



TEXAS FORENSIC  
SCIENCE COMMISSION  
*Justice Through Science*  
1700 North Congress Ave., Suite 115  
Austin, Texas 78701

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OPINION COMMITTEE

September 22, 2017

FILE # ML-48209-17  
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Via E-Mail

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

RQ-0183-KP

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 opinion on whether postmortem toxicological analysis and related expert testimony conducted pursuant to the request of a medical examiner or forensic pathologist is subject to Commission accreditation requirements. Relevant statutory provisions include the Texas Code of Criminal Procedure Articles 38.01 and 38.35 (a)(4)(F).

### 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 84<sup>th</sup> Legislative Session, the Legislature passed SB-1287 which transferred responsibility for the State's crime laboratory accreditation program to the Commission from the Department of Public Safety, effective September 1, 2015.<sup>4</sup> The Commission's accreditation authority is the area of the Commission's jurisdiction that is the subject of this request.

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

<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> *Id* at § 4-d.

### III. Applicable Law/Legal Analysis

Under the authority provided in the Texas Code of Criminal Procedure Article 38.01 § 4-d, the Commission requires crime laboratories that conduct *forensic analyses* for the purpose of determining the connection of the evidence to a criminal action to be accredited by the Commission.

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>5</sup> The term "forensic analysis" is defined as follows:

"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>6</sup>**

Thus, the question of whether a particular type of activity is subject to Commission accreditation requirements depends on whether it is considered a "forensic analysis" under Texas law.

Toxicology is the science of identifying and understanding the adverse effects of external chemical and physical agents on biological systems.<sup>7</sup> Human performance toxicology performed on live humans is a forensic discipline clearly subject to Commission accreditation requirements.<sup>8</sup> Postmortem toxicology is a type of toxicological analysis performed to aid in the medical or legal investigation of a person's death. There are no significant differences in the analytical process whether testing is performed on live humans or deceased individuals.

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<sup>5</sup> *Id.* at § (a)(1).

<sup>6</sup> *Id.* at § (a)(4).

<sup>7</sup> Federal Judicial Center, National Research Council of the National Academies, *Reference Manual on Scientific Evidence*, p. 635 (2011).

<sup>8</sup> *See* Tex. Code Crim. Proc. art. 38.35 (a)(4).

Some postmortem toxicology work is performed in the toxicology laboratory of a medical examiner or forensic pathologist's office, while other postmortem toxicology work is performed by crime laboratories along with toxicology for live humans (e.g., blood alcohol for DUI cases, etc.). Unlike human performance toxicology testing on live humans which is typically requested by law enforcement agencies, postmortem toxicology is typically requested by a medical examiner or forensic pathologist for the purpose of assisting him or her with determining the cause and manner of death of an individual. *Postmortem toxicology may but does not necessarily involve a criminal action.* There are times when postmortem toxicology results become part of a criminal proceeding such as when someone is accused of poisoning or when the toxicology results of a deceased individual provide information for the trier of fact in a criminal action against a living defendant. However, toxicologists whose work is exclusively limited to postmortem toxicology believe their work is performed *principally for the purpose medical practice because:* (1) it is performed at the request of a licensed physician; and (2) the determination of cause and manner of death is fundamentally the practice of medicine. While they recognize postmortem toxicology results may be used to determine the connection of the evidence to a criminal action, they believe this purpose is secondary to the principal purpose which is the practice of medicine.

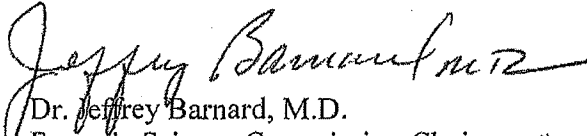
#### IV. Summary of the Question

The Commission respectfully requests your guidance regarding how a Texas court would likely view the following:

- (1) Does postmortem toxicology conducted at the request of a medical examiner or forensic pathologist fall within the exemption from "forensic analysis" set forth in article 38.35(a)(4)(F) TEX. CODE CRIM. PROC.?
- (2) Is the answer to this question the same regardless of whether the postmortem toxicology results are used in a law enforcement investigation for the purpose of determining the connection of the evidence to a criminal action?

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

Sincerely,

  
Dr. Jeffrey Barnard, M.D.  
Forensic Science Commission Chair