suggested that the full Commission consider permitting a temporary licensee to work on up to 5 cases per year (including both testimony and analysis). In effect, this would eliminate all of the ambiguities, since an analyst reaching or even nearing this volume of casework could then truly justify a full license. Members made changes to the temporary license language in 651.212 to remove the one case rule and allow for the volume to be assessed on a case-by-case basis.

Members discussed whether the license should come with a designation after the licensed person's name, and after discussion, decided it should appear as "TXFA" (e.g., Robert Sailors, MS, TXFA).

MOTION AND VOTE: *Sliter moved to adopt "TXFA" as the abbreviated designation for a Texas Licensed Forensic Analyst. Sailors seconded the motion. The Committee unanimously adopted the motion.*

Review and discuss Dr. Middleberg's letter, response draft and replacement process for seat.

Members discussed Dr. Middleberg's resignation from the Committee and reviewed a draft response to his letter from Committee Chair, Greg Hilbig. Members also discussed how to proceed in selecting a replacement for Dr. Middleberg's seat. Roger Kahn, Texas Association of Crime Laboratory Directors President, will send out a call for nominations to private laboratories. The nominations will be reviewed by the Commission at its August 18, 2017 meeting.

Discussion of proposed statistics requirement for examiners applying after January 1, 2019 and development of financially accessible, online statistics course for forensic examiners.

Members did not discuss this agenda item but will address the topic again at the Committee's next meeting.

Discussion of proposed general exam requirement, including exam material and question development, exam developer agreements, topics, structure and administration of the exam and contract for psychometric testing services.

Members and Garcia discussed progress on the exam development. Garcia has reached out to Ron Smith for development of test content on court room testimony. Garcia has also reached out to Bill Thompson to assist in developing content for the human factors portion of the exam. Garcia mentioned that this portion may also be developed by Commissioner Bruce Budowle and herself if the cost of an expert's services are too high. Garcia also mentioned reaching out to John Hollway from Quattrone Center for the Fair Administration of Justice for development of root cause analysis content and content related to just-culture reviews. Garcia also reported a kick-off call was scheduled with ACS, the group evaluating the psychometrics of the exam.

Members directed Garcia and staff to send a survey via Survey Monkey to potential licensees to evaluate the selected exam topics. Staff will send out the survey before the Committee's next meeting.

Update from the Texas Association of Crime Laboratory Directors, including discussion of any comments and feedback related to the published program rules, program summary and program timeline.

Roger Kahn, Texas Association of Crime Laboratory Directors President, provided comment throughout the meeting on several agenda items. Roger indicated that the Committee, after today's meeting, has addressed many of the comments he received from the TACL D membership.

Discussion of program budget.

Members briefly discussed the program budget, including the cost of software needed for the database that will hold information related to the program and allow examiners to access and update their profile information. Garcia is unsure what the cost of the software will be at this time but is working with OCA to determine that. Garcia and staff will provide further update on program costs/budget items at the Committee's next meeting.

Consider proposed agenda items for August 17, 2017 meeting.

Staff will circulate a proposed agenda for the next meeting.

Schedule and location of future meetings.

The Committee will meet again August 17, 2017, the day prior to the Commission's next quarterly meeting.

Hear public comment.

Roger Kahn, Crime Laboratory Director at the Harris County Institute of Forensic Sciences, provided comment throughout the session.

Adjourn.