

# 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

- 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)

**Criteria questions – Advanced degree, years of experience, and OSAC service**

- One Forensic Medical Examiner

- 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
- 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)
  - Counsel – either for the FSSB or to help resolve issues from public labs
- Commission members shall not receive compensation, but shall be reimbursed for their reasonable actual and necessary expenses
- Reporting requirements include impact on individual people / cases
- 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 either on staff or contracted for counseling Forensic Science Service Providers? (NIJ – p. 19)
  - Distinction between role of outside counsel to Forensic Science Body and outside counsel to forensic science service providers.

- If FSSP counsel, then would need conflict firewall so not involved in complaints/investigations that could be connected to advice of counsel.
- Should not include private lab counsel
- **Each mandate should have a specific statutory timeline for implementation, TBD, as resources allow.**

## PART IV: MANDATE

Providing Principles and Goals for the permanent Forensic Science Statewide Body (FSSB) to implement.

### Accreditation of Laboratories

- ❖ A forensic laboratory that conducts forensic analysis must be accredited 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.
- ❖ Timeframe: Two years after the effective date of statute.
- ❖ The FSSB shall verify that forensic laboratories have obtained the accreditation required under this subsection.
- ❖ If a forensic laboratory will not meet the accreditation requirements within the time required by this subsection and the forensic laboratory submits a petition to the FSSB requesting an extension of time or a permanent waiver before the forensic laboratory is in violation of this subsection, the commission in its discretion may grant the extension of time or waiver for the forensic laboratory to meet the accreditation requirements.

### Registration

- ❖ The FSSB shall establish a process to register forensic experts that requires conformance to forensic-specific requirements. 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 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.

# Complaints, Reports, and Investigations

## General Concepts

- ❖ Who discloses: Design a system of reporting of negligence, misconduct, or nonconformance by a Forensic Science Service Provider that affects the integrity of the forensic science or forensic medicine results, or the practice of forensic science.
- ❖ 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.
- 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, opportunity for complainant to respond, close 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.
- ❖ 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 annually to the FSSB.

## 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)

- TX: person who makes the complaint is posted on the website and meeting minutes. The target is not - usually only disclosed when it rises to misconduct.
- ❖ Timeline – x Months after complaint referred to lab for further info, x months after referral for report and recommendation so that lab conducts initial investigation, report, and recommendations for majority of disclosures and complaints. To be determined by FSSB staff.
- ❖ Does not apply to ongoing or open criminal investigation 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)

## Notification

- ❖ The FSSB shall develop and implement a notification procedure for investigations conducted under this section and disclosed information that includes all of the following:
  - Notification to institutional stakeholders: Prosecuting Attorneys Association of Michigan; 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.
- ❖ 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, Best Practices, and authority to design a system of grants for Implementation

- ❖ 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
- ❖ **Authorization to set up a program for grants**
  - Allows for advancements in quality control. Provides an incentive for institutional labs to support changes and disclosure that otherwise might be cumbersome.
  - Responds to issue of small public labs lacking funding for necessary accreditation
  - When a best practice is authorized by the Commission, public forensic science labs may apply for grants on a schedule and process identified by the Commission.
  - On a standard Fiscal Year budget cycle, the Commission shall recommend to the legislature appropriation required to fund these grants.
  - The Commission shall consider implementation of a separate grant process in exceptional circumstances for private labs.
  - Potential issue of providing grants to same agencies that are regulated or subject to complaints/investigations.