



NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST
National Institute of
Standards and Technology
U.S. Department of Commerce

Views of the Commission Pretrial Discovery of Forensic Materials

Subcommittee	Approved by Commission	08/11/2015
Reporting and Testimony		

Commission Action

The Commission voted to adopt this Views Document on August 11, 2015, by a more than two-thirds majority vote (86% yes, 10% no, 3% abstain).

Note: This document reflects the views of the National Commission on Forensic Science and does not necessarily represent the views of the Department of Justice or the National Institute of Standards and Technology. The portion of the document directly labeled “Views of The Commission” represents the formal Views of the Commission. Information beyond that section is provided for context. Views documents do not request specific action by the Attorney General, and thus do not require further action by the Department of Justice upon their approval by the Commission. The National Commission on Forensic Science is a Federal Advisory Committee established by the Department of Justice. For more information, please visit: <https://www.justice.gov/ncfs>.

Overview

The key values of honesty and openness are essential for science to progress, and this is no less true when the science is intended to be utilized in the legal process. When forensic science evidence is part of a criminal case, the complexities and variability of forensic science make appropriate a substantial advance disclosure of the items examined; the kinds of analyses conducted and methods used to evaluate those items; the testing conducted on those items; the observations made; the opinions, interpretations, and conclusions reached; and the bases for those observations, opinions, interpretations, and conclusions. This is necessary to enable the legal process to deal effectively with such evidence in the immediate case and for forensic science to improve in the future. The National Commission on Forensic Science, therefore, believes that the interaction of forensic science with the courtroom and with the fair administration of the criminal law will be greatly enhanced by such substantial advance disclosure, leading to more careful analysis of such evidence and, in the end, more just results in the cases in which such evidence is utilized as well as betterment of the science itself. Toward that end, the National Commission on Forensic Science endorses the foregoing four principles to guide the parties and policymakers in criminal cases when deciding how to determine the scope and timing of pre-trial access to information about forensic evidence generated for the purpose of criminal litigation.

Views of the Commission

1. When a party proposes to use forensic evidence in a criminal case, the adversary party should be provided with access to the underlying items examined (if reasonably available) as well as with detailed information about the kinds of analyses conducted and methods used to evaluate those items; the testing conducted on those items; the observations made; the opinions, interpretations, and conclusions reached; and the bases for those observations, opinions, interpretations, and conclusions.
2. Access to such information should be made in sufficient time for the adversary party to make effective use of it.
3. Access to such information should be equally available to both sides, regardless of which side is proposing to use the evidence.
4. Access to such information should be enforceable by the parties through the courts.

Background

The above four principles may be briefly elaborated, as follows:

1. *Substantial Advance Access*

Peer review is central to assessing the validity of all scientific assertions. If such review is to be meaningful in the case of forensic science, the variable and sometimes controversial nature of forensic science requires full access to the underlying items examined (if reasonably available); the kinds of analyses conducted and methods used to evaluate those items; the testing conducted on those items; the observations made; the opinions, interpretations, and conclusions reached; and the bases for those observations, opinions, interpretations, and conclusions. The functional equivalent of peer review in the legal system is the adversarial process, by which the parties get to examine and cross-examine proffered evidence. In the case of forensic science evidence, this process cannot function effectively if the competing parties are not given substantial advance access to the underlying items examined (if reasonably available); the kinds of analyses conducted and methods used to evaluate those items; the testing conducted on those items; the observations made; the opinions, interpretations, and conclusions reached; and the bases for those observations, opinions, interpretations, and conclusions, because otherwise, the parties are in no position to meaningfully confront the evidence.

Moreover, this is not just a matter of providing substantial advance disclosure to secure adequate confrontation at trial. As the Supreme Court has recognized, the overwhelming majority of criminal cases are currently resolved through plea bargains. Where such plea bargains are premised in material part on the existence of relevant forensic science evidence, the negotiations leading to the plea bargain cannot be fairly arrived at without the parties having sufficient access to the aforesaid information and evidence to allow them to meaningfully evaluate it.

2. *Timeliness of Disclosure*

It follows from the above that, to be useful, such disclosure must occur sufficiently soon after indictment for counsel to have adequate time to evaluate the information and evidence.

Although no time requirement fits every situation, and not all discoverable material need be provided at the same time, the more technical the forensic science evidence is and the more central that evidence is to a resolution of the factual and legal issues in the case, the earlier

the disclosure should be.

3. *Reciprocal Access*

We see no basis for advocating that the disclosures discussed above be made only by the prosecution. If the defense chooses to make use of forensic evidence, either at trial or as part of a plea bargain negotiation, it should afford the prosecution the same timely access to information and evidence as would be made by the prosecution in reciprocal circumstances.¹

4. *Enforcement by the Courts*

Rules of access to information and evidence, including timeliness and reciprocity, cannot be effective if they are not enforceable by the courts. This should include not only compliance with statutory requirements and court rules but also enforcement of reciprocal agreements reached by the parties to exchange information about forensic science evidence. For example, although the government, in the interests of justice, might choose to make greater disclosures about forensic science evidence it proposes to use than the law of a particular jurisdiction requires, it might also choose to provide such enhanced disclosures only upon the defense's agreeing to make comparable disclosures in the event the defense chose to introduce forensic evidence. Such agreements, if reduced to writing, should ordinarily be enforceable in court.

¹ It should be noted that we are not addressing situations where one party or another employs a forensic expert to help that party understand, evaluate, or prepare to challenge the other party's forensic expert. In such situations, various doctrines might apply that would bar disclosures by one or both sides, in whole or in part. Our recommendations are here limited to the situations where a party proposes to make use of forensic evidence either at trial (including pretrial motion practice) or in plea negotiations.

More generally, there may be a variety of situations not covered by the four principles here advanced where disclosure of forensic science information may or may not be appropriate. This Views document takes no position on such issues, which may or may not be the subject of subsequent documents.