

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****AUGUST 9-10, 2010****RECOMMENDATION**

RESOLVED, That the American Bar Association urges the federal government to provide funding and resources sufficient to:

1. Facilitate the examination of existing standards, accreditation (such as ISO 17025), and certification for (a) laboratories, government and private, (b) examiners/analysts in government and private laboratories, and (c) identified forensic science service providers who offer examination conclusions and/or interpretations of forensic laboratory results. The examination should include a review of applicable timelines and enforcement provisions for implementation and compliance with such standards, accreditation, or certification criteria. Further, the examination should identify gaps and issues existing within such standards and criteria for accreditation and certification. The findings of such examination should be made publicly available.
2. Facilitate the development by existing accreditation and certification boards and organizations of effective and enforceable programs for laboratory accreditation and the certification of qualified laboratory analysts, examiners, pathologists, identified forensic science service providers and others who offer examination conclusions or interpretations.
3. Facilitate efforts to obtain uniformity in standards across state and territorial borders which promote validated protocols and the use of “best practices” for analysis by discipline and method, including, but not limited to, such quality assurance and quality control measures as internal peer review; maintenance of appropriate testing or examination documentation to facilitate external peer review by other experts; internal and external performance audits; regular proficiency testing; and corrective action procedures when proficiency testing or case work errors are discovered;
4. Facilitate the development and adoption of standards and common terminology for the clear communication of scientific testing results including, wherever possible, uniform report content within disciplines;
5. Adopt legislation or provide for the creation of standards that will reasonably ensure public and private laboratory management and staff are free from undue pressure, internal or external, commercial, financial or otherwise, that may affect the quality or integrity of the laboratory examination or analysis;

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6. Coordinate the development of a national code of ethics for the forensic sciences among forensic science organizations, government laboratories and the broader scientific community; and facilitate incorporation of such a code of ethics into the accreditation and certification system with mechanisms in place to provide for enforcement and compliance;
7. Conduct research into the study of human error, contextual and confirmational bias and methods and strategies for overcoming such limitations with the goal of informing the development of applicable standards;
8. Establish a process to regularly assess the adequacy of existing forensic education and training programs (at all levels) across disciplines against recognized standards, accreditation and certification criteria, “best practices,” and protocols; and define an enforcement mechanism for remediation of identified deficiencies. This assessment should take into consideration whether such training or education in the forensic disciplines includes (a) relevant research, (b) changes or modifications to standards for laboratory accreditation, (c) examiner certification, (d) new and developing technologies and protocols for their use, and (e) ethical issues pertinent to the role of the forensic practitioner;
9. Provide necessary incentives to encourage students in the physical and life sciences to pursue studies in fields critical to forensic sciences; develop funding mechanisms and incentives to encourage students to enter into study in the forensic sciences including forensic pathology and other enhanced undergraduate, graduate and post-graduate educational opportunities; and
10. Facilitate the implementation of training in forensic science for law enforcement, lawyers and judges, in such subjects as the scientific method, forensic science disciplines, relevant standards, laboratory accreditation, certification, ethics, and quality assurance and quality control measures.

REPORT
(REVISED)

By the terms of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Congress authorized “the National Academy of Sciences to conduct a study of forensic science as described in the Senate report.” The charge from Congress as set out in the Senate Report was as to:

“(1) assess the present and future resource needs of the forensic science community, to include State and local crime labs, medical examiners, and coroners;

...

(4) make recommendations for programs that will increase the number of qualified forensic scientists and medical examiners available to work in public crime laboratories;

(5) disseminate best practices and guidelines concerning the collection and analysis of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes, investigate deaths, and protect the public;

...

(8) examine additional issues pertaining to forensic science as determined by the Committee.” S. REP. NO. 109-88, at 46 (2005).”

On February 18, 2009, the National Academy of Sciences issued a report entitled “Strengthening Forensic Science in the United States: A Path Forward” responding to the Congressional mandate. Since the release of the National Academy report, strengthening forensic sciences has been the subject of two hearings by sub-committees of the United States House of Representatives and two hearings by the United States Senate Committee on the Judiciary. The latest of the Senate hearings occurred on September 9, 2009. Informational meetings with Senate Judiciary staff and representatives of various stakeholder groups have been ongoing and draft legislation is expected soon. The White House Office of Science and Technology Policy has established a subcommittee “to assess the practical challenges of implementing those recommendations and advise the White House on how best to achieve the goals outlined in the [National Academy of Sciences] report.”

ABA resolutions 100D, 100E, 100F, 100G, 100H, and 100I reflect the consideration of the diverse views of the criminal defense bar, the Innocence Project, as well as some individual prosecutors, academicians, members of the judiciary, and practitioners specializing in science and technology. The resolutions have been reviewed by some members of the forensic science community and their input has been considered. The resolutions do not support all recommendations made by the National Academy of Sciences (NAS); the resolutions only support NAS recommendations 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13. The resolutions do not support NAS recommendation 1 because there was no consensus on creating a stand-alone National Forensic Institute of Science. The resolutions do not support NAS recommendation 4 because no consensus could be

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reached in support of laboratory independence; consensus only was reached in favor of laboratory autonomy.

This resolution is not intended to, in any way, undercut or go counter to Federal Rules of Evidence 702 and the federal trial court's discretion per *Daubert v. Merrill Dow Pharm. Inc.* and *Kumho Tire Co. v. Carmichael* in determining what expert testimony is useful, reliable, and admissible. Likewise, the resolution is not intended to change the law on experts in state courts that have modified or rejected *Daubert*.

This resolution focuses on resources and practices which can insure the quality and scientific reliability of evidentiary analysis in crime laboratories and among some forensic science service providers. The report by the Academy addresses a number of issues in which the ABA already has established policy. In this respect this resolution is consistent with and continues to advocate that pre-existing ABA policy, here in the context of the discussion now under consideration in Congress. For instance, this Resolution continues the ABA's advocacy in favor accreditation¹ of laboratories and medical examiners offices,² examiner certification,³ development of validated, peer reviewed standards,⁴ adequate funding of laboratories and medical examiners offices,⁵ access to forensic science services and experts by indigent defendants,⁶ training in forensic science for attorneys,⁷ enforceable ethical standards for analysts and other forensic science service providers,⁸ standard terminology and reporting of testing procedures and results,⁹ research into sources of human error and strategies for correcting the same,¹⁰ adoption of quality assurance and quality control measures including proficiency testing, laboratory audits and corrective action protocols,¹¹ and the presentation of expert testimony.¹² Further, this resolution is not inconsistent with ABA policy which advocates against state legislatures requiring persons

¹ The report by the National Academy of Sciences uses the term "accreditation" to indicate that a laboratory has adopted policies and follows procedures which are believed to be efficacious. "Certification" is used generally to refer to a process denoting a demonstration of competency by an individual scientist, analyst or examiner. For purposes of clarity, the resolution adopts the same meaning to minimize confusion. A number of organizations accredit forensic laboratories. Perhaps the most well known is the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). ASCLD/LAB has accredited 359 laboratories including state, federal and local public laboratories, 12 international laboratories and 27 private laboratories. ASCLD/LAB currently is in the process of converting the accreditation of its U.S. laboratories to meet the requirements of a recognized international standard ISO/IEC 17025:2005. A number of organizations also provide board certification for practitioners. Among the most well known board certifications in forensic science is the American Board of Pathology's board certification in forensic pathology and the International Association for Identification's latent print certification.

² ABA Resolution 111B (August 2004). See also ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(i).

³ *Id.*

⁴ *Id.* See also ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(ii).

⁵ *Id.*

⁶ *Id.* ABA Standards for Criminal Justice, DNA Evidence 16-4.2, 16-4.3.

⁷ *Id.*

⁸ ABA Resolution 111E (August 2004).

⁹ ABA Standards for Criminal Justice, DNA Evidence 16-3.3.

¹⁰ ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(v). See also Commentary to that same section at DNA EVIDENCE 67 (3rd Ed. 2007).

¹¹ ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(iii)(vi) (c).

¹² ABA Standards for Criminal Justice, DNA Evidence 16-5.3

engaged in providing digital forensic and network testing services from obtaining licensure as private investigators.¹³ Instead, this resolution supports such policy in its call for professional certification of such experts based upon the current state of technology and science.¹⁴ In addition, the resolution recognizes the importance to American legal system of supporting a strong educational foundation for the forensic sciences. In that regard, it is hoped that the educational and training assessment called for under this resolution¹⁵ will place an emphasis on (a) relevant research, (b) changes or modifications to standards for laboratory accreditation, (c) examiner certification, (d) new and developing technologies and protocols for their use, and (e) ethical issues pertinent to the role of the forensic scientist.

Each of the resolutions submitted proposing enhancements and improvements to forensic science are part of an integrated whole which, in the estimation of the two sections, represent good criminal justice policy and will greatly contribute to efforts to enhance the integrity and reliability of forensic evidence in this country. The ABA has already advanced many of these recommendations as policy in the past. The compilation of those policies and new policies in this integrated series of statements by the ABA and its membership will assist governmental policymakers as they proceed in the legislative and implementation process.

Respectfully submitted

Charles Joseph Hynes
Chair, Criminal Justice Section
August 2010

¹³ ABA Resolution 301(August 2008).

¹⁴ *Id.*

¹⁵ See 8) above, lines 57 through 60.

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Charles Joseph Hynes, Section Chair

1. Summary of Recommendation(s).

Urges the federal government to provide funding and resources sufficient to facilitate the examination of existing standards, accreditation (such as ISO 17025), and certification for (a) laboratories, government and private, (b) examiners/analysts in government and private laboratories, and (c) identified forensic science service providers who offer examination conclusions and/or interpretations of forensic laboratory results. The examination should include a review of applicable timelines and enforcement provisions for implementation and compliance with such standards, accreditation, or certification criteria. Further, the examination should identify gaps and issues existing within such standards and criteria for accreditation and certification. The findings of such study should be made publicly available.

2. Approval by Submitting Entity.

The proposed resolution was approved on November 7, 2009 by the Criminal Justice Section Council.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

Yes. It was pulled shortly before the HOD Midyear 2010 Meeting due to some issues raised by the ABA Science and Technology Section. Since then we have worked with them on this recommendation.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

ABA Resolution 111B (August 2004). See also ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(i). ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(ii). ABA Standards for Criminal Justice, DNA Evidence 16-4.2, 16-4.3. ABA Resolution 111E (August 2004). ABA Standards for Criminal Justice, DNA Evidence 16-3.3. ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(v). See also Commentary to that same section at DNA EVIDENCE 67 (3rd Ed. 2007). ABA Standards for Criminal Justice, DNA Evidence 16-3.1(a)(iii)(vi) (c). ABA Standards for Criminal Justice, DNA Evidence 16-5.3. ABA Resolution 301 (August 2008).

This recommendation is consistent with the above listed Association policies.

5. What urgency exists which requires action at this meeting of the House?

The need to provide the funds, resources and other legislative support necessary to effectively integrate the forensic science community into this nation's system of homeland security as outlined in the National Academy of Sciences report, *Strengthening*

Forensic Science in the United States: A Path Forward. The proposed policy suggests specific steps for to be considered in order to improve the work of the forensic science community, and be better able to respond not only to resolving issues related to criminal investigations but also to provide aid and assistance in times of natural and man-made mass disasters. Action at this meeting will allow proponents to promote the various recommendations immediately.

6. Status of Legislation. (If applicable.)
By the terms of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 Congress authorized “the National Academy of Sciences to conduct a study of forensic science as described in the Senate report.”
7. Cost to the Association. (Both direct and indirect costs.)
None.
8. Disclosure of Interest. (If applicable.)
No known conflict of interest.
9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.)
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2010 House of Delegates agenda it is being circulated to the following:
Section, Divisions, Forums
Science and Technology Section
Standing Committee on Legal Aid and Indigent Defendants
Judicial Division
Individual Rights and Responsibilities Section
Coalition for Justice
Young Lawyers Division
Council on Ethnic and Racial Justice
Government and Public Section Lawyers Division
Standing Committee on Ethics and Responsibility
Standing Committee on Lawyers’ Professional Responsibility
Death Penalty Representation Project
Death Penalty Moratorium Project
10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)
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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

A. Summary of Recommendation.

Urges the federal government to provide funding and resources sufficient to facilitate the examination of existing standards, accreditation (such as ISO 17025), and certification for (a) laboratories, government and private, (b) examiners/analysts in government and private laboratories, and (c) identified forensic science service providers who offer examination conclusions and/or interpretations of forensic laboratory results. The examination should include a review of applicable timelines and enforcement provisions for implementation and compliance with such standards, accreditation, or certification criteria. Further, the examination should identify gaps and issues existing within such standards and criteria for accreditation and certification. The findings of such study should be made publicly available.

B. Issue Recommendation Addresses.

The need to provide the funds, resources and other legislative support necessary to effectively integrate the forensic science community into this nation's system of homeland security as outlined in the National Academy of Sciences report, *Strengthening Forensic Science in the United States: A Path Forward*.

C. How Proposed Policy Will Address the Issue.

The proposed policy suggests specific steps for to be considered in order to improve the work of the forensic science community, and be better able to respond not only to resolving issues related to criminal investigations.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.