



NATIONAL COMMISSION ON FORENSIC SCIENCE



Recommendations to the Attorney General Pretrial Discovery

Subcommittee
Reporting and Testimony

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Action by Attorney General	01/06/2017

Attorney General Action

The Department of Justice (DOJ) responded on January 6, 2017, by issuing a memorandum to Department personnel, entitled *Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts*. For more information, please see the Attorney General’s Memorandum at: <https://www.justice.gov/ncfs/page/file/930411/download>.

Commission Action

The Commission voted to adopt this Recommendation on June 21, 2016 by more than a two-thirds majority vote (78% yes, 18% no, 3% abstain).

Note: This document includes recommendations developed and adopted by the National Commission on Forensic Science and proposes specific acts that the Attorney General could take to further the goals of the Commission. The portion of the document directly labeled “Recommendations” represents the formal recommendations of the Commission. Information beyond that section is provided for context. This document does not necessarily represent the views of the Department of Justice or the National Institute of Standards and Technology. 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>.

Recommendations

The National Commission on Forensic Science recommends that the Attorney General take the following actions:

- **Recommendation #1: The Attorney General should direct federal prosecutors, when they intend to offer expert testimony on forensic science test results and conclusions, to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
 - (i) a statement of all opinions the witness will express and the basis and reasons

- for them;**
- (ii) the facts or data considered by the witness in forming them;**
- (iii) any exhibits that will be used to summarize or support them;**
- (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;**
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
- (vi) a statement of the compensation to be paid the witness.**

With three modifications, this Recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B). Because of speedy trial and case management concerns, “reasonably in advance of trial” has been substituted for the 90-days-before-trial disclosure requirement of the Civil Rule, but the Commission expects that “reasonably in advance of trial” will usually mean at least a few weeks before trial and with sufficient time for the defense to consult with and/or secure expert assistance. Also, although the Civil Rule requires “a *complete* statement of all opinions,” the Recommendation excises the word “complete” in the belief that it is at best confusing and at worst unnecessarily burdensome. Finally, the Commission intends that the listing requirement of (v) take effect prospectively, as not all forensic experts may have kept such lists in the past.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert’s case record.**

As depositions of an adversary’s expert witnesses are not permitted in federal criminal cases, access to the expert’s underlying case record is proposed to mitigate the absence of discovery depositions and to allow the adversary party to examine the underlying data on which the expert’s opinions are based (subject to any judicial protective order).

- **Recommendation #3: To the extent the aforementioned disclosures exceed what is presently required by federal law, the Attorney General should authorize federal prosecutors to condition such additional disclosures on the defense’s agreeing to provide the same broad disclosures if the defense intends to offer forensic expert testimony.**

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant who intends to offer expert testimony to give the government the same kind of disclosure that the government is required to give the defendant under 16(a)(1)(G). But because the discovery proposed by the Commission’s recommendations would go beyond what is required by 16(a)(1)(G), it seems only fair for the government, if it chooses, to condition such additional disclosure on the defendant’s agreement that it will make the same broad disclosures if it intends to offer forensic expert testimony of its own (subject to any claim of privilege upheld by the court).

Commentary

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because “it is difficult to test expert testimony at trial without advance notice and preparation.”¹ Indeed, in a number of the cases in which convicted defendants were

¹ Fed. R. Crim. P. 16 (1975), advisory committee’s note.

subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.² There are many other advantages to comprehensive discovery as well. Even in the case of DNA, according to President Bush's DNA Initiative³, "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Providing forensic science test results, opinions, and conclusions reasonably in advance of trial is also critical to facilitating a comprehensive and scientific review of the data. Such disclosures will allow opposing experts to sufficiently review the scientific findings to provide appropriate guidance to counsel and help form their own opinions.

Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as expansive or as timely as in civil litigation. Ironically, this is despite the fact that, under federal law, experts can be deposed in civil cases but not in criminal cases, so that the need for substantial pretrial written disclosure would seem to be even greater in criminal cases than in civil cases if trial by ambush is to be avoided. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.⁴ With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."⁵ Also, there is no evidence that the intimidation of experts is a major problem, both because in federal practice, the expert is often a government employee, and because the evidence can often be reexamined, if necessary, by another expert.⁶ Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science that the defendant intends to offer.⁷

Although Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government, on defendant's request, to provide a summary of a forensic expert's "opinions, the bases and reasons for those opinions, and the witness's qualifications," this provision, perhaps because of the aforementioned history, has often been narrowly interpreted by the government and the courts. By contrast, Federal Rule of Civil Procedure 26(a)(2) not only sets forth in much greater detail what disclosures regarding expert testimony must be made prior to trial but also provides that such disclosure, absent court order, must be made well in advance of trial. The need for meaningful and timely discovery in relation to expert testimony is particularly acute in the case of forensic science, where questionable forensic science has often gone unchallenged. The Commission is therefore of the view that the Attorney General, both as a matter of fairness and also to promote the accurate determination of the truth, should require her assistants to make pretrial disclosure of forensic science more in keeping with what the federal civil rules presently require than the more minimal requirements of the federal

² See Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 108 (2011).

³ National Institute of Justice, *President's DNA Initiative: Principles of Forensic DNA for Officers of the Court* (2005).

⁴ See 2 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 252, at 36-37 (2d ed. 1982).

⁵ Commentary, *ABA Standards for Criminal Justice, Discovery and Procedure Before Trial* 67 (Approved Draft 1970).

⁶ 2 Wayne LaFave & Jerod Israel, *Criminal Procedure* § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").

⁷ See *Williams v. Florida*, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."); *United States v. Nobles*, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate the Fifth Amendment because it involved no compulsion of the defendant).

criminal rules. *See* Recommendation #1, above. Further, in the absence of depositions, the defendant should have access to the expert's case record. *See* Recommendation #2, above. Finally, to the extent permitted by law, the defense should also be reciprocally required to make these enhanced disclosures. *See* Recommendation #3, above.

It should be noted that the foregoing recommendations, designed to achieve the purposes summarized above, are a direct application to the particularities of *federal* practice of the Views Document on Discovery adopted by this Commission on August 11, 2015. Application to *state* practice might require different modifications.