

The Texas Forensic Science Commission (“Commission”) adopts new Subchapter D, §§651.301 – 651.308, related to its policies and procedures for processing complaints and laboratory self-disclosures without changes. The new rules reflect adoptions made by the Commission at its November 3, 2017 quarterly meeting in accordance with Article 38.01 §4(a)-(b-2), Code of Criminal Procedure.

**Fiscal Note.** The Commission has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal.

**Public Benefit/Cost Note.** The Commission has also determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefit will be effective notice of the Commission's policies and procedures for processing complaints and laboratory self-disclosures.

**Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses.** As required by the Government Code §2006.002(c) and (f), the Commission has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any small or micro business.

**Takings Impact Assessment.** The Commission has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

**Government Growth Impact Statement.** Leigh M. Savage, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1.

**Request for Public Comment.** The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh Savage, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or [leigh.savage@fsc.texas.gov](mailto:leigh.savage@fsc.texas.gov). Comments must be received by December 27, 2017 to be considered by the Commission.

**Statutory Authority.** The new rules are adopted under Article 38.01 §4(a)-(b-2), Code of Criminal Procedure.

**Cross reference to statute.** The proposal affects 37 Texas Administrative Code Chapter 651.

§651.301. Purpose.

(a) Generally. This subchapter contains the Texas Forensic Science Commission (Commission) rules adopted under Article 38.01 §4(a) Code of Criminal Procedure, that govern the Commission's duties to:

(1) to develop and implement a reporting system through which crime laboratories may report professional negligence or professional misconduct;

(2) require a crime laboratory that conducts forensic analyses to report professional negligence or professional misconduct to the Commission; and

(3) investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory.

(b) The Commission may initiate for educational purposes an investigation of a forensic analysis without receiving a complaint, submitted through the reporting system described in this subsection, that contains an allegation of professional negligence or professional misconduct involving the forensic analysis conducted if the Commission determines by majority vote of a quorum of Commission members that an investigation of the forensic analysis would advance the integrity and reliability of forensic science in Texas.

§651.302. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accredited field of forensic science—means a specific forensic method or methodology validated or approved by the Commission under Article 38.01, Code of Criminal Procedure §4-d as part of the accreditation process for crime laboratories.

(2) Crime laboratory—means a public or private laboratory or other entity that conducts forensic analysis subject to this article.

(3) Forensic analysis—has the meaning assigned by Article 38.35, Code of Criminal Procedure. The term does not include:

(A) latent print examination;

(B) a test of a specimen of breath under Chapter 724, Transportation Code;

(C) digital evidence;

(D) an examination or test excluded by rule under Article 38.01, Code of Criminal Procedure;

(E) a presumptive test performed for the purposes of determining compliance with a term or condition of community supervision or parole and conducted by or under contract with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles; or

(F) 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;

(4) Forensic pathology—includes that portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.

(5) Accredited laboratory—includes a public or private laboratory or other entity that conducts forensic analysis as defined in Article 38.35, Code of Criminal Procedure and is accredited by a national accrediting body recognized by the Commission and listed in §651.4 of this title.

(6) Physical evidence—has the meaning assigned by Article 38.35, Code of Criminal Procedure.

(7) Professional misconduct—means the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis.

(8) Professional negligence—means the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis.

(9) The term "would substantially affect the integrity of the results of a forensic analysis" does not necessarily require that a criminal case be impacted or a report be issued to a customer in error. The term includes acts or omissions that would call the integrity of the forensic analysis, the individual forensic examiner, or the laboratory as a whole into question regardless of outcome on the underlying criminal case.

#### §651.303. Statutory Requirements for Commission Investigations.

(a) If the Commission conducts an investigation under §651.301(a)(3) of this subchapter of a crime laboratory that is required to be accredited under Code of Criminal Procedure, article 38.01 §4-d pursuant to an allegation of professional negligence or professional misconduct involving an accredited field of forensic science, the investigation:

(1) must include the preparation of a written report that identifies and also describes the methods or procedures used to identify:

(A) the alleged negligence or misconduct;

(B) whether negligence or misconduct occurred;

(C) any corrective action required of the laboratory, facility, or entity;

(D) observations of the Commission regarding the integrity and reliability of the forensic analysis conducted;

(E) best practices identified by the Commission during the course of the investigation; and

(F) other recommendations that are relevant, as determined by the Commission; and

(2) may include one or more:

(A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility or entity that may involve some kind of negligence or misconduct; and

(B) follow-up evaluations of the laboratory, facility or entity to review the implementation of any corrective action required or the conclusion of any retrospective reexamination.

(b) If the Commission conducts an investigation under §651.301(a)(3) of this subchapter of a crime laboratory that is not accredited under this article or the investigation is conducted pursuant to an allegation involving a forensic method or methodology that is not an accredited field of forensic science, the investigation may include the preparation of a written report that contains:

(1) observations of the Commission regarding the integrity and reliability of the forensic analysis conducted;

(2) best practices identified by the Commission during the course of the investigation; or

(3) other recommendations that are relevant, as determined by the Commission.

(c) If the Commission conducts an investigation of a forensic analysis under §651.301(b) of this subchapter, the investigation must include the preparation of a written report that contains:

(1) observations of the Commission regarding the integrity and reliability of the forensic analysis conducted;

(2) best practices identified by the Commission during the course of the investigation; and

(3) other recommendations that are relevant, as determined by the Commission.

(d) The Commission by contract may delegate the duties described in §§651.301(a)(1) and (3) to any person the Commission determines to be qualified to assume those duties.

(e) The Commission may require that a crime laboratory investigated under this subchapter pay any costs incurred to ensure compliance with this section.

(f) The Commission shall make all investigation reports completed under this subchapter available to the public. A report completed under this subchapter, in a subsequent civil or criminal proceeding, is not prima facie evidence of the information or findings contained in the report.

(g) The Commission may not make a determination of whether professional negligence or professional misconduct occurred or issue a finding on that question in an investigation initiated under §651.301(b) of this subchapter or for which an investigation report may be prepared under subsection (b) of this section.

(h) The Commission may review and refer cases that are subject of an investigation under §651.301(a) or (b) to the office of capital and forensic writs in accordance with Section 78.0545(b), Government Code.

#### §651.304. Processing of Complaints and Laboratory Self-disclosures.

(a) Forms. The FSC shall approve forms for complaints and laboratory self-disclosures and make them available on the FSC website.

(b) Process Generally. Complaints and self-disclosures are initially reviewed by the Commission's Complaint and Disclosure Screening Committee ("CDSC") approved for investigation by a majority of a quorum of Commissioners, investigated through an Investigative Panel, which may include outsourced investigative resources, and completed in the form of a report adopted by a majority of a quorum of Commissioners.

#### §651.305. Complaint and Self-disclosure Screening.

(a) Complaints and self-disclosures shall be considered initially through the CDSC. The chair of the CDSC shall present the complaints and disclosures before the Commission with a recommendation for disposition. The CDSC may recommend the following dispositions:

(1) dismiss the complaint or disclosure;

(2) accept the complaint or disclosure and submit for action by an Investigation Panel;

(3) recommend the Commission use its discretion to review the matter for educational purposes;

(4) recommend no further action by the laboratory is necessary at this time; or

(5) take such other action as appropriate.

(b) The CDSC may assign staff to collect preliminary information related to a complaint or self-disclosure, including research into the status of any underlying criminal or civil case and whether the complaint or self-disclosure addresses a forensic analysis subject to investigation by the Commission.

(c) An actor named in a complaint or self-disclosure and the involved accredited laboratory, facility or entity may be given an opportunity but is not required to provide a written reply, offering any reasons for or against accepting the complaint or disclosure for investigation.

(d) The following factors may be considered when a complaint or self-disclosure is screened by the CDSC and considered by the Commission:

(1) whether the Commission has investigative jurisdiction;

(2) the availability of the person who was the defendant in the criminal action associated with the forensic evidence;

(3) the availability of any actor who conducted any part of the forensic analysis;

(4) the length of time between the forensic analysis and the complaint or disclosure;

(5) the availability of records in connection with the forensic analysis and any associated litigation;

(6) the status of any criminal case or civil litigation associated with the forensic analysis;

(7) the potential for additional relevant forensic analysis;

(8) any other factor that would enhance or detract from a complete and accurate investigation of the forensic analysis and any alleged negligence or misconduct;

(9) the availability of funds to complete an investigation; and

(10) the opportunity for the investigation and report to educate the forensic science community, advance the standards and training associated with such a forensic analysis or identify legislative recommendations for strengthening a field of forensic science.

(e) Upon reaching a recommended initial disposition for a complaint or self-disclosure, the CDSC shall provide a summary of the recommendation to the Commission's presiding officer for presentation to a quorum of Commissioners.

(f) Following action by a quorum of Commissioners regarding the disposition of any complaint or self-disclosure, the Commission shall notify the complainant, actor involved in the forensic analysis and the laboratory, facility or entity of the disposition.

(g) To ensure thorough consideration of all complaints and self-disclosures, complainants and laboratories submitting self-disclosures should make such submissions at least fifteen (15) business days before a particular quarterly Commission meeting to have the complaint or self-disclosure considered at that meeting. The

Commission reserves the right to consider any complaint or disclosure that does not meet the 15-day deadline at the next quarterly meeting.

(h) A Commission member may, by formal motion, request that the full Commission reconsider a dismissed complaint or disclosure if the member identifies new evidence of professional negligence or professional misconduct that was not previously considered by the Commission. The new evidence may be derived from either:

(1) information in the existing record that the complainant believes was not considered by the Commission previously; or

(2) new information brought to the Commission's attention that was not previously considered by the Commission.

(i) A motion described under subsection (h) of this section may be made only if the Commissioner believes in good faith that the information will have a material impact on the Commission's analysis of the complaint or disclosure pursuant to its screening criteria.

(j) After considering the member's motion, the Commission shall vote to:

(1) affirm the original decision to dismiss the complaint or self-disclosure; or

(2) re-open the complaint or disclosure.

(k) The Commission shall notify the complainant and the appropriate laboratory, facility or entity in writing of the results of the Commission's vote under subsection (h) of this section.

(l) The Commission shall conduct an appropriate investigation of a complaint or disclosure reopened under subsection (j)(2) of this section.

#### §651.306. Dismissal for Lack of Jurisdiction.

(a) Autopsy-related complaints. The Commission's General Counsel may dismiss complaints related to the portion of an autopsy conducted by a medical examiner or licensed physician as falling outside the Commission's statutory jurisdiction without bringing the complaint before the Complaint Screening Committee or a quorum of Commissioners for consideration.

(b) DNA mixture complaints. The General Counsel may refer complaints and requests involving DNA mixtures to the statewide DNA Mixture Triage Team or other responsible entity without bringing the complaints and requests before the Complaint Screening Committee or a quorum of Commissioners for consideration. The General Counsel shall provide the total number of complaints and inquiries referred to the statewide DNA Mixture Triage Team to the Commission at each quarterly meeting during which such referrals are made.

(c) Non-physical evidence complaints. The General Counsel may dismiss complaints not related to an examination or test on physical evidence, because such complaints fall outside the Commission's jurisdiction as they are not "forensic analysis" complaints as defined by Article 38.35, Code of Criminal Procedure.

(d) Right to re-open. Any Commission member has a right to reopen cases dismissed pursuant to subsections (a) – (c) of this section. Commission staff must maintain a list of complaints dismissed under this subsection for periodic distribution to Commission members.

§651.307. Investigative Panels.

(a) Panel procedure. After a quorum of Commissioners vote to conduct an investigation, the Commission's presiding officer shall nominate at least three members of the Commission to an Investigation Panel ("Panel") subject to the approval of a quorum of Commissioners, and the Investigation Panel shall elect one of the members as chair of the Panel.

(b) Panel investigation. A Panel shall coordinate any investigation voted upon by the Commission. The Panel initially shall specify the focus of the investigation, communicate with the entities or individuals involved in the investigation, and collect any appropriate records. The Panel also may initiate contact with any governmental agency, individual or entity to inquire about assistance in a full investigation. The Panel may:

(1) collect and review appropriate documents as necessary;

(2) conduct interviews with appropriate individuals;

(3) issue notification of results or refer the case to a governmental or other relevant agency or accrediting body, pursuant to a written communication, memorandum of understanding or other appropriate agreement between the agencies;

(4) contract with a subject matter expert if needed; or

(5) take such other action as appropriate.

(c) Limitation on panel meetings held by telephone. Commission Panels may meet by telephone for information-gathering purposes only. However, all deliberative discussions by Panels shall be held in open, public meetings in accordance with the Texas Open Meetings Act.

§651.308. Investigative Reports.

(a) Written report requirements. If the Commission approves a full investigation, the Panel shall coordinate the completion of the investigation and draft a written report, including a recommendation for final disposition to a quorum of Commissioners. The Panel may delegate the initial draft of the report to Commission staff. An investigative report or recommendation is not final and does not represent the conclusions of the Commission until a final report is adopted and issued by the quorum of Commissioners. Following consideration of the recommendation for final disposition from the Investigation Panel, the Commission shall issue a report using the criteria set forth in Article 38.01, Code of Criminal Procedure.

(b) Investigations of accredited crime laboratories and accredited forensic disciplines only. For investigations involving accredited crime laboratories and accredited forensic disciplines, the Commission may:

(1) find there is insufficient credible information to conclude that professional negligence or professional misconduct occurred in the forensic analysis;

(2) find there is sufficient evidence to conclude that professional negligence or professional misconduct occurred in the forensic analysis;

(3) require retrospective re-examination of evidence as appropriate;

(4) require corrective action and follow-up as appropriate.

(c) All Commission investigations. For all Commission investigations, regardless of whether they involve accredited crime laboratories and accredited forensic disciplines, the Commission's report may:

(1) make observations regarding the integrity and reliability of the forensic analysis conducted;

(2) identify applicable best practices; and

(3) make other relevant recommendations.

(d) Any finding by the Commission is not a comment upon the guilt or innocence of any individual and is not necessarily a basis for relief in litigation or in any other forum. Reports of the Commission are not admissible in a civil or criminal action.

(e) The Commission shall make the final report available to the public on the Commission's website and provide a copy, as applicable, to the:

(1) prosecutor, judge, defendant and defense attorney involved in the underlying criminal case, if any;

(2) Board of Pardons and Paroles;

(3) Director of the Department of Public Safety;

(4) Governor;

(5) Lieutenant Governor;

(6) Speaker of the House of Representatives;

(7) complainant; and

(8) actor(s) and accredited laboratory, facility or entity involved in any part of the forensic analysis.

(f) Open records limitation. Pursuant to Code of Criminal Procedure, Article 38.01 §10, information that is filed as part of an allegation of professional misconduct or professional negligence or that is obtained during an investigation of an allegation of professional misconduct or professional negligence is not subject to release until the conclusion of an investigation by the Commission.