



TEXAS FORENSIC
SCIENCE COMMISSION

Justice Through Science

*1700 North Congress Ave., Suite 445
Austin, Texas 78701*

MEMO

Date: November 1, 2017

To: Licensing Advisory Committee and Members of the Forensic Science Commission

From: Lynn Garcia, General Counsel

Re: Summary of Adjudication of Comments on New Rules to 37 Tex. Admin. Code Chapter 651 to add Subchapter C related to Forensic Analyst Licensing Program.

The following provides a brief summary of the comments received by Commission staff regarding the Proposed Rules for the Licensing Program. Also provided is a summary of the LAC's consideration of each item, with suggested changes to the Proposed Rules.

- 1. Date Received: June 15, 2017**
Commenter: Mike Martinez
Laboratory: Bexar Co. Crime Laboratory

Comment: 651.206 (definition of forensic analyst): Change language to discourage individuals from performing technical reviews on disciplines or sub-disciplines for which they had never been qualified to conduct analysis.

Adjudication: the definition of forensic analysis is straight out of statute; any suggested change would need to come from Legislature.

Comment: 651.207 FEPAC allows for distance learning and strictly online degrees should not be allowed.

Adjudication: the section requires all programs to meet the natural science core courses and specialized science courses set forth in the FEPAC accreditation standards. The LAC does not see the benefit of excluding all online degrees. The key question is whether the degree program meets the science course standards.

Comment: 651.207(1)(A): language "or higher" should be consistent. Same with "closely related field."

Adjudication: "or higher" language has been addressed for consistency. The term "closely related field" has been eliminated and all degree language has been harmonized with accreditation standards.

Comment: 651.207(2) Coursework Requirements: should be the same and consistent discipline to discipline.

Adjudication: That is not possible as each discipline is fundamentally different. A DNA analyst must take different college level coursework than a drug chemist due to the nature of the analytical work. See accreditation requirements as example of this.

Comment 651.207(2): There is no need to make statistics mandatory. This requirement is misguided.

Adjudication: The Commission and LAC fundamentally disagree. 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.) The Commission maintains its commitment to increasing education, training and assessment of forensic analysts in the area of statistics.

2. Date Received: June 16, 2017

Commenter: Adam Negrusz

Laboratory: United States Drug Testing Laboratories, Inc.

Comment:

The Fellows and Diplomates of the American Board of Forensic Toxicology should be exempt from the examination requirement when applying for the license from Texas Forensic Science Commission. They can submit their annual CE documentation, the same they submit to the ABFT, to the Texas Commission.

Adjudication: While the Commission recognizes the value of the ABFT exam, it 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)."

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 mandatory ethics/disclosure CE which is Texas-specific and will be required for renewal during each CE cycle.

3. Date Received: June 16, 2017

Commenter: James JS Johnson

Laboratory: N/A (Attorney in private practice)

Comment: The licensing requirements are a violation of a defendant's right to call an unlicensed expert witness on his or her own behalf. They constitute 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.

Adjudication: This is an issue for the Legislature and/or Texas courts to address and is beyond the scope of the Commission's jurisdiction. 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. Constitutional concerns regarding the accreditation mandate need to be addressed either through the Legislature or the court system.

4. Date Received: June 16, 2017
Commenter: Justin Schwane
Laboratory: SWIFS

Comment: 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.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

5. Date Received: June 17, 2017
Commenter: Brad Hall
Laboratory: Travis Co. ME Toxicology Lab

Comment: ABFT certification should be accepted as "alternative method" for fulfilling the licensing requirements for toxicologists (especially postmortem toxicology).

Adjudication: Based on comments from the Travis and Bexar County ME toxicology laboratories, the LAC recommended submitting AG opinion request regarding the question of whether postmortem toxicology is covered by the statute. If it is not covered, then the licensing requirement will not apply. If it is covered, then the comments regarding the ABFT exam will be handled in the same way as indicated in response to Comment #2 above. Commission staff has submitted the opinion request to the Attorney General's office and will notify parties when the Attorney General publishes his response.

6. Date Received: June 20, 2017
Commenter: Alonna Guerrero
Laboratory: SWIFS

Comment: The currently contemplated fee (\$100-150) is too high.

Adjudication: The Commission has not posted a proposed fee schedule yet but will keep in mind the importance of not imposing a financial burden on analysts.

7. Date Received: June 22, 2017
Commenter: Emily Esquivel
Laboratory: Jefferson Co.

Comment: 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.

Adjudication: Changes were made to 651.2017 to reflect this concern. Specific chemistry courses are replaced with current education requirements under accreditation. However, post January 1, 2019, requirement is "a minimum of sixteen semester credit hour (or equivalent) college-level courses in chemistry above general coursework" from an accredited university.

Comment: Imposing the SWGTOX Appendix A requirements is problematic because it would write some people out of a job and also because it sets up a discrepancy between the rules imposed on in-state examiners vs. out-of-state examiners.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

8. Date Received: June 23, 2017
Commenter: Chris Fontenot
Laboratory: Jefferson Co.

Comment: The additional chemistry-hour requirements on seized drug analysts may cause current analysts who have been in the field for years to be unable to perform casework, as some may only have 16 hours total.

Adjudication: Addressed through edit to 651.2017.

Comment: The additional SWGTOX requirements for both “analysts” and “toxicologists”, will cause current analysts who have been in the field for years to cease casework because of the Column A and B requirements.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

Comment: Breath Alcohol Scientists should be included in this document (and on the required accreditation lists), as they testify just as “toxicologists” just as much, or more in many cases than blood alcohol analysts.

Adjudication: Commission has no authority to include breath alcohol in this program because breath alcohol was excluded from the accreditation requirement by statute (see Tex. Code Crim. Proc. 38.35) and thus the licensing requirement does not apply. The suggestion here would require a legislative change.

9. Date Received: June 23, 2017
Commenter: Veronica Hargrove
Laboratory: Bexar Co. ME's Toxicology Lab

Comment: The licensing program should not apply to postmortem toxicology. 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 ordered by a physician (the Medical Examiner).

Adjudication: Based on comments from the Travis and Bexar County ME toxicology laboratories, the LAC recommended submitting AG opinion request regarding the question of whether postmortem

toxicology is covered by the statute. If it is not covered, then the licensing requirement will not apply. Commission staff has submitted the opinion request to the Attorney General's office and will notify parties when the Attorney General publishes his response.

10. Date Received: July 7, 2017

Commenter: Elizabeth Todd

Laboratory: SWIFS

Comment: 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, SWIFS believes that the specific course requirements should be broadened somewhat for toxicologists to include biological courses as well as chemistry courses. They suggest a change such as the following:

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.

Adjudication: This was a common objection and thus changes have been made to 651.207 to replace the previous language with "current education requirements under accreditation." However, for applicants *after January 1, 2019*, the SWGTOX Appendix A requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

Comment: Section 651.207(c)(5)(A) states that applicants must be routinely proficiency-tested in accordance with the laboratory's accrediting body proficiency testing requirement. Section 651.206(2) acknowledges that some individuals who draw conclusions, make interpretations, or tech review casework may must be licensed but may not be proficiency tested. SWIFS wants 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.

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.

Adjudication: The law requires "successful completion of proficiency testing *to the extent required for crime laboratory accreditation.*" Thus, if proficiency testing is not required by the accrediting body for the particular individual or individuals described above, there will be a point in the application process at which the laboratory representative can certify the particular individual is not subject to proficiency testing per accreditation requirements. It is indeed expected that some staff will seek licensure who are not currently subject to regular proficiency testing.

Comment: As it relates to Specific Coursework Requirements in Section 651.207(c)(2), there may well be people with numerous years¹ experience who do not meet the educational requirements or where there is not good documentation of alternately-named coursework content due to the length of time a person has been out of school; for example, a person may have received a Masters in Chemistry in the 1980's and most of the coursework on their transcript references Masters thesis work not specific course names. Particularly for current forensic examiners in Texas, there should be a mechanism for the Commission to assess and allow licensure for those who have a long forensic work history but an

educational history that does not exactly meet the letter of the regulations or where good documentation about coursework content is not available.

Adjudication: This comment was addressed through edits to 651.2017 replacing the prior language with a requirement that the individual satisfy the “current education requirements under accreditation.”

11. Date Received: July 7, 2017

Commenter: Roger Kahn

Laboratory: Harris County IFS

Comment: The proposed seized drugs coursework exceeds current accreditation requirements and will write some existing examiners out of eligibility.

Adjudication: Changes were made to 651.2017 to reflect this concern. Specific chemistry courses are replaced with current education requirements under accreditation. However, post January 1, 2019, requirement is "a minimum of sixteen semester credit hour (or equivalent) college-level courses in chemistry above general coursework" from an accredited university.

Comment: The SWGTOX requirements also exceed current accreditation requirements and will write some existing examiners out of eligibility.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

12. Date Received: July 10, 2017

Commenter: Christina Lindquist

Laboratory: UC Davis Veterinary Genetics

Comment: §651.207—2C Specific Coursework Requirements: Forensic Biology: DNA Analyst.

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 our accreditation. Please consider adding a qualifier in this section to allow for this waiver in the nonhuman DNA discipline for the education requirement. I propose a “C-i : DNA Analysts in the non-human DNA sub-discipline are not required to fulfill the Federal Bureau of Investigation’s Quality Assurance Standards for Forensic DNA Testing.”

Adjudication: See edits to §651.207 specifying that QAS requirements do not apply to non-human DNA analysts

Comment: §651.207—3A General Forensic Analyst Licensing Exam Requirement: Exam Requirement.

Because non-human DNA analysts often have advanced genetics degrees (as opposed to forensic science degrees), and nonhuman DNA laboratories are not part of larger forensic science laboratories

(where many disciplines are present and cross-discipline training is common), I am concerned that some of the General Forensic Analyst Licensing Exam questions will not be applicable to the knowledge base that our analysts need to be competent non-human DNA analysts and act as a resource for the court. Please consider the non-human DNA laboratory sub-discipline when designing this general exam. There are no FSC-recognized certification bodies for non-human DNA analysis now or likely in the future, so all of the analysts in this sub-discipline will be taking the General Forensic Analyst Licensing Exam.

Adjudication: The general forensic analyst exam is an exam of general applicability and is not discipline-specific.

Comment: §651.207—4A Knowledge-based Competency Requirements.

I would have concerns here that the knowledge base for non-human DNA analysts would be slightly different than those of a human DNA analyst. For example, I am sure that a human DNA analyst needs to be familiar with the markers used in CODIS and must also be familiar with the Cambridge reference sequence for mitochondrial DNA. A non-human DNA analyst would have no reason to be familiar with these. Instead they should have a knowledge base that includes phylogeny and taxonomy, allele calling of di-nucleotide repeats, and developing databases for newly documented populations. Please consider the different knowledge base required of non-human DNA analysts when defining the required knowledge base for a Licensee.

In most cases, leaving out specifics (for example, saying “reference sequences” instead of Cambridge Reference Sequence) can broaden the required knowledge base guidelines to include all species, not just human.

Adjudication: The LAC is working with the commenter to revise the knowledge-based competency requirements to encompass those areas of training and knowledge common to the non-human DNA community. The document will be published when complete.

13. Date Received: July 13, 2017

Commenter: Jamie Mraz

Laboratory: DPS

Comment: ABFT certification should be accepted in lieu of general exam. Alternatively, special recognition should be given to those who are certified.

Adjudication: 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)."

14. Date Received: July 14, 2017

Commenter: Chris Palenik

Laboratory: Microtrace

Comment: The temporary license category is vague and confusing, especially for trace analysts out of state who do not work a high volume of cases but whose cases may extend over a long period of time. I would suggest that the TFSC 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 above ambiguities, since an analyst reaching or even nearing this volume of casework could then truly justify a full license.

Adjudication: See changes to temporary license language in 651.212 which remove the one case per year rule to provide more flexibility.

15. Date Received: July 14, 2017
Commenter: Frederick Strathmann
Laboratory: NMS

Responses to these comments require consideration by the Commission at the 11/3 quarterly meeting.

16. Date Received: July 14, 2017
Commenter: Veronica Hargrove and Randall Frost
Laboratory: Bexar Co. ME and Director of ME's Toxicology Lab

Comment: A postmortem toxicology laboratory should not be required to have a TFSC Forensic Analyst license.

Adjudication: Based on comments from the Travis and Bexar County ME toxicology laboratories, the LAC recommended submitting AG opinion request regarding the question of whether postmortem toxicology is covered by the statute. If it is not covered, then the licensing requirement will not apply. Commission staff has submitted the opinion request to the Attorney General's office and will notify parties when the Attorney General publishes his response.

Comment: We support ABFT certification in place of licensure.

Adjudication: The law requires licensure. The only component of certification that may be substituted for licensure is the exam. As previously stated, 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)." Note this comment will be moot if the Attorney General returns an opinion stating that postmortem toxicology is not covered by the statute.

Comment: We have significant concerns regarding the use of the SWG as a requirement for licensure for toxicologists

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area. Note this comment will also be moot if the Attorney General returns an opinion stating that postmortem toxicology is not covered by the statute.

17. Date Received: July 15, 2017
Commenter: Megan Barton

Laboratory: DPS

Comment: For Toxicology education requirements I would like to suggest the minimum requirements the set forth by SWGTOX for Analyst minus the Statistics (General or organic chemistry - 16 semester hrs, 2 analytical and or interpretive courses). I think making it different based on type of analyst is going to be tough for labs and the licensing program to keep track of. Additionally, I am currently the Toxicology Technical Leader for the TxDPS and do not have a master's degree which is required in the SWGTOX document.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

18. Date Received: July 15, 2017

Commenter: Anna Mudd

Laboratory: DPS

Comment: SWGTOX reqs are problematic for DPS analysts as not all will be able to meet the reqs.

Adjudication: This was a common objection and thus changes have been made to 651.207 to remove the SWGTOX Appendix A requirements for currently practicing examiners and replace those with current education requirements under accreditation. However, for applicants *after January 1, 2019*, the SWGTOX requirements will apply unless and until the OSAC publishes a relevant standard or guideline on the Registry of Standards and Guidelines to supplant the SWGTOX guidelines in this area.

Comment: The provisional license period of 9 months would not offer enough time for current Forensic Scientists in the Toxicology section at DPS to achieve the coursework requirements as outlined by SWGTOX and required by this policy.

Adjudication: This comment is mooted by edits to 651.207 referenced in the previous comment.

Comment: 651.212 Temporary Forensic Analyst License—one case per year is too few especially considering that analysts sometimes have to come back to testify a few times within the year following separation from the lab.

Adjudication: *See* changes to temporary license language in 651.212 which remove the one case per year rule.

Comment: Proficiency testing requirement may be problematic for new analysts because they won't yet need to be tested per accreditation requirements.

Adjudication: The law requires "successful completion of proficiency testing *to the extent required for crime laboratory accreditation.*" Thus, if proficiency testing is not required by the accrediting body for the particular individual or individuals described above, there will be a point in the application process at which the laboratory representative can certify the particular individual is not subject to proficiency testing per accreditation requirements.

19. Date Received: July 15, 2017

Commenter: Brad Hall
Laboratory: Travis Co. ME's Toxicology Lab

Comment: Joins the comments in the letter submitted by Dr. Hargrove.

Adjudication: *See* responses to Dr. Hargrove's comments above.

20. Date Received: July 16, 2017

Commenter: Bruce Goldberger
Laboratory: ABFT

Responses to these comments require consideration by the Commission at the 11/3 quarterly meeting.