

Date: May 25, 2010

The Honorable Patrick J. Leahy
Chairman, Senate Committee on the Judiciary
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Scientific Working Group on Digital Evidence (SWGDE) appreciates the opportunity to offer several constructive observations and suggestions regarding the “*Preliminary Outline of Draft Forensic Reform Legislation – 5/5/10*” (the “Draft”). SWGDE membership represents a vast array of organizations such as federal, state, local government and law enforcement agencies, higher education institutions, international agencies and standards creating bodies that are actively engaged in the field of digital and multimedia evidence. SWGDE’s mission is to foster communication and cooperation as well as ensuring quality and consistency within the forensic science community. This scientific working group (SWG), established in 1997, has enjoyed international recognition as a result of its long-standing dedication to excellence.

SWGDE utilized the direct knowledge and familiarity of its membership with the issues raised in the National Research Council of the National Academies report “Strengthening Forensic Science in The United States: A Path Forward” (the “NAS report”), as a cornerstone in its evaluation of the Draft. In June, 2009, in direct response to the NAS report, SWGDE submitted substantive comments to the Subcommittee on Forensic Science (SoFS) of the Executive Office of the President’s Office of Science and Technology Policy, National Science and Technology Council’s Committee on Science. A copy of that SWGDE response is available through the SWGDE website (www.swgde.org) at the following link:

<http://swgde.org/documents/swgde2009/Position%20on%20the%20National%20Research%20Council%20Report%20to%20Congress.pdf>.

Clarification on the functionality of highly regarded SWGs, such as SWGDE, is essential for understanding our evaluation of the Draft. The forensic SWGs provide a mechanism for the development and dissemination of consensus-based guidelines and recommendations in the areas of education, certification, training, procedural methodologies, quality assurance and quality control. SWGs have been in existence for years with some obtaining recognition in the early 90’s for their activities in the development of guidelines, practices and supporting research. SWGDE documents have been cited in federal and state court decisions, utilized by numerous international standards developing bodies (e.g., International Organization on Computer Evidence (IOCE), European Network of Forensic Science Institutes (ENFSI), International Organization for Standardization/International Electrotechnical Commission (ISO/IEC), and, American Society for Testing and Materials (ASTM) International) and are referenced daily by

countless federal, state, and local government agencies. To ensure SWGDE upholds the highest professional ideals, SWGDE maintains an open membership, conducts three meetings annually, has an active resource-oriented website, and engages in proactive dissemination of information relating to its work. The current structure and delegation of responsibilities within SWGDE (and, we believe, also in a number of other SWGs) parallels the proposals for “subcommittees” as described in the Draft. Therefore SWGDE recommends replacement of the term “subcommittee” with “Scientific Working Group” throughout the Draft.

SWGDE believes the Draft (and associated legislation) should contain definitions of a number of key terms, including “laboratory”, “peer-review”, and “qualified professional organizations”. The below suggestions are made with the knowledge those terms have not yet been defined and are to some extent qualified due to the lack of precise definitions.

Accreditation:

The intent to ensure compliance with accreditation across all forensic laboratories is commendable. However, prior to the implementation of such legislation sustained funding must exist and be distributed to support those agencies that do not have adequate funds and resources for initial implementation and thereafter to support ongoing annual compliance requirements.

Regarding the authority and duties proposed to be assigned to the Forensic Science Commission (FSC) in the area of accreditation, fully functional and highly regarded accreditation bodies already exist that can and will meet the specifications identified in the Draft (e.g., American Society of Crime Laboratory Directors-Laboratory Accreditation Board (ASCLD-LAB), Forensic Quality Services (FQS), The American Association for Laboratory Accreditation (A2LA)). These existing accreditation bodies already are held accountable to an oversight structure that would take precedence over the FSC’s listed responsibilities. Therefore assignment of those duties to the FSC, per bullets #2, #3 and #4 of the Draft, is not necessary.

Certification:

SWGDE recognizes the value and importance of individual certification and supports the concept that all practitioners must be certified in their discipline if such certification is available. If this foundational assumption is accepted SWGDE believes further delineation of duties as specified in bullets #1 and #2 of the Draft are not necessary.

To ensure the highest level of certification the process must receive approval or recognition by an accredited certifying body such as the Forensic Specialty Accreditation Board (FSAB). The overarching evaluation of these bodies eliminates the need to insert the FSC into the determination of certification for the disciplines. It is further proposed that bullets #3, #4, #6, and #7 of the Draft are not necessary and impinge on the duties of the relevant, already recognized, certifying body.

SWGDE is concerned that the Draft does not address how to deal with individuals in training who seek certification and work in an accredited facility. We believe that legislation should

include provisions relating to such personnel. Such legislation might include, for example, a grace period until appropriate training and experience is attained.

SWGDE supports any effort to increase the accuracy and reliability of expert witness testimony. In view of the other provisions described in the Draft, as well as existing case law decisions, we do not believe that amending the Rules of Criminal/Civil Procedure or the Rules of Evidence is necessary at this time.

Research:

SWGDE would like to offer a few points for consideration relative to the research section of the Draft. Although it is commendable to delegate the oversight of research to the National Institute of Standards and Technology (NIST), many existing federal agencies have long histories involving credible, objective scientific research in forensic science. Those agencies, as well as the fruits of that research, have achieved widespread respect and recognition. Dwindling research funds are presently cutting many of these research programs to the bare bone. SWGDE believes further reallocation/reduction of those research funds will decimate the programs. Therefore SWGDE recommends the FSC, in conjunction with NSF, coordinate with the broad-based scientific R&D community (e.g., NIST, DoD, DHS S&T, FBI, NIJ) to administer programs to fund peer review research in areas consistent with both the research priorities developed by the FSC and the research needs identified by practitioners and the SWGs.

The establishment of collaboration between the FSC and the broad scientific R&D community (as identified above) on research objectives will serve to better coordinate funding to research needs and priorities. The listed broad-based scientific R&D community, in conjunction with the FSC, would meet quarterly to coordinate efforts and reduce redundancy. SWGDE believes this will reduce duplicative efforts, invigorate practitioner input to R&D, and optimize existing federal research capabilities. Limiting this effort to the entities listed in bullets #5 and #6 of the Draft would hinder these objectives and may provide justification for the continuation of past activities that have proven to be inadequate.

SWGDE believes the proposed research funding, as outlined in the Draft, should specify that any new funds that should not be reallocated from existing forensic research budgets. This should be a separate funded line item for research administered by the listed broad-based scientific R&D community. SWGDE believes Congress should continue to authorize individual annual agency budgets that support agency R&D (e.g., NIST, DoD, DHS S&T, FBI, NIJ) as long as the agencies submit annual reports to the FSC.

Standards/Best Practices:

SWGDE believes the majority of the bullets in this section of the Draft are activities already overseen by the existing fully functional SWGs. SWGDE shares the concern that not all SWGs function at the same high level and therefore are subject to valid criticism for their lack of

consensus, lack of open representation, and failure to communicate. To eliminate these criticisms the FSC would be responsible for bringing all SWGs to the same level of accountability and professionalism.

It is imperative that the FSC understands the term “standard”. The concept of “standard” must be limited to those documents processed through a Standards Developing Organization (SDO). Forensic science related guidelines, protocols, etc., intended to become standards must follow a SDO process prior to their being promulgated as standards. The SWGs, in conjunction with the FSC, should identify the appropriate SDO. For example, the International Organization for Standardization (ISO) is recognized worldwide as a compilation of national standards bodies that are organized to promote the development of standardization and related activities. SDO’s such as ISO already have in place manuals that guide and educate users through the standard process therefore bullet #5 of the Draft is duplicative and unnecessary.

The FSC is responsible for the overseeing of enforcement of the standards once they have attained “standard” status.

Oversight and Coordination:

Many of the activities listed under this section of the Draft have been addressed above in this letter. SWGDE agrees that the FSC should consult regularly with the directors/senior officials of federal agencies affected by this legislation. The FSC’s interagency authority should be more clearly defined and an unambiguous definition of scope of authority seems essential to its success.

To address bullets, #4, #5, #6, #7 and #8 of the Draft, the FSC should acknowledge current SWGs and work towards strengthening the SWG’s level of recognition, authority, and stance within the scientific community. Currently seventeen established SWGs exist to address the issues identified in this section of the Draft. As mentioned at the beginning of this letter, the detailed duties of the proposed “subcommittees” within the Draft mimic the current SWG structure and delegated responsibilities.

Of particular concern, bullet #7 of the Draft asserts that the FSC Deputy Director is the appointing authority for members of the various subcommittees. This process, entailing one individual as the sole appointing authority, has the real potential to introduce bias or prejudice into the composition of the subcommittee members. This approach seems to be in direct conflict with the NAS report.

The NAS report provides strong justification for utilizing NIST’s attributes and assigning SWG oversight to this agency comports with the NAS direction. The establishment of a SWG Program Office at NIST also provides a sound establishment of the SWGs in an unbiased, scientific, and metrological environment. This centralized focal point ensures the support, infrastructure, and commonality amongst the SWGs to attain the highest level of professionalism.

SWG chairs have discussed the possibility of the NIST/SWG management model and while no major objections were noted it was agreed that implementation is dependent on dedicated funding. The FSC should provide support to NIST for the complete implementation of this effort and initiate the appropriation of continuous funding and legislative language to ensure sustainability, uniformity and accountability. This established program, along with the proposed cooperative effort between the FSC and NIST, further promotes the idea of the “subcommittee” being comprised of the SWG. If, upon reviewing our recommendations, the subcommittee concept is still preferred, then SWGDE would strongly urge the inclusion of the SWGs in all coordination and consultation efforts.

The point brought out in bullet #9, sub-bullet #2, of the Draft describes the authority of the FSC to identify and expand forensic science educational programs. An organization already exists that evaluates educational requirements in forensic science degree programs and related fields. One of the American Academy of Forensic Sciences (AAFS) committees is the Forensic Science Education Programs Accreditation Commission (FEPAC). FEPAC has an established accreditation mechanism to thoroughly review academic curricula and a means to advertize those institutions that achieved accreditation. SWGDE does not see a need to duplicate these efforts as another duty assigned to the FSC but would welcome FSC’s acknowledgment and monetary support to continue and expand the program.

Similarly, as proposed in bullet #9, sub-bullet #8, of the Draft, numerous Codes of Ethics have already been written, published and accepted by institutions such as AAFS, ASCLD/LAB and many of the SWGs. To address the concerns raised in the NAS report the Council of Federal Forensic Laboratory Directors (CFFLD) adopted the ASCLD/LAB Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists to control and unify all federal forensic crime laboratories. Rather than developing a new Code of Ethics, SWGDE recommends following the CFFLD’s action by allowing for the adoption one of the existing published Codes of Ethics.

In closing, SWGDE would like to reiterate the unanimous desire of its members to participate in any discussion relating to the creation or adoption of legislation as it relates to forensic science and the possible impact it will have on the discipline of Digital and Multimedia Evidence. All resources of SWGDE remain available to you and the Senate Committee of the Judiciary to support these efforts. If you so desire, please contact James Darnell at 918.582.2297.

Thank you for allowing us to comment on the Draft. Please contact the undersigned if you have any questions. SWGDE looks forward to working with the Committee, its members, and staff.

Sincerely,



James Darnell
SWGDE Chairman

Cc: Senator Jeff Sessions
Senator Herb Kohl
Senator Dianne Feinstein
Senator Russ Feingold
Senator Arlen Specter
Senator Chuck Schumer
Senator Dick Durbin
Senator Benjamin L. Cardin
Senator Sheldon Whitehouse
Senator Amy Klobuchar
Senator Ted Kaufman
Senator Al Franken
Senator Orrin G. Hatch
Senator Chuck Grassley
Senator Jon Kyl
Senator Lindsey Graham
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Mr. Noah Bookbinder, Senator Leahy Chief Counsel
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