

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 9-10, 2010

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments, legislative bodies and courts to provide the funds and other resources necessary to assure that in criminal cases an accused (1) is able to obtain the testing or re-testing of evidence, when feasible, by qualified experts and (2) is provided expert testimonial or other assistance when necessary to assure a fair trial or sentencing proceeding.

REPORT
(REVISED)

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. The National Academy report suggests thirteen recommendations intended to strengthen forensic sciences and integrate those disciplines into a system 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. Although not a specific recommendation of the National Academy report, underlying the report is the importance of reliability and professionalism of forensic evidence to the criminal justice system.

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 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*.

The report by the Academy addresses a number of issues in which the ABA has already established policy. In that respect this resolution is consistent with and continues to advocate that pre-existing ABA policy. This resolution in particular is consistent with prior resolutions supporting access to forensic science services and experts by indigent defendants.¹ The ability of

¹ ABA Standards for Criminal Justice, DNA Evidence 16-4.2, 16-4.3.

1001

a defendant to test, re-test, and consult with testimonial and non-testimonial experts is critical to the reliability and fairness of the criminal justice system.

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

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Criminal Justice Section

Submitted By: Charles Joseph Hynes, Section Chair

1. Summary of Recommendation(s).
Urges federal, state, local and territorial governments, legislative bodies and courts to provide the funds and other resources necessary to assure that in criminal cases an accused (1) is able to obtain the testing or re-testing of evidence, when feasible, by experts who meet appropriate accreditation and certification requirements, and (2) is provided expert testimonial or other assistance when necessary to assure a fair trial or sentencing proceeding.
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

1001

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 federal, state, local and territorial governments, legislative bodies and courts to provide the funds and other resources necessary to assure that in criminal cases an accused (1) is able to obtain the testing or re-testing of evidence, when feasible, by experts who meet appropriate accreditation and certification requirements, and (2) is provided expert testimonial or other assistance when necessary to assure a fair trial or sentencing proceeding.

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.