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July 20, 2010

Commissioners
Texas Forensic Science Commission
By email to individual Commissioners' email addresses

Dear Commissioners,

Thank you, as always, for the valuable work you do. I'm writing in advance of Friday's meeting to share a few thoughts with you about your work.

1. The Commission does not need to reconsider the parameters of its jurisdiction.

I recently received a copy of the memo recently presented to you, "Memorandum on the Jurisdiction of the Forensic Science Commission," where the Chairman and other lawyers assert that the Commission must restrict the scope of its work. I have attached a brief response memo thereto, and hope you will find it useful to you. Below I briefly summarize some of the points made.

It is well established that Texas law grants Commissions wide latitude in determining their jurisdiction; as long as a Commission does not take on matters clearly beyond its scope, its jurisdictional decisions are given great deference.¹

When the Commission previously considered, debated, and unanimously supported accepting allegations which concerned forensic problems from years past that might still plague the work of accredited forensic laboratories, you were acting in a manner entirely consistent with the legislative intent as well as the specific language of the legislation itself. Barbara Deane would have certainly informed you if the Commission were acting illegally when doing so.

¹ See, e.g., *Southwestern Bell Telephone Co. v. Combs*, 270 S.W.3d 249, 249 (Tex. App. – Amarillo, 2008, pet. overruled) (citing *Gulf Coast Coalition of Cities v. Public Utility Com'n*, ___ S.W.3d ___, 712 (Tex. App.-Austin 2005, no pet. and *Berry*, 9. S.W.3d at 893)

The Legislative Sponsors' Intentions

For example, State Senator Whitmire, a chief architect of the legislation, has said that the statute "left some freedom to examine older cases and look for errors in the science."² And as State Senator Hinojosa, the principal sponsor of the legislation creating the Commission, explained to you at your January 29, 2010 meeting, "There should be no limitation to this commission into looking into forensic science methods." Senator Hinojosa has also told the press that "[t]here's no statute of limitations on any of the investigations the Forensic Science Commission does."³

The Legislation Itself

This intent is reflected in the statute, which says that "(t)he Commission shall:... (3) 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."⁴ Thus the point is to investigate problems in the past that may affect the integrity of forensic results from accredited laboratories past, present and future. You are not restricted to investigating problems only when the lab was already accredited at the time of the alleged problem.

The Commission is completely within its legal authority to have accepted the cases that it has, and to continue to accept similar allegations for review.

2. The Commission may violate the Texas Open Meetings Act if it reverses course on the Willis/Willingham and/or Moon allegations based on recommendations from the subcommittees.

The delegation of the Willis/Willingham and Moon cases for private Commission subcommittee consideration may very well be interpreted by the courts to have been in violation – potentially criminal violation – of the Texas Open Meetings Act. We learned of this by virtue of the legal perspective we sought on this issue generally, when the Commission declined to provide me, as a member of the public, notice of or the ability to attend the subcommittee meeting(s) held on the Willingham/Willis case in between the last Commission and the meeting to be held this Friday. I have attached for your review the legal analysis that was presented to us by the law firm of Weil, Gotschal & Manges.

It is worth noting that it would be up to a court (and only a court) to determine if anything the Commission has done is in violation of the Texas Open Meetings Law (TOMA). I only offer the attached memo because: I found it helpful to my understanding of how the law operates; many Commissioners have publicly expressed concern about not wanting to violate that law (regardless of the push for some Commission business to be held

² Texas Forensic Science Commission questioned, *The Corsicana Daily* (Oct. 27, 2009).

³ *Id.*

⁴ Tex. Code Crim. Pro. Art. 38.01(4)(a)(3) (emphasis added).

behind closed doors); and it is not clear to me that you have been provided specific advice on this point. Thus I sincerely hope you find it helpful, and trust that Barbara Deane and her staff have been and will of course remain available to you on this important point.

Since the Commission has already accepted and commenced its Willingham/Willis (and Moon) investigations (and that in the eyes of many, these closed-door reviews were utterly unnecessary and counterproductive), it seems that if the Commission simply proceeds with those investigations without reference to the closed meetings, you might well avoid any appearance of violating the TOMA while still performing your proper functions, in as timely a manner as possible.

3. The Commissioners hold the power, but must exercise it for it to take effect.

I noticed at the last meeting that many Commissioners raised points and concerns. Yet in many instances those concerns did not translate into action because the Commissioners did not make a motion to seek a vote on them. Thus the concerns were not acted upon, simply aired.

Under the previous Chairman, a motion would often be suggested upon the airing of an idea or concern. That no longer seems to be the case.

Therefore, I offer you this friendly reminder: If you want your concern acted upon, it is probably up to you to make a motion to do so. Otherwise it seems the concern will be aired but no opportunity for action will be offered by the Chair.

4. Please promptly resume your work on your investigations already underway.

It is now over 9 months since the new Chairman effectively stopped the Commission's work (or at least its public work) on its ongoing investigations. You have shown great patience and restraint while allowing the Chairman to get his bearings, but as many of you have expressed, it is time to get back to the work that the State has asked of you.

The Willis/Willingham case in particular needs to be resumed. The people of the state know about your expert's report on that allegation, but you - and the public - have been denied the other perspectives that you intended to seek at the October 2, 2009 meeting. (Agenda attached.) As the November 27, 2009 *Texas Observer* article, "Fire and Innocence," (which I'd sent to you in advance of your 1.29.10 meeting) detailed, there are over 600 people serving time on arson convictions that may have been based on similarly seemingly unreliable arson analyses, and your investigation may help the innocent get their cases reviewed. And as the attached November 29, 2009 *Waco Tribune* article notes, there are some Fire Marshals in Texas who believe that there are fire investigators in Texas who are using the same seemingly unreliable methods of arson analysis that have long been discredited by the national and international arson



communities. That investigation is far less important for the cases upon which it is based, and far more important for the innocent people who may presently be behind bars, and those who might suffer from a wrongful arson conviction today and in the future.

Thank you for taking the time to read this letter. I apologize for its length and the attachments, but I wanted to share my perspective with you as you endeavor to continue your work on behalf of the Texas justice system.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'S. Saloom', written over the 'Sincerely yours,' text.

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**BRIEF RESPONSE POINTS TO TEXAS FORENSIC SCIENCE COMMISSION
“MEMORANDUM ON THE JURISDICTION OF THE FORENSIC SCIENCE”
COMMISSION**

By Stephen Saloom, Policy Director, July 20, 2010

This memo addresses the unsigned, undated memo that the Commission recently received regarding the Commission’s jurisdiction. In short, that memo seeks to define the Commission’s jurisdiction very narrowly. That interpretation is wholly inconsistent with the Commission’s past unanimous decisions in this regard, which had been thoroughly deliberated by the Commission. Such an interpretation is also inconsistent with the statements of the legislative leadership and sponsors who championed the legislation that created the Commission.

An important question that must be answered before one can appropriately regard this memo is: Who actually wrote it? The memo references many lawyers,¹ but it seems as if those attorneys referenced did not actually “sign off” on the memo as a whole, but may have simply seen an early version and/or offered some form of suggestion on one or more points. This point must be clarified, by asking each of the attorneys referenced, for any meaningful reading of the memo must include knowledge of whose name is fully attached to it.

Whomever the lawyer(s) are that authored the memo seeking to inform your perspective on this issue, it seems wholly inappropriate that any form of legal memorandum for the Commission would be written by anyone other than Barbara Deane, the lawyer detailed to work for the Commission by the Attorney General (perhaps with support of staff from the Attorney General’s office), as Attorney Deane has long been considered by the Commission to be its general counsel on matters of Texas law². Given that the Commission is primarily composed of scientists, it seems likely that the actual lawyer-author(s) of this memo sought to use it as a vehicle to confuse the Commissioners about how the law relates to your work as Commissioners, and to claim that

¹ “This memorandum was prepared in response to that request and has been drafted, reviewed and edited through the combined efforts of the two members of the FSC who are lawyers, counsel for the Attorney General’s Office, the Office of Court Administration and the Department of Public Safety (“DPS”).” Memo on the Jurisdiction of the Texas Forensic Science Commission, undated, unsigned.

² The Commission, at its June 20, 2008 meeting, “discussed that Ms. Deane is considered the general counsel for the Commission.” Texas Forensic Science Commission, Minutes from June 20, 2008 Meeting in Austin, Texas.



their past decisions were unlawful and need to be revised. That conclusion is simply not true. The Commission's decisions under the previous Chairman seem by all reasonable assessments to have been nothing other than lawful and appropriate.

Not only were the Commissioner's past decisions properly arrived at (through informed debate that was open to the public, no less), those decisions were not challenged by Attorney Deane, whose job was to ensure the Commission's compliance with Texas law. Perhaps most importantly, though, when considering the propriety of the past Commission decisions, Texas law grants Commissions wide latitude in determining their jurisdiction. As long as a Commission does not take on matters clearly beyond its scope, its jurisdictional decisions are given great deference.³

Therefore, the Commission is completely within its legal authority to have accepted the cases that it has, and to continue to accept similar allegations for review.

Below are specific responses to assertions made in the memo, which follow section by section.

LEGISLATIVE HISTORY

The memo asserts that because the Forensic Science Commission (FSC) legislation was passed in a bill which includes separate provisions about the Department of Public Safety (DPS), that the "accreditation" reference in the FSC statute must mean "DPS accreditation." That is not true.

The FSC legislation's connection to the DPS legislation was purely a matter of legislative process, not substance.⁴ The FSC legislation was amended onto the DPS legislation because it was a vehicle sure to pass; the subject matter of the two was never intertwined.

The legislative language creating the Forensic Science Commission (originally contained, in large part, in SB 1263) was included in the DPS legislation (HB 1068) *only* because 1068 was a

³ See, e.g., *Southwestern Bell Telephone Co. v. Combs*, 270 S.W.3d 249, 261 (Tex. App.-Amarillo, 2008, pet. overruled) (citing *Gulf Coast Coalition of Cities v. Public Utility Com'n*, 161 S.W.3d 706, 712 (Tex. App.-Austin 2005, no pet.)

⁴ . At a public hearing after public controversy was ignited when Governor Perry inserted Mr. Bradley as Commission Chairman and Chairman Bradley abruptly and unilaterally cancelled the October 2, 2009 meeting where the Commission's publicly available report in Willis/Willingham was to be questioned and the investigation continued, Senator Whitmire referred to the resistance creation of the FSC faced in the legislature, and the resulting procedural necessity to attach the FSC legislation to the DPS legislation. "The bill passed the Senate much broader. "We were trying to create an independent agency with powers to go in and ask departments why you did this. We got resistance in the House, in fact it got stopped in the House. My good friend and colleague Sen. Hinojosa had a bill that the Governor and others wanted to pass that was going to broaden the opportunity to capture DNA from suspects and convicted felons. There was our perfect vehicle. We put the best language we could at the time trying to emphasize its independence, transparency, and large academic influence." *Hearing on the Forensic Science Commission and the Texas Department of Criminal Justice Before the S. Comm. on Criminal Justice*, 2009 Leg., 81st Sess. Interim (Tex. 2009).

vehicle sure to be acted upon by the legislature; thus amending 1068 to include the Forensic Science Commission was a way to ensure that the FSC became law. Their connection as a legislative vehicle was never intended, nor understood, to intertwine the substance of the two previously unrelated pieces of legislation.

This was necessary because the House Committee on Law Enforcement had let the Senate Forensic Science Commission legislation, SB 1263, die on its calendar. Therefore, when HB 1068, which was sponsored by the Chairman of the House Committee on Law Enforcement, came over to the Senate, Sen. Hinojosa amended the bill on the floor of the Senate to include the text of SB 1263. The legislation was then modified in the conference committee to remove the Forensic Science Commission's power to accredit laboratories. This is completely normal legislative process, particularly at the end of a session, and is in no way understood to intertwine the substance of different initiatives that pass on the same legislative vehicle.

STATUTORY INTERPRETATION

The author(s) focus a great deal on the meaning of the term “accredited” in the one place that it (inconsistently) appears in the statute. While it is important that every word in the statute be given full consideration by the Commission, the attention given to how to define that term is inordinate. In short, the legislature did not use the term “DPS accredited” in that one instance, but instead simply the term “accredited.” To claim more of that term is simply to claim too much.

What the author(s) fail to focus on is the far more important word in the enabling statute regarding the Commission’s investigative charge: “would”. That language directs that “The Commission shall... (3) 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.”⁵ The Legislature’s use of the word “would” – as opposed to “did,” for example - here is of tremendous significance. Thus even in a broad interpretation of the phrase “accredited laboratory, facility or entity” (which this author does not support), the plain language of the statute denotes an intent that the Commission analyze allegations regardless of the accreditation status at the time the problem occurred, but instead question whether the problem, whenever it occurred, would affect the work of a laboratory, facility, or entity while it was or is accredited, i.e. at a time when the public should be able to have at least a baseline level of trust in its work.

To that extent, the statute is not specifically concerned with to whether the alleged negligence or misconduct actually affected the integrity of a forensic analysis at the time it occurred (although this will almost always be relevant to an overall inquiry). . The alleged professional negligence or misconduct must merely *have the capacity to affect* the integrity of a forensic analysis at an accredited laboratory to merit the Commission’s investigation.

⁵ Tex. Code Crim. Pro. Art. 38.01(4)(a)(3) (emphasis added).

