



**DEFENDANT NOTIFICATION
AFTER MAJOR FORENSIC
NONCONFORMANCE**

A Joint White Paper Authored By:

*Texas Forensic Science Commission and
Texas Criminal Justice Integrity Unit*

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EXECUTIVE SUMMARY

On July 11, 2013, the Texas Forensic Science Commission (“TFSC”) and the Texas Criminal Justice Integrity Unit (“TCJIU”) hosted a stakeholder roundtable meeting on methods for ensuring defendants receive appropriate notification after a major forensic nonconformance, especially in high-volume disciplines where thousands of cases may be affected. Participants in the roundtable included forensic science practitioners and managers, prosecutors, defense attorneys, members of the judiciary, advocacy groups and representatives from various national certification and accreditation bodies. The goal of the roundtables was to bring a diverse group of stakeholders together to create a roadmap for handling future cases.

Though the majority of forensic scientists in Texas produce high quality work, from time to time an analyst may engage in negligence or misconduct with the potential to impact thousands of cases. For example, in one recent case an analyst was struggling to obtain the data required under the lab’s policies and procedures to support a positive finding of alprazolam for a pharmaceutical tablet. Instead of asking for help, he used the evidence from another alprazolam case to support a positive finding in the case he was working.

Because of the analyst’s misconduct, the reliability of all of his work during his tenure at the laboratory (impacting 36 different counties) was called into question. The laboratory was proactive in notifying the agencies that had submitted evidence. However, because so many different counties were affected, it was extremely challenging to determine whether affected defendants have received notification consistently, or whether notice varies from county to county depending upon local resources and other factors. It is also difficult to assess the extent to which prosecutors themselves understand the nature and scope of the forensic misconduct and potential ramifications.

Roundtable participants identified a number of ideas for improving stakeholder notification statewide. Most of the suggestions involved using existing agencies, in particular the Commission on Indigent Defense, the Forensic Science Commission, Texas District and County Attorney’s Association, Texas Criminal Defense Lawyer’s Association, the Texas State Bar, local bar associations, and the Attorney General’s Office to coordinate responses. Participants recognized that Texas is unlikely to support a statewide public defender’s office in the foreseeable future and focused on ways to ensure existing resources are channeled effectively.

The notice protocol suggested by stakeholders consists of nine steps and is presented on page 7 below. Steps 1-2 concern the role of the laboratory; steps 3-6 involve coordination by stakeholders—from state agencies like the TFSC and Commission on Indigent Defense to prosecutors and defense counsel; steps 7-9 suggest methods for marshaling resources to ensure effective representation of affected defendants.

THE AUTHORS

Texas Forensic Science Commission

In May 2005, the Texas Legislature created the Texas Forensic Science Commission (“TFSC”) or (“Commission”). Under its enabling legislation, the Commission is required to investigate allegations of negligence or misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity.¹ The Legislature also required the Commission to develop and implement a reporting system through which accredited laboratories, facilities, or entities may report professional negligence or misconduct.²

In May 2013, the Legislature expanded the scope of the Commission’s jurisdiction by passing SB-1238.³ Under the new legislation, the Commission may investigate complaints involving forensic disciplines that are not subject to accreditation under Texas law, with the exception of autopsies.⁴ The Commission may also affirmatively initiate an investigation of a forensic analysis for educational purposes without receiving a complaint if the Commission determines by majority vote that the investigation would advance the integrity and reliability of forensic science in Texas.⁵

The TFSC has nine members, all of whom are appointed by the Governor of Texas. Seven of the members are scientists and two are attorneys (one prosecutor and one defense attorney).⁶ The TFSC’s presiding officer is designated by the Governor.⁷ Following are the current members of the Commission:

- Vincent Di Maio, MD, Former Chief Medical Examiner of Bexar County (Presiding Officer).
- Sarah Kerrigan, PhD, Chair, Department of Forensic Science, College of Criminal Justice, Sam Houston State University (Vice Chair).
- Richard Alpert, JD, Chief of Misdemeanor Division, Tarrant County DA’s Office.
- Jeffrey Barnard, MD, Chief Medical Examiner of Dallas County.
- Arthur Eisenberg, PhD, Chairman of Department of Forensic and Investigative Genetics, University of North Texas Health Science Center.
- Jean Hampton, PhD, Chairman of Department of Health Sciences, Texas Southern University.
- Brent Hutson, PhD, Forensic Odontologist and Director of Department of Clinical Fixed Prosthodontics, Texas A&M University Health Science Center, Baylor College of Dentistry.

¹ TEX. CODE CRIM. PROC. § 38.01(4)(a)(3).

² *Id.* at (4)(a)(1)-(2).

³ Tex. S.B. 1238, 83rd Leg., R.S. (2013)

⁴ *Id.* at 3(b-1).

⁵ *Id.* at 3(a-1).

⁶ *Id.* at 2(a).

⁷ TEX. CODE CRIM. PROC. § 38.013(c).

- Bobby Lerma, JD, Criminal Defense Attorney, Brownsville, and Past President of Texas Criminal Defense Lawyer’s Association.
- Nizam Peerwani, MD, Chief Medical Examiner of Tarrant, Parker, Denton and Johnson Counties.

In the years since the Commission was established, Commissioners have committed significant time and resources to improving forensic policy and practice in Texas. In addition to handling complaints, self-disclosures and related investigations, the Commission is actively engaged in promoting the development of professional standards and training and recommending legislative improvements. The Commission is also committed to ensuring that lessons learned from investigations are used to improve communication and coordination among stakeholders in the criminal justice system. It is for this reason that the Commission partnered with the Criminal Justice Integrity Unit to host a roundtable on notification.

Texas Criminal Justice Integrity Unit

The Texas Criminal Justice Integrity Unit (“TCJIU”) is an ad hoc committee created by Judge Barbara Hervey of the Texas Court of Criminal Appeals (“CCA”).⁸ The TCJIU was established in June 2008 and held its first formal meeting in August 2008. The TCJIU was created to review the strengths and weaknesses of the Texas criminal justice system. The TCJIU’s purpose is to bring about meaningful reform through education, training, and legislative recommendations. The TCJIU meets periodically as needed, and meetings are called by the Chair.

Members of the TCJIU include a diverse group of policymakers and stakeholders in the criminal justice community in Texas. Current members include:

- Judge Barbara Hervey, Texas Court of Criminal Appeals (Chair)
- Judge Sid Harle, District Judge, San Antonio
- Senator Rodney Ellis, Texas Senate
- Senator Carlos Uresti, Texas Senate
- Senator Jose Rodriguez, Texas Senate
- Jaime Esparza, District Attorney, El Paso
- Pat Johnson, Director, Texas Department of Public Safety Crime Lab
- James McLaughlin, Executive Director, Texas Police Chiefs Association
- Mary Anne Wiley, Deputy General Counsel to Governor Rick Perry
- Russell Wilson, Special Fields Bureau Chief, Dallas County District Attorney
- Jim Bethke, Director, Texas Indigent Defense Commission
- Bill Allison, Clinical Professor of Law and Director, University of Texas Criminal Defense Clinic
- Gary Udashen, Criminal Defense Attorney, Dallas
- Edwin Colfax, Project Manager, Texas Indigent Defense Commission

⁸ The CCA is the highest level appellate court for criminal cases in Texas. The TCJIU website may be accessed at: <http://www.cca.courts.state.tx.us/tcjiu/tcjiuhome.asp>

Shared Collaborative Mission

Over the past two years, the TFSC and TCJIU have worked together to develop training and educational programs for attorneys, judges, and law enforcement entities in Texas. Both organizations are committed to working collaboratively to encourage stakeholder participation and provide cost-efficient training and educational programs.

The purpose of this white paper and suggested notice protocol is not to impose any requirements or rules on Texas stakeholders. Rather, the paper provides suggestions for ensuring effective notification statewide after a major forensic issue is discovered with the potential to impact thousands of cases. The goal is to ensure parties receive effective notice regardless of whether they live in a large urban county or a smaller rural county with less financial and human resources available.

OBSERVATIONS AND RECOMMENDATIONS

This section sets forth the observations made by stakeholders during the roundtable session on July 11, 2013. Each numbered subject area corresponds to a series of questions posed to participants. At the end of the session, we outline a suggested notice protocol based on the observations.

1. The Role of the Texas District and County Attorney’s Association and the Importance of Notice Redundancy

The first actor within the criminal justice system to receive notice after a forensic nonconformance is typically the prosecutor. The laboratories are obligated to notify submitting law enforcement agencies and affected prosecutors when a problem with forensic analysis is discovered.

The Texas District and County Attorney’s Association (“TDCAA”) is one of the largest associations of prosecuting attorneys in the world. The organization has an active blog with current news followed closely by many of its members. As a result, TDCAA has been very efficient and effective at posting notice of forensic failures on its website and suggesting proactive steps for its members to follow.

However, participants recognized that TDCAA cannot force its membership to check its blog regularly or to follow its recommendations. Stakeholders concluded that we should continue to involve TDCAA and incorporate their communication methods. Though they are not guaranteed to reach 100% of prosecutors, we know through experience they are effective for a meaningful percentage of prosecuting attorneys in the state. TDCAA should consider designating someone whose job is to assist with member communication in the wake of a forensic non-conformance.

Participants emphasized the importance of notice redundancy—making several layers of contact with various affected parties is critical. The response protocol should include a technical briefing by the laboratory that identified the nonconformance so

stakeholders may ask questions, and so they may understand the scope of the problem accurately. Participants noted that affected parties sometimes get their news from the media which is not always the most accurate or complete source.

Participants also suggested that the TFSC send individual letters to affected prosecutors after receiving a laboratory self-disclosure. The Commission should consider sending those letters via certified mail in situations where it is unclear whether the prosecutor received the notice or not.

Participants also noted that The Texas Criminal Defense Lawyer's Association ("TCDLA") should receive the same notification as TDCAA. If the Commission needs to facilitate that process, then it should do so. The TCDLA should appoint a forensic contact who is a counterpart to the contact at TDCAA.

The Texas Center for the Judiciary should be among the entities that receives notice when a major forensic failure occurs, as well as the regional presiding judges through the Office of Court Administration.

The Commission and other stakeholders should consider providing education on defendant notification at seminars, CLEs, etc. Updates on nonconformances should be included in organizational publications. The Commission should also provide notice to state and local bar associations.

The State Attorney General's office should also be notified about forensic nonconformances as they occur, especially the prosecutorial assistance unit.

Though this may be a logistical challenge given current resources, recordkeeping at the county level should include attorney identification by State Bar number so attorneys may be notified of forensic issues more easily.

2. Do prosecutors understand their obligation to provide notice to defendants when a major forensic nonconformance occurs?

Stakeholders believe that most prosecutors in Texas do understand their obligation. However, prosecutors can always use more training on *Brady* issues because it is sometimes challenging to determine when something is exculpatory. Training needs to be precise and include concrete examples of forensic nonconformances. Participants noted that the state's new discovery law (Michael Morton Act) may help to clarify obligations; TDCAA is in the process of providing regional training on this legislation for its members.

Participants noted that extra assistance should be available to guide prosecutors in rural counties. The Attorney General's office provides this service to some extent but the Commission should make an extra effort to ensure rural prosecutors are kept up-to-speed on forensic issues as they develop.

The TFSC should consider establishing a centralized Internet-based repository accessible to everyone in the state with basic information on pending forensic complaints and disclosures, including a FAQ section and other guidance. Other stakeholders (TCDLA, TDCAA, Texas State Bar, etc.) could post similar information on their sites. The Commission will work to make this one of the features on its new website.

3. Scope of Prosecutor Notice

Stakeholders recognized that prosecutors have an obligation to make a good faith effort to contact defendants. However, they cannot track individuals beyond their last known address. Letters sent by prosecutors should be clear in describing the issue identified by the lab, and refer the defendants to an available resource (public defender, court-appointed counsel, etc.) whenever possible. Prosecutors are encouraged to attend the technical briefing hosted by the laboratory and to contact their local defense bar for help in addressing the notice question. They are also encouraged to communicate with responsible local judges so they understand the scope and potential ramifications of the forensic nonconformance.

The State of Texas (*e.g.*, Attorney General's office) has an obligation to assist prosecutors with notice in these cases, especially counties with limited resources. The TFSC should maintain open lines of communication with the AG's office whenever a forensic nonconformance occurs with the potential to affect many cases. A representative from the Attorney General's office should be designated as the point person for forensic nonconformance cases.

4. After the prosecutors have notified affected defendants, who should be responsible for following up on the notice? Absent a statewide public defender system, which agencies should be responsible for ensuring defendants (especially indigent defendants) receive notice and have access to counsel in these cases?

The majority of stakeholders felt the Commission on Indigent Defense should be responsible for these cases by appointing attorneys on a temporary basis to address the claims. The Commission on Indigent Defense should work with the State Bar, TCDLA and Texas law schools to obtain effective and targeted representation where possible. The attorney group would be appointed only for the purposes of dealing with the forensic nonconformance at issue and would be disbanded when the cases have made their way through the appeals process. Absent a statewide solution, local counties should consider creating "consortiums" with their neighboring counties so that attorneys capable of handling appeals and writs may represent defendants in these cases across multiple counties. The Commission on Indigent Defense could in turn fund the local consortiums. Form pleadings should be created and distributed to help attorneys represent clients efficiently in these cases.

If laws need to be changed to permit the Commission on Indigent Defense to fulfill this role, they should be changed during the next legislative session. The Governor's office and/or the Attorney General's office should be consulted regarding access to emergency funds for these cases.

Finally, the State Bar should consider developing guidelines for professional responsibility in cases where a defense attorney who no longer represents a defendant receives notice from the prosecutor. Some further action should be taken by the attorney so the notice does not fall through the cracks.

5. How can we ensure counsel has the appropriate experience to work defendants through re-testing and/or the writ process? Is there a streamlined protocol we can offer despite the localized nature of criminal defense work? Which agencies can help with this effort?

Stakeholders felt the Commission on Indigent Defense (in partnership with the State Bar) is the best organization to handle this (*see* explanation in #4 above). Absent their assistance, stakeholders will continue to rely on TCDLA, the Innocence Project of Texas and a county-by-county approach. This approach is inefficient and creates unequal results depending on what county a person lives in.

The State Bar really should consider elevating the professional standards for court-appointed attorneys in criminal cases. There should also be training available specifically focusing on these issues so attorneys have guidance for future cases.

Absent a state solution, counties must make the effort to appoint one or two competent and experienced appellate attorneys depending on the volume to handle all affected cases through the writ process. This allows for consistency and efficiency in representation for all affected cases in the county and should be the norm in all cases.

The State could consider amending the post-conviction writ rules to make these types of cases more streamlined for all parties.

SUGGESTED NOTICE PROTOCOL FOR CASES INVOLVING FORENSIC NONCONFORMANCE IN HIGH VOLUME DISCIPLINE

In sum, the following notice protocol should be followed in future cases involving high volume forensic disciplines:

STEP ONE: Laboratory identifies forensic nonconformance and assesses potential scope of problem. Laboratory discloses issue to the TFSC, DPS and the national accrediting body responsible for the laboratory's accreditation.

STEP TWO: Laboratory determines which law enforcement agencies submitted evidence in potentially affected cases and notifies those agencies and responsible prosecuting authorities. Assuming a large number of cases are affected, laboratory creates and maintains list of cases. Laboratory updates list of cases with results of any re-testing performed and notifies prosecuting authority of results as necessary.

STEP THREE: Once the TFSC recognizes that a large number of cases may be affected, staff should begin outreach effort by contacting representatives from the following agencies and notifying them of the nonconformance: Texas District and County Attorney's Association; Texas Criminal Defense Lawyer's Association; Commission on Indigent Defense; Office of Court Administration (including presiding judges); Texas Center for the Judiciary; State Bar of Texas and local Bar associations; Office of the Attorney General (prosecutor assistance division); and Innocence Project of Texas. Stakeholders publish information in appropriate online forums, newsletters etc. For example, TDCAA would publish the information on its blog, etc.

STEP FOUR: TFSC contacts all affected district attorneys, using a variety of communication methods (phone, email, etc.). TFSC should use certified mail as necessary for those who are difficult to contact.

STEP FIVE: Laboratory offers a technical briefing for affected agencies, prosecutors, and local defense counsel to describe forensic nonconformance, re-testing process and corrective action taken.

STEP SIX: TFSC publishes summary of facts and investigation on website including a Frequently Asked Questions section. This information will not concern the details of the TFSC's pending investigation but will provide resource information for affected parties.

STEP SEVEN: TFSC will meet with stakeholders listed in Step Three above to determine whether counsel need to be identified to represent affected defendants. TFSC will work with representatives from stakeholder groups, especially the Commission on Indigent Defense, to develop a plan using the resources of existing agencies. TFSC will maintain continuous communication with affected prosecutors, especially those in small and rural counties. TFSC will alert Attorney General's office and the Commission on Indigent Defense with a list of counties in which further assistance may be needed.

STEP EIGHT: Stakeholders will work together to assess what additional financial resources (if any) will be needed to ensure effective notice and representation. To the extent possible, the Commission on Indigent Defense will provide attorneys to work on forensic nonconformance cases on a temporary basis. The Commission may also be effective in marshaling local resources, possibly through county consortiums where smaller counties can work together to provide qualified appointed attorneys familiar with the writ process and forensic issues. The leadership of the Commission on Indigent Defense should explore the extent to which this is possible under its current statute. If legislative changes are needed to make such support possible in the future, the agency should consider whether such changes would be feasible. Other potential sources of human resources and possibly funding for representation include TCDLA, the Texas State Bar, the Attorney General's Office and the Governor's Office. The TFSC should work together with the Commission on Indigent Defense to determine which agencies might provide resources.

STEP NINE: After working with the stakeholder representative group listed in Step Three, the TFSC should provide periodic updates on its website and at quarterly meetings. Any gaps in notice or representation should be addressed by the stakeholder group to the extent possible.

In addition to these steps, stakeholders identified the following key points:

EDUCATION AND TRAINING: The TFSC should work with the TCJIU and the Texas State Bar to provide training for attorneys in writ processing and forensic issues in particular. It is important that attorneys appointed to assist defendants in these cases have the skills and competency level to do so effectively. Training and education should include CLE programs and other communication methods designed to reach broad audiences.

CONTENT OF NOTICE TO DEFENDANTS: When notifying defendants of the forensic nonconformance, prosecutors should provide a resource for defendants to inquire about any re-testing or potential writ process. This prevents prosecutors from being placed in the impossible position of advising defendants who contact their office with inquiries. It also gives the defendant access to information and possible representation independent from the prosecuting authority. The parties responsible for assisting defendants should be identified through a collaborative effort by the stakeholders listed in Step Three above, in collaboration with local courts and defense bar associations.

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To download an electronic copy of this white paper or follow the activities of the TFSC and TCJIU, please refer to the following websites:

<http://www.fsc.state.tx.us> or www.fsc.texas.gov

<http://www.cca.courts.state.tx.us/tcju/tcjuhome.asp>