NATIONAL COMMISSION ON FORENSIC SCIENCE

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

Adjudication of Public Comments on Initial Draft Document on Pretrial Discovery Recommendations

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Type of Work Product:
Adjudication of Public Comments on Initial Draft Document on Pretrial Discovery Recommendations

Public Comment Summary:
There were nine public comments on this document.

Adjudication Process Used by Subcommittee:
Reviewed by co-chairs and leader of the legal group, and then submitted for comment to the entire 23-person Subcommittee

Itemized Issues and Adjudication Summary:
The comments are adjudicated in the order that they were received by the Commission.

The first comment, from an Anonymous source, noted that the list of cases in which a witness testified has not previously been maintained by many forensic experts. *Response*: The final report makes clear that this requirement is intended to be prospective. Also, all that needs to be provided is the name of the case, the court, and the date on which the expert testified.

The first comment also asked for the term "case file" to be defined. *Response:* To accord with other Commission reports and to eliminate possible ambiguity, the final report replaces "case file" with the term "case record." Moreover, since the instant report is a Recommendation as to what prosecutors should provide, it is left to the Attorney General to make a reasonable determination of what should be covered by the term.

The second comment, from Cecilia Crouse, states as follows: "At the August 11, 2015 NCFS meeting the Commission voted to approve the Pretrial Discovery of Forensic Materials Views document. This [prior] document is comprehensive and in my opinion included most of what is recommended in this newly proposed document." *Response:* The new document is, indeed, drawn directly from the Views document. But the new document is a Recommendation document, intended to make specific recommendations to the Attorney General in order to help her implement the views suggested in Views document and that is why it is a separate document.

The second comment also raises some questions about the wording and scope of the specific recommendations of what the expert witness is supposed to provide in Recommendation #1.
Response: As the final report now makes clear, the wording of Recommendation #1, with three specified modifications, is taken verbatim from Federal Rule of Civil Procedure 26(a)(2)(B), which has been in existence for many years. The scope and meaning of the terms have therefore been the

subject of numerous court decisions, which the Attorney General could readily apply to resolve any ambiguities.

The third comment, from another Anonymous source, suggests that Recommendation #2 is too broad and burdensome, particularly in its reference to the "case file." *Response:* As noted above, Recommendation #2 has been modified in the final report to be limited to the "case record," a term defined in other Commission reports in such a way as to avoid some of the fears expressed by the comment.

The fourth comment, from Ted Hunt, extends over more than five single-spaced pages, and includes a great many very helpful edits, nearly all of which have been accepted in the final report, so only the substantive comments will be discussed here. Overall, the substantive comments are either reservations about the scope of the terms used or questions about the need for the recommendations in light of the wording of Federal Rule of Criminal Procedure 16(1)(G) and other existing requirements. *Response:* Regarding uncertainties about the scope of the terms used, the final report makes clear that nearly all the terms are drawn verbatim from Federal Rule of Civil Procedure 26(a)(2)(B), the scope and meaning of which have very largely been resolved by years of federal judicial decisions interpreting them. As to the need for these Recommendations in light of Federal Rule of Criminal Procedure 16(1)(B), the full Subcommittee discussed both the cases cited by Commissioner Hunt and those cited by Subcommittee members and came to the firm conclusion, as stated in the final report, that Rule 16(1)(B) "has often been narrowly interpreted by the government and the courts." (See also comment eight, below). But even if (contrary to our view), the Recommendations simply mirror what Commissioner Hunt believes the law may currently require, it would still be useful to have the Attorney General reinforce these requirements.

The fifth comment, from still another Anonymous source, recommends a further Recommendation that would require the prosecutors to include in their expert reports any "material that questions the competency and credibility of the expert witness." *Response:* The disclosure of such material, not just for expert forensic witnesses but for all witnesses, is already seemingly required by the Supreme Court's rulings in the *Brady* and *Giglio* cases, which, being constitutionally based, apply across the board. While the commentator partly recognizes this but suggests that "Brady material needs to be defined in more detail," we think this is better left to judicial decisions.

The sixth comment, from Jeffrey Benson, suggests that the Recommendation that the government expert's case record be disclosed not be "predicated on the defense signing an agreement," but adds that "it appears appropriate that both sides agree to allow access to each other's underlying casefiles." *Response:* The final report separates out these two aspects into two separate recommendations, #2 and #3, in order to emphasize the competing considerations that Mr. Benson notes.

The seventh comment, from the National Association of Federal Defenders, strongly supports the report overall, but suggests that language be added to reflect the limits on attorney-expert communications and the like reflected in Civil Procedure Rule 26(b)(4)(B) and elsewhere.
Response: In the final report, language was added to the interpretive note immediately under Recommendation #3 (dealing with reciprocal disclosure) stating that the defense disclosures are "subject to any claim of privilege upheld by the court."

The seventh comment also recommends that the listing of items to be disclosed under Recommendation #1 either be broadened or clarified to include, e.g., "citations to any validation studies." *Response:* As previously indicated, the listing in Recommendation #1 closely tracks the language of Federal Rule of Civil Procedure 26(a)(2)(B). The extensive case law under that Rule is in our view the best guide as to what needs to be disclosed and provides ample guidance for the Attorney General and her prosecutors. Of course, nothing in these Recommendations precludes a defense lawyer from requesting more.

The eighth comment, from William W. Taylor, III, James A. Bensfield, Timothy P. O'Toole, Addy R. Schmitt, May Lou Soller, and Morris "Sandy" Weinberg, Jr, strongly supports the report across the board. It notes that "[e]xpert disclosures in criminal cases often are a single paragraph and contain only the basic outline of the important opinion the expert will give and very little of the basis for it." It argues that, if the Attorney General adopts the report, much more meaningful disclosure will occur.

The ninth comment, from the American Society of Crime Laboratory Directors, Inc., argues that most of Recommendation #1, including the pretrial disclosure of the expert's opinions and bases for them, the data considered by the witness, the exhibits that will be used by the expert, and the expert's qualifications, should all be eliminated, since pretrial listing of these items "sets experts up for failure" by requiring advance knowledge of what questions they will be asked.

Response: The ninth comment's excisions would seemingly reduce the required pre-trial discovery to considerably less than even that presently required in federal courts by the criminal rules of procedure. Moreover, if followed by federal prosecutors, such excisions, even if arguably lawful, would effectively eliminate any meaningful pre-trial discovery whatsoever. As for the objection that the expert does not know in advance what questions he will be asked, we do not agree.

Regarding direct examination, since the disclosures recommended by our report will be made in conjunction with the prosecutor, the preparer of the report will indeed know the questions the expert will be asked on direct examination. As for cross-examination, in the event that a cross-examiner is permitted to ask a question that goes beyond the scope of the report, any objection that the answer is also beyond the scope of the report is very likely waived. Perhaps the drafters of the ninth comment are concerned with state practice, where the volume of cases presents practical problems not shared at the federal level. Our Recommendations, however, are limited to the recommendations to the Attorney General, and our final report expressly notes this limitation and adds that "Application to state practice might require different modifications."