



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
TASK FORCE ON FORENSIC SCIENCE  
LANSING

CHIEF JUSTICE BRIDGET M. McCORMACK  
COL. JOSEPH GASPER  
CO-CHAIRS

Task Force on Forensic Science  
November 1, 2022  
In Person, Michigan Hall of Justice  
925 W. Ottawa Street, Lansing, MI  
and  
Virtual via Zoom

Voting Members	Representing
Col. Joe Gasper, Director	Michigan Department of State Police
Chief Justice Bridget M. McCormack	The Michigan Supreme Court
Mr. Jeff Nye, Director	Michigan Department of State Police, Forensic Science Division
Mr. Jonathan Sacks	Public defenders or criminal defense attorneys
Mr. Matthew J. Wiese	Prosecuting attorneys
Dr. Jeffrey M. Jentzen, M.D., Ph.D.	Board-certified pathologists with experience in forensic pathology
Mr. Kent Gardner, Director	Oakland County Sheriff's Department Forensic Laboratory
Mr. Christopher R. Bommarito	Forensic science practitioners with at least five years of experience in the field
Mr. Brandon N. Giroux	Forensic science practitioners with at least five years of experience in the field
Hon. (ret.) Dr. Donald Shelton, Ph.D.	Individuals from the private sector or from a university in this state who have earned a doctoral degree in a distinct field relevant to forensic science and who have published scholarship related to the field in a peer-reviewed journal
Dr. Ruth Smith, Ph.D.	Individuals from the private sector or from a university in this state who have earned a doctoral degree in a distinct field relevant to forensic science and who have published scholarship related to the field in a peer-reviewed journal
Dr. Barbara O'Brien, Ph.D.	Individuals from the private sector or from a university in this state who has published scholarship related to cognitive bias
Judge Paul J. Denenfeld	The 17th Circuit Court of Kent County, designated by the Chief Justice
Ms. Laurie Montgomery, Attorney General Dana Nessel's designee	The Michigan Attorney General's Office
Non-Voting Members	
Senator John Bizon	The Michigan Senate, designated by the Senate Majority Leader
Senator Stephanie Chang	The Michigan Senate, designated by the Senate Minority Leader
Representative Robert Bezotte	The Michigan House of Representatives, designated by the Speaker of the House
Representative Laurie Pohutsky	The Michigan House of Representative, designated by the House Minority Leader.

**I. Arrival and Coffee**

**II. Call to Order**

- Chief Justice Bridget M. McCormack called the Task Force on Forensic Science meeting to order at 9:39 a.m.
- All were advised the meeting was being recorded.

**III. Roll Call**

- Roll call was taken, and a quorum was present.

Attendance Roll Call	Present Yes	Present No	Location, City, County, & State
<b>Voting Members</b>			
Col. Joe Gasper, Co-Chair	X		
Chief Justice Bridget M. McCormack, Co-Chair	X		
Mr. Jeff Nye	X		
Mr. Jonathan Sacks	X		
Mr. Matthew J. Wiese	X		
Dr. Jeffrey M. Jentzen, M.D., Ph.D	X		Virtual via Zoom
Mr. Kent Gardner	X		
Mr. Christopher R. Bommarito	X		Virtual via Zoom
Mr. Brandon N. Giroux		X	
Hon. (ret.) Dr. Donald Shelton, Ph.D.	X		
Dr. Ruth Smith, Ph.D.	X		
Dr. Barbara O'Brien, Ph.D.	X		
Judge Paul J. Denefeld	X		
Ms. Laurie Montgomery, Attorney General designee	X		
<b>Non-Voting Members</b>			
Senator John Bizon	X		Virtual via Zoom
Senator Stephanie Chang		X	
Representative Robert Bezotte		X	
Representative Laurie Pohutsky	X		

**IV. Approval Vote of the September 20, 2022, Meeting Minutes**

- A motion to approve the September 20, 2022, meeting minutes was given by Dr. Barbara O'Brien and seconded by Dr. Ruth Smith.
- With no discussion, the September 20, 2022, meeting minutes were approved with 13 Yeas, 0 Nays, and 0 Abstained.

**V. Subcommittee Updates and Revisions for Findings and Recommendations**

- Subcommittee 1: Forensic Science Statewide Body, Speaker: Mr. Jonathan Sacks
  - Mr. Jonathan Sacks acknowledged and thanked the members of the subcommittee and support staff: Judge Denefeld, Judge Shelton, Senator Bizon, Chris Bommarito, Kent Gardner, Brandon Giroux, Laurie Montgomery, and Jeff Nye.
  - Part I: Where Forensic Science Statewide Body (SSB) is Housed in State Government
    - The recommendation of where the Forensic Science Statewide Body (FSSB) is housed remains the same. The FSSB should be housed within the appropriate Executive Branch agency and to include similar enabling and independence language to the 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
  - The recommendation of the composition of the FSSB remains the same: Four forensic science practitioners, legal system practitioners, and academics. New language was added to the forensic science practitioner's description clarifying each practitioner should have an advanced degree

from an accredited program and/or OSAC (Organization of Scientific Committees for Forensic Science), or comparable service, plus ten years of experience. Similar language will be added to each of the forensic scientist practitioner bullet points.

- For the forensic pathologist, language was added that they should have NAME (National Association of Medical Examiners) accreditation.
  - In response to the innocence network recommendation, an advisory, non-voting position was added. This could be a social scientist, the cognitive psychologist, the data scientist, or an expert in a developing area of forensic science.
- Part III: Scope and Process
    - Regarding General Counsel, it was determined that General Counsel would be to the Permanent Commission and not outside counsel for the forensic science service providers.
  - Part IV: Mandate
    - For accreditation, definitions for forensic science practitioner and forensic analysis were added. The forensic science practitioner definition came from the Department of Justice group and the forensic analysis definition came from the forensic science legislation that Senator Chang introduced years ago. The definitions make the foundation requirements clear. Accreditation applies to someone actually doing the testing, not somebody who's looking at results and giving an opinion on the results. There is an accreditation requirement where testing is involved, but not for analysis review.
      - Col. Gasper: Under the definition of Practitioner, it mentions the collection of evidence. Police agencies around the state and in our department have evidence technicians, and they go out and collect evidence. Are you proposing that even that evidence technician, any person that is collecting evidence, needs to be accredited?
        - Ms. Laurie Montgomery: It's a two-part definition. In addition to doing the collection, also issues test results, provides reports, or provided interpretations, conclusions, or opinion through testimony with respect to such evidence. They would not meet that definition because they are just collecting. If they go on to do fingerprint analysis, then absolutely, they will need to be accredited.
    - Regarding a waiver, there was pretty much consensus that there shouldn't be a waiver requirement where there are two systems of experts; some having accreditation requirements while others don't. Because it would be new for some, there should be a process to get an extension of time for the accreditation requirement. It was added that practitioners could request an extension.
    - Specific language was adopted, at Dr. Jentzen's recommendation, regarding medical examiners. Medical examiners should be accredited by NAME and that examiners in suspect homicide cases should be board-certified forensic pathologists. The FSSB will evaluate the need and feasibility for additional ISO accreditation requirements for medical examiners down the road.
    - The registration section pretty much stayed the same. Some changes may be made to make it consistent with other sections.
    - There were no major changes in the concept of Complaints, Reports, and Investigations.
      - Who discloses, when to disclose, and where those disclosures take place stayed the same. The lab reports and responses remained the same.
      - The two-tiered process remained the same.
      - Clarification was added that 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.
    - For results, similar language to Texas was added, making it clear for civil litigation that nothing in here is admission by the State of responsibility.
    - The notification section is mostly the same with the addition of notification to the accreditation body and the Criminal Defense Attorneys of Michigan.
    - Education and Information remains the same.

- For appropriations, resources and best practices, a consensus wasn't reached regarding grant authority. It is hoped that it can be revisited by the forensic science body and a recommendation can be made down the road by the permanent body.
- Subcommittee 2: Forensic Science Practice, Speaker: Mr. Jeff Nye
  - Committee members are: Mr. Jeff Nye, Dr. Ruth Smith, Sen. Stephanie Chang, Dr. Barbara O'Brien, Rep. Laurie Pohutsky, Col. Joseph Gasper, and Dr. Jeffrey Jentzen.
  - Objective I: Conduct a Statewide Survey of Forensic Science Service Providers.
    - We conducted a statewide survey for forensic science service providers at the organizational level. (*Results previous shared*)
    - We did conduct our survey of actual practitioners at the individual level a couple of weeks ago with 26 responses.
      - 25 out of 26 commented they work within an accredited laboratory. But, when drilled down into some of the details, there were two that actually do not work in an accredited laboratory.
      - One response from one not working in an accredited laboratory commented that because they work in a small unit, accreditation would be of little benefit.
      - 26 out of 26 commented they did not have sufficient time to train.
      - 25 out of 26 commented they supply information equally to the defense as well as the prosecution.
      - 21 out of 26 commented they supply information beyond the case files.
      - 4 out of 26 commented they are not directly involved in the decision making related to the evidence testing process.
      - 22 out of 26 commented they are directly involved in the decision making related to the evidence testing process.
      - 26 out of 26 commented they do take proficiency tests.
      - 2 out of 26 commented they actually take blind proficiency tests.
      - 25 out of 26 commented their work is audited.
      - Comments related to bias were pretty appropriate relevant to what was discussed in the Task Force.
      - Suggestion related to additional quality assurance measures included blind testing and case managers.
      - There were really good comments about continued education, and keeping up with changes, and forensic science rapidly changing. But with that 26 out of 26 said there were sufficient educational opportunities available to them, but funding and time seem to be barriers to education.
      - 9 out of 26 commented they provide educational opportunities to prosecutors.
      - 5 out of 26 commented they provide educational opportunities to the defense.
      - Appropriate comments were provided regarding new technologies, finding new technologies, and how they implement new technologies, with barriers being funding and limited staff.
      - 3 out of 26 commented they are not competent in having sufficient training and educational opportunities to stay up to date with things.
      - Regarding times they go out and testify, there appears to be a relatively low court attendance.
      - There's a low level of communication with defense.
      - There's a medium level of communication with prosecution.
      - 4 out of 26 feel there is a level of concern with bias in their analysis.
      - 22 out of 26 don't feel there is a concern with bias in their analysis.
      - 26 out of 26 commented they have received training on bias.
      - Narrative questions and responses:
        - Question: As an analyst in your discipline, what are the challenges you face in providing quality forensic science services?
          - Response: The system into which forensic information is presented is adversarial. The adversarial system actually creates a situation in which the non-forensic science parties will seek to use the most favorable for their argument. Forensic science is not the single cause of incomplete or misrepresentation of scientific information in court,

- it's just a convenient one to point out. To ignore the role the adversarial system has on what, how, and why forensic results are presented or questioned, is missing part of the problem, providing the court the best information with which to make a decision. The results are not terribly flawed nor perfect.
- Response: The challenges we face are from outside pressures; An agency, or person thinking we can do something that we can't physically do; People outside of forensic science, thinking they know more about our job than the people with forensic science; Someone thinking that just because someone is enlisted that they can't be impartial; People thinking that something can be done overnight or in an hour.
  - Response: A wide array of duties pulls away from case work and completion, needs fewer duties or more analysts to meet the needs of the standards and also complete case work. *(This is a resource type of a response)*
  - Question: What are your recommendations to address challenges? *(Direct communication to the Task Force)*
    - Response: Accreditation; Methods and conclusions based on national or international standards such as OSAC (Organization of Scientific Area Committees for Forensic Science) Registry or ASTM (American Society for Testing and Materials); A new model to include distinct business units, such as Research and Development, Quality Assurance, Analytical, IT, and facilities (more structure within every organization); Funding for training and equipment; Universal and repeated recognition of the positive work done by forensic scientists. You talk about cognitive bias, but what you fail to realize is that you are contributing to the Availability Heuristic in the general public, legislators, attorneys, and even yourself by echoing the relatively few but well publicized cases of "bad forensic science." Statistically the court is more likely to encounter reliable forensic science than "bad." I read the blog of a defense attorney who is a fantastic litigator, but he never claims forensic science or forensic scientists are flawed because he knows forensic science isn't bad. Forensic science doesn't need more guardrails to be reliable; Make all analysts and supervisors civilians; Make a separate crime scene unit that is not associated with the laboratory; remove from under the direct oversight of a police agency; Assign staff with the knowledge and expertise to be more involved in decisions that effect the forensic science lab; Multiple comments regarding communication and training and training for users of forensic science, funding for additional positions
  - Objective II: Independence within Law Enforcement Agencies
    - Multiple discussions were had regarding various models of how forensic science is provided. Examples would be Houston and how they are a quasi of non-law enforcement, and the Virginia system where they're a private independent State agency. Discussions were had regarding the removing or the concern about the parent organization being a law enforcement agency and employing enlisted staff members.
    - The subcommittee acknowledges that adhering to certain accreditation standards should mitigate bias and independence concerns raised. ISO 17025 does have a number of different accreditation requirements related to independence within your organization, bias, mitigating that bias, and addressing outside influences from the forensic laboratory.
      - Recommendation: Law enforcement agencies evaluate their hiring practices to ensure the most qualified and competent individual is hired for any given position within a forensic science laboratory, without special consideration for enlisted member status.
      - Recommendation: Future monitoring by the Commission of forensic science service providers housed within law enforcement agencies for potential conflict or bias that may result from undue influences.
  - Objective III: Access
    - Multiple discussions were had regarding the equal access to defense attorneys.
    - Specifically, requests for additional analysis to have an existing process that includes defense/prosecution discussion followed by request from the investigating agency.

- Specifically, a request from a defense attorney can be vetted by the presiding judge and a court order submitted for testing.
  - Recommendation: Non-MSP service providers to use similar models for requesting analysis.
  - Recommendation: Education for attorneys, judges, and investigating agencies on laboratory capacity, technical competencies, and process for making additional requests. Make this training into a fully available video or statute.
- Objective IV: Practices for Quality Control and Compartmentalization.
  - Recommendation: All forensic science service providers institute a blind proficiency testing program to evaluate each discipline and method on an annual basis.
  - Recommendation: All forensic service providers consider interlaboratory evaluations or re-analysis audits as an additional quality assurance measure.
  - Recommendation: Conduct further studies and research to determine the feasibility of instituting sequential unmasking and its effect on case productivity and bias reduction.
  - Recommendation: Create policies internally that address unmasking.
  - Recommendation: All Forensic Service Providers become accredited to ISO 17025 and/or 17020 from an ILAC (International Laboratory Accreditation Cooperation) member accrediting body. Along with a recommendation the State of Michigan provide some support. That support could be monetary, but also knowledge, experience, and support to help guide those laboratories.
  - Recommendation: All Forensic Science Service Providers become accredited within two years of the requirement.
- Objective V: Disclosure of Negligence/Misconduct
  - Recommendations provided previously
- Objective VI: Training Requirements
  - Recommendations provided previously
- Object VII: Resource Needs
  - Recommendation: Conduct a detailed annual needs assessment across the State of Michigan forensic science service providers and building some resources around how they increase staff numbers and increase technologies.
- Subcommittee 3: Criminal Legal System, Speaker: Hon. (ret.) Dr. Donald Shelton
  - Recommendations and findings were presented previously.
  - One revision was made: Under Education (1:D), we are recommending mandatory continuing education both for attorneys and judges, and that the Supreme Court had already moved in the area of continuing education for judges. Previously we had recommended that the Judicial Board, appointed by the Supreme Court, require forensic science education for judges. The subcommittee consulted with the Judicial Education Board and looked at their hourly requirements. They are requiring a twenty-four-hour continuing education credit for judges every two years. But twelve of those hours are already allocated to the Supreme Court's Annual Judicial Conference; Six of those hours are allocated toward ethics training for judges. We came to a resolution with them and are recommending that the annual requirement at the Judicial Conference, in those first twelve hours, include a session on forensic science education.
  - Under section three: In Evidence and Discovery we did have a discussion about a proposed new Michigan Court Rule regarding disclosure of DNA test results and information. That recommendation was based on the American Bar Association Criminal Justice Standards. However, we did modify it and provided for a waiver of those requirements by the defense and the timing that disclosure requirement would not begin until an arrangement in Circuit Court.
  - Regarding information from the prosecution about the witnesses who would testify, we amended it to make that information not be required until thirty days before the trial, or upon request of the defense attorney.
  - Under section four there are two recommendations: The first is that the expert witness instruction be deleted from the jury instructions. That is based on the recommendation of the American Bar

Association. The second is an instruction that an instruction not be given with regard to what's called the Anti-CSI instruction.

- Comments from Task Force members related to the three subcommittee updates.
  - Mr. Christopher Bommarito expressed he does have comments related to Mr. Nye's presentation and wanted to confirm he'd have the opportunity to participate in the later discussion.
    - Chief Justice McCormack's responded Mr. Bommarito will have the opportunity to participate in an in-depth discussion and that she's expecting there'll be places in each report where there might be some disagreement, and that's what we're hoping to work through today and see where we are.
  - Dr. Jeffrey Jentzen recommended, under Accreditation of Laboratories, forensic pathologists be accredited by the American Board of Pathology and the Medical Examiner's Office be accredited or affiliated with a NAME accreditation. We need to have the office accredited and not the medical examiner, because the majority of medical examiners in Michigan are not forensic pathologists; They have an MD degree only as the requirement.

## VI. Public Comments

- No public comments expressed

## VII. Discussion of Findings and Recommendations

- Mr. Jonathan Sacks: Subcommittee 1, Forensic Science Statewide Body
  - Part I: Where Forensic Science Statewide Body (FSSB) is Housed in State Government
    - No questions or comments expressed
  - Part II: Composition
    - Mr. Sacks will get specific language from Dr. Jentzen regarding the medical examiner piece, and to be consistent, he will update the accreditation section as well.
    - Mr. Sacks will make sure the language about practitioner qualifications is consistent amount the four forensic science practitioners.
    - The advisory position has been added.
    - Ms. Kaitlin Stadler question: On the composition piece, the member of the public, is this a justice involved individual, or just any member of the public?
      - Mr. Sacks response: Currently the list is blank because there were so many possibilities, but we can include a list in the language.
    - Hon. (ret.) Dr. Donald Shelton question: Just to clarify, who appoints the people? Am I correct that unless it's otherwise indicated, the governor makes these appointments?
      - Mr. Sacks response: Yes, each position is appointed by the governor to standard four-year terms.
    - Mr. Christopher Bommarito comment: I think we need a little bit more specifics in the language regarding the academic positions.
      - Mr. Sacks response: We have two academics. One with the DNA expertise. Should we clarify PhD degrees, or what should we have for specifics for the academic requirements?
        - Mr. Bommarito follow-up comments: Feels like we need to have something there as far as requirements.
        - Dr. Barbara O'Brien comments: There should be a PhD requirement for sure and some form of employment, but we don't want to make it too exclusive.
        - Judge Paul Denefeld question: Chris Bommarito, are you suggesting we narrow the degree down with a specific field the academic is in?
          - Mr. Bommarito follow-up comment: No. That is not what I am suggesting. We have one with a requirement in DNA analysis. We need to say something like it is a PhD from a state university.
        - Mr. Jeffrey Nye comments: The DNA expertise needs to be specific to forensic DNA; From an academic perspective, conducts research and publishes in the relevant areas.

- Mr. Bommarito follow-up comment: Yes, that is basically what I'm saying. In fact, Senator Chang's legislation had some requirements in there, that might be a good starting point.
- Mr. Sacks recap: We have the PhD requirement for the specific higher education and accreditation (language to be provided by Dr. Barbara O'Brien and Dr. Ruth Smith) and the research and publication requirements.
- Ms. Laurie Montgomery question: For one prosecutor, one defense attorney, and one retired judge the original bill said that each of those entities would set forth a list of ten people and the Governor would select from the ten. Ten seems a little astronomical. Could we maybe change that to be that those entities would put forth three names and the Governor would then choose from that?
  - Mr. Matthew Wiese comment: He would support that change.
  - Mr. Sacks comments: That is a good suggestion, I've seen that in a number of other different committees and commissions.
    - Hon. (ret.) Dr. Donald Shelton comment: Only as to the prosecutor and defense, not the Supreme Court.
    - Chief Justice McCormack comment: The Governor usually asks for three names and then she picks.
    - Hon. (ret.) Dr. Donald Shelton comment: The Supreme Court is going to be making this appointment, not making a recommendation to the Governor.
- Hon. (ret.) Dr. Donald Shelton regarding the academic requirements: I think we should give whoever the Governor is some credit, and not try to so narrowly define this that we end up with three people who would fit that. I would be inclined more to a general requirement that it be someone at a State University with a PhD. But I think the accreditation is going to be a problem in trying to figure out accredited by whom.
  - Dr. Barbara O'Brien comments: We don't want somebody from just a made-up university. I don't think that would happen, but we want something there. It could be a private school. We wanted to find the broadest accreditor. We looked at the Higher Learning Commission and it looks like they have 108 institutions in Michigan. We could talk about how narrow we want the accreditation to be. We just don't want it to be a fly-by-night organization.
  - Hon. (ret.) Dr. Donald Shelton follow-up comment: I'm just saying we need to give the Governor some credit.
  - Mr. Sacks comment: We have a good broad list and will follow-up with Dr. O'Brien and Dr. Smith for good guidance that's not too narrow.
- Mr. Nye comments regarding the four forensic science practitioners: The requirements are a very high bar. The advanced degrees for some of those areas are going to be a little challenging. For instance, there are not too many people who have an advanced degree in a pattern discipline; The ten years of experience would be the bottom of what we should go with. It takes a long time to get that knowledge; I wouldn't mind narrowing things just a little. In the original legislation, and I do think it's a concern here, is that you have on this Task Force two individuals, one that represents a local practitioner, and one that represents a state practitioner. But yet, we don't have any of those delineations here at all. For me and my organization in particular, we provide 85% of the service to the State and there's really no guarantee that we have any representation on the Task Force, but I also recognize Judge Shelton's comments about being too narrow in our requirements.
  - Mr. Sacks follow-up comments regarding the advanced degree: The comment about the requirements being too restrictive, I think we resolved that. We talked about how each practitioner should have either an advanced degree from an accredited program and/or OSAC, or comparable experience plus ten years. We will update language under each of the forensic science practitioners. The advanced degree is an either/or requirement. Somebody that does not have an advanced degree, could meet this bar if they are either OSAC or have comparable experience. So, the only absolute there is, is the ten years of experience.
  - Mr. Sacks follow-up comments regarding where the forensic science practitioners should come from: Should we specify which institutional lab these folks should come from, being the Forensic Science Division, or not? The number will have the impact. So, if the largest actor is the Forensic Science Division, it is likely one or more of these people will end up coming from there. I'm not sure we need to specify. But this isn't something we talked about much, so I'm



interested in what the Task Force thinks about that idea or that suggestion and if we need a change there or a specific recommendation.

- Mr. Bommarito comments: If the Governor is appointing all the members and doesn't chose any members from the Michigan State Police Forensic Science Division, then there's bigger problems than we would think. I think leaving it to the discretion of the Governor is pretty reasonable.
- Judge Paul Denenfeld comments: I am in agreement (leaving it to the discretion of the Governor). I am also concerned about perception. We understand the Michigan State Police Forensic Science Division is the big player and I think any Governor is also going to recognize that. To designate one particular kind of qualification, which is somebody who works for the Forensic Science Division, I think you're asking for trouble.
- Mr. Nye follow-up comments: My concerns are more of that we have a Task Force with an x number of individuals that aren't rooted in particular areas of forensic science will have the potential for disconnect. I will add, I would no more want to make a ton of recommendation, for let's say Chris Bommarito's lab as a private lab, because I don't understand the pressures and different experiences of his organization or any other private organization might make. That kind of goes the other way as well depending on the makeup of this body. There is the distinct possibility that they would make recommendations that are not relative.
- Col. Joseph Gasper comments: I would agree with Mr. Nye. The strong majority, if not all of the Boards and Commissions that the Governor appoints to that have anything to do with the State Police, we add that we have a representative of a specified area in the bylaws of the scope of that. I don't see in the foreseeable future where we have a laboratory system that does more work than what we do. So, from a standpoint of impropriety or the insinuation that there wouldn't be problems, again that speaks to the size of the entity.
- Mr. Sacks response: If there is a concern here, I don't think it is a make-or-break sort of issue. It is very easy to add at both ends, saying at least one of these four should be from the Forensic Science Division and at least one of these four should come form a private laboratory. That way both bases are covered and that seems to be a good resolution of this issue.
  - Judge Paul Denenfeld: Is in agreement.
  - Chief Justice McCormack: Is in agreement.
- Mr. Sacks commented: He will make the changes to the academic and make the changes to the specification of one Forensic Science Division person and one private individual.
- Mr. Matthew Wiese question: When it comes to the prosecutor and retired judge, are we all on the same page with that? Because I'm thinking PAAM would put forth three names for the persecutors and the Governor would pick. Is CDAM representative of all defense attorneys in Michigan?
  - Ms. Laurie Montgomery response: Not everyone who is a defense attorney is a part of CDAM, but who else would do it? So, it falls on CDAM. But having three doesn't necessarily mean a person has to be a part of CDAM.
  - Mr. Sacks response: CDAM is probably the best bet.
  - Chief Justice McCormack response: SADO is another possibility.
  - Mr. Sacks response: SADO is a possibility, and MDIC is a possibility. There are arguments for each. There's not a parallel organization like PAAM that covers everybody.
  - Mr. Wiese questions: So, when it comes to judges, you said you put forth three names, but it looks like it's a court appointment.
    - Chief McCormack response: This is meant to be that the court gets an appointment to the Commission. Historically I have given the Governor three names, or she just asked for one name, so we could do it any number of ways. But I think there's an argument for the court picking the judge that's going to be doing this work.
  - Mr. Sacks commented: He will make the clarification and also adding the piece regarding the member of the public appointment.

- Part III: Scope and Access
  - Mr. Sacks Comments: We added some things. We wanted to keep this comprehensive. We focused a lot on transparency issues covering Open Meetings Act, Freedom of Information Act, and a good definition as to what the scope is to make it clear that it's both social science and more traditional forensic science. We took a nice mission statement from the NIJ (National Institute of Justice) report. We took the transparency matrix from the NIJ report, and we added the piece on General Counsel and the mandate of that General Counsel.
  - Mr. Nye comments: Regarding the Scope and definition of forensic science, I want to make sure we all understand exactly what we are accepting here, which to me reads as though it's most every standard, traditional, forensic science practice, including four other expert examinations. That's sort of a really large umbrella of everything. I just want to make sure that's really what we want. We have included in there behavioral, Medical, Social Science, but the other expert examinations seem very, very broad.
    - Mr. Sacks response: The origin of most of this definition came from the same definition that was in the Executive Order. And then, as a result of Judge Shelton's presentations, we added the Social Science piece.
    - Judge Denenfeld comment: *Daubert* was also a reason why we added that because it says it's a standard it applies to.
    - Mr. Nye comment: If we vote on this and it gets accepted, this is going to be the broadest interpretation of forensic science that I can think of in the country. To include behavioral sciences and other extra examinations, that's amazingly broadened. I'm not saying it's bad, I just want to make sure that everybody understands what we're doing.
    - Dr. O'Brien comments: I'm glad it's broad, because I'm thinking about some of the areas I'm most troubled by. Things like handwriting analysis and things like bite mark evidence. Those are things that I think wouldn't fall under anything.
    - Mr. Nye comments: I agree with those two disciplines. I'm thinking about some of Chris Bommarito's comments about traffic crash reconstruction, facial recognition, etc. It's very, very broad. If you're looking at evidence and drawing an expert opinion, you're included under the umbrella of whatever we put forward.
    - Ms. Laurie Montgomery comments: I think that's why we made it so broad. Because we know science quotation changes, and what is considered science changes, like accident reconstructions, which are a big problem. I think that's why we wanted it broad enough to make sure it does carry some of those troublesome areas that you mentioned.
    - Hon. (ret.) Dr. Donald Shelton comments: Not to be too legalistic about it, but I think the United States Supreme Court answered this question in the *Kumho* case where they said these standards apply to all experts, not just scientific experts, and that one of the reasons why this broad definition applies.
    - Mr. Sacks comments: My hope here is that the permanent forensic science body would prioritize well, and if it's a less traditional area, it would be because there's a real need for someone to take a good look at because it's popping up in criminal trials. I think what we have is a good approach and something to be proud of, to take a look at social science, and to look at medical examiners, areas that haven't necessarily been traditional forensic science in other places.
    - Col Gasper comments: I have considerable concerns. It is too broad. When we get further into the recommendations for the other types of investigations, basically we're opening this to all areas of policing. If we want handwriting and bite marks, I would rather put handwriting and bite marks in there versus leaving it open-ended for the interpretation of the future. If we have the opportunity to define the scope and the scope needs to change in the future, then that would be the responsibility of the entity of the future to seek the modification to broaden the scope.
    - Mr. Wiese comments: I'm thinking about domestic violence and using an expert witness to testify about the dynamics of a domestic violence relationship, which is a behavioral or a social science. Or, using a forensic nurse to testify about evaluating a strangulation case, which I have done before. So, if you look through the scope, they would be covered under that. But when you get further on, they talk about verifying that the forensic science practitioners, and I'm looking at accreditation laboratories, they don't really fall into that. I don't

disagree that *Kumho* says what it says, but I don't think those types of sciences fall here for a Forensic Science Commission. If I took a domestic violence shelter advocate who's worked with thousands of battered women over the years and has seen patterns, who qualifies under how the courts have said they're allowed to testify, they would never fit as a practitioner.

- Ms. Montgomery comments: They would register as an expert. They wouldn't be under the accreditation requirement.
- Mr. Wiese comments: I'm just thinking practically how I prosecute and handle cases. I have a strangulation case. I've been at a training where a forensic nurse trains on strangulation investigations. She's never testified as a witness, but I want to retain her as an expert witness. She then has to register first before she can be allowed to testify. Isn't that really the judge's role as the gatekeeper to decide who's the expert? It seems like we're creating some real logistical, practical problems here on how cases are going to be processed.
- Mr. Sacks comments: The thinking here is the broad definition of the Scope is sort of a starting point for a permanent forensic science body. The specific parts of the mandate part isn't going to apply to everything. Like Laurie (Ms. Montgomery) said, a number of those experts you named don't have those accreditation requirements. They are not subject to ISO 70125. Same with Col. Gasper and other areas of policing; that's also not going to be subject to that requirement. It's simply that registration piece. That's the one that applies to that broader scope.
- Mr. Wiese comments: Do we really want a Forensic Science Commission to say, so you're not registered, and tell this judge that person can't testify in their court. That just doesn't seem right.
- Hon. (ret.) Dr. Donald Shelton comments: The judge is going to decide whether the witness is qualified or not, and registration doesn't control that. It may be a factor in the Judge's decision. Registration isn't a jurisdictional requirement. It is there for a purpose, and certainly it could be part of an argument before a judge. But it doesn't control. It's not a per se requirement to testify.
- Chief Justice McCormack comment: We cannot change the rule of evidence and we can't change the common law.
- Mr. Weise comments: I deal with these issues trying cases and with trial judges, so I'm afraid that's going to confuse the situation.
- Hon. (ret.) Dr. Donald Shelton comments: In your hypothetical post I can see a judge saying...Well prosecutor, why isn't this witness registered? And you're going to say because she's never testified before, and she's an expert in this area. And the judge is going to say okay. It is just that sort of process that the law allows for the judge to exercise that gatekeeping responsibility. What we do here is not going to limit, in this section, what the judges can admit or not.
- Chief Justice McCormack comments: I have yet to review many transcripts where there is a real fight put on about the qualifications of an expert. So, to the extent, this give the lawyers another tool in trying to sort out whether the expert should be qualified. I don't see much of a fight on the defense side about qualifications of experts in most of these social science areas.
- Ms. Laurie Montgomery comments: I think the whole purpose of having the registration of experts is to start identifying bad actors and the way to get them is when the good defense attorneys or good prosecutors start cross-examining them and catching them, and then other people aren't going to use them. So, what this creates is a form of a tracking system so someone can go to a central database that has all these experts listed and say...Okay, well, this is where they testified. Or this is where there was a complaint and start cross-examining them. So, prosecution can also kick out terrible defense experts that have impeached themselves.
- Mr. Weise comments: We already do that by getting transcripts from other jurisdictions.
- Ms. Montgomery comments: It's just easier to have a central database.
- Mr. Kent Gardner comment: OSAC kind of covers that broad range with best practices. That might be a good guideline.
- Mr. Weise comments: That's probably my biggest issue. It's not really forensic science, its behavior science and social science. That's why I have a hard time fitting it under this.

- Dr. Barbara O'Brien comments: It's kind of semantics. It's not what we typically think of when we think about forensic science like DNA or fingerprints, but it is somebody applying scientific principles to a question, and they can do it in a way that's misleading, or valid, or unsubstantiated; whether it's bite mark, or victimology, or gang experts, or fingerprints. It's still applying the scientific method to questions relevant to the law.
  - Judge Denenfeld comments: Nothing we're talking about here is changing the Michigan Rule of Evidence. Nothing is changing the fact that I have to comply with Rule 701, 702, 703 when it comes to experts. This committee doesn't have that kind of authority. Michigan Supreme Court sets our Michigan Rules of Evidence and our Legislature set our statutes that are signed into law. So, it is still ultimately left up to the judge, applying the extant rules of evidence and statutes to determine whether or not somebody is an expert. We are not amending anything, nor can the Commission do that because the Commission is neither a legislative body nor a judicial body in that sense.
  - Mr. Sacks comments: The closest is the mandate to offer recommendations on future legislation for Michigan Rule of Evidence as they apply to the work of the Commission. The new definitions we've put in for forensic science practitioners and forensic analysis are much more narrow definitions and that's the one some of these mandates apply to, whereas the larger scope is the registration, the training, the education, and the collection of information. We'll mark that we are still discussing where we're going to land on scope. But regardless of what the scope is, the specific mandates don't apply equally to every piece with accreditation being the main example.
  - Ms. Montgomery comments: In Part III the definition is stating forensic science is only connected to the criminal action, but in Part IV, for the mandate, we're stating the interpretation of evidence for criminal and civil law.
  - Mr. Sacks comment: Let's keep it criminal. We will remove civil from Part IV.
- Part IV: Mandate
    - Mr. Sacks comments regarding accreditation and registration: We discussed and resolved the definitions and the timeframe where somebody can be accredited and ask for an extension to do that.
    - Mr. Sacks comments regarding the permanent body: We will continue to make recommendations.
    - Mr. Sacks comments: We will also look at the availability of witnesses.
    - Mr. Nye comments about the accreditation section: The accreditation requirement does not apply to practitioners who only analyze or offer opinions on other people's data or other practitioners. That's a major loophole. How do you make sure that those that offer their opinions on somebody else's data are actually doing it in a quality way? I don't have a solution because the individual can't apply for accreditation, be assessed to administrative technical review, or be audited internally. Those that are offering opinions on data they are not actually doing the work on the physical evidence, that's a big gap there and it's a concern.
    - Mr. Christopher Bommarito comments: That's what the registration is for, and if you had bad actors doing that, FSD would want to demonstrate why that testimony was flawed to the Commission. We could then revoke that expert's registration.
    - Mr. Nye comments: If we require labs to be accredited, that's proactive. If we're trying to prove bad work and bad testimony versus this other situation, there's not really a solution here. You're only working on it after the fact, when they've already done poor interpretation, maybe provided poor advice or testimony. That becomes a challenge, and it becomes a lift. Because what really happens in practicality, is you have attorneys coming to practitioners that are from a forensic laboratory that's accredited to be the resource to refute the testimony from another expert that's independent. It's just a very heavy lift and a lot of work, and it very reactive.
    - Mr. Bommarito comment: But isn't it better than what we have now?
    - Mr. Nye comments: It will centralize it all in one place, and right now it's very decentralized. In order for someone to be deemed a bad actor it doesn't always take just one test. It takes time to get there and get everything into a central place. By that time, it's already out there and there's already a record of things being done. I'm not sure it's better, it's just different.

- Mr. Sacks comments: Mr. Nye is talking about the same struggle the full subcommittee has, where you're balancing on one side where we all feel like an accreditation recommendation is necessary, but we also recognize that we just can't chill the use of experts from the defense, and many of those are one or two person operations. Requiring registration for analysis rather than accreditation solves the bigger problem which is the potential chilling effect. There's no perfect solution, but this is a good starting point. We do have the mandate of the permanent forensic science body to look at the challenge of providing experts for the Indigent Defense, and we could add language about who ideally should be a private lab. The best starting point is to use the definitions that were for forensic science practitioners that were provided by the Department of Justice group some years ago.
- Hon. (ret.) Dr. Donald Shelton comments: I hope this can be proactive in a way that junk scientists will be reluctant to register, and that the registration may deter some of the bad actors from registering, and it will deter the prosecution and the defense from using them.
- Judge Paul Denefeld comments: We're thinking in broad ways here and I understand why we would do that. But a lot of this can be dealt with cross examination at a trial. There are some safeguards that are still out there.
- Dr. Ruth Smith comments: Under accreditation it says the FSSB shall verify that forensic science practitioners have obtained accreditation, but it will be the lab or the organization rather than the practitioner.
- Mr. Nye comments: There are many aspects of accreditation that you can follow as an individual practitioner, but not be accredited. Things like proficiency testing, continuing educational requirements, there's a lot that could be done. Could we incorporate any of those as potentials to make sure there are some elements without going through accreditation to make sure they are actually confident and capable to offer an opinion?
- Mr. Sacks comments: Under registration we have the FSSB examines and establishes minimum qualifications for certain disciplines, and we'll examine whether certain disciplines should require certification. We can expand it with some of the things commented on. Requested Mr. Nye provide pieces that should be added.
- Mr. Sacks comments: On the mandate question, it looks like we are in a good place on accreditation and registration. Mr. Nye has provided a few pieces to add to the registration section about proficiency testing and educational requirements.
- Mr. Sacks comments regarding Complaints, Reports, and Investigations: The same definitions put into the Accreditation section as to the forensic science practitioner needs to go into this Complaint, Reports, and Investigation section.
- Mr. Sacks comments: We have a few general concepts about who discloses, when they disclose, the recognition of attention, and that it's not personnel complaints, but complaints that substantially impact the work product. We talked about the type of reports, the type of complaints, the type of investigations, and then the process for complaints and reporting.
- Mr. Sacks question: Are there any questions or comments regarding general concepts, types of reports, and types of investigations?
- Mr. Nye comments: For consistency's sake, under general concepts of when to disclose, the way it's written now, is 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. I think the last *or* between requirement and substantially, should be *that substantially affect*. It is clarified in the third bullet area where it says the results must be impacted, I just want to make sure it's consistent.
- Mr. Sacks comments: That seems like a fair clarification to make. I'll make the change.
- Mr. Sacks comments regarding Complaints and Reporting, Process Issues and results: For Complaints and Reporting, we talked about high severity and a high risk of recurrence framework, and that staff of the permanent commission would look at that, categorize it, and then issue recommendations. The actual commission would make the decision. But, when there is high severity and high risk, that's when there would be an investigation, and seven of the eleven members of the Forensic Science Commission would have to approve that investigation for it to happen. Most complaints and reporting will lead to referrals and need a response.

- Mr. Gardner question: I have a question on what to disclose. Does that mean that the forensic science laboratory doesn't have to disclose to the commission?
- Mr. Sacks response: Those that meet the requirements would be required to disclose.
- Mr. Sacks comments regarding Process Issues: This area was too complicated to fix in a few subcommittee meetings. This is one of the first things a permanent forensic science body would need to sort out; exactly what the processes are and what the requirements are for confidentiality. We talked about the timeline and what would be needed for the different stages for complaints and potential investigations. This is something to be figured out by the permanent body. We talked about who the investigation applies to and the powers of that investigation. There would be voluntary compliance and documentation would be expected, but if that wasn't provided then there would sort of be a ramp up if needed to subpoena power. Then we have a series of results as to what happens after these investigations, a clarification that it doesn't supplant a traditional appellate process; If it resulted in a public report, recommendations, reprimands, or corrective actions, there would be notifications, subject would be notified and an opportunity to appeal; If required, there would be recommendation for a larger scale institutional response; Then, if needed, enforcement powers could be addressed at a later date down the road. The commission would make a recommendation to the Legislature.
- Col. Gasper question: Who do you see doing the investigation?
- Mr. Sacks response: For the most part, investigations would go back to the forensic science practitioner for reports that would come out. For this small series of case that would have investigation, the ones where there is a high recurrence or high problematic area, that's a combination of staff of the commission. Where staff doesn't have expertise, one of the early mandates talked about contract experts.
- Col. Gasper question: Under the types of investigation, for example the educational investigations; The commission has as interest in understanding something more particular at a lab, so they essentially ask that lab to provide a brief to the commission about some particular topic. Is that an example of what an educational investigation would be?
- Mr. Sacks response: This is something we need to clarify regarding the actual complaint kind of reporting process or invited investigations. If a forensic science lab says, look, we've had an institutional problem with one of our analysts, and we'd like someone to take a look. Educational investigations are more along the lined of, oh, there's a new thing going on with facial recognition technology. We want to know more about that. So that may be better placed in another section. We should clarify that's not tied to the larger investigative process.
- Hon. (ret.) Dr. Donald Shelton question: Under results; one would appeal to whom?
- Mr. Sacks response: Out of the NIJ report it talked about there should be an opportunity to appeal. I don't know the answer to that, so that may be something that we leave, or that may be something that we figure out. If this is an executive agency, then there may be an automatic administrative appellate structure that kicks in through the executive branch. I'm not sure what the appeal to the judicial branch would be. For now, the reports are just reported recommendations and not actually actionable.
- Col Gasper comment: I think it ought to be taken out.
- Mr. Sacks comment: After talking it through, an appellate piece isn't so relevant to this model.
- Dr. O'Brien comment: Maybe change from appeal to reconsider.
- Mr. Sacks comments: I will change it to reconsider. I will make the change Col. Gasper brought up in the list of the types of investigations and make it clear to types the rest of the section refers to.
- Mr. Nye question: Is there an order for a complaint to be filed? As an example, we (FSD) have opportunities for people to file complaints through a process. Because we are going to require organizations to be accredited, there's another process for complaints to be filed there. It just feels like a third or fourth opportunity for complaints to be filed. It feels there should be opportunities for those to be addressed through that continuum with the commission or statewide body being the last if their complaint is not resolved.
- Chief Justice McCormack comment: Sort of an exhaustion of remedies. Take your complaint to the agency first and let them have an opportunity to fix it.

- Mr. Nye comments: It doesn't necessarily resolve the issue of notifying of those complaints and the outcome of those complaints per se, but I feel like we could get out of order, with competing investigations going on at the same time.
- Mr. Sacks comments: I think the process here is because so many the complaints go back to the lab or forensic service provider, that sort of order of operations works out organically. So that your average complaint that comes in is put on that scale of risk of recurrence; Is it one of the rare ones where there needs to be more questions asked, or does it just get sent back. Let's say there's somebody who's a loud voice, who is an agitator, who sends complaints to the Attorney General's Office, and a complaint to the Forensic Science Division, and a complaint to the Forensic Science Commission, and writes letters to other folks as well. These ones go back to the Forensic Science Division unless it's one that actually stand out for whatever reason. I don't think it's important for this body to not need a step back or reject complaints out of hand. Because, even though, for example, the Forensic Science Division has a really good internal process for resolving complaints that come their way, that may not be the case with another forensic service provider which receives a complaint. So, Jeff (Mr. Nye) I think what you're describing is going to happen organically. There could be investigations going on in different places, but I don't think there's going to be parallel investigations occurring, except in the very rare case where there's something that rises above and meets the requirements that are set out.
- Mr. Nye comments: We are in a similar place, but not quite. With an accrediting body, if we receive a complaint internally, it is dealt with our internal processes under accreditation. You have to have those internal processes in place; that's part of the accreditation process. If somebody chose to skip reporting a complaint to us directly, and chose to report it to our accrediting body, the accrediting body returns the question back to the complainant to say...Have you brought this to the attention, or have you complained to the forensic science service provider? If the answer is no, rather than the accrediting body forwarding that complaint to us, the complaining get redirected back to us. So, the accrediting body will not take the complaint at all until they've brought the complaint directly to the forensic science service provider. So, what you're (Mr. Sacks) stating is when we receive a complaint, in most cases we will forward it to the provider for them to evaluate their actual processes. But, in some instances if it's a big complaint, they will go directly with it. I think that's sort of the minutia of what we have to be very careful about and how that needs to occur.
- Mr. Sacks comments: If it's a response to a feeling that within the status quo all complaints should not be handled internally versus a recognition that actually, internally is the way to handle most complaints. So, the way the permanent body resolves that is most complaints will follow that process, but few will rise to a different level.
- Mr. Nye comments: The other way of looking at it is just because, if the statewide body does an investigation, that doesn't remove the requirement for us to do our own investigation. Obviously, you're setting up a situation where you're going to have parallel investigations going on for sure. That's going to create problems.
- Mr. Sacks comments: The hope is that's the very rare case and that would be worked out and resolved through the systems.
- Mr. Kent Gardner comments: On page six, first bullet point, it says result in automatic independent investigation. It's kind of contrary to let the lab do the investigation first and duplicates the process. It could be changed to automatic review, rather than start off an investigation right away.
- Ms. Laurie Montgomery comments: What if we were to just add a sentence that says part of their investigation is to contact the service provider right away and determine what they're investigating, or what their report was, or what their conclusion was.
- Mr. Nye comments: Where the complaint skipped all those steps before is kind of what I'm getting at.
- Mr. Sacks comments: I will add that part of the investigation is to contact the forensic service provider to see what actions might have already been taken.
- Ms. Montgomery comments: By contacting the forensic service provider and asking questions, we can eliminate duplicate efforts.

- Mr. Nye question: What's the next step if the forensic service provider hasn't received that complaint? How do you handle that situation?
- Ms. Montgomery response: It wouldn't really be duplicative because you're not doing anything at that stage, only they are. Then maybe the report the body does can help you with your internal.
- Mr. Nye comments: That's my point. It would be faster to have the provider do the initial investigation. It's like going nuclear first, escalating through the process. It would be very simple and clear to anybody filing a complaint, to say have you done this step. Did that not get resolved? Okay, did you go to this next step? Did that not get resolved? If no, okay now we'll take it forward if it didn't get a resolution.
- Mr. Sacks comments: With the Detroit Crime Lab as an example. It's a very small series of complaints that's going to ratchet to an investigation. For the most part it would be sent back to the lab to see if they know anything. If not, then they would be asked to take a look and let the body know what they think. What we're looking to prevent is a situation like when the Detroit Crime Lab collapsed. In rare circumstances, where the right thing to do is not to just send the complaint back for an internal investigation and response.
- Mr. Nye comments: I think you're drawing a comparison with the Detroit Lab that's not a situation we'll have when we require accreditation. The Detroit Lab was not accredited and when they finally became accredited, it was for one discipline. With all these processes and everything that we have in place, there's quality assurance processes that would have caught these rather than a complaint. So, if we start with step one and require accreditation, we may not have situations like Detroit. So, if we draw a parallel to Detroit, I think we're skipping a few layers there.
- Ms. Caitlin Stadler comments: I have not read any reports on recommendations for the DOJ (Department of Justice) or Forensic Science National Boards that don't include this piece in their recommendations for strengthening science or improving forensic science. Nearly all of them include this in the interest of transparency. So, it sounds like what Jonathan (Mr. Sacks) and this subcommittee are proposing is consistent, and maybe even looser, than some of the requirements I have read in other articles. This is in line with what's considered good practices based on what I've read.
- Mr. Nye comments: To draw comparisons to other states and what they're doing, we could spend months comparing what we have written to others. An example of what we have that is not in any other is subpoena power. I don't know of any other Forensic Science Commission that has subpoena power. To me, we can take what other people have done and make it better. I'm not saying there shouldn't be the option for an investigation. What I am saying is there should be an order of the investigation. It not about being less transparent, it about being more transparent. But is also about not having conflict on how those investigations are done. The opportunities for those, the content, the thoroughness of those investigation we've already talked about how broad this all is. The amount of effort that's going to go into any of these is going to be massive and we're going to bite off a lot more than we can handle when there's already processes in place.
- Chief Justice McCormack comments: It seems the disagreement is actually pretty minor. Jeff (Mr. Nye) you're not saying you object to the agency doing an investigation. You think it should be seriatim, that you should start with the home agency doing the first investigation, and then the commission would have the benefit of that investigation to do its own. Jonathan (Mr. Sacks) response is that the Commission should retain some discretion in case it's another Detroit Crime Lab. I see both sides and this might be one of those areas where we can keep thinking about how to bridge the gap, but it might be one that we just have a couple of different perspectives on. There are going to be some of those in this final report and that's going to be okay. I think the disagreement is somewhat minor and if we have to express it as one that's okay.
- Judge Paul Denefeld Comment: What if we created a presumption that the initial investigation would be done by the actual agency unless the commission decided there was a reason not to do it in that order.
- Chief Justice McCormack comment: Like an articulable reason.
- Ms. Laurie Montgomery comment: Like a whistleblower.
- Chief Justice McCormack comment: A whistleblower would be an articulable reason. There would be reasons where Jeff (Mr. Nye) would say I think the commission should dig into that. So,



this might be a way to bridge that gap. Keep it in Jonathan's (Mr. Sacks) list and see if this suggestion, or something like it, might bridge our gap.

- Mr. Sacks comments: I have it on the of something we can keep working on. That seems like a good suggestion as a way to do it. I agree with Chief Justice that it seems like a minor thing in the scheme of things for this process.
- Col. Gasper comments: I suggest putting a time limit on the investigations for both an internal investigation and commission investigation so we don't fall into that trap of the abyss of other governmental investigations that aren't held accountable by anyone and can go on to perpetuity.
- Chief Justice McCormack comments: Meaning we should have some outer limit about the time to be completed by.
- Ms. Montgomery question: Regarding the investigation itself and not the complaint?
- Col. Gasper response: Correct.
- Mr. Sacks comments: We have talked about timeline for stages and responses about complaints, but I'll specify a timeline for the investigations and recommendations.
- Ms. Montgomery question: Would we want to treat differently investigations of particular targets versus investigations that are a bit like when you go back and look at microscopic hair comparisons or bite marks, in which case there's not an identifiable target? It seems like then you should just take as long as it takes.
- Hon. (ret.) Dr. Donald Shelton comment: Like places where the science has changed.
- Ms. Montgomery comment: Yeah, then you may want to go through and review all the cases that have this type of evidence. I don't think I would want to put a timeframe on them.
- Mr. Sacks comments: I will add that the timeline requirements are different for a specific target versus a more general review of forensic science.
- Mr. Sacks comments: I have some good changes and additions to make. It sounds like we still need a little work is the initial referral, and Judge Denefeld might have resolved that issue.
- Mr. Sacks comments regarding notification: Last time we made sure the accrediting body was in the mix.
- Mr. Sacks comments regarding Education and Information: This is the clearinghouse and dissemination of information of developments. This won't be a body that actually researches new developments but talks about where to find out about them. This is a central place for Michigan practitioners to visit for information on available education, training for different practitioners, and a central database of experts that's tied to the registration requirements. We talked about collecting and analyzing information of current laws, rules, and policies. This is where there would be things like recommendations on the Rule of Evidence rather than actual control over those rules.
- Dr. Jeffrey Jentzen questions: Should we make the requirement that medical examiners receive something like fifteen hours of forensic science education out of the fifty they're required over a three-year period of time? Many times, physicians get these positions, and they don't have a background in forensic science.
- Mr. Sacks response: If we have a recommendation like that, it would be in the accreditation section for medical examiners, and we could add the training requirement there as well.
- Dr. Jentzen comment: I will provide information to add.
- Mr. Sacks comments regarding Recommendations for Appropriations, Resources, and Best Practices: We took out the grant piece, so this is very much general recommendations. We added access to evidence for defendants in criminal prosecutions to specify what that piece is talking about.
- Mr. Sacks final comments: We have about half a dozen pretty good changes I'll make, and there are two areas that will need a little more hashing out. One being the scope piece, and one being the idea of referral and how the referral would work to the particular forensic science lab or practitioner before the investigation.

#### **VIII. Break in Public Meeting: Lunch**

#### **IX. Resume Public Meeting: Discussion of Findings and Recommendations**

- Mr. Jeffrey Nye: Subcommittee 2, Forensic Science Practice

- Objective 1: Statewide Survey of Forensic Science Service Providers
  - Mr. Nye: Any comments or thoughts regarding the survey at the organization level?
    - None expressed.
  - Mr. Nye: Any comments or thoughts regarding the survey at the practitioner level summary provided earlier?
  - Chief Justice McCormack comment: It would be nice to have it in the final report.
- Objective 2: Independence within Law Enforcement
  - Mr. Nye comments: We talked a lot about having a case manager process in place for at least some of the larger providers with the idea of creating a barrier between those who are doing the analysis and those that are submitting evidence or investigate crimes. We looked at biases, training, and hiring practices.
    - Recommendation: If you're within a law enforcement agency that you evaluate your hiring practices to make sure that you're getting the most competent person to work in a forensic science laboratory.
    - Recommendation: Some sort of monitoring process set up for possible conflict, or bias, or outside influences from the laboratory.
  - Mr. Sacks comments: I'm really pleased with some of the pieces here. The case manager is a significant and really important piece. Where you've landed on the hiring of enlisted personnel, I think that recommendation is a good way to land where everyone is treated equally and it's not a plus factor, but it's also not a minus factor. I would like to see more about external independence. We have explored different models of independence. One is the Houston non-profit model, and one is the Virginia government agency model. One is MCOLES, and one is the SADO model where there's an agency with independent governance. I did think of two potential directions we could go here as a Task Force. One is the idea of maintaining the Forensic Science Division as it is but having some independent governance along the same line as MCOLES, SADO, and these other governing agencies. It could focus on some of the areas like training, testing, access to evidence, best practices, and quality control. The other is a recommendation that the long-term goal should be independence and policy decisions in these areas between FSD and the Michigan State Police. As an interim step, there should at least be an advisory board on these areas. A parallel I found here is something called Michigan Intelligence Operation Center which has an advisory board of different stakeholders. By virtue of the advisory board, it's a lot more legitimacy for the intelligence function there and also some good suggestions that have been adopted. So, one recommendation is the independent governance within the Michigan State Police on these policy issues, and the other is an acknowledgement that's a good long-term goal, but at least in the short term, some sort of an independent advisory body.
    - Mr. Sacks comments regarding Independent Counsel: There are some process issues to be figured out. We talked about how the council of the forensic science body could respond to questions from the Forensic Science Division, and we ultimately realized that would not work. The Independent Counsel needs to work on commission functions and there could be conflicts of interest with investigations. But I do think there should still be access to the Forensic Science Division to some sort of independent counsel when these policy and quality control issues come back so there's never a situation where PAAM becomes the landing spot for certain questions that come up. I would like to see a recommendation for access to independent counsel where it could come from a separate division where there could be independence from the Attorney General's Office. I think that resolves the issues of an executive agency not being able to hire Independent Counsel. I know that when I was at the Indigenous Defense Commission, the Indigenous Defense Commission still has access to Independent Counsel at the Attorney General's Office in the Bureau of Licensing, and there's no issue that that person is actually talking to the Attorney General about defense issues. There could also be an FTE (full-time employee) for that or money to contract somebody.
  - Mr. Nye comments regarding Independence: When I think of independence within a law enforcement agency you have to look at structure and where forensic science services are provided within a law enforcement agency. So, when I think of MSP, there are several bureaus within MSP of which Col. Gasper sits at the top of all that structure. I'm going to point out basically

two bureaus within our department. One is Field Operations, which is essentially our troopers, our investigators, and that's public safety area of the agency. The other is the Field Support Bureau and that has a whole host of support for the field like MIOC, biometrics, forensic science, grant and community services, etc. The reason I bring up this structure that we have, is that I benefit from a great amount of independence from the investigative arm or our agency. Because if you follow the chain appropriately, the Col. is the connection between those two different arms of the agency. You could look at some other law enforcement agencies and it's not uncommon to have the forensic science portion of a law enforcement agency to report directly to a commander that also oversee investigations and that's where I think we're different than some, in that we have that separation within our organization. Even though we work for a law enforcement agency, there's a lot traveling to get over to that other side of the house.

- Mr. Nye comments regarding an advisory panel that specifically works with FSD: Picking up on what Col. Gasper said in our last meeting, it would be very hard for me to accept some recommendation that would specifically apply to us without applying to all the other stakeholders. There are many other law enforcement agencies out there that have some sort of forensic science service they provide.
- Mr. Nye comments regarding independent legal Counsel: The issue of having an independent legal counsel is a very complicated one. I was not in my current position when the decision was made not to continue to have legal support. I'm sure there are plenty of good reasons. I would want more as to why that was discontinued. If I remember right, the amount of services we were getting happened to be given through the Attorney's Office because that's a requirement for State Departments.
- Mr. Matthew Wiese comments: It was not PAAM, we never gave legal advice. So, I don't know if that was a situation some years ago.
- Mr. Sacks comments: It was a situation we discussed in our subcommittee. It wasn't sort of legal advice per se. It was about what to do about a situation about certain narcotics testing results and how those were interpreted. For us it was a good example of something that should have gone to independent counsel rather than PAAM. The way things played out; it became an arena for massive criticism.
- Mr. Wiese comments: Our role has been more like what you're talking about with disclosures and that's where we work with the lab and say there's an issue and we need to get this disclosed and out to the stakeholders. The CBD and THC that came up recently is a good example of that that got noticed. It got disclosed right away to all the stakeholders. But we don't give them legal advice.
- Hon. (ret.) Dr. Donald Shelton comment: Until we had DNA, almost all forensic sciences were designed to help the police prosecute people. That's where they all came from. That's where they originated, not in a medical laboratory, but in a police laboratory. And so, there is, there has always been, and there is the perception by the public, and particularly by jurors as well, that this laboratory, this forensic science examination, is simply part of the prosecution and part of the police. Some places have resolved this by saying we're going to address that perception by taking the forensic science function away from law enforcement and make it be independent scientists. I think we all decided that isn't going to work in this state, and that's why the title of this section is Independence within Law Enforcement. We still have the basic problem of how to address this perception of simply being an arm of the police and doing what police are set out to do, which is convince people. I see in the report the committee acknowledges that the perception exists, but I don't think anything is done about it because it then says: However, the bias comes in different forms and not just law enforcement officers. It may be, but we're talking about the perception by the public and jurors that the laboratory analyst is part of the prosecution function. I was trying to be practical about this saying maybe the best we can do to try to address this perception, maybe not the reality, is to civilianize laboratory analysts; to set a timeline for laboratories to get to the point to having civilian analysts so that it's no longer Sgt. Smith testifying, it's Harry Jones. We can say that we're going to take steps in the hiring process, and we know the enlisted officer doesn't get any preference, and that's the recommendation here. I understand that, but it doesn't address the perception. The perception is still there. I think that's one of the things we need to address here. From where we started with, should we take this away from the

State Police, to saying that well, they can perceive how they want, but the reality is, we hire the best people. I don't think that's where we need to be.

- Mr. Wiese comments: We have had a lot of conversations about these things. I'm going through my memory of all the trials I've handled. Most of them were not State Police law enforcement. There were some. And the ones that were, like fingerprints and ballistics, the point wasn't to dwell on the fact that they were a sergeant with the State Police. The point was to draw on the credentials for doing the science. So, I can see where there might be a perception. But it wasn't like they are police officers so therefore they are more credible, or they have bias. It was more do they know what they're doing when they do a fingerprint analysis, do they know what they are doing when they're doing firearms ballistics analysis.
- Hon. (ret.) Dr. Donald Shelton comment: Mine is a little different. I, contrary to most judges, interviewed jurors after every trial basically to tell them what was going to happen afterwards. I think what you (Mr. Wiese) talked about is a conversation between the attorneys and the judge. But that's not how the jurors are perceiving.
- Dr. Barbara O'Brien question: Why is that a problem? That jurors perceive them as an arm of law enforcement?
- Judge Paul Denefeld response: Because science isn't supposed to be biased one way of the other.
- Dr. O'Brien comments: I don't understand the issues of the fact that many forensic science analysts are law enforcement, but I see that more as a bias that can affect them. I'm trying to figure out what the bias is that people are perceiving them as an arm of law enforcement.
- Hon. (ret.) Dr. Donald Shelton comment: It lends credibility to them because they are police officers.
- Dr. O'Brien comments: Do you think it lends credibility? Or do you think it makes them think that they're partisan?
- Hon. (ret.) Dr. Donald Shelton comment: Maybe there is some of what you (Dr. O'Brien) say today, but what I see in jurors is that, in spite of my instructions to jurors, the reality is most people still want to believe police officers because they think the police rightly are there to protect them from criminals and they're doing what's in their best interest.
- Mr. Nye comments: To me it feels a little bit when you're talking about independence or enlisted numbers being in the laboratory like there's more of a system answer to things rather than just a singular answer, which is remove all officers from the lab. So, for me, when I think of perception its education, it's the opportunity for retesting by an independent expert as being true to the science and showing true competence. It's all these other things, not just not including an enlisted member simply because of that potential for perception because that perception is just going to migrate to the next thing. We're not really addressing the issue, which is the ability to show training records to competency, proficiency testing, auditing of reports, and all the other things that show they are competent in what they do. The other thing we're missing on when you're talking about law enforcement officers, at least within my organization, is they bring a skill set that's above and beyond just the analysis of it. Part of their training going through recruit school is interacting with the public, communication, communication skills, a level of confidence, decision making, and all those things. Forensic scientists are not just scientists, they are communicators too, and they have to go in front of a jury and be able to show their processes and show their evidence, show their conclusions, and communicate those in a confident, competent manner. That's why I think just simply removing law enforcement officers from a lab would be a step backwards rather than addressing what the perceptions are.
- Mr. Christopher Bommarito question: Jeff (Mr. Nye), are you saying that the civilian members aren't as competent to relay results as enlisted? I don't really understand your last point.
- Mr. Nye response: I'm not saying that at all. I am saying this idea of perception by jurors can be addressed through education, and communication and examination why they're on the witness stand. What I'm saying is that confidence and ability to communicate comes through experience. Many of our enlisted members come with that to us after coming through recruit school and interacting with the public in the manner that they do.
- Mr. Bommarito comments: I'm astounded by that recommendation that hiring practices shouldn't consider enlisted member status. Since the NAS (National Academies of Science) report was

released in 2009, it's pretty widely acknowledged nationally that the best practice in forensic science is independence from police agencies. We have looked at a number of ways to accomplish this, but as Judge Shelton said, due to the number of logistical and operational concerns it became fairly obvious that complete separation wasn't practical and not in the best interest of FSD. But it is certainly problematic to have cops doing forensic analyses, if not in practice, then perception. It is not a knock on the enlisted men and women that are doing the work in MSP. I know a lot of them and from what I know they do a really good job at their work. But if nothing else, it's a bad look, and it has very many disadvantages from perceived or actual prosecutorial bias to the cost of retirement and training. Frankly it's just a different mindset between the civilian scientists and enlisted personnel. So, the next logical proposal was to remove cops from the lab. This is something Jeff (Mr. Nye) said is pretty much happening already, because typically enlisted members are less qualified academically. We thought a reasonable way to accomplish removal is through attrition, so that way it wouldn't be disruptive to the labs or personnel and over time the transition would be made. I thought it was important to codify that policy because every time a new enlisted person is hired in FSD, the clock starts over again; so, from that point it might be another twenty years before we have the opportunity to not have police doing lab work in FSD. But instead, the recommendation is just for the opposite. You're codifying cops in the lab and that just flies in the face of what's commonly thought to be best practice.

- Mr. Nye comments: This is just one of those areas we are not going to get consensus on.
- Chief Justice McCormack question? In your (Mr. Nye) subcommittee was there a division on this? It sounds like nobody thinks it's practical to move the agency out of law enforcement. But were there two different groups about maybe moving enlisted folks out by attrition or not?
- Mr. Nye response: Not as I recall. I think there was five of us on that particular discussion and I don't recall there being an issue on this.
- Dr. Barbara O'Brien comments: There wasn't, but I should admit that I've heard some things today that may be sort of somewhat persuasive arguments that I have to process.
- Chief Justice McCormack comments: We should mark this as there being different viewpoints on and eventually, we'll need to know where people land. I think some people are hearing this for the first time, so I don't think we have to call any question today. This should be one of those areas we flag.
- Mr. Nye comments: Chris (Mr. Bommarito), When you look, there are 400-600 forensic laboratories in the U.S. and the vast majority of them are in law enforcement agencies. I can think of one, and that's Houston, that moved outside of law enforcement. Maybe there's one or two that I'm not aware of, but that's a pretty big record of people not moving out of law enforcement. I am aware of one or two more where they don't allow enlisted members to apply, But it's a small fraction. Chris (Mr. Bommarito), I don't know if you can provide any additional context for that.
- Mr. Bommarito comments: I agree with you in your first point that there aren't a lot of labs that have separated from their law enforcement parent because logistically it's really difficult. A good example is you built a brand-new facility in Western Michigan that's housed in the same building as the police. So, to separate that is not a practical thing. Your second point about agencies that don't preclude enlisted people is off base. I know Laurie (Ms. Montgomery) had a survey, so I gathered some of the other Midwest state systems as well as the FBI, and for the most part there aren't enlisted people actually doing lab work. There are some in management and there are some in other roles like a bomb squad that is within the jurisdiction of forensic science, but they are not doing what would be considered doing lab analysis. It is really commonplace that we're not seeing this because it's best practice. I don't think eliminating by attrition is really a particularly difficult thing.
- Col. Joseph Gasper: Even though we have a consolidated facility in Grand Rapids the enlisted members do not have access to the lab, I don't have access to the lab, we don't work in the lab, we don't get to go into the lab. So, from that standpoint there would be no issue with separation in the facility from that perspective. Our Bomb Squad is not in the lab. Bomb squad is in Special Operations. The other piece is we would have some contractual challenges to remove our enlisted from the opportunity to compete. If whatever we do here has the ability to legally or statutorily trump contract law, then problem solved. If it's not, and the labs are staying in our

department, then we should probably make the point of how the majority feel, but no matter what we do, we can't do anything about it.

- Mr. Kent Gardner comments: It's all about the importance of perception compared to what's actually being done as far as bias goes. Our lab has six, you might call enlisted, we call them deputies. Three have been brought in as civilians and their now deputies. I think the biggest bias is not because they are police officers, but instead, the bias they bring to the job. Ms. Montgomery comments: Attorney General Nessel is interested in developing what her position was going to be in regard to enlisted versus civilians, so I did make a chart. I think we heard back from ten. I can clean this up and send it around. The majority said while there are enlisted people in supervisory, or management, or higher up in the chain, they are not actually performing the lab analysis. There are some caveats like the people who did polygraphs in the Indiana State Police, they were enlisted. Blood pattern analysts, bullet trajectories, crime scenes out of Ohio, some where enlisted. So, it was really hard cut to do just a yes or a no, so we tried to use as many examples in this chart. I was going to ask for the subcommittee to flush out and beef up the case management part because I think that's a huge problem right now where law enforcement and prosecutors are talking to analysts. I could provide redacted examples where they've said things like I don't have a lot of evidence, I need some sort of DNA to lock this guy in. That should not be a communication between a prosecutor, law enforcement, and an analyst.
- Mr. Bommarito comments/response to Col. Gasper: Nothing that we're doing here in this Task Force is final; They are all recommendations. So, whether or not contractually that might create issues, we're making the recommendations to say this is the best practice, this is where things should head. That way it gives some ammunition for negation. We should be saying how things should be and let all those practical concerns sort of flush themselves out.
- Mr. Nye comment: For me it seems like we're chasing perception, which is a really hard, challenging thing to do. So, imagine a situation where you have a law enforcement officer that wants to apply for a job in a forensic lab, and he or she decides to stop being a law enforcement officer and apply for the position as a civilian. Is that really going to change the perception. Because really, you're going to testify to is I'm retired Sergeant So and So, and so it doesn't change the perception in any way, shape, or form as part of your history. I don't believe we can bar somebody based on their past employment history. I believe it is something you have to be aware of, manage, train around, and educate. I think it is a very difficult direction to go.
- Ms. Montgomery comments: There were two state agencies that said exactly that. So, troopers and enlisted people could become analysts, but they would have to drop that and become civilians and that's what they required them to do.
- Hon. (ret.) Dr. Donald Shelton comments: Maybe part of the access part of your (Ms. Montgomery) report, it goes on to whoever's doing the analysis, ought not be infected with, what they call, domain and irrelevant information flowing from the request coming from the police or persecutor. I think that further complicates this perception that this science is just an arm of the police. Maybe we could discuss that in the next section.
- Chief Justice McCormack comments: Maybe we'll end up saying everybody believes Best Practices, the majority thinks we should strive to get by attrition to an all-civilian workforce and a minority thinks...or vice versa.
- Judge Paul Denefeld comments: I know we talked a lot about perception. I want to talk about culture and the fact that police officers have devoted their careers to try to convict people. There is a culture that goes with being a police officer and that it is our job to put the bad guys away. I don't think that is particularly a helpful kind of culture. To me, yes there is a perception problem, but there is also a culture problem. Science isn't supposed to be convicting people, it is supposed to be shedding light on what the actual science says so the fact finder can be able to determine guilt or non-guilt.
- Mr. Gardner comments: I think if you talk to most analysts on the bench, they don't have that attitude. They want to make sure they do a good job and make the right call.
- Mr. Nye comments: I respect many people have many different experiences than what I have. I have spent my entire life in the laboratory, I have not been on the road, I have not been interacting in the community in that way, or upholding the law of the State. As we talk about things like culture and the difficulties or challenges with culture, we are also reinforcing that culture or that

perception in some ways. I would guess if we pulled the number of enforcement individuals here if they are out there to convict, my guess would be that's not the case, they are out there to uphold the law. I think that perception is starting with us in some ways, and we have an opportunity to change that perception in some ways. It almost seems like the easy button to not include enlisted members in the laboratory, and that has us down a very difficult path. The more right thing to do is to make sure we are communicating and addressing what the role of law enforcement is in this state and what the role of forensic scientists are in this state. Science doesn't convict, science just provides information, and that's where we have some challenges.

- Chief Justice McCormack comments: This section is going to have some nuances in it and some majority and minority in it and that's okay.
- Objective III: Access
  - Mr. Nye comments regarding requests for access: Here we're talking about access to experts in a forensic laboratory, access to information and those types of things. Our requests for analysis, primarily for us, and I'm guessing for Kent (Oakland County) and maybe others, are requests that typically come from law enforcement agencies. There is a process if a defense attorney on a specific case has interest in having something analyzed. One recommendation would be to educate what that process is and how to get those requests vetted. There is also training around those competencies, capabilities, timing, and the resource intensive nature of some of those requests.
  - Mr. Laurie Montgomery questions: If a defense attorney does want more evidence tested, what do they have to do right now?
  - Mr. Nye response: First thing is to have a discussion with the prosecutors on the case. If they come to an agreement that's fine. If they cannot come to an agreement, they can go before a judge.
  - Ms. Montgomery comments: That's the problem. Why does the defense have to go through a judge when the prosecutor can call up MSP and say test this?
  - Mr. Matthew Wiese comments: In my 35 years, I have never done that. Never once have I called the lab and said will you test this, please. I think that is a perception that that happens with regularity, and it just does not. The only time I speak to a lab analyst is when we have a trial starting in a week and it's like, we better get you down here, when you're going to testify, and what you're going to say. Honestly, that's how it typically works.
  - Hon. (ret.) Dr. Donald Shelton comment: We not talking about the prosecutor, we're talking about the prosecution and those requests originally come from the police, not from you. The police don't have to talk to the defense attorney or go to the judge to get an order, and the point Laurie (Ms. Montgomery) was making is not about the prosecutors, but about the Government.
  - Mr. Wiese comments: If we set up the customer service model to try to eliminate bias, I think those steps will help. But you are right, the police do talk to the labs. They have 100 pieces of evidence, and the lab analysts says well, I'm not going to test all 100 pieces, but which ones should I test? It would be more relevant that we would test this based on the facts that we believe as they happened. So yes, that leads to all kinds of presumptions and biases that I think we need to address.
  - Mr. Nye comments: There is not a forensic science laboratory in the country that is flush with the resources to test everything and take in all requests. So, we have guidelines. We are more apt to say no to a prosecutor or a law enforcement agency, that we are not going to test something as we are to a defense attorney. Simply because what they're requesting to be analyzed versus an investigative lead; there's a disconnect there. That's just the educational process. The other part about speaking with law enforcement, a lot of times it's not about getting information that's biasing, but a lot if it is about efficiency. If they have information about an item that was recovered and what they're trying to establish, that scientist has to be objective to the evidence as opposed as to be bias about the information given. It is the efficiency in that capacity that drives a lot of that information.
  - Dr. Barbara O'Brien comments: The thing about biasing information, it's not like there's efficiency information and then there's biasing information. You could be given the information for efficiency

purposes, but it still conveys enough information to create sort of an expectation. The case manager would at least attenuate it.

- Hon. (ret.) Dr. Donald Shelton comment: My concern is about what's not here. It doesn't address the question of domain irrelevant information getting to the analyst. It's not that the analyst is out to get people. It is that it's a cognitive bias based on the information they get, and their reaction is human. The nationwide recommendation is they shouldn't get that information. Maybe it's more efficient to know this is a fingerprint from the guy who confessed. But that doesn't mean it leads to a good scientific analysis. I'm not complaining about something that is in here. I'm complaining about something that's not, which is a recommendation about how to reduce domain irrelevant information getting to the analyst.
  - Dr. Barbara O'Brien comments: We talked about how best practices are going to be so specific to each discipline and we were thinking rather than trying to get into the weeds, the case manager is the means of reducing bias. We can make it clear that the role of the case manager is not just to be like a point person, but also to minimize exposure to domain irrelevant information.
  - Hon. (ret.) Dr. Donald Shelton comment: If the role of the case manager is to filter out domain irrelevant information, then we need to say that.
  - Mr. Nye comments regarding Contact with Experts by Stakeholders: This is more access related to consulting with science practitioners prior to court proceedings. The recommendation would be to create model policies. We do have some improvements we can make in that particular area in my division. Also have another set of policies with the non-criminal partners, being the innocence clinics, because there are two slightly different ways that we have to interact depending on the set of circumstances.
  - Mr. Nye comments regarding the Clearinghouse Process (Case Manager): We talked quite a bit about the case manager, basically to evaluate and implement where possible, practices that limit the lab staff access to potential biasing information. This is sort of flushing out the things we just talked about.
  - Mr. Jonathan Sacks question: Has the subcommittee addressed access and provision of evidence just to make sure that the same information that's supplied to the prosecution in a particular case is supplied to the defense as well? With the discovery rules and the Brady rules, I just want to acknowledge that forensic science different institutional labs should be committed to that process as well.
  - Mr. Nye comments: I believe that is getting into Judge Shelton's section just a little bit with respect to Discovery and things of that nature. So, I think it'll be better to pick that up with his steps.
  - Mr. Nye comments: I think one important part is when a case is submitted for analysis from a law enforcement agency, we work that case on behalf of that investigating agency. It's important to be open and fair with information, but understand we are just holders of somebody else's information. Our product is actually somebody else's inventory. There's a lot that has to be weeded through that to see how that process works. Through accreditation and things like that we have to be careful that we are not placing things on public domain, and if we do place things on public domain, we have to notify and a whole host of other things. It sounds very good on the surface, but there are some nuances to that, that's why we have to create that policy so we have something written so everyone understands exactly what to ask for, how to ask for it, who should ask for it, and how it's going to be delivered, so there's not misunderstanding of how that policy reads and it's consistent. Not only consistent within one organization, but consistent amongst a number of different organizations around the state.
- Objective IV: Practices for Quality Control and Compartmentalization
    - Mr. Nye comment: The recommendation on blind proficiency testing is that everybody institutes a blind proficiency testing program. The intent is to evaluate each discipline and method on an annual basis. As an alternative to blind proficiency testing, testing random re-analysis, which is more in line with what we do in some disciplines within our laboratories.
    - Mr. Christopher Bommarito comments: I'm not sure how we can make a recommendation for blind proficiency testing when there aren't any blind proficiency providers. And furthermore, doing blind re-analysis in a lab my size is more than a bit problematic. I think you almost have to add



something like where practical or where practicable, we recommend blind proficiency testing. But it's not going to be feasible in many cases.

- Mr. Nye question: Chris (Mr. Bommarito), where do you have challenges with random re-analysis?
  - Mr. Bommarito response: First of all, we don't maintain custody of evidence. Then, who do I have to do it? In my laboratory we have two analysts doing drug analysis and just one doing all the trace evidence stuff. Everything is externally peer reviewed. So, I think we have a very robust quality assurance system, but we would probably have to farm that out to another lab to re-analyze some things that were analyzed in our lab.
  - Mr. Nye comments: That is pretty much the answer I was anticipating. We got the same issue. It's resource intensive as far as applying blind proficiency tests or re-analysis, but there's value in it. We do it, but probably not as much as we would like because it takes a lot of resources. I made a note where applicable or practical. There are some disciplines where it just does not work very well and I don't want to consume more DNA evidence, I want to make sure to save it for second testing by defense if they would like. On the flip side, most drug analysis and certainly blood testing for alcohol and others, there's quite a bit of evidence that's available. I can certainly put where applicable or practical, but it's something that everybody should look at as an opportunity to provide.
  - Dr. Jeffrey Jentzen question: Jeff (Mr. Nye) Wouldn't blind proficiency testing be equivalent to blind testing the same materials in a lab?
  - Mr. Nye response: It can be. There are slightly different nuances to it. There is a lot of context nature as well to make sure people are making the proper decisions and writing the appropriate tasks and things of that nature. So, some of it is context related and it's not just analysis related, they both kind of get at it from different sides.
  - Mr. Nye comments regarding Mr. Bommarito's comments regarding blind proficiency tests: I don't know what Houston does for blind proficiency tests. My assumption is that they work with their local law enforcement agencies or local partners to develop those as opposed to simply buying them from a provider, but I think that is something we have to look at.
  - Mr. Nye's comments regarding sequential unmasking: Sequential unmasking has a lot of nuances. Our recommendation would be to recommend somebody to do the actual research and studies necessary to see what might actually be feasible and doable, and at the same time improve the amount of information and mitigating some of the bias. This is one of those areas where there is not a lot of information out there, but we felt we should make the recommendation for somebody to look at it.
  - Mr. Nye comments regarding accreditation: We've talked a lot about accreditation and Jonathan (Mr. Sacks) brought that up as well. The only area we have had some discussion within the committee is how long it's going to take to be accredited. Right now, we have it as two years. Everybody just needs to recognize it's probably going to take a bit more than two years. Right now, two years is just there as a place holder.
  - Ms. Laurie Montgomery comments: I think our committee said three years.
  - Mr. Nye comments: I think three years is more feasible.
- Objective V: Disclosure of Negligence/Misconduct
    - Mr. Nye comments regarding disclosure: I don't know that we need to dive into disclosure. Jonathan (Mr. Sacks) did a really good job with that.
    - Mr. Sacks comments: My suggestion would be to mirror what we have for group one. We have the definition as to what is reportable from a forensic service provider, and that seems to be a good thing as to what should be publicly disclosed as well. In other words, it's not every non-conformance, but every non-conformance that meets the criteria, etc. That way we have a consistent list for what goes to the Commission and what should go to the public.
  - Objective VI: Training Requirements
    - Mr. Nye comments regarding training requirements: We have areas of training with continuing education related to practitioners. We have some stuff about the initial training as far as covering things like bias, court room testimony, and ethics, and the typical discipline specifics. For

- education, eight hours minimally annually, and it's relevant to the discipline they work in. Annual training related to ethics and bias for everybody that provides a forensic science service.
- Hon. (ret.) Dr. Donald Shelton comment: Our committee did make a recommendation with regard to a specific part of that training. It probably fits with this. It's the particular recommendation that new hires who don't have a degree in criminal justice or forensic science should be trained in the basic *Daubert* requirements. Maybe we can incorporate that into your suggestions.
  - Chief Justice McCormack comment: If the subjects are overlapping, and we are being consistent, that's a good thing.
- Objective VII: Resources Needed
    - Mr. Nye comments regarding resources: The recommendation is to do an annual needs assessment and a funding stream needed based on that needs assessment to address questions on technology, capacity, and all those things.
    - Mr. Sacks comments: This piece is consistent with the last piece of the commission, at least as the resource needs and those recommendations, and the needs assessment. The grants piece we could not agree on.
    - Chief Justice McCormack question about the resources piece: We have the ability to gather data with this new set of recommendations. Do we want to recommend that it be transparent? Or is that something that is getting to in the weeds for this report? If there is some new body, it will have data for the first time that we haven't had before and making it transparent is beneficial.
    - Mr. Sacks response: I think that makes sense. In the Process and Scope section we talk about the transparency makeup. So, I can add that piece, publicizing all the data collected by the Task Force, or something along those lines.
    - Chief Justice McCormack comment: Valuable data, not the guy that complains to sixteen agencies and doesn't have a real complaint.
  - Hon. (ret.) Dr. Donald Shelton: Subcommittee 3, Criminal Legal System
    - Hon. (ret.) Dr. Donald Shelton comments: Some of our recommendation will be shorter because we have discussed them already. One thing that's different about our committee is that all our recommendations can be implemented, and need to be implemented, directly by the Supreme Court and not by legislation because we are the Legal Systems committee, and that legal system is headed by the Supreme Court.
    - Objective I: Education
      - Hon. (ret.) Dr. Donald Shelton comments regarding education for attorneys: We are recommending for the first time, mandatory, continuing legal education for all attorneys in the state. As I mentioned before there are fifty states and forty-six of them require mandatory education for attorneys. We're one of the four that do not. The Supreme Court, because we have an integrated bar in the legal sense, not in the racial sense, has the ability to control that as part of that program. Our recommendation is that any attorney appearing in a trial or an appellate criminal proceeding, should be required to have at least one annual course on forensic science evidence before participating in those criminal proceedings. We are recommending the Michigan Indigent Defense Commission include a mandatory forensic science requirement as part of their LARA (Department of Licensing and Regulatory Affairs) process for appointed trial attorneys. The recommendation for appellate attorneys is a similar requirement to be adopted by the Appellate Defender Commission for attorneys from the State Appellate Defender Office (SAD) and the Michigan Appellate Assigned Counsel System.
      - Hon. (ret.) Dr. Donald Shelton comments regarding judges and judicial education: The Supreme Court was ahead of us in this regard and had already adopted an order requiring continue legal education for judges beginning in January 2024 and appointing a Judicial Education Board. As I mentioned earlier, we recently modified this recommendation to correspond with their recommendations for judicial education.
      - Hon. (ret.) Dr. Donald Shelton comments regarding schools: The recommendation is that any school which offers forensic science degrees be accredited by the American Academy of Forensic

Science, which has that process set up. The second part of that relates to education of employees.

- Mr. Dave Biswas (Representing Senator John Bizon) comments: For legislative attorneys, we go to the National Conference of State Legislators. They give us the full year requirement. One of the things, problem, that's been happening over this area is some states are different. Some states are bi-annual, not every state does it on a yearly basis. You could have a course that's being offered in forensic science that's approved in one state and not approved in another. I don't know what methods of things that would be looked at. I know Michigan has their own ICLE (Institute of Continuing Education) thing. However, you have the American Bar Association based on memberships that does free continuing legal education requirements as part of certain fees that you pay as well too.
- Hon. (ret.) Dr. Donald Shelton comments: I think there are a variety of organizations that offer continuing legal education; Most for a fee, some not. I think all of them try to accommodate various state requirements. As to variations between states, there are certainly variations there. Some states are still using *Frye* requirements, and there may be deviances there. My thought about it is just getting some exposure to what forensic science is about, and what the requirements for admissibility are would be a giant step forward for many attorneys. Particularly if they are going to be involved criminal proceedings.
- Dr. Ruth Smith comments: Just one comment on the accreditation for the education programs. It is the FEPAC (Forensic Science Education Programs Accreditation) that does the accreditation rather than AAFS (American Academy of Forensic Science) accreditation.
- Hon. (ret.) Dr. Donald Shelton comments: I will include that. FEPAC is an organization associated with AAFS that does the actual accreditation.
- Mr. Christopher Bommarito comment: I was appointed to the Virginia Scientific Area Committee. I attended a meeting a couple of weeks ago in Virginia, and one of the things I thought they were doing fairly that was fairly interesting as far as training, is they have their technical leaders prepare presentations which is then given sort of as a seminar to any legal community members. These presentations are given regionally by their regional lab supervisors in that discipline at no cost. I thought that was an interesting idea. I know it's not something you were mentioning, but I don't know if it could be something that could be incorporated into some recommendations if others think it's a good idea.
- Mr. Jeffrey Nye comments: Chris (Mr. Bommarito), we've had some discussions internally. Our department runs a Homeland Security type conference, and it would be really nice, and it doesn't necessarily have to be run by us, if we had a Forensic Science Conference like the Homeland Security Conference. That draws hundreds and hundreds of people every year. That would be something really nice to do.
- Mr. Nye comments: I don't want people to think I want to control a lot of it or the type of education that is out there, but If we have a statewide body in some sort of approval process for what is counting as forensic science education, I think what I'm talking about will be what Judge Shelton was after getting, which is more legal forensic science stuff, but there's a lot of misinformation about forensic science. I'm not saying it has to be pro MSP type of information that's out there, but it would be nice if somebody was vetting the type of education materials out there.
- Hon. (ret.) Dr. Donald Shelton comments: With regard to attorneys, I think that will happen. My expectation is the Supreme Court, if they adopt this, in consultation with the Bar, will set up some sort of committee that talks about what qualifies as credit, how many do you need, and how to do it similar to the process they set up for judges. That sort of operates as a filter on phony continuing education.
- Mr. Matthew Wiese comment: The Court would order it, and the Bar would monitor it.
- Hon. (ret.) Dr. Donald Shelton comments: Something like that. What they've done with the judges is they've created this Judicial Education Board that is heavily all judges and staffed by MJJ (Michigan Judicial Institute). I would think that something similar would be set up. There are lots of continuing legal education models to choose from. Our only point here was, whatever process is set up, it needs to include a forensic science education requirement.

- Mr. Wiese question: That's addressed for sure for criminal lawyers, but the first one says attorneys in Michigan. Are we just talking about forensics for the criminal? Are we talking about all lawyers?
  - Hon. (ret.) Dr. Donald Shelton comments: It said any attorney appearing in a trial or appellate criminal proceeding should be required to have the forensic science requirement. All attorneys would have to have continuing education, but only the criminal lawyers would require the forensic science education.
- Objective II: Testimony
- Hon. (ret.) Dr. Donald Shelton comments regarding testimony: We only made one recommendation here, but I think it is major. The problem that evidenced itself is that judges frankly are not taking their *Daubert* obligations in the manner in which the Supreme Court said to do that. Some judges are reluctant to conduct a *Daubert* hearing at all. May have refused or avoided conducting the required *Daubert* hearing. Even in those where there is a *Daubert* hearing, some judges reverse the burden of proof, and for traditionally admitted forensic science evidence, have put the burden of proof on the opponent of that introduction of evidence rather than the proponent. This is a national issue. It is not just a Michigan Issue. The United States Supreme Court Commission has recommended a change to FRE (Federal Rule of Evidence) 702. Those changes would one, emphasize that the judge is required to conduct a hearing for contested evidence, and that the proponent has the burden of proof, and that the burden of proof isn't leave that to the jury. That burden of proof is more likely than not, the *Daubert* requirements have been complied with. That is probably going before the Supreme Court in February and there's very little opposition to it. Our recommendation is that MRE (Michigan Rule of Evidence) 702 be modified to follow the Federal recommendation.
  - Mr. Wiese comments: When this came through, we did an email discussion with our committee, and I think Chief Justice said she liked it. I made the comment that it goes through the normal process for stakeholders to give input.
  - Hon. (ret.) Dr. Donald Shelton response: It has to.
  - Mr. Wiese comments: When I looked at it with some of my colleagues, my prosecutor colleagues, we were wondering about the deletion of the first sentence of the rule. The first sentence says the judge makes the determination, and here it jumps right to the witness is qualified. Just to make sure we're clear that the judge still makes that determination. Because when we take out the jury instruction on an expert witness, if we do that, we are just putting this totally in the hands of the jury. Are we just putting this totally in the hands of the jury?
  - Hon. (ret.) Dr. Donald Shelton response: This doesn't change anything but the underlined portion and what it says...if the proponent has demonstrated to the court that it is more likely than not that: The to the court provision was meant to say Judge, fulfill your gatekeeping rule.
  - Ms. Laurie Montgomery comment: There is a lot of language that is changed, and that is what PAAM is talking about.
  - Mr. Wiese comments: Yeah, and this will go through the process.
  - Chief Justice McCormack comments: The judge is always the gatekeeper of evidence, and the rules are just to help them in their gatekeeping work. So, is there a suggestion in 702 where the judge no longer gets to gatekeep?
  - Ms. Montgomery comment: I think it says at the bottom if the proponent has demonstrated to the court. So, I think we captured it. But I think PAAM concerns are because the beginning part was taken out, it may have caused some confusion.
  - Chief Justice McCormack comments: My point is that would fly in the face of all the background norms. I don't object to making it clear that you didn't mean to change the traditional role.
  - Mr. Wiese comments: It's just written differently. So that created a question. It will go through that process.
  - Chief Justice McCormack comment: It will.
  - Hon. (ret.) Dr. Donald Shelton comments: In researching the evolution of the changes of FRE 702, the discussion was adding to the court to reinforce what the first sentence basically says...do your jobs judges.

- Objective III: Evidence of Discovery
  - Hon. (ret.) Dr. Donald Shelton comments regarding evidence and discovery: The major recommendation here relates to a discovery of DNA evidence. The recommendation is that 6.202, which is the general discovery for forensic science evidence will be applied, but we create a special category for DNA evidence. 202 would say the rule applies to forensic science evidence except DNA evidence which is governed by the following rule: 6.203. This is a lengthy recommendation regarding discovery of DNA testing and background information. We started with the recommendation of the American Bar Association Criminal Justice Standards Committee and then we revised it as part of our discussion. This rule would require the Government to disclose a lot of information about DNA testing which has happened in a particular case. We discussed that in terms of timing, one of the concerns Matt (Mr. Wiese) mentioned was that this would slow down everything about the plea-bargaining process. And there is certainly a lot of credibility to that position. This system needs to move efficiently. So, we made a couple of changes. One is that the prosecutor would be required within a reasonable time after arraignment in Circuit Court, which is a second step basically in the criminal process, and that seemed to make a lot of sense. And, prior to entry of a plea, we added unless waived by the defendant in open court, and the point there was to allow the defense to waive this provision in order to proceed with a plea, which by definition in the importance, with the advice of the defense attorney.
  - Hon. (ret.) Dr. Donald Shelton comments regarding disclosing information about the particular witnesses who are going to testify: We changed that to add or upon the request of the Defense Counsel.
  - Hon. (ret.) Dr. Donald Shelton comments regarding defense testing and retesting: The only discussion we had related to that, which indicates that an affidavit, when the Defense Counsel, wants to get the court to order and pay for some testing, then they have to file a motion. But the affidavit in support of that motion can be ex parte. This would be part of the modification and addition to the Michigan Court Rule, which also would be required to go through the ordinary procedure before approval by the Supreme Court hearings, opportunity to be heard.
  - Mr. Jeffrey Nye comment: We do roughly 10,000 DNA cases a year. Totality, we probably do close to 2,500 FOIAs and Discovery requests per year. We basically have here an automatic Discovery on every case that we do. The only other state that I know that does this is New York. It was implemented three or four years ago. It is very, very, very expensive for that volume of cases. There is a certain percentage of those cases where nobody is really asking for that information nor do they really need it, but we are creating a mechanism for automatic there. An estimate from another agency about the same size of what we do in Michigan gave an estimate of 29 FTEs (Full-Time Employees) and about \$2,000,000 per year. It's expensive. That's my only concern about it. It's a very, very expensive thing to address for something that there's a process for already, and that's an email request by either party.
  - Hon. (ret.) Dr. Donald Shelton comments: One of the differences between this recommendation and New York is that New York has no provision for a waiver by the defense. It is automatic in New York, and that's not something we wanted to create here. We all know 98% of criminal cases are decided by plea. Out of the 10,000 that you do, how many of those actually end up going to trial. Many of them are going to get resolved early on in the proceedings and this information wouldn't have to normally be produced. I think Matt (Mr. Wiese) made some real good points in our committee about making sure that we had the ability for the defense to say you don't need to do that, I want to enter a plea in the best interest of my client, let's proceed. On the other hand, we have defense attorneys that don't know enough to ask for it, or what to do with it. I understand your (Mr. Nye's) concerns. But it's certainly not automatic, and it will not end up being super expensive.
  - Mr. Nye comments: For me, it's like a push and a pull. We push the information out there, or they pull it from us.
  - Mr. Wiese comments: This feels more of a pull that they have to ask for it. We're on the way to a trial and a thirty-day deadline where we just have to hold everything anyway. Then we have to make sure it's all disclosed rather than the automatic at the front end. When we looked at it, it freaked us all out because we were thinking about all this Discovery just being blown out there

without even being requested and likely not looked at. So, I really appreciate the conversations that we had and the compromise that we reached.

- Mr. Nye comments: From a prosecution standpoint, I assume you have retention schedules, policy and procedures that maintain criminal justice information. Does that also apply to General Counsel on what the retention schedules are, and how they maintain that Criminal Justice information for defense?
  - Ms. Laurie Montgomery comments: For defense there is really no rule in Michigan. Some keep it for five to ten years. That's probably the best practice.
  - Mr. Nye comments: I wonder if that should be part of that because we are talking about people's genetic information.
  - Mr. Wiese comments: If it's a capital case, we retain it indefinitely. Then we have the typical retention schedules which is three to five years. Maybe that's something we want to look at.
  - Ms. Laurie Montgomery comments: That's County specific. So, the AG Prosecutors Office is not like that. It's seven years for some evidence, if it's a felony, then its eighty years or something. Every department and office is different, which is kind of a problem.
  - Hon. (ret.) Dr. Donald Shelton comments: I think that's true among prosecutors as well. Some are seven and some are less. I know of no requirement or anybody that has a requirement for the defense to retain evidence.
  - Ms. Laurie Montgomery comments: They just have their file. They have to keep their file and provide it back to the client post representation, that's really it. That's why there's not a rule for that.
  - Mr. Jonathan Sacks comments: We have our own retention schedule at SADO. But it's true. Your average individual defense attorney, the court rule just requires the file transfer.
  - Ms. Laurie Montgomery comments: I would say they usually do around five to ten years, but there's no rule.
  - Chief Justice McCormack comments: There's not a requirement on a defense attorney. There's not obligation to some other party or witness. Their duty and loyalty is to their own client.
  - Ms. Laurie Montgomery question: Is there a way Jeff (Mr. Nye) to add a blurb that it may require there be resources given to MSP in order to facilitate these responses. You're going to be the big bulk of it. We want full discovery for everyone, but we need resources for it.
  - Mr. Nye comments: I think the other part of that equation is this is going to at some point apply to a lot more than just DNA at some point. It's starting here, but then you're really talking about it instead of being 10,000 cases, then you're talking about 75,000 cases for us. That's a massively, heavy lift. Resources and impact are what it really gets down to.
  - Ms. Laurie Montgomery comment: I think this is a way to make that known. Put it out there that we want to do this but need resources.
  - Hon. (ret.) Dr. Donald Shelton comments: Why don't I add this recommendation a recommendation to consider increases in resources to MSP laboratories for compliance purposes.
  - Mr. Wiese comments: I think the way we restructured this language that may not be as big as a demand, but I think we should have the resources.
  - Mr. Nye comment: The only other laboratory in the state with DNA for Discovery is Kent's (Mr. Gardner) lab. Oakland County.
  - Ms. Laurie Montgomery question: If you (Mr. Nye) are subbing out of MSP, don't you take ownership of it? Let's say it Bodie and you have most of the files.
  - Mr. Nye response: Not to the level of what this is asking for.
  - Ms. Montgomery question: Even now, I understand Sorenson when you would just get the report. But now you don't get an electronic data?
  - Mr. Nye response: No, not proficiency test results, not CVs, it's a whole host of things. That's probably deeper in the weeds than what we get to.
- Objective IV: Jury Instructions
    - Hon. (ret.) Dr. Donald Shelton comments regarding jury instructions: The first recommendation is to delete the current jury instruction on expert witnesses, and to replace that with telling judges no instruction regarding expert witness testimony should be given. This is patterned after the American Bar Association Criminal Justices Standards. The current instruction, regardless of how

we play with the words in it, is perceived as vouching for the expert witness by the jury when the judge tells them this witness is going to be allowed to give opinion testimony because they're an expert in this field. The studies have demonstrated that the jury perceives that as the court vouching for the expertise of a particular witness. And so, this recommendation says...don't say anything, it's a witness like any other witness.

- Mr. Wiese comments: Will everything about the second part of the instructions be gone too?
- Hon. (ret.) Dr. Donald Shelton response: Everything about that will be gone because those same instructions are part of the instructions about all witness testimony.
- Mr. Wiese comments: The feedback from prosecutors is do we really want to take that out that cautionary about the expert not being God, and just to accept everything they say, because that kind of gives a qualifier of that. So, we take that out, the judge decides as gatekeeper this person is qualified under 702, but then we don't say you're an expert. They qualify. Do we say that in front of a jury, not in front of a jury?
- Hon. (ret.) Dr. Donald Shelton response: Both sides do it anyway when you present a witness. The first thing they do is lay qualification out even though the judge has already decided the science of testimony is already coming in. You're doing it to impress the jury that this is a knowledgeable witness, and you ought to believe it.
- Chief Justice McCormack question: Should there be a second instruction from the judge saying you can believe this witness to be credible?
- Ms. Laurie Montgomery comments: When I was talking to an executive about this, I would really like for some of them studies and social work to actually be put into the report because I think it gains a lot more credibility that way. When I was talking to PAAM and to the AG, it was...why are we deleting this? We already tell the jury they can decide whether or not they accept it or not. So, I think social science really helps push that. So, I'd like to see that flushed out in the report.
- Hon. (ret.) Dr. Donald Shelton response: I did not include that in the findings. I will make sure to include that as well. As far as the instructions are concerned, I don't think they (the jury) hear much after "expert", and that's the problem.
- Judge Paul Denenfled comments: Originally when our committee looked at this, I expressed some concern about whether jurors were confused about why this particular witness was able to give opinions as opposed to every other witness. But I read what Don (Judge Shelton) put out for all of us to read and I got with the program.
- Chief Justice McCormack comment: That reinforces what Laurie (Ms. Montgomery) said to include the studies.
- Hon. (ret.) Dr. Donald Shelton response: I'll add all the findings to these.
- Hon. (ret.) Dr. Donald Shelton comments regarding Anti-CSI Instruction: I have done a couple of quantitative studies about the CSI effect. Part of that was researching the question should judges instruct about CSI and the common requested instruction asking the judge to instruct the jury the Government has no obligation to perform any particular forensic science analysis. The problem when that instruction has been given or fussed around with, the courts have struck down those convictions on the basis if flies in the face of the unreasonable doubt instruction saying that the jury may legitimately find that the failure to conduct a particular forensic test creates a reasonable doubt, so they struck that down and several lawyers have tried to modify that instruction. The general recommendation from most people who have looked at these cases is, don't go there. Give the reasonable doubt instruction and let the jury figure out whether that failure is reasonable or not. I think I end up there based on that. That's what we discussed in the committee. I don't think it justifies trying to fashion some instruction that may end up in the reverse.
- Judge Paul Denenfled comments: I just had a sexual conduct trial last week and the prosecutor Voir Dired us. That's obviously different than an instruction. But the prosecutor is of course saying, in respect to the jury, that you understand I don't have any obligation to present all of this evidence. Do you think that's a problem, or do you think Voir Dire is fair game?
- Hon. (ret.) Dr. Donald Shelton response: I'd be happy to share with you the research we've done on similar cases where that Voir Dire was a basis for reversal.
- Hon. (ret.) Dr. Donald Shelton comment: One of the problems nationally with forensic science evidence being admitted is lawyers not being educated enough to know when to object or when to

raise issues, and that places judges in a very difficult position. Much of the problem with forensic science today is inadequate education of lawyers on both sides.

- Chief Justice McCormack comments: Getting from here to the report we walk over to the Governor is what we have to talk about next. I am open to any suggestions and feedback. Amy (Lindholm), who does this as an extra job on top of an already full-time job, has already been putting together an outline of what a final report might look like. Some of it, I think, is going to be easy and non-controversial to describe what we've done and how we got here. When we get to recommendations, I think today we identified a few places where we may not get unanimity. I'm holding out hope that some of the ideas that were floated today can push us to some place where we have an agreement on the top line, even if we have different ways of sort of proceeding on that top line. We need the three subcommittee reports to merge together a little bit better. Maybe the three subcommittee chairs can take a look at the first draft of that when it's pulled together.
- Ms. Amy Lindholm comments: There is one (first draft) that is started, and it is on the shared drive and uploaded. Everyone should have access to it and subcommittee chairs have added access.
- Chief Justice McCormack comments: Let the subcommittee chairs make the changes that we heard that there was agreement on today. I think there was some places everyone agreed about some changes, and we'll get those done. And maybe, if I could ask the subcommittee chairs to identify the places where we do not necessarily get to some agreement and outline some of the choices you think we were left with. We are probably going to do a lot of this work on the shared drive. We can, however, come together for a one hour Zoom meeting at some point and go through things if there are any final decision where we really need people to basically raise their hand and choose door "A" or door "B" in some of these, because it may be that Jeff (Mr. Nye) and Jonathan (Mr. Sacks) don't know where a majority is on some of the things where we had an impasse. But I think we would like the final meeting to be all of us voting on the final version of the report, so we'd like to get all this work done before the December 13<sup>th</sup> meeting. Which might mean we need one more, one hour Zoom meeting in maybe late November or early December as we're finalizing. If anybody thinks I made up things that don't make sense should speak.
- Col. Gasper comments: That sounds right to me. I think that's a good plan. I think there's already a lot of work that gets done offline, which is very helpful.
- Hon. (ret.) Dr. Donald Shelton comment: The structure question related to what I was talking about earlier; I assume that at some point in the report, Amy (Lindholm), there will be a list of recommendations?
- Chief Justice McCormack comments: I think so, there will be a summary of recommendations at the top and then more details.
- Hon. (ret.) Dr. Donald Shelton comment: So then, we talked about those recommendations earlier about the findings, I'll call them background. Is the background information to be in our discussion, or footnoted, or how do we want to do that?
- Ms. Amy Lindholm comments: I leave that a little bit up to you. There are more of the findings in the current draft, then like these recommendations added that we have from today. I'm not looking at it right now, I don't know if I had it integrated with the recommendations, or if it was findings separate and then recommendations. I think they're separate.
- Hon. (ret.) Dr. Donald Shelton comment: Just let me know how you would like that structured.
- Chief Justice McCormack comments: However we decide, the way we did it with in the Jail Task Force was we had the summary of recommendations up front and then a more detailed recommendation by recommendation with the findings, and the process, and justification for those recommendations. But if people prefer a better way, especially those of you who are carrying the heavy load on this, I'm not going to get in your way. We went with that model because it was one we had available to us, not because we're committed to it.
- Chief Justice McCormack comments: Is there anything else we need to talk about today? We'll have to be in touch electronically. I think if we get to a place where we know where those decision trees are, where you all want some votes, or you think you find a way to get us to unanimity, so fine. Let us know, and we can call a one-hour Zoom meeting.
- Hon. (ret.) Dr. Donald Shelton question: So, this December 13<sup>th</sup> meeting is not set in stone then?
- Chief Justice McCormack comments: No, that (December 13<sup>th</sup>) is our final meeting. I was hoping that by that time of the meeting we all have the draft report, and we are voting on the draft report, and then we finalize it, put a cover on it, and walk it across the street.
- Mr. Jonathan Sacks comments: On my end, I'll be able to put together a sort of final draft based on today's discussion with the two sort of grayish areas noted there. If it seems like there's a good fix, we can



talk about that in the one-hour Zoom meeting, or else we can bring it to the December 13<sup>th</sup> meeting. Let me step back and think about that. Maybe send it around to the subcommittee as well and then go from there.

- Mr. Christopher Bommarito question: When we are voting, are we voting on the whole document? Are we voting on specific issues? Because like today, it seems like there is probably most debate on the independence issue. My concern is if it just goes in with the majority of people think this, and the minority of people think this, the end result is just status quo, because you're not really saying anything. I think we have enough people with enough knowledge to vote on these issues.
- Chief Justice McCormack comments: First, it's not for me to say, but my response would be both. I think we first might need some of these votes to figure out what a majority thinks, and then how we handle the minority view is up for discussion. One way is you can drop a footnote where there is a minority view and say Task Force member (Name) disagrees with the particular recommendation and would prefer... Or, you can have a separate minority report. Those are all possibilities. Do you have a preference Chris (Mr. Bommarito)?
- Mr. Bommarito response: No, I just want to know how we're proceeding so in my own mind I'm settled to what the next steps are.
- Chief Justice McCormack comments: What we're going to do next is where there are places that we uncovered today, and there may not be unanimous agreement. I'm going to let the subcommittee chairs reflect on those and see if they think they have a proposal to get us to unanimity. My first choice is going to be unanimity if that's out there. If that's not possible, then we're going to come back in either a one-hour Zoom meeting or email and vote out those few remaining places where there's disagreement, so we know what the majority of the report is going to say. Then separately discuss how we want the minority views on those topics to be reflected, if they are minor enough that the folks with those views are comfortable having them in a footnote, that's great. That's what we did with the Jail Task Force report. If that's not acceptable, there are other ways to go about it. Sometimes you include them in a dissent, or a partial dissent in a report. I'm going to get to how we handle the dissent after we see if there is a dissent.
- Mr. Matthew Wiese comments: Judge Shelton, your notes about my points on the DNA discovery, I'm totally fine with that in a footnote. I like a lot of the changes, I'm totally comfortable with it. I don't want to write any dissent.
- Mr. Jonathan Sacks comments: In terms of today's stuff, all three subcommittee reports, I think the independence is the only piece where we're not necessarily there. The pieces that came up in the Forensic Science Body Report, I think we can overcome those pretty well. So, I think it's just going to be independence and we'll see where that lands. Jeff Nye and I will talk about that as well.
- Hon. (ret.) Dr. Donald Shelton question: Not to denigrate my committee or Jeff's (Mr. Nye's) committee, but if we produce what Jonathan's (Mr. Sacks') committee has come up with, that will be the major accomplishment of this Task Force, and I think it took a lot to get there. I think by the two of you (Col. Gasper and Chief Justice McCormack) selecting Jonathan (Mr. Sacks), that subcommittee worked out brilliantly, and I want to thank him for his work on that, because this is the guts of what we're about.
- Mr. Jonathan Sacks comments: I appreciate that, but it's definitely a subcommittee project.

#### **X. Next Meeting**

- DATE: Tuesday, December 13, 2022
- TIME: 9:30 a.m. – 12:00 p.m.
- LOCATION: TBD – Remote or in-person at Michigan State Police Headquarters,  
7150 Harris Drive, Dimondale, MI

#### **XI. Adjournment**

- A motion to adjourn was given by Mr. Kent Gardner and seconded by Hon. (ret.) Dr. Donald Shelton, Ph.D.
- With none opposed and no discussion, this Task Force meeting was adjourned by Chief Justice Bridget M. McCormack at 2:39 p.m.