AMERICAN SOCIETY
OF
CRIME LABORATORY DIRECTORS, INC.

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ASCLD Board Comments

Draft Work Product on Pretrial Discovery of Forensic Materials

The currently proposed Draft on ***"Pretrial Discovery of Forensic Materials"*** lists 4 recommendations, a statement of issue, background and 4 principles related to pretrial Discovery. The following are specific comments, issues and explanations along with recommended wording, where applicable, to help provide a consensus document:

Comment #1: Recommendation #2 - "Access to such information should be made in sufficient time for the adversary party to make effective use of the information."

> **Issue**: The terms "sufficient time" and "effective use" are concerning because they are not defined. What is effective use of the information and who makes the determination if effective use has been made? Is the court to decide if an independent expert has had enough time to make effective use? Doesn't the court already have the ability to make that decision? Can't both attorneys argue to the court that they should have more time for examination of the evidence? The wording in the background narrative is much better than the recommendation itself. The adequacy of the time should be left to the determination of the court or the presiding judge.
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> Furthermore, the rules of discovery already require that the prosecution at least make physical evidence available for inspection by the defense prior to trial. The wording of this recommendation seems to imply that parties should be required to hand over physical evidence to their opponent as a matter of course. In the criminal context, this potentially creates huge logistical problems as well as impacts statutorily imposed chain of custody obligations. Who gets the evidence? The attorneys? What happens when a defendant represents himself? Is the opponent allowed to do consumptive/destructive testing? Does the type of access referenced in the proposal mean that the defense will be able to come into the lab any time and for every case?
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> ***Recommended Wording*:**
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> "An appropriate amount of time for forensic analysis review should be determined on each case by a court of competent jurisdiction"

Comment #2: Recommendation #3 – "Access to such information should be equally available to both sides, regardless of which side is proposing to use the evidence."

Issue: The term "reciprocal" emphasizes this binding agreement and should be included as part of the recommendation.

Recommended Wording:

"Timely, reciprocal access to information and evidence should be equally available to both the prosecution and the defense, regardless of which side is proposing to use the evidence. "

Comment #3: Recommendation #4 **– "**Access to such information should be enforceable by the parties through the courts."

Issue: As the courts evaluate timelines for delivery of information, they must take into account the realistic expectation of the time required for scientific testing. This evaluation should consider current caseload demands, turnaround times, and other local jurisdictional obligations such as "speedy trial" requirements for that particular forensic provider. This evaluative process will require exceptional communication between the prosecutor, defense and courts and likely curtail "last minute" testing by any of the parties.

Recommended Wording:

"Access to such information should be enforceable by the parties through the courts. Realistic timelines for scientific testing must be set by the court through a collaborative process with the local forensic provider."

The following comments apply to the general principles within the background section of the document:

Comment #4: All instances of the word "substantial" in the document should be removed as it relates to advanced access.

Issue: Substantial is a term subject to interpretation and has the potential to create efficiency issues for courts. For instance, some forensic providers resolve controlled substances cases in less than two weeks. Requiring "substantial" advanced access to discovery materials would be virtually impossible given court mandated timelines. If we provide a 7 day turnaround time on a drug case, is 8 days a "substantial" advanced access? We would argue "no" by the strict definition of the word, but in reality this is plenty of time for most drug cases. Again, this needs to be left up to the courts. The attorneys can opportune the presiding judge if they feel there has not been <u>appropriate</u> time for review.

Comment #5: The wording in this document regarding plea bargains, in some instances, has resulted in an unnecessary burden on both the courts and forensic "service" providers.

Issue: The documents states that *"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 as to allow them to meaningfully evaluate such information and evidence."*

Many attorneys argue that a client should never enter a plea or accept a plea bargain without knowing the forensic evidence. This is not realistic in many cases. The language above infers that the forensic provider will have to analyze and test all potential evidence recovered from a crime scene. This recommendation is not necessary in all cases and will have the detrimental effect of slowing down both the courts and forensic providers. If an individual knows that they had a controlled substance, why do they need to wait to plea bargain until they see the lab report and look at the spectra? In more complicated cases, why would any attorney encourage their client to take a plea without having the forensic evidence to evaluate?

If the argument is that prosecutors are putting out better plea deals before the evidence analysis has been accomplished, it seems like an ethical issue to take up with the state bar rather than an issue for a national forensic document. This sentiment about plea bargains will require labs to work more unnecessary evidence and will slow the judicial system in waiting for the unnecessary evidence analysis.

Comment #6: Is there a need for principle #4?

Issue: Every jurisdiction in the United States already has rules governing discovery along with available court-imposed sanctions for parties who violate those rules. Attorneys who negligently or willfully violate those rules are subject to discipline. Perhaps some examples could be included to clarify the need for this principle?

Comment #7: Clarification and prevention of copyright infringement during Discovery

Issue: During the Discovery process, courts will sometimes order the "duplication" of proprietary material(s). Sometimes the forensic provider is placed in the awkward position of having to defend federal, state or other copyright laws. For instance, a judge may order a laboratory to provide duplicates of books and literature or proprietary software (Chemstation, AB software, etc…) because the reviewing expert does not wish to purchase them for their peer review.

***Recommended Wording*:**

"Nothing in this recommendation should be construed to require forensic providers to break federal or state copyright or other laws.

Summary:

The American Society of Crime Laboratory Directors supports the discovery process and agrees that discovery should be done in a timeframe so that all parties can review the laboratory results. Beyond this general support, ASCLD is not a legal authority nor does ASCLD have the legal expertise to comment on the legal foundation for this recommendation. ASCLD does note that each jurisdiction has discovery rules which dictate the responsibilities of the forensic science service provider (FSSP), the prosecutor's office, and the defense counsel.

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It should be noted that if adopted wholesale by the criminal justice community, the discovery requirements proposed in this recommendation will result in a significant burden for FSSPs to include the need to hire staff to process evidence from more cases as many cases are currently resolved prior to laboratory analysis especially on drug possession cases, the need for additional administrative staff to ensure prescribed discovery timelines are met, and the adoption of technological infrastructure to make the discovery process efficient and effective. This burden would stress FSSPs already limited ability to meet the demands of the criminal justice system and resources must be dedicated to ensure that FSSPs have the necessary ability to meet the recommendations made by the Commission and other national bodies.

ASCLD Board of Directors

May 15, 2015