

FORENSIC SCIENCE STATEWIDE BODY SUBCOMMITTEE OUTLINE OF POTENTIAL LEGISLATION

PART I: WHERE FORENSIC SCIENCE STATEWIDE BODY (FSSB) IS HOUSED IN STATE GOVERNMENT

- Issues: Authority and Mandate, Potential Conflicts, Separation of Powers
- Models examined:
 - Michigan Commission on Law Enforcement Standards, Executive, MSP
 - Michigan Indigent Defense Commission, Executive, LARA
 - Legislative Corrective Ombudsman, Legislative, Michigan Legislative Council
 - State Appellate Defender Office, Judicial
- Recommendation:
 - Housed within Executive Branch agency that is the best fit
 - Not Michigan State Police: Perception of lack of independence
 - Independence language from MIDC Act:

MCL 780.985(2): The MIDC is an autonomous entity within the department. Except as otherwise provided by law, the MIDC shall exercise its statutory powers, duties, functions, and responsibilities independently of the department. The department shall provide support and coordinated services as requested by the MIDC including providing personnel, budgeting, procurement, and other administrative support to the MIDC sufficient to carry out its duties, powers, and responsibilities.

PART II: COMPOSITION

- Governor Appointees
- Four Forensic Science Practitioners:
 - A forensic scientist, with an advanced degree and at least ten years' experience, who has received substantial education, training, or experience in the subject of laboratory standards or quality assurance regulation and monitoring;
 - A forensic scientist, with an advanced degree and at least ten years' experience, who has received substantial education, training, or experience in the subject of molecular biology (DNA analysis/population genetics);
 - A forensic scientist, with an advanced degree and at least ten years' experience, who has received substantial education, training, or experience in the subject of forensic chemistry (drug analysis, toxicology or trace evidence);
 - A forensic scientist, with an advanced degree and at least ten years' experience, who has received substantial education, training, or experience in the subject of pattern evidence (firearms, toolmarks, latent fingerprints, footwear/tire tracks)

- Each practitioner should have an advanced degree from an accredited program and/or OSAC or comparable service, plus ten years of experience.
- One board-certified Forensic Pathologist Medical Examiner with NAME Accreditation
- Two Academics, one with DNA expertise
- One Retired Judge (Supreme Court appointment), one Prosecutor (PAAM appointment), one Defense Attorney / Public Defender (CDAM appointment)
- Member of Public
- Advisory, non-voting position – social scientist, cognitive psychologist, data scientist, or an expert in a developing area of forensic science.
- Governor appoints to staggered four-year terms

PART III: SCOPE AND PROCESS

- **Scope:** "Forensic science" means the field of study of medical, chemical, toxicological, firearms and toolmark identification, or other expert examinations including DNA and social science evidence, for the purpose of determining the connection of the evidence to a criminal action. Forensic science includes the study of the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.
- **Mission:** "The state forensic science commission needs to contribute to a positive culture in crime laboratories while maintaining its role as an independent investigating body." (NIJ Report, p.23)
- Open Meetings Act
- Freedom of Information Act
- Certain number of required meetings per year
- Commission hires Director who sets organization chart, identifies appropriate staff, and seeks appropriations
- Requires dedicated budget and staff (NIJ Report, p.18)
- Ability to retain expert contractors, including, but not limited to:
 - Lab experience to help with investigation and review
 - A statistician (NIJ Report, p.17)
- Commission members shall not receive compensation, but shall be reimbursed for their reasonable actual and necessary expenses
- Annual report requirement (NIJ Report, p.21)
- Website (NIJ Report, p.21)
- Transparency Matrix: Include Best Practices for Transparency: Public meetings, comments, posted policies, posted adjudications, findings, and lab documents (NIJ Report, p.23)
- General Counsel on staff (NIJ – p. 19)
 - Not outside counsel to forensic science service providers.

PART IV: MANDATE

Accreditation of Laboratories

- ❖ A laboratory or organization that employs a “Forensic Science Practitioner” who conducts “Forensic Analysis” must be accredited in all disciplines by an accrediting body that requires conformance to the appropriate quality assurance standards and to forensic-specific requirements such as ISO 17025 or 17020 and that is a signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangements for Testing Laboratories. The accreditation requirement does not apply to practitioners who only analyze or offer opinions on testing results generated by other practitioners.
 - A “Forensic Science Practitioner” is an individual who (1) applies scientific or technical practices to the recognition, collection, analysis, or interpretation of evidence for criminal and civil law or regulatory issues AND (2) issues test results, provides reports, or provides interpretations, conclusions, or opinions through testimony with respect to such evidence. Providers who render opinions based only on the review or evaluation of data from examinations conducted by other entities or on the review of procedures, tests or methods used by other entities would not be included in this definition. (Definition from National Commission on Forensic Science)
 - "Forensic analysis" means a medical, chemical, toxicological, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. Forensic analysis includes an examination or test requested by a law enforcement agency, prosecuting attorney, criminal suspect or defendant, or court in a criminal action. Forensic analysis does not include an expert examination or test, including, but not limited to, a statistical or engineering analysis, conducted for the purpose of opining on a specific aspect of the forensic evidence or the type of forensic test utilized, or 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. (Definition from Senate Bill 277, 2019)
- ❖ Forensic science includes the study of the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician. Medical Examiners must be Accredited by NAME and examinations in suspected homicide cases should be performed by board-certified forensic pathologists. The FSSB will evaluate the need and feasibility for additional ISO accreditation requirements for Medical Examiners.

- ❖ The FSSB shall consider the challenges of providing experts for indigent defendants and shall review and provide recommendations on the accreditation requirements periodically to ensure equitable access to quality scientific experts. [*The FSSB subcommittee struggled with how best to address challenges that the accreditation requirement and expense might present to single experts unaffiliated with a major laboratory, and whether these challenges might reduce the supply of available experts.*]
- ❖ Timeframe: Three years after the effective date of statute.
- ❖ The FSSB shall verify that Forensic Science Practitioners have obtained the accreditation required under this subsection.
- ❖ If a Forensic Science Practitioner will not meet the accreditation requirements within the required time frame, the practitioner may submit a petition to the FSSB requesting an extension of time.

Registration

- ❖ The FSSB shall establish a process to register forensic science experts that requires conformance to forensic science-specific requirements. Social science experts should also register under this provision. This process shall consider the challenges of providing experts for indigent defendants and shall be reviewed periodically to ensure equitable access to quality scientific experts.
- ❖ The FSSB shall establish and maintain a publicly accessible record of forensic science experts that includes their registration status, prior cases where they have testified, and records of past misconducts determined by the commission.
- ❖ FSSB examines and establishes minimum qualifications for certain disciplines and the FSSB will examine whether certain disciplines should require certifications.

Complaints, Reports, and Investigations

General Concepts

- ❖ Who discloses: Design a system to report a Forensic Science Service Provider's negligence, misconduct, or nonconformance that affects the integrity of the forensic science or forensic medicine results, or the practice of forensic science. The complaint can be filed by a laboratory, another FSSP, an employee of the FSSP, a member of the public, criminal justice stakeholders, or the defendant in a case.
- ❖ When to disclose: Any significant event, nonconformity with policies, procedures, or accreditation standards, or error related to an accreditation requirement or substantially affecting the integrity of forensic results must be disclosed if there is a reasonable expectation that knowledge of the event or nonconformity by interested parties external

to the forensic science provider would call into question the quality of the forensic service provider's work.

- ❖ The results / work product must be impacted. Not a forum for personnel complaints that do not substantially impact the work product.

Types of Reports / Complaints (Made in a manner required by FSSB)

- Formal lab reports and responses – Negligence, misconducts, nonconformance that has affected the integrity of the forensic science or forensic medicine results.
 - These reports are mandatory – FSSPs should have a procedure for documenting professional negligence and misconduct. When issues of professional negligence or misconduct occur, the FSSP is obligated to report these to the FSSB and provide all relevant documentation for review. Accredited FSSPs are separately required by their accrediting body to report to it issues of professional negligence or misconduct.
 - Reporting of Forensic Science Laboratory internal audits if they meet the reporting requirements. (e.g., forensic science method audits, not personnel or financial); provision of management system review shall be provided annually to the FSSB.
- Employee Whistleblower – If an employee of a forensic laboratory or any other individual has discovered, has suspicion, or has reason to believe an act of professional negligence, misconduct, or nonconformance affected the integrity of a forensic science or forensic medicine result, that employee or individual may report that act.
- Media
- Criminal Legal System Stakeholders, including people prosecuted

Types of Investigations

1. Educational Investigations: Initiate an investigation of a forensic discipline for educational purposes without receiving a complaint if the Commission determines the investigation would advance the integrity and reliability of forensic science.
2. Complaints and reporting resulting in investigations
3. Invited Investigations by Laboratory
4. Retroactive case reviews – DNA, hair microscopy, bitemark (NIJ Report, p.28)

Complaints and Reporting

- ❖ FSSB to notify FSSP or expert of complaint against them.
- ❖ Process for the majority of complaints – evaluated on a severity and risk of recurrence framework to be implemented by the Forensic Science Statewide Body.

- ❖ Only “high severity” and “high risk of recurrence” result in automatic independent investigation and response. Everything else referred to service provider for report and investigation. Staff to make recommendation to full FSSB.
- ❖ Certain complaints / reports will require information requests of the forensic science service providers to evaluate severity/risk of recurrence.
- ❖ Multi-layer response – Forensic Science Statewide Body will generally request an internal response from the forensic science service provider on a timeline, then FSSB will evaluate if a further investigation is necessary.
- ❖ For the majority of complaints that are referred for report and investigation, upon delivery of findings, the FSSB reviews, provides an opportunity for complainant to respond, and then closes case or refer for further investigation and/or corrective action.
- ❖ FSSB shall receive a copy of this report and response and publicly disclose, absent confidential information.
- ❖ For all independent FSSB investigations, either those occurring because high severity and high risk of recurrence, or because referral for report and recommendation insufficient, then 7 out of 11 members of the FSSB required to approve.
- ❖ If there is an independent investigation by FSSB, steps must be implemented to avoid duplication of investigations.

Process Issues

- ❖ Confidentiality - Specific target of complaint not made public until investigation is complete and only if issue rises to level of misconduct / complaint founded.
 - One potential model, MCR 9.261, Judicial Tenure Commission.
 - Interplay with Open Meetings Act.
 - Issue to leave for FSSB determination, public comment - Policy balancing OMA, *Brady* disclosure, need for confidentiality
 - “The issue of confidentiality also needs to be clarified. Certain personnel matters must remain confidential, at least during the pendency of an investigation. However, in general, commission meetings should be public. This issue is one reason why having a general counsel is helpful for a commission. During any meeting, a person must be available to provide guidance on matters that may require closed sessions.” (NIJ Report, p.20)
- ❖ The FSSB shall set the Timeline for the stages of responses to complaints and potential investigations.
- ❖ An investigation should not apply to a specific prosecution of a person that involves forensic science evidence until conclusion of trial court proceedings and exhaustion of appeal by right.
- ❖ Investigation powers –

- FSSB first requests FSSP or expert voluntary compliance and documentation, then if no compliance, FSSB has subpoena power for investigations.
- The registration and accreditation requirements mandated by FSSB could include cooperation with investigation requests.

Results

- ❖ Does not supplant judicial appellate process
- ❖ Public report, recommendations, reprimands, corrective actions
- ❖ Legal system stakeholders notified, especially as to discoverable material (NIJ Report, p.25)
- ❖ Subjects notified, opportunity to appeal (NIJ Report, p.25)
- ❖ The Commission may provide a recommendation for a larger-scale, institutional response if required.
- ❖ Recommendation for legislative changes to include future enforcement powers as needed.
- ❖ Language similar to TX legislation: “Not a comment upon the ‘guilt or innocence of any party in an underlying civil or criminal trial involving conduct investigated by the Commission.’” (NIJ Report, p.25) Not an admission by the State of responsibility.

Notification

- ❖ The FSSB shall develop and implement a notification procedure for investigations and disclosed information conducted under this section resulting in findings of misconduct, negligence, reprimands, recommendations, or corrective actions that includes all of the following:
 - Notification to institutional stakeholders: Prosecuting Attorneys Association of Michigan (PAAM); Criminal Defense Attorneys of Michigan (CDAM); the State Appellate Defender Office; the Michigan Indigent Defense Commission; local prosecutors and public defenders; the Michigan Judges Association; the Michigan District Judges Association; the Department of Attorney General; and prosecution Conviction Integrity Units.
 - Notification to a convicted person in the criminal case, and that person’s attorney:
 - A requirement that the convicted person in the criminal case acknowledge receipt of the information described under this subsection and a method for the commission to receive the acknowledgment.
 - A description of the technical issue and a written summary of the facts.
 - A protocol for the FSSB to provide potentially affected defendants with information regarding relevant resources including, but not limited to, public defenders.
 - Information that any remedy still must follow standard appellate and post-conviction remedies, rules, and procedures.

- ❖ The notification procedures apply to both independent FSSB investigations and laboratory disclosures.
- ❖ Notification of the investigation and determination to the relevant accrediting body
- ❖ The FSSB shall ensure notification procedures respect due process concerns and respect laboratory remediation and corrective processes.
- ❖ Includes notification of the disposition, if that disposition includes a finding that an act of professional negligence, misconduct, nonconformance, or a change in science affected the integrity of the results of a forensic analysis.

Education and Information

- ❖ Provide a clearinghouse and disseminate information of developments in forensic science.
- ❖ Provide information on available education and training to all stakeholders.
- ❖ Provide a central database of Forensic Science Experts.
- ❖ Collect and analyze information related to the impact of current laws, rules, policies, and practices on forensic crime laboratories and the practice of forensic science; evaluate the impact of those laws, rules, policies, and practices on forensic crime laboratories and the practice of forensic science; identify new policies and approaches, together with changes in science and technology; and make recommendations for changes to those laws, rules, policies, and practices that will yield criminal justice system results more consistent with the sound practice of forensic science.

Recommendations for Appropriations, Resources, and Best Practices

- ❖ Cooperation to reduce backlogs, respond to developing issues (NIJ Report, p.12-13, 24)
- ❖ Assessing system capabilities and needs (NIJ Report, p.23-24)
- ❖ The FSSB shall make recommendations so that adequate resources and facilities are available for the FSSB, for the MSP Forensic Science Division and other Forensic Science Service Providers.
- ❖ The FSSB shall identify and encourage best practices for Forensic Science Service Providers to improve the practice, delivery, and use of forensic science in Michigan.
- ❖ Priority areas for best practices include:
 - Analysts and experts obtain certification in areas of expertise
 - Compliance with accreditation requirements
 - Strengthen forensic science methodologies and quality assurance standards
 - Access to evidence for all stakeholders
 - Compartmentalization and independence from the prosecution function and responses to cognitive bias

- ❖ The subcommittee did not form a consensus for authorization to establish a program of grants to serve as an incentive for meeting the best practices.

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