NATIONAL COMMISSION ON FORENSIC SCIENCE

Pretrial Discovery of Forensic Materials

Type of Work Product: Views Document by the Subcommittee on Reporting And Testimony

Adjudication of Public Comments on Draft Document

Public Comment Summary:

There were eighteen public comments received. Ten were from public defender organizations and criminal defense counsel. Four were from forensic crime laboratories or similar groups. One was from a state prosecutor's office. One was from a law professor. Two commentators were anonymous.

Adjudication Process Used by the Subcommittee:

During an in-person meeting of the subcommittee, the views of the various commentators were summarized and discussed. No member expressed a desire to change the current draft, although several indicated that some of the issues raised should be addressed in subsequent Policy and/or Directive documents presently under consideration (see below). Although some additional public comments were received after the in-person meeting of the subcommittee, none raised issues that were not included in the earlier discussion; moreover, some of the issues they raised were further discussed in a subsequent telephone conference of the subcommittee; but, again, no member was persuaded to change the current draft.

Itemized Issues and Adjudication Summary

All of the public comments were thoughtful and well expressed. None expressed disagreement with the overall thrust of the draft.

With respect to Recommendation #1 – describing the forensic science information that should be made available by way of discovery – the single most common comment (primarily from the public defender/criminal defense counsel commentators) was to suggest that the draft make clear that the recommended discovery include access to the underlying "raw data." In the

subcommittee's view, this is already made clear in the first sentence of Recommendation #1 ("the adversary party should be provided with access to the underlying items examined"). Additionally, however, the subcommittee is presently considering a specific Directive draft that would require access to the underlying "case file." Thus, in the subcommittee's view, no change in the current draft is required.

With respect to Recommendation #2 – that access to the discovery materials "be made in sufficient time for the adversary party to make effective use of the information" – a number of commentators wondered whether "sufficient time" was too vague. But as indicated (in effect) in the subsequent commentary on page 2 of the draft, the subcommittee is of the belief that a Views document is not the place to try to define this term with particularity, since it will vary depending on a wide variety of factors and situations. Nevertheless, the subcommittee expects to provide more specificity on timing when addressing more specific situations in subsequent Policy and/or Directive drafts.

Also with respect to Recommendation #2, several of the commentators (such as the prosecutor's office and some of the forensic laboratory commentators) wondered whether the commentary to that Recommendation on page 2 of the draft, dealing with access to forensic evidence in advance of plea bargains, was unrealistic and burdensome in many mundane cases. But the language in the draft itself is quite nuanced, stating only that "Where such pleas 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 [forensic science] information and evidence ...." (emphasis supplied). In other words, the comment in the draft speaks only to those cases in which the forensic science evidence is significant, and even then it will still be up to defense counsel and the defendant to decide in a given case whether to exercise access to that evidence.

With respect to Recommendation #3 – recommending that access to forensic science evidence and information be equally available to both sides– several of commentators noted that this might be problematic under the law of some states, which places limitations on what can be demanded from the defense. But, as the draft points out in the footnote to page 3, the subcommittee is purposely leaving this issue to subsequent documents.

There were no comments on Recommendation #4 (making access to discovery information judicially enforceable).

Finally, a few commentators offered more narrow suggestions, including stylistic and usage recommendations, which the subcommittee also considered but concluded were not sufficiently material and/or persuasive to warrant further change.