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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.<sup>1</sup>

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.

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<sup>1</sup> 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."<sup>2</sup> 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."<sup>3</sup>

### *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."<sup>4</sup> 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

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

<sup>3</sup> *Id.*

<sup>4</sup> 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.

Stephen Saloom,  
Policy Director