

FISC Bulletin Board

IAAI Fire Investigation Standards Committee (FISC)

and
Wayne J. McKenna, Esq.

TRENDING: UNIVERSAL ACCREDITATION FOR PUBLIC AND PRIVATE FIRE INVESTIGATION SERVICE PROVIDERS

Introduction

This column is a call to attention.

For some time now, the authors have been urging members of the fire investigation community to track developments flowing from the renowned report published by the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward (the "NAS Report")*.² One upshot of the NAS Report is a movement towards mandatory universal accreditation of all public and private organizations³ providing fire investigation services for "criminal, civil, regulatory, or administrative proceedings."⁴ This article introduces this "universal accreditation initiative," including the steps leading up to its development and potential implications for organizations providing fire scene investigation services.

2. Events Leading Up to the Universal Accreditation Initiative

We begin by recounting the events leading up to the universal accreditation initiative. In 2009, the *NAS Report* was published. Taking more than two years to prepare, the *NAS Report* is over 300 pages in length and contains an overview of multiple problems relating to forensic sciences and the law in both criminal and civil cases. It also analyzes the strengths and weaknesses of individual disciplines, including laboratory analysis of explosives evidence and fire debris, as well as fire scene investigations.

At the heart of the *NAS Report* is this conclusion:

In short, the quality of forensic practice in most disciplines varies greatly because of the absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight.⁵ [Footnotes omitted.]

Given this conclusion, it is not surprising that of the 13 specific recommendations made by the *NAS Report* to address issues in the forensic sciences, one was for mandatory accreditation and certification. Recommendation 7 provides that, "[I]aboratory accreditation and individual certification of forensic science practitioners should be mandatory."⁶

This recommendation has received little attention in the fire investigation community beyond those who are particularly concerned with forensic laboratories. This is perhaps understandable, as only a very brief section of the *NAS Report* addresses fire scene investigations.⁷ Further, Recommendation 7 is for mandatory "laboratory accreditation," [emphasis added] rather than mandatory accreditation for organizations providing fire scene investigation services. However, recent developments arising from the *NAS Report* could bring fire investigation organizations under the purview of the universal accreditation initiative.

In 2013 the federal government took a major step in responding to the *NAS Report* by announcing its decision to establish a "National Commission on Forensic Science" (the Commission) as part of a new initiative to strengthen and enhance the practice of forensic science.⁸ The Commission is a collaborative effort of the US Department of

... continued on page 34

Justice (USDOJ) and the National Institute of Standards and Technology (NIST). Here is the purpose of this new initiative:

The new initiative provides a framework for coordination across forensic disciplines under federal leadership, with state and local participation. The Department of Justice, through its involvement in the commission, will take an active role in developing policy recommendations and coordinating implementation. The NIST-administered guidance groups [now known as Organization of Scientific Area Committees or NIST-OSAC] will develop and propose discipline-specific practice guidance that will become publicly available and be considered for endorsement by the commission and the Attorney General. This coordinated effort will help to *standardize national guidance for forensic science practitioners.*⁹ [Emphasis added.]

On January 10, 2014, USDOJ and NIST announced the newly appointed members of the Commission.¹⁰ Membership includes a broad representation of experts selected from leaders and stakeholders in the government, forensic science, and legal communities.¹¹

The Commission's Charter states its Objectives, which include:

[T]o provide recommendations and advice to the Department of Justice (DOJ) concerning national methods and strategies for: strengthening the validity and reliability of forensic sciences . . .; enhancing quality assurance and quality control in forensic science laboratories and units; identifying and recommending scientific guidance and protocols for evidence seizure, testing, analysis, and reporting by forensic science laboratories and units; and identifying and assessing other needs of the forensic science communities to strengthen their disciplines and meet increasing demands generated by the criminal and civil justice systems at all levels of government. . . .¹²

A key question arises from reading these broad-ranging objectives: How does the Commission define the "forensic science laboratories and units" as covered by these objectives? The answer to this question has not been decided with finality at the time of writing this article. However, a subcommittee of the Commission has proposed the following definitions for the purposes of the Commission's work products:

Forensic Science – The application of scientific practices to the recognition, collection, analysis, and interpretation of physical evidence for criminal and civil law or regulatory purposes.

Forensic Science Service Provider – A person or entity that (1) applies scientific practices to recognizing, collecting, analyzing or interpreting physical evidence and (2) issues test results, provides reports, or provides interpretations, conclusions, or opinions through testimony with respect to such evidence.

On a plain reading, it appears that these definitions are broad enough to include fire scene investigations. As we will see in the next section, with specific reference to the universal accreditation initiative, it is much more apparent that its scope includes fire scene investigations.

3. Status of Universal Accreditation Initiative

This section introduces what we have termed the universal accreditation initiative. This initiative is the brainchild of the Commission's Accreditation and Proficiency Testing Subcommittee (the Subcommittee). Its initiative is supported by the many references to the benefits of mandatory accreditation in the *NAS Report*.

In November 2014, the Subcommittee prepared and posted for public comment a draft recommendation for mandatory universal accreditation of forensic science service providers (FSSPs). Following its review of a relatively paltry number of public comments, the Subcommittee prepared a revised *Final Draft Policy Recommendation on Universal Accreditation*.¹⁴ This *Recommendation* failed to receive the required 2/3 vote of the Commission in its fifth meeting held at the end of January 2015. If it had received sufficient votes, the Commission would have passed the *Recommendation*, and then forwarded it to the United States Attorney General for consideration.¹⁵ As the *Recommendation* did not receive the requisite votes, the Commission returned it to the Subcommittee for further deliberation.¹⁶

While the authors cannot predict what further changes will be made to this *Recommendation*, it seems clear that there will be some form of mandatory universal accreditation policy recommendation submitted to the Attorney General in the foreseeable future. It would be wise for public and private organizations providing fire scene investigation services to track this development and prepare for changes to come.

4. Highlights of Draft Universal Accreditation Policy Recommendation

The *Final Draft Policy Recommendation on Universal Accreditation* states its position very simply:

It is recommended that all Forensic Science Service Providers (FSSP) become accredited.¹⁷

The *Recommendation* goes on in its “Statement of Issue,” to say:

The National Academy of Sciences (NAS) Report set forth 13 recommendations for forensic science services providers (FSSPs) to move towards best practices, standardization and improving the quality of services including universal accreditation of FSSPs. Many FSSPs currently providing services in furtherance of **criminal, civil, regulatory or administrative proceedings** in the United States are not accredited to any national or international standard. **To achieve universal accreditation the Commission recommends that the Attorney General take several actions to promote and enforce universal accreditation.**¹⁸ [Emphasis added.]

The *Recommendation* goes on to outline a five-point implementation strategy to achieve the goal of universal accreditation.¹⁹

One might assume that any federal government initiative of this nature would be limited to organizations and agencies within the jurisdiction of the federal government, but the *Recommendation* is cast much more broadly. As stated above, its goal is to improve FSSPs providing services for “criminal, civil, regulatory, or administrative proceedings in the United States.”²⁰ Further, the universal accreditation recommendation is intended to include providers of public AND private fire scene investigation services, even those providing such services on a part-time basis.²¹

However, even though the aim of the subcommittee drafting the *Recommendation* is eventually to achieve “universal” accreditation of FSSPs, as its title suggests, the implementation strategy reflects the limits of its enforceability. Even if the Commission ultimately approves a proposal for universal accreditation of FSSPs, all that will happen at that point is the Commission will forward it to the Attorney General for consideration.²²

If the Attorney General accepts the recommendation, and assuming it contains an implementation strategy as set out in the current *Recommendation*, its effect will vary. It will become applicable to DOJ FSSPs, allowing a five-year period for them to achieve accreditation. DOJ funding for non-DOJ FSSPs will be tied to accreditation, and federal

prosecutors will be required to contract with accredited FSSPs or those on the path to accreditation. For state and local jurisdictions, universal accreditation would be a model to follow, with the Attorney General “encourage[ing] by all means possible the universal accreditation of all non-DOJ FSSPs with any enforcement mechanisms.”²³ Over time, pressures from others such as peers, competitors, clients, and the legal community will probably motivate many FSSPs to seek accreditation.

Now, having considered the potential application of a universal accreditation recommendation that the Commission might pass, let us consider more closely the definition of a FSSP. The *Recommendation* defines a FSSP as:

A person or entity that
1) recognizes, collects, analyzes, or interprets physical evidence AND (2) issues test or examination results, provides laboratory reports, or offers interpretations, conclusions, or opinions through testimony with respect to the analysis of such evidence.²⁴

For clarification, in an appendix to the *Recommendation*, the Subcommittee provides examples of functions that are included in this definition. These functions include those in public or private practice, who provide services for the investigation of a “crime scene”, for example “fire investigation” and “crime scene reconstruction.” However, the *Recommendation* limits its provisions to those who are “recogniz[ing], collect[ing], analyz[ing], or interpret[ing] physical evidence,” by stating that, “Providers that render opinions based only on the review of data from examinations conducted by other entities should not be impacted by this recommendation.”

In understanding the scope and potential impact of the *Recommendation*, it is important to appreciate the difference between accreditation and certification, as well as the relationship between these two concepts. Appendix B to the *Recommendation* helpfully clarifies these concepts and makes clear that it does not address certification. These differences are very important to understanding the scope of the *Recommendation*, so we are reproducing them here:

Accreditation is an independent third-party assessment of a **FSSP’s** (which can consist of one or many practitioners) quality, administrative and technical systems. Accreditation uses specific criteria and procedures based upon accepted standards to ensure the quality of the FSSP’s management system by examining staff competence, training and continuing education; method validation; appropriateness of test methods; traceability of measurements and calibrations

... continued on page 36

to national standards; suitability, calibration and maintenance of test equipment; testing environment; documentation, sampling and handling of test items; and quality assurance of data including reporting results and proficiency tests.

Professional certification, which is not addressed in this document, is the recognition by an independent body that an **individual** has acquired and demonstrated specialized knowledge, skills, and abilities in the standard practices necessary to execute the duties of their profession. Certification programs can include: written and/or practical testing; an evaluation of education, training and practical experience; requirements for continuing education; and adherence to a code of ethics. Certification does not assess the quality, administrative and technical systems used by the individual in their work. It also does not assess methods, procedures, testimony, reports, documentation, equipment, validation, measurement uncertainty, facilities, evidence handling, security, safety procedures used by the individual.

Accreditation and Certification are very different programs that assess and evaluate different aspects of forensic practitioners and FSSPs. They are not interchangeable but both are necessary to strengthen forensic science. [Emphasis in the original.]²⁷

In addition to the matters quoted above, the *Recommendation* includes the following sections: "Background," "Benefits of Accreditation," "Challenges to Achieving Accreditation," and "Proposed Implementation Strategy." We encourage our readers to access the *Recommendation* online at https://edit.justice.gov/sites/default/files/ncfs/pages/attachments/2015/01/21/universal_accreditation_-_final1.13.15.pdf and become familiar with its content and the potential implications for their organizations or employers.

Keep in mind that the Commission has returned the *Recommendation* to the Subcommittee for further deliberations. It is therefore difficult to predict with any certainty what changes might occur in its next proposal or when the Subcommittee will issue a new draft recommendation. However, as the Subcommittee is taking its lead from the recommendations in the *NAS Report* it does seem likely that some form of mandatory universal accreditation will ultimately result from these efforts. To track developments respecting this universal accreditation initiative, access the DOJ website at <http://www.justice.gov/ncfs>, and then click the "Work Products" link and the "Meetings" link. Look for materials dealing with "universal accreditation."

5. Conclusion

While the *Recommendation* is quite short, four pages in its entirety including appendices, it is potentially groundbreaking for fire scene investigation organizations. If the essential components are retained in the policy recommendation that we expect will eventually be passed by the Commission, this universal accreditation initiative has far-reaching implications:²⁸

- It could apply to private providers of fire scene investigation services, which could include private fire investigation companies, investigation units in insurance companies, and in-house investigation units in corporations or law firms.
- It could apply to public providers of crime scene and fire scene investigation services, including police and fire departments, as well as fire investigation units in volunteer or combination fire departments.
- It could apply to investigators handling civil as well as criminal investigations.
- There are significant costs of time and money associated with accreditation. While the outcome of accreditation is improved quality control and quality assurance, the associated costs could be substantial. These costs could be particularly onerous for small or volunteer organizations.

As we discussed earlier, even if the Commission passes a universal accreditation proposal, there are barriers to the Attorney General's ability to enforce it against all of the FSSPs that it catches in its broad scope. However, even in its draft form, it raises awareness amongst the fire investigation and legal communities about the importance of quality assurance, quality control, and proficiency testing. Accreditation will generally require FSSPs to demonstrate that they follow industry standards, guidelines, and best practices. One would expect that in time, as the legal community recognizes the benefits of accreditation, new avenues will open up in both civil and criminal cases to challenge the admissibility or weight of expert testimony offered by those who work for unaccredited FSSPs.

There are definitely challenges to obtaining accreditation, as the *Recommendation* acknowledges; however, the benefits outweigh these challenges. This is particularly so when viewed from the ultimate goal of achieving justice when forensic science evidence is used in court.

While accreditation will be new for many FSSPs, there is a growing body of fire and police organizations that are either accredited or on the road to accreditation. See for

example programs provided by the Center for Public Safety Excellence, whose accreditation program is administered by the Commission on Fire Accreditation International (CFAI) (<http://publicsafetyexcellence.org/agency-accreditation/about-accreditation-cfai.aspx>), and the Law Enforcement Accreditation Program established by CALEA (<http://www.calea.org/content/law-enforcement-accreditation>). A visit to these websites shows that a growing number of fire and emergency services organizations and law enforcement agencies are voluntarily pursuing accreditation to improve the services they provide. One would hope that the gap can be bridged between these accreditations and the ISO/IEC accreditation standards that will likely be required by the Subcommittee's revised policy recommendation.²⁹

There are also moves towards fire investigation accreditation on the international front. IAAI President Peter Mansi informs us that:

In the United Kingdom, the IAAI UK Chapter has recently voted to be the 'professional body' for fire investigators and have been actively composing a 'protocol for fire investigations' for the UK Forensic Regulator, which is a stepping stone towards ISO 17020, *General Criteria for the Operation of Various Types of Bodies Performing Inspection*. It is this standard that the UK Forensic Regulator is striving towards for all forensic practitioners and organizations for the very same reasons that are being proposed in the US.

ISO 17020 is also the accreditation standard that would apply to fire investigators in the United States if the Commission ultimately passes some variation of the current *Recommendation*.

In closing, we see this universal accreditation initiative as a harbinger of things to come. A careful reading of the *NAS Report*, together with the other initiatives of the Commission and the NIST-OSAC,³⁰ suggests that a **mandatory universal certification** initiative for fire investigators is not far behind.

There are two final thoughts we would like to leave you with: 1) KNOWLEDGE IS POWER; and, 2) DO NOT SHOOT THE MESSENGERS! As always, do not hesitate to be in touch with us with your comments or suggestions for topics of future FISC Bulletin Boards.³¹

Acknowledgements

Thanks to the FISC members for their continued work of suggesting ideas for this column and writing or reviewing drafts. These FISC members are: Steven J. AVATO, Mark A. BEAVERS, Ross BROGAN, Mike DONAHUE, Mike HIGGINS, Rick JONES, Raymond J. KUK, Glenn LAUPER, Hal C. LYSON, Peter MANSI, Major J. Ron McCARDLE, Wayne J. McKENNA, Rick MERCK, Angelo PISANI, Jr., Christopher D. PORRECA, Gerard H. (Jerry) RUDDEN, Joe SESNIAK, Amanda SILVA, Mark A. TEUFERT, Joe TOSCANO, George A. WENDT, Jeff WILLIAMS.

Particular thanks to those who contributed to this article, including FISC member Raymond J. Kuk, Section Chief, Arson & Explosives II, ATF Forensic Science Laboratory – Washington, who drew our attention to the significance of the universal accreditation project for fire investigators, thereby providing the idea for this column. Also, to Carl Chasteen, Chief of Forensic Services, Bureau of Forensic Fire and Explosives Analysis, Division of State Fire Marshal, Florida, for alerting us to the public comment opportunities in responding to draft work products of the Commission's subcommittees, and John Lentini, CFI, D-ABC, Scientific Fire Analysis LLC, who updated us on the results of the Commission's vote on this Recommendation. I also appreciate the help of my partner and fellow FISC member, Wayne J. McKenna for his work in co-authoring this article, and the contributions of the following FISC members who provided their insights and feedback in its drafting: Raymond Kuk, Peter Mansi, Joe Sesniak, Glenn Lauper, Ron McCardle, Joe Toscano, Ross Brogan, and Jeff Williams.

... continued on page 38

Endnotes

¹For more detail on the impact of the *NAS Report* on fire investigators, see Terry-Dawn Hewitt & Wayne J. McKenna, *A Perfect Storm Brewing for Fire Investigators in Court* (2014, 79 pgs.), available for free download from the Legal Scholarship Network: <http://ssrn.com/abstract=2381519>.

²COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter *NAS REPORT*].

³ACCREDITATION AND PROFICIENCY TESTING SUBCOMMITTEE OF THE NAT'L COMM. ON FORENSIC SCI., FINAL DRAFT WORK PRODUCT AS SUBMITTED FOR VOTE (2015), available at: http://www.justice.gov/sites/default/files/ncfs/pages/attachments/2015/01/21/universal_accreditation_-_final1.13.15.pdf [hereinafter *UNIVERSAL ACCREDITATION FINAL DRAFT WORK PRODUCT*], at 2, 3, & App. A.

⁴UNIVERSAL ACCREDITATION FINAL DRAFT WORK PRODUCT, *supra* note 3, at 1.

⁵NAS REPORT, *supra* note 2, at 6.

⁶NAS REPORT, *supra* note 2, at 25.

⁷ NAS REPORT, *supra* note 2, at 172–3 (*citations omitted*).

⁸*Department of Justice and National Institute of Standards and Technology Announce Launch of National Commission on Forensic Science*, NIST LAW ENFORCEMENT STANDARDS OFFICE (Feb. 15, 2013) <http://www.nist.gov/oles/doj-nist-forensic-science021513.cfm>.

⁹*Id.*

¹⁰*U.S. Departments of Justice and Commerce Name Experts to First-ever National Commission on Forensic Science*, U.S. DEPT. OF JUSTICE, OFFICE OF PUBLIC AFFAIRS (Jan. 10, 2014) <http://www.justice.gov/opa/pr/2014/January/14-at-029.html>.

¹¹*Members*, U.S. DEPT. OF JUSTICE, NAT'L COMM. ON FORENSIC SCI., (updated Feb. 15, 2015) <http://www.justice.gov/ncfs/members>.

¹²CHARTER OF THE NAT'L COMM. ON FORENSIC SCI., (Mar. 18, 2013), available at: <http://www.justice.gov/sites/default/files/ncfs/legacy/2014/05/13/ncfs-charter.pdf>, para. 3.

¹³SUBCOMMITTEE OF THE NAT'L COMM. ON FORENSIC SCI., *Initial Draft Views Document on Defining Forensic Science and Forensic Science Service Provider* (Oct. 2014) available at: http://www.justice.gov/sites/default/files/ncfs/pages/attachments/2014/10/24/draft_views_document_on_defining_fs_and_fssp_-_final.pdf.

¹⁴ACCREDITATION AND PROFICIENCY TESTING SUBCOMMITTEE OF THE NAT'L COMM. ON FORENSIC SCI., *Final Draft Policy Recommendation on Universal Accreditation* (2015), <https://edit.justice.gov/>

[sites/default/files/ncfs/pages/attachments/2015/01/21/universal_accreditation_-_final1.13.15.pdf](http://www.justice.gov/sites/default/files/ncfs/pages/attachments/2015/01/21/universal_accreditation_-_final1.13.15.pdf), [hereinafter *UNIVERSAL ACCREDITATION RECOMMENDATION*], at 1.

¹⁵NAT'L COMM. ON FORENSIC SCI., *Work Product Development Process* (2015), http://www.justice.gov/sites/default/files/ncfs/pages/attachments/2015/02/13/ncfs_process_for_work_product_developmentfinal.pdf [hereinafter *WORK PRODUCT DEVELOPMENT PROCESS*].

¹⁶March 2, 2015 email from Brette Steele, Senior Advisor on Forensic Science and Senior Counsel, Office of the Deputy Attorney General to Terry-Dawn Hewitt, McKenna Hewitt.

¹⁷UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 1.

¹⁸UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 1.

¹⁹UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 3.

²⁰UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 1.

²¹UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 2, 3, & App. A.

²²WORK PRODUCT DEVELOPMENT PROCESS, *supra* note 15, at 2.

²³UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at 3.

²⁴UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at fn. 1.

²⁵UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at App. A.

²⁶UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at fn. 1.

²⁷UNIVERSAL ACCREDITATION RECOMMENDATION, *supra* note 14, at App. B.

²⁸These implications are solely the opinions of the authors, and not the IAAI or other FISC members.

²⁹The current *UNIVERSAL ACCREDITATION RECOMMENDATION* requires FSSPs to use accrediting bodies that submit to and are in compliance with ISO/IEC 17011 and are a signatory to the ILAC MRA. Accreditation shall be to internationally recognized standards (at a minimum ISO/IEC 17025, General Requirements for the Competence of Testing and Calibration Laboratories, ISO/IEC 17020, General Criteria for the Operation of Various Types of Bodies Performing Inspection and, ISO 15189, Medical laboratories - Particular Requirements for Quality and Competence) including all appropriate supplemental standards. Of these, ISO/IEC 17020 is the most appropriate standard for FSSPs providing fire scene investigation services but not laboratory testing services.

³⁰See NIST ORGANIZATION OF SCIENTIFIC AREA COMMITTEES (updated Mar. 3, 2015) <http://www.nist.gov/forensics/osac.cfm>.

³¹Terry-Dawn Hewitt can be reached at TDHewitt@McKennaHewitt.com