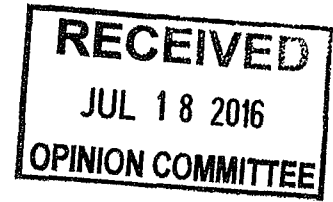




TEXAS FORENSIC  
SCIENCE COMMISSION

*Justice Through Science*

1700 North Congress Ave., Suite 445  
Austin, Texas 78701



July 18, 2016

FILE # ML-48047-16  
I.D. # 48047

RQ-0117-KP

*Via E-Mail*

Texas Attorney General Ken Paxton  
Office of the Attorney General  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

RE: Texas Forensic Science Commission – Request for Attorney General Opinion

Dear Attorney General Paxton:

**I. Summary**

The Texas Forensic Science Commission (“Commission”) respectfully requests your legal guidance on an issue related to the Commission’s statutory authority and the admissibility of forensic analyses in Texas courts—specifically, whether “forensic analysis” as defined in Article 38.35 of the Code of Criminal Procedure that is neither accredited by the Commission nor exempt by statute or administrative rule is admissible in a criminal action under Texas law. Relevant statutory provisions include the Texas Code of Criminal Procedure Articles 38.01 and 38.35(d)(1), and Texas Rule of Evidence 702.

The Commission also requests clarification on the reporting requirements for accredited crime laboratories pursuant to the Texas Code of Criminal Procedure Articles 38.01 and 38.35.

**II. Background**

In May 2005, the Texas Legislature created the Commission by passing House Bill 1068 (the “Act”). The Act amended the Code of Criminal Procedure to add Article 38.01, which describes the composition<sup>1</sup> and authority of the Commission.<sup>2</sup> The Commission is required to “investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity.”<sup>3</sup> During the 83<sup>rd</sup> Legislative Session, the Legislature clarified the scope of the Commission’s jurisdiction by passing SB-1238, which allows the Commission to investigate forensic disciplines and entities *not* subject to accreditation but subject to certain limitations.<sup>4</sup> During the 84<sup>th</sup> Legislative Session, the Legislature passed SB-1287 which transferred responsibility for the crime laboratory accreditation program to the Commission from the Department of Public Safety, effective September 1, 2015.<sup>5</sup>

<sup>1</sup> The Commission consists of seven scientists, one defense lawyer and one prosecutor. All members are appointed by the

<sup>2</sup> See Act of May 30, 2005, 79<sup>th</sup> Leg., R.S., ch. 1224, § 1, 2005.

<sup>3</sup> TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(3).

<sup>4</sup> See *Id.* at § 4(b-1) and (b-2).

<sup>5</sup> *Id.* at § 4-d.

### III. Applicable Law/Legal Analysis

Texas Rule of Evidence 702 permits testimony by an expert qualified by knowledge, skill, experience, training or education if the scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue.<sup>6</sup> However, Article 38.35(d)(1) of the Texas Code of Criminal Procedure expressly prohibits the admission of “forensic analysis” and expert testimony in a criminal case if, at the time of the analysis, the “crime laboratory” conducting the analysis was not accredited by the Commission.<sup>7</sup> The term “forensic analysis” is defined as follows:

(4) “Forensic analysis” means a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term includes an examination or test requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court. The term does not include:

- (A) latent print examination;
- (B) a test of a specimen of breath under Chapter 724, Transportation Code;
- (C) digital evidence;
- (D) an examination or test excluded by rule under Article 38.01;
- (E) a presumptive test performed for the purpose of determining compliance with a term or condition of community supervision or parole and conducted by or under with a community supervision and corrections department, the parole division of the Texas Department of Criminal Justice, or the Board of Pardons and Paroles; or
- (F) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action.<sup>8</sup>

The term “crime laboratory” is defined broadly to include “a public or private laboratory or other entity that conducts a forensic analysis subject to this article.”<sup>9</sup>

Forensic disciplines are exempt from the accreditation requirement either by statute (*see* above provisions) or by the Commission through its rulemaking authority.<sup>10</sup> Disciplines subject to accreditation are listed in the Texas Administrative Code Title 37, Chapter 651.5.<sup>11</sup> The Commission may grant an exemption from accreditation for a crime laboratory or forensic discipline where:

---

<sup>6</sup> Tex. R. Evid. 702.

<sup>7</sup> TEX. CODE CRIM. PROC. art. 38.35 § (d)(1).

<sup>8</sup> *Id.* at § (a)(4).

<sup>9</sup> *Id.* at § (a)(1).

<sup>10</sup> TEX. CODE CRIM. PROC. art. 38.01 § 4-d(c).

<sup>11</sup> *See* 37 Tex. Admin Code § 651.5.

1. independent accreditation is unavailable or inappropriate for the laboratory;
2. the type of analysis is admissible under a well-established rule of evidence or a statute other than Article 38.35; or
3. the type of analysis is routinely conducted outside of a crime laboratory by a person other than an employee of a crime laboratory.<sup>12</sup>

Disciplines currently exempt from the accreditation requirement are listed in the Texas Administrative Code Title 37 Chapter 651.6 and 651.7.<sup>13</sup>

We request clarification regarding the admissibility status of forensic disciplines that clearly meet the “forensic analysis” definition but for which no recognized accrediting body is available *and* the Commission has not granted an exemption from accreditation either because: (1) the discipline has not applied for the exemption; or because (2) the Commission is reluctant to grant an exemption based on concerns regarding the integrity and reliability of the forensic analysis. It appears that Article 38.35’s accreditation requirement precludes the admission of this type of evidence. However, Texas Rule of Evidence 702 permits testimony by an expert qualified by knowledge, skill, experience, training or education if scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or to determine a fact in issue without reference Article 38.01’s accreditation requirement.<sup>14</sup> We seek guidance on whether Article 38.35’s application to “forensic analysis” supersedes the general expert admissibility rule set forth in Texas Rule of Evidence 702.

#### **IV. Unaccredited Discipline Case Example**

The Commission recently released a report on bite mark comparison, a type of forensic analysis neither exempt from nor subject to the accreditation requirement in Texas. For this particular discipline, no entity has applied for an exemption, there is no recognized accrediting body available and the Commission would be hesitant to grant an exemption from the accreditation requirement given widespread and significant concerns regarding the reliability and validity of the analysis and the current state of the research in the field.

#### **V. Summary of the Question Regarding Unaccredited Disciplines**

In sum, the Commission respectfully requests your opinion regarding whether:

(1) *unaccredited forensic analyses that are also not exempt from accreditation by statute or administrative rule are admissible under the Texas Code of Criminal Procedure, Article 38.35(d)(1);*

(2) *the Commission has the discretion under Article 38.01 §(4-d)(c) to withhold an exemption from the accreditation requirement pending resolution of concerns regarding the integrity and reliability of the forensic analysis; and*

(3) *the specific provisions regarding admissibility of forensic analyses set forth in Article 38.35(d)(1) of the Texas Code of Criminal Procedure control over the general expert admissibility rule set forth in Texas Rule of Evidence 702.*

---

<sup>12</sup> TEX. CODE CRIM. PROC. art. 38.01 § 4-d(c)(1)-(3).

<sup>13</sup> 37 Tex. Admin. Code Ch. 651.5, 651.6.

<sup>14</sup> Tex. R. Evid. 702.

## VI. Question Regarding Reporting Requirements for Crime Laboratories

Pursuant to Texas Code of Criminal Procedure Article 38.01 Section 4(a)(2), the Commission shall require crime laboratories that conduct forensic analyses “to report professional negligence or professional misconduct to the Commission.”<sup>15</sup> Article 38.35 defines *crime laboratory* as “a public or private laboratory or other entity that conducts forensic analysis.”<sup>16</sup> The same Article defines *forensic analysis* as a medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence for the purpose of determining the connection of the evidence to a criminal action.<sup>17</sup> The forensic analysis definition excludes certain forensic disciplines from the definition—latent print examination, breath analysis, digital evidence, presumptive testing for community supervision purposes, medical testing, and autopsies,<sup>18</sup> while other disciplines are excluded by administrative rule as discussed above.

Many accredited crime laboratories in Texas conduct forensic analyses in *both* accredited disciplines (e.g., DNA analysis, toxicology, etc.) *and* unaccredited disciplines (e.g., latent print analysis, crime scene, etc.). While some accredited crime laboratories have disclosed incidents of professional negligence and misconduct regarding all disciplines in the laboratory, others maintain disclosure is only necessary for accredited disciplines.

Accordingly, the Commission seeks your guidance on the following question:

*Do the reporting provisions under Texas Code of Criminal Procedure Article 38.01, Section 4(a)(2) require Texas crime laboratories to report professional negligence and professional misconduct for all of the forensic analyses they perform in the laboratory? Or are laboratories only required to report professional negligence and professional misconduct for forensic analyses that are subject to accreditation?*

We would appreciate your opinion on these questions of statutory interpretation. Your responses will greatly assist the Commission in providing helpful guidance to the forensic community. Thank you in advance for your time and consideration.

Sincerely,



Lynn Garcia  
General Counsel

---

<sup>15</sup> TEX. CODE CRIM. PROC. art. 38.01 § 4(a)(2).

<sup>16</sup> TEX. CODE CRIM. PROC. art. 38.35 § (a)(1).

<sup>17</sup> *Id.* at § (a)(4).

<sup>18</sup> *Id.*