

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

August 7-8, 2006

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the black letter *ABA Criminal Justice Standards on DNA Evidence*, dated August 2006.

**PROPOSED ABA CRIMINAL JUSTICE STANDARDS ON
DNA EVIDENCE**

AUGUST 2006

PART I: GENERAL PROVISIONS

STANDARD 1.1 **SCOPE OF STANDARDS**

- (a) For purposes of these standards, DNA evidence is biological material from which DNA is or can be extracted.
- (b) These Standards are applicable to DNA evidence used for genetic identification in criminal cases.

STANDARD 1.2 **GENERAL PRINCIPLES**

- (a) Consistent with rights of privacy and due process, DNA evidence should be collected, preserved, tested, and used when it may advance the determination of guilt or innocence.
- (b) DNA evidence should be collected, preserved and tested, and the test results interpreted, in a manner designed to ensure the highest degree of accuracy and reliability.
- (c) The policies and procedures employed for testing DNA evidence should be available for public inspection.
- (d) Test results and their interpretation should be reported and presented in an accurate, fair, complete, and clear manner.
- (e) A person charged with or convicted of a crime should be provided reasonable access to relevant DNA evidence and, if it has been tested, to the test results and their interpretation.
- (f) The collection and preservation of, access to, and use of DNA evidence should be regulated to prevent inappropriate intrusion on privacy rights.
- (g) Funding necessary to achieve these principles should be provided.

PART II: COLLECTING, PRESERVING AND USE OF DNA EVIDENCE

STANDARD 2.1 **COLLECTING DNA EVIDENCE FROM A CRIME SCENE OR OTHER
LOCATION**

- (a) Whenever a serious crime appears to have been committed and there is reason to believe that DNA evidence relevant to the crime may be present at the crime scene or other location, that evidence should be collected promptly.

(b) Whenever DNA evidence is to be collected by law enforcement, a law enforcement officer or other official forensic investigator properly trained in the identification, collection, and preservation of DNA evidence should be dispatched to the location and, following written guidelines, should identify, collect, and preserve that evidence, taking reasonable care to ensure that the collection is representative of all relevant DNA evidence present; and

(c) If a defendant has been charged with the crime under investigation and the defendant's attorney or investigator is denied access to a crime scene or other location after completion of law enforcement's investigation at the scene or location, the defendant should be permitted to seek a court order to allow the defendant's attorney or investigator reasonable access to the location and permit a representative of the defendant's attorney properly trained in the identification, collection, and preservation of DNA evidence to collect DNA evidence.

STANDARD 2.2 JUDICIAL ORDER FOR COLLECTING DNA SAMPLES FROM A PERSON

(a) A DNA sample should not be collected from the body of a person without that person's consent, unless authorized by a search warrant or by a judicial order as provided in subdivision (b) of this standard.

(b) Except in exigent circumstances, a judicial order for collecting a DNA sample from the body of a person should be issued only upon notice and after an opportunity for a hearing at which the person has a right to counsel, including the right to appointed counsel if the person is indigent.

(i) If the person from whom the sample is to be collected is suspected of committing a crime, an order should issue only upon an application demonstrating:

(A) probable cause that a serious crime has been committed, and

(B) if the sample is to be collected from a person is:

(1) a sample collected by a physically noninvasive means, reasonable suspicion that the person committed the crime charged; and

(2) a sample collected by physically invasive means, probable cause that the person committed the crime charged; and

(C) that the sample will assist in determining whether the person committed the crime.

(ii) If the person from whom the sample is to be collected is not suspected of committing a crime, an order should issue only upon an application demonstrating:

(A) probable cause that a serious crime has been committed; and

(B) that a sample is necessary to establish or eliminate that person as a contributor to or source of the DNA evidence or otherwise establishes the profile of a person who may have committed the crime, either because there is reason to believe that the person has contributed to or been the source of the DNA evidence, or for other good cause shown that the sample of that particular person is necessary for that purpose.

STANDARD 2.3 JUDICIAL ORDER FOR DNA SAMPLES COLLECTED BY NON- LAW ENFORCEMENT ENTITIES

When a hospital, clinic, laboratory, or other non-law enforcement entity has collected a DNA sample from a person for a purpose other than a criminal investigation, law enforcement should not obtain or otherwise have access to that sample without the consent of the person who is the source of the sample, unless authorized by a judicial order under the conditions provided in Standard 2.2, or by search warrant.

STANDARD 2.4 COLLECTING DNA SAMPLES FROM PERSONS IN A GROUP BY CONSENT

A law enforcement officer should be permitted to obtain a DNA sample from a person by consent, except that:

- (a) consent should not be sought from persons based primarily upon their membership in a constitutionally protected class;
- (b) consent should not be sought from a large number of persons based on grounds other than individualized suspicion that each committed the crime under investigation unless seeking such consent has been authorized by the head of a law enforcement agency or the chief prosecutor in that jurisdiction; and
- (c) when consent is sought as provided in subdivision (b) of this standard, each person should be informed of the reason for the request and of the right to refuse it, and the consent should be obtained in writing.

STANDARD 2.5 MANNER OF COLLECTING AND PRESERVING DNA EVIDENCE

- (a) DNA evidence should be collected and preserved in a manner designed to document its identity, ensure its integrity, and, whenever possible, ensure its availability for testing and retesting. Specifically:
 - (i) the evidence should be properly handled, packaged, labeled, and stored; and
 - (ii) the location where and the place or thing from which the evidence was collected or the person from whom or the entity from which it was collected, the date and time it was collected, the identity of the person who collected it, and the manner in which it was collected and preserved should be documented.
- (b) Whenever DNA evidence is collected from a person, it should be collected by a method that is medically safe and no more intrusive than reasonably necessary. When it is collected from a person by court order, the order should so specify.

STANDARD 2.6 RETENTION OF DNA EVIDENCE

- (a) Property containing DNA evidence obtained in the investigation of an unsolved homicide, rape or other serious offense, and the extract from such evidence, if any has been obtained, should be retained in a manner that will preserve the DNA evidence. A

jurisdiction should promulgate written rules in all cases, which should require authorization of the prosecutor before the property or extract is destroyed or discarded.

(b) Property containing DNA evidence obtained in an investigation which has resulted in the prosecution of a person or persons for homicide, rape or other serious offense, and the extract from such evidence, if any has been obtained, should be retained in a manner that will preserve the DNA evidence until all persons charged have been convicted of an offense, or adjudicated as having engaged in conduct constituting such an offense, and have exhausted their appeals and served their sentences or commitments. If retention of a particular piece of property containing DNA evidence is impractical, reasonable care should be taken to retain representative samples of those portions of the property that contain DNA evidence.

PART III: TESTING OF DNA EVIDENCE

STANDARD 3.1 TESTING LABORATORIES

- (a) A laboratory testing DNA evidence should:
- (i) be accredited every two years under rigorous accreditation standards by a nonprofit professional association actively involved in forensic science and nationally recognized;
 - (ii) be governed by written policies and procedures, including protocols for testing and interpreting test results, and permit deviation from protocols only by a technical leader or other appropriate supervisor;
 - (iii) use quality assurance and quality control procedures, including audits, proficiency testing, and corrective action protocols, that are consistent with generally accepted practices and in writing;
 - (iv) use protocols for testing and interpreting DNA evidence that are scientifically validated through studies that are described in writing;
 - (v) follow procedures designed to minimize bias when interpreting test results;
 - (vi) timely report credible evidence of laboratory misconduct or serious negligence to the accrediting body; and
 - (vii) make available to the public the written material required by this standard.

(b) A laboratory testing DNA evidence should make available to the prosecution the information and material that the prosecutor must disclose to the defense pursuant to Standard 4.1, and to defense counsel the information and material that the defense must disclose to the prosecutor pursuant to that standard.

(c) When an accrediting body receives notice of credible evidence of laboratory misconduct or serious negligence concerning DNA evidence at the testing laboratory, either as provided in subdivision (a) (vi) of this standard or through other means, it should audit laboratory procedures and cases that may have been affected by the misconduct or serious negligence and issue a written report.

STANDARD 3.2 TESTING AND INTERPRETATION OF DNA EVIDENCE

(a) DNA evidence should be tested and interpreted in a timely manner by qualified personnel using the policies and procedures adopted by the laboratory as provided in Standard 3.1.

(b) Each step in the testing of DNA evidence and in the interpretation of the test results should be recorded contemporaneously in case notes.

(c) The case notes should document all information necessary to allow an independent expert to evaluate the process used and the conclusions reached.

(d) All case notes made and raw electronic data produced during testing should be preserved.

STANDARD 3.3 LABORATORY REPORTS

(a) A summary of all DNA testing and data interpretation should be recorded promptly in a report.

(b) The report should be sufficiently comprehensive so that an independent expert can identify the process used and the conclusions reached. Specifically, the report should include:

(i) what was tested,
 (ii) who conducted the testing,
 (iii) identification of the protocol used in the testing and any deviation from the protocol,

(iv) the data and results produced by the testing or data interpretation,
 (v) the examiner=s interpretation of the results and conclusions

therefrom,

(vi) the method and results of any statistical computation, and
 (vii) any additional information that could bear on the validity of the test results, interpretation or opinion.

(c) A separate section of the report should explain the test results, interpretation and opinion in language comprehensible to a layperson.

STANDARD 3.4 CONSUMPTIVE TESTING

(a) When possible, a portion of the DNA evidence tested and, when possible, a portion of any extract from the DNA evidence should be preserved for further testing.

(b) A laboratory should not undertake testing that entirely consumes DNA evidence or the extract from it without the prior approval of the prosecutor if a law enforcement officer is requesting the testing, or of defense counsel if the testing is requested by defense counsel or defense counsel=s agent.

(c) Before approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial

instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order.

(d) Before approving a test that entirely consumes DNA evidence or the extract from it, the attorney for any defendant against whom an accusatorial instrument has been filed, or for any other person who intends to conduct such a test, should provide the prosecutor an opportunity to object and move for an appropriate court order.

(e) If a motion objecting to consumptive testing is filed, the court should consider ordering procedures that would permit an independent evaluation of the analysis, including but not limited to the presence of an expert representing the moving party during evidence preparation and testing, and videotaping or photographing the preparation and testing.

PART IV: PRETRIAL PROCEEDINGS

STANDARD 4.1 DISCLOSURE

(a) The prosecutor should be required, within a specified and reasonable time prior to trial, to make available to the defense the following information and material relating to DNA evidence:

- (i) laboratory reports as provided in Standard 3.3;
- (ii) if different from or not contained in any laboratory report, a written description of the substance of the proposed testimony of each expert, the expert's opinion, and the underlying basis of that opinion;
- (iii) the laboratory case file and case notes;
- (iv) a curriculum vitae for each testifying expert and for each person involved in the testing;
- (v) the written material specified in Standard 3.1(a);
- (vi) reports of all proficiency examinations of each testifying expert and each person involved in the testing, with further information on proficiency testing discoverable on a showing of particularized need;
- (vii) the chain of custody documents specified in Standard 2.5;
- (viii) all raw electronic data produced during testing;
- (ix) reports of laboratory contamination and other laboratory problems affecting testing procedures or results relevant to the evaluation of the procedures and test results obtained in the case and corrective actions taken in response; and
- (x) a list of collected items that there is reason to believe contained DNA evidence but have been destroyed or lost, or have otherwise become unavailable;
- (xi) material or information within the prosecutor's possession or control, including laboratory information or material, that would tend to negate the guilt of the defendant or reduce the punishment of the defendant.

(b) The defense should be required, within a specified and reasonable time prior to trial, to make available to the prosecution the information and material in subdivision (a)(i) through (ix) of this standard for each expert whose testimony the defense intends to offer.

STANDARD 4.2 DEFENSE TESTING AND RETESTING

(a) Upon motion, made with notice to the prosecution, a court should permit the defense to inspect and test DNA evidence in the prosecution's possession or control. An affidavit in support of the motion may be presented to the court ex parte.

(b) The motion should specify the nature of any test to be conducted, the name and qualifications of the expert designated to conduct the test, the place of testing, and the evidence upon which the test will be conducted.

(c) The court should issue any orders necessary to make the evidence to be inspected or tested available to the designated expert and condition its order so as to preserve the integrity of the material to be tested or inspected.

(d) Prosecution monitoring of the preparation and testing should not be permitted unless consumptive testing is involved as described in Standard 3.4.

STANDARD 4.3 DEFENSE EXPERTS

(a) Expert assistance should be provided to an indigent defendant at government expense prior to and during trial if there is reason to believe that the prosecution will present DNA evidence or if expert assistance may lead to the discovery of relevant evidence.

(b) The defendant should be permitted to make an application for expert assistance ex parte.

(c) If the expert will not testify as a defense witness at trial, the prosecution should not be permitted to interview or call the defense expert as a prosecution witness unless the court determines that the prosecution has no alternative means to obtain equivalent evidence that the expert possesses.

PART V: TRIAL**STANDARD 5.1 ADMISSIBILITY OF DNA EVIDENCE**

(a) Expert testimony concerning DNA evidence, including statistical estimates, should be admissible if based on a valid scientific theory, a valid technique implementing that theory, and testing and interpretation properly applying that theory and technique.

(b) A court should be permitted to take judicial notice of facts relating to DNA evidence that are not subject to reasonable dispute.

(c) A witness testifying about DNA evidence should be qualified by knowledge, skill, training, or education in those matters about which that witness testifies.

(d) Whenever feasible, issues involving the admissibility of DNA evidence should be determined prior to trial.

STANDARD 5.2 TRADE SECRETS PRIVILEGE

(a) The successful assertion of the trade secrets privilege should not relieve the proponent of DNA evidence of the obligation to satisfy the admissibility criteria of Standard 5.1.

(b) A trade secrets privilege should be recognized if the allowance of the privilege would not tend to conceal fraud, prevent the proponent of DNA evidence from satisfying Standard 5.1, unduly interfere with the ability of a party to challenge the admissibility of the evidence or its reliability, or otherwise work an injustice. When disclosure is directed, the judge should prescribe such protective measures as the furtherance of justice may require.

STANDARD 5.3 PRESENTATION OF EXPERT TESTIMONY

(a) An expert giving testimony concerning DNA evidence should be asked to identify and explain the theoretical and factual basis for any opinion given and the reasoning upon which the opinion is based.

(b) Expert testimony should be presented to the trier of fact in a manner that accurately and fairly conveys the significance of the expert's conclusions.

(c) Valid statistical estimates of population frequencies should be admissible.

(d) When DNA evidence is offered at trial, evidence relevant to the reliability of that evidence, including relevant evidence of laboratory error, contamination, or sample mishandling, should also be admissible.

(e) An attorney intending to call an expert witness concerning DNA evidence should confer with that expert in preparing for trial in order to permit an informed and appropriate presentation consistent with this standard.

STANDARD 5.4 PROSECUTION COMMENT ON DEFENSE RESPONSE TO TESTS

(a) A prosecutor should not be permitted to argue or imply that a defendant's failure to test or retest DNA evidence, or the defendant's failure to offer evidence of such a test or retest conducted on the defendant's behalf, constitutes an admission of guilt.

(b) A prosecutor should be permitted to offer evidence or make argument concerning the defendant's failure to test or retest DNA evidence, or the defendant's failure to offer evidence of such a test or retest conducted on the defendant's behalf, only for a purpose other than an admission of guilt and only in fair response to evidence or argument of the defense. The court should instruct the jury that it may consider that evidence only for that other purpose.

PART VI: POST-CONVICTION

STANDARD 6.1 POST-CONVICTION TESTING

- (a) A person who has been convicted of a serious crime, including a person convicted based on a guilty plea, should be permitted to have DNA evidence in the possession of the prosecution or one of its agents tested or retested after conviction if:
- (i) the testing requested was not available at the time of trial and currently is available from a laboratory meeting the requirements of Standard 3.1, there is credible evidence that prior test results or interpretation were unreliable, or the interests of justice require testing or retesting; and
 - (ii) the results of testing or retesting could create a reasonable probability that the person:
 - (A) is innocent of the offense,
 - (B) in a capital case, did not have the culpability necessary to subject the person to the death penalty, or
 - (C) did not engage in aggravating conduct that caused a mandatory sentence or sentence enhancement.
- (b) When a person files an application for testing or retesting:
- (i) the prosecution should be notified and, if the person is indigent and does not have counsel, counsel should be appointed;
 - (ii) the application should be denied unless the person, after consultation with counsel, files a sworn statement declaring that he or she is innocent of the crime, did not have the culpability necessary to be subjected to the death penalty, or did not engage in the aggravating conduct that caused a mandatory sentence or sentence enhancement;
 - (iii) if the person files the statement, a hearing should be held to determine whether the person has met the requirements of subdivision (a) of this standard, and if there is a determination that the requirements of subdivision (a) of this standard have been met, the request for testing or retesting should be granted;
 - (iv) after the results of any testing are reported to the parties, an applicant should be permitted to seek a second hearing to determine what relief, if any, is appropriate; and
 - (v) if either hearing is to be held, the prosecutor should be required to give prior notice of the hearing to the victim of the crime to which the hearing relates.
- (c) If the application for testing or retesting is granted, and the court determines the result is inculpatory, the applicant's profile should be entered into the database authorized in Standard 8.1(b)(i), if it is not already present there.
- (d) An applicant should have the right to appeal or seek leave to appeal any adverse decision made pursuant to this standard.

PART VII: CHARGING BY DNA PROFILE

STANDARD 7.1 CHARGING PERSONS BY DNA PROFILE

When DNA evidence that may have been left by the perpetrator of a serious crime is collected and preserved, and a DNA profile of the person who left the evidence is established from it, but the person's identity is unknown, a grand jury or the prosecutor should be permitted to charge the person, as identified by the profile, with the crime by indictment or other instrument requiring a judicial probable cause determination.

PART VIII: DNA DATABASES

STANDARD 8.1 AUTHORIZED AND PROSCRIBED DNA DATABASES

(a) The legislature should authorize the establishment, maintenance, and operation of DNA databases used for criminal identification, and proscribe DNA databases that are not statutorily authorized. The legislation should include significant criminal and civil penalties for unauthorized databases and for unauthorized use or dissemination of information from any database.

(b) The only databases permitted to be maintained for criminal identification purposes should be those including profiles:

(i) of persons convicted of crimes designated by the legislature as appropriate for inclusion in the database, of persons found not guilty by reason of insanity for such crimes, and of persons adjudicated for conduct that, but for their age, constituted the commission of such crimes

[or of persons arrested for crimes designated by the legislature as appropriate for inclusion in the database, if there has been a judicial determination of probable cause or an indictment or information has been filed];

(ii) derived from evidence collected from crime scenes or other locations as provided in Standard 2.1; and

(iii) maintained for quality assurance at a laboratory.

(c) A genetic profile should be included in a database only if developed by testing conducted as provided in Standard 3.2.

(d) Whenever a matching profile is declared, confirmatory retesting of a new sample should be conducted, if possible.

(e) Databases should be developed and maintained in a manner that protects privacy to the fullest extent possible. Specifically:

(i) To the extent feasible, DNA markers valued only for individual identification and not known to be associated with behavioral propensities or susceptibility to disease should be used.

- (ii) Each profile should be maintained by number or by other anonymous means, and the information identifying a profile as belonging to a particular person should be separately maintained and safeguarded.
- (iii) Profiles should remain anonymous unless a matching profile is declared.
- (iv) Reasonable steps should be taken to prevent unauthorized access to, tampering with or copying of the contents of the database.
- (f) DNA samples used for the purpose of developing profiles from known individuals should be retained only for the purpose of confirmatory retesting or for upgrading the database to reflect new technologies.
- (g) Databases should be expanded to other categories of persons as resources become available, privacy concerns are resolved, and the security of the information is assured.

STANDARD 8.2 USE RESTRICTIONS AND DESTRUCTION OF DNA EVIDENCE

- (a) A profile developed from DNA evidence collected as provided in Standards 2.2 and 2.3 should not be entered into a database or compared with profiles in a database (for example, by keyboard search).
- (b) If a profile developed from DNA evidence at a crime scene or other location as provided in Standard 2.1 has been identified as that of a person who is not a suspect, that profile should not be entered into a database or compared with profiles in a database (for example, by keyboard search).
- (c) A profile developed from DNA evidence collected by consent as provided in Standard 2.4 should not be entered into a database or compared with profiles in a database (for example, by keyboard search) without the written consent of the person who is the source of the profile.
- (d) A profile developed from a DNA sample collected from a location other than a crime scene solely for the purpose of obtaining the profile of a person should not be entered into a database.
- (e) When the official investigation or prosecution is concluded and it is determined that a previously unknown source of DNA evidence was either (i) a victim of the crime that is under investigation or that is the subject of the prosecution or (ii) any other person not related to that crime as a perpetrator, the evidence should be destroyed and any profile developed from it should be expunged from any DNA database into which it had been entered.
- (f) A profile developed from a DNA sample collected from the remains of an unidentified deceased person may, for purposes of identifying that person, be compared with profiles in the databases authorized in standard 8.1(b), but should not be entered into a database.
- (g) Notwithstanding the provisions of subdivisions (a) through (f), a laboratory conducting DNA testing should be permitted to enter in a quality assurance database maintained by the laboratory any profile developed from DNA extracted in the testing

conducted in the laboratory, and should be permitted to retain the profile in that database as long as necessary for quality assurance purposes.

STANDARD 8.3

ACCESS TO DNA DATABASES

Information in a database should be provided only to criminal justice agencies and only for purposes of criminal identification, except:

- (a) a defendant should have access to:
 - (i) the results of all database searches and analyses performed in connection with the case;
 - (ii) the search procedures used to identify profiles relevant to the case;
 and
 - (iii) upon a showing of good cause, any other information related to the database that is relevant to the defense;
- (b) upon a showing of good cause, a court should grant a defendant=s request to order a comparison of profiles in the database with an unknown profile;
- (c) a prosecutor should have access to the same information provided to the defense pursuant to subdivisions (a) and (b) of this standard;
- (d) the agency maintaining a database should be permitted to disclose information about the database for the purpose of seeking advice on quality control and assurance; and
- (e) persons conducting scientific research on population genetics or related issues may be granted access to genetic profiles in a database for the purposes of that research, provided that the profiles are anonymous, privacy concerns are resolved, and the security of the information is assured.
- (f) as allowed by Standard 8.2(f).

STANDARD 8.4

EXPUNGEMENT

- (a) If any person=s conviction is vacated, the person=s profile should be expunged from any database that includes the profiles of convicted offenders, unless the person=s profile is in that database based on another conviction.
- (b) Methods should be devised to expunge routinely from databases any profile which should not have been entered or which should be expunged pursuant to these standards.
- (c) A person should have the right to petition a court to have that person=s profile expunged from a database as required by these Standards.

REPORT

INTRODUCTION

In August 2000, the ABA House of Delegates passed Resolution No. 115, which urged federal, state, local, and territorial jurisdictions to adhere to certain principles concerning biological evidence collected during the investigation of criminal cases. These principles included:

- (1) All biological evidence should be preserved.
- (2) All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.
- (3) All necessary funding to accomplish these principles should be provided.
- (4) Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.

Earlier that year the Criminal Justice Council passed the following resolution (April 2000): “The Criminal Justice Section recognizes the need for national standards pertaining to the collection, packaging, storage, apportioning, testing analysis, report writing, and testimony with regard to the use of biological evidence in criminal cases. Accordingly, it directs the Section Chair to refer this task to the Criminal Justice Standards Committee for creation of appropriate standards.” In response, a three-person study group was appointed to identify appropriate issues for a Standards Task Force to address. Upon receiving the report of the study group, the Standards Committee appointed a diverse and highly-qualified Task Force that met six times between the summer of 2003 and spring of 2005 to review and refine draft standards. In June 2005, the Task Force submitted its proposed standards to the Standards Committee. That Committee further refined the proposed standards at meetings in June and September 2005. The draft as approved at the September meeting was submitted to the Section Council for a first reading at the fall 2005 meeting. Remands from the first meeting were considered by the Standards Committee. The second reading took place in April 2005.

DNA Profiling

The advent of DNA evidence in 1985 dramatically changed the legal landscape. One judge called it the “single greatest advance in the ‘search for truth’ . . . since the advent of cross-examination.”¹ A National Academy of Science report stated that “DNA analysis is one of the greatest technical achievements for criminal investigation since the discovery of fingerprints.”² The introduction of DNA analysis presented the legal system with significant challenges. New

¹ People v. Wesley, 533 N.Y.S.2d 643, 644 (Ct. Ct. 1988).

² NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC DNA EVIDENCE 73 (1996) [NRC II].

DNA technologies were introduced at the trial level as cases litigating the older procedures worked their way through the appellate court system. The initial technique, Restriction Fragment Length Polymorphism (RFLP) analysis by gel electrophoresis, was soon supplanted by Polymerase Chain Reaction (PCR)-based methods involving the DQ-alpha locus, “polymarkers,” and the D1S80 locus. These, in turn, were replaced by PCR amplification and capillary electrophoresis of Short Tandem Repeats (STRs), the current procedure. In addition to nuclear DNA analysis, courts have admitted evidence based on mitochondrial DNA (mtDNA) sequencing, as well as DNA analyses of animals, plants, and the HIV virus.

DNA exonerations. The power of DNA evidence to exonerate the innocent has also had profound effects. The National Institute of Justice issued a report in 1996 that documented 28 exoneration cases.³ Since then over 175 convicts, fourteen of whom had been on death row, have been exonerated. Legal concepts of “finality” seem fragile in light of such powerful evidence, and many states and the federal government have enacted statutes providing for post-conviction DNA testing. (The same considerations – reliability and durability – also resulted in the extension of statutes of limitations and John Doe indictments.)

Databases. DNA’s discriminatory power combined with computer technology permitted the creation of offender databases. Every state has enacted legislation to obtain samples from convicted offenders for DNA databases, although the targeted offenses and other matters differ widely. The DNA Identification Act of 1994 authorized the FBI to establish the Combined DNA Index System (CODIS), a national database. The capability to find a “cold hit” in a case without a suspect is an extremely important development. It means that DNA evidence can be used not only to construct a case after a suspect has been identified but also to investigate a case.

Problems. Despite the power of DNA evidence, some problems have been exposed in its use. For example, the DOJ Inspector General has released two reports relating to DNA, one involving misconduct by an FBI analyst in testing⁴ and the other on shortcomings in CODIS procedures.⁵ In addition, the Virginia DNA laboratory experienced problems originating from the Earl Washington case.⁶ The most egregious reported failures involved the Houston Police Department, which had to close its DNA operations due to major deficiencies,⁷ one of which had

³ EDWARD CONNORS ET AL., NAT’L INST. JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

⁴ OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, THE FBI LABORATORY: A REVIEW OF PROTOCOL AND PRACTICE VULNERABILITIES (May 2004) (investigation of Jacqueline Blake’s failure to use negative controls in DNA testing).

⁵ OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, AUDIT REPORT, THE COMBINED DNA INDEX SYSTEM ii (2001) (“[T]he integrity of the data contained in CODIS is extremely important since the DNA matches provided by CODIS are frequently a key piece of evidence linking a suspect to a crime.”).

⁶ The governor ordered an audit by ASCLD/LAB, which has released a report. See ASCLD/LAB, LIMITED SCOPE INTERIM INSPECTION REPORT, COMMONWEALTH OF VIRGINIA, DIVISION OF FORENSIC SCIENCE, CENTRAL LABORATORY (April 9, 2005).

⁷ See QUALITY ASSURANCE AUDIT OF HOUSTON POLICE DEP’T CRIME LABORATORY – DNA/SEROLOGY SECTION (Dec. 12-13, 2002). See also Nick Madigan, *Houston’s Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003 (operations suspended in December after an audit found numerous problems including poor calibration and maintenance of equipment, improper record keeping, and a lack of safeguards against contamination; “Among other problems, a leak in the roof was found to be a potential contaminant of samples on

resulted in the wrongful conviction of Josiah Sutton based on DNA evidence.⁸ As described by a subsequent investigation, “the DNA Section was in shambles – plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis and who was lacking the qualifications required under the FBI standards, staffed by underpaid and undertrained analysts, and generating mistake-ridden and poorly documented casework.”⁹ Errors and misconduct can lead to inaccurate results, which can create injustice in particular cases and discredit DNA evidence as a whole. Consequently, there is a need for accreditation, proficiency testing, extensive discovery, defense experts, post-conviction testing, and other procedures to ensure the exoneration of the innocent and the conviction of the guilty.

Prior reports. A number of organizations have looked at DNA evidence in the intervening years, commencing with the Office of Technology Assessment Report in 1990.¹⁰ This was followed by reports by the National Academy of Sciences in 1992 and 1996 (NRC I and NRC II).¹¹ Later, the National Commission on the Future of DNA Evidence, established by the Department of Justice, published a number of documents on DNA analysis.¹²

During this same time, groups in the forensic science community promulgated standards for DNA testing. The first was the “Technical Working Group on DNA Analysis Methods” (TWGDAM). Next, the 1994 DNA Identification Act established the DNA Advisory Board (DAB), which promulgated quality assurance standards. TWGDAM was subsequently renamed “Scientific Working Group on DNA Analysis Methods” (SWGDM) and replaced the DAB when the latter legislatively expired. Moreover, the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB) and other organizations operated voluntary accreditation programs for public and private crime laboratories. The “Justice for All” Act, enacted in 2004, contained several provisions involving DNA analysis, including the Innocence Protection Act. The ABA Standards on DNA Evidence build on these prior studies and standards.

Overview of Standards

Part I: General Provisions

tables below.”). The city of Houston has authorized an independent investigation, and three preliminary reports have been issued.

⁸ See Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004 (“[P]rosecutors in Mr. Sutton’s case had used [DNA] to convict him, submitting false scientific evidence asserting that there was a solid match between Mr. Sutton’s DNA and that found at the crime scene. In fact, 1 of every 8 black people, including Mr. Sutton, shared the relevant DNA profile. More refined retesting cleared him.”).

⁹ THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (June 30, 2005).

¹⁰ OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, GENETIC WITNESS: FORENSIC USES OF DNA TESTS (1990).

¹¹ NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE (1992) [NRC I]; NRC II, *supra* note 2.

¹² *E.g.*, NATIONAL COMM’N ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999).

There are two Standards in Part I: (1) the scope of the standards and (2) general principles. The Task Force considered and then rejected the notion that the Standards should apply more generally to other kinds of biological evidence – e.g., fingerprints, microscopic hair and fiber comparisons, etc., concluding that DNA was sufficiently specialized and important to deserve its own standards.

Part II: Collecting, Preserving, and Use of Biological Evidence

Finding biological evidence and then properly collecting and preserving it are the critical first steps in the use of DNA profiling. Often the police have only one opportunity to get it right. Standard 2.1 deals with the collection of evidence at crime scenes and other locations. Defendants are also given reasonable access to these locations after the police have completed their investigation. Standard 2.5 addresses the manner of collection, and Standard 2.6 focuses on evidence retention, both before and after trial. Other standards in Part II are considered below as implicating privacy issues.

Part III: Testing of Biological Evidence

If the power of DNA profiling to exonerate the innocent and convict the guilty is to be maximized, the highest scientific standards must be applied. Part III addresses these issues and tracks existing DNA regulations and other well-established scientific principles. The validity of DNA testing and quality assurance procedures are the primary focus. In addition, the special problem of “consumptive” testing is addressed in Standard 3.4.

Part IV: Pretrial Proceedings

Part IV contains provisions on pretrial discovery, including defense retesting, and on the right to defense experts for indigents. These issues raise obvious due process concerns. In addition, extensive pretrial disclosure and access to defense experts can also be viewed as “quality assurance” safeguards. With two exceptions, prosecution discovery is coextensive with defense discovery. Both exceptions are constitutionally based and consistent with the current *Criminal Justice Standards on Discovery*.

Part V: Trial

Standard 5.1, which governs the admissibility of DNA profiling, requires the proponent of DNA evidence to establish that the testimony, including statistical estimates, is based on a valid scientific theory, a valid technique implementing that theory, and testing and interpretation properly applying the theory and technique. Although this Standard requires valid procedures, it does not attempt to resolve the *Daubert-Frye* debate. The qualifications of experts, judicial notice, and in limine motions are also addressed. A related issue involves the trade secrets privilege (Standard 5.2) and its effect on the admissibility determination. The next standard focuses on the presentation of DNA evidence to the jury. Unless the evidence is accurately and fairly communicated, the jury may be misled, especially with respect to statistical estimates. Standard 5.4 addresses the limits of prosecutorial comment on a defendant’s failure to retest

DNA evidence. Subdivision (a) of that Standard restates the constitutional principle that a criminal defendant has no obligation to test or retest evidence; subdivision (b) recognizes the limited doctrine of fair response if the reliability of the government's testing is attacked.

Part VI: Post-Conviction

The principal issues with postconviction testing (Standard 6.1) concern what limitations should be placed on this type of testing – i.e., time limitations, exclusion of convicts who pleaded guilty, etc. The standard rejects both of these limitations. It does, however, require (1) a good reason for the defense's failure to request DNA testing at the original trial (e.g., unavailability of new technology) and (2) a showing that the results of new testing will be indicative of innocence of the charged crime, of a mandatory aggravating factor in a capital case, or of conduct that caused a mandatory sentence or sentence enhancement. The Standards also seek to discourage unwarranted applications by requiring the applicant to submit an affidavit asserting "innocence" in these circumstances. In addition, if the test results are inculpatory, the applicant's profile is entered into the offender database (if it is not already included). This is a penalty for a frivolous application. The last part of the Standard focuses on procedural issues – notice, hearings, right to counsel, and appeals.

Part VII: Charging by DNA Profile

Standard 7.1 sanctions the use of indictments by DNA profile (i.e., "John Doe" indictments) where the identity of the perpetrator is unknown and the statute of limitations is about to expire. Other charging mechanisms (i.e., the filing of an information) are also permitted, provided there is a judicial determination of probable cause. Here again, a balancing of interests is involved. This approach is superior to a blanket extension of the statute of limitations in cases involving DNA evidence because it requires the prosecutor to marshal the evidence in the case and present it to a grand jury or judge prior to the expiration of the statute of limitations. This will ameliorate, at least to some extent, the problem of staleness of evidence, which is the most convincing rationale for statutes of limitation.

Privacy Issues

The most difficult policy issues involve privacy restrictions on the use of DNA evidence. A person's entire genetic code is found in that person's DNA. Moreover, "familial" searching of databases may lead to the identification of persons who are not in any database (e.g., relatives). The Fourth Amendment sets only the baseline in this context. Some commentators have argued that DNA resembles medical records and deserves the same type of protection. The initial seizure or collection of a DNA sample from a person raises personal privacy issues, and the later use of that DNA raises informational privacy issues. These issues are examined below. Once again, a balancing of interests is required.

Nontestimonial Orders

Standard 2.2 authorizes judicial orders for collecting biological samples from persons. Standard 2.2 requires reasonable suspicion for non-invasive procedures (e.g., saliva samples) and probable cause for invasive procedures (e.g., blood samples). Obtaining elimination samples from victims and nonsuspects is also addressed. Standard 2.3 adopts the same procedures for collecting samples from hospitals and clinics. The judicial-order approach is believed to be superior to the alternative procedures discussed in the next two paragraphs because the decision to collect DNA evidence from a person is made on the record in open court by a neutral and detached magistrate.

Dragnets

There are several other collection procedures that are controversial. The first is dragnets, in which large segments of the population are asked to contribute samples voluntarily. Although dragnets have often proved ineffective, they continue to be used. Dragnets have exacerbated racial tensions in some minority communities, and reports suggest that some “requests” have involved coercive aspects (e.g., threats to release the name of nonconsenting persons to the media). In this context, Standard 2.4 prohibits seeking consent from a group based primarily upon their membership in a constitutionally protected class. Moreover, dragnets should be authorized by the head of a law enforcement agency or the chief prosecutor of the jurisdiction. The Standard also requires that donors be informed of the reason for the request and of the right to refuse. Moreover, the consent should be written. Although these provisions are more demanding than the minimal constitutional requirements, it is difficult to argue that citizens should not know of their constitutional rights. The inherent inability to specify the exact number of persons that would trigger this Standard should not result in a failure to address such a significant issue.

Surreptitious Collection

No standard deals directly with so-called “abandoned” samples, also described as “covert involuntary DNA sampling” – e.g., seizing a coffee cup from the trash and developing a profile from the saliva on it. The term “abandoned” is misleading both as a matter of constitutional law and as a matter of language. Under Fourth Amendment jurisprudence, the issue is whether people have a reasonable expectation of privacy in their DNA in this context, and this cannot be resolved simply by asserting that people “abandon” their DNA. No one can leave home without shedding DNA; a DNA profile can be developed from dandruff.¹³ The question becomes: “What privacy expectations should people in a free society have in their genetic profiles?” While the Standards do not address the collection of such DNA evidence, Standard 8.2(d) prohibits including profiles based on this type of collection in databases.

¹³ JAMES D. WATSON & ANDREW BERRY, *DNA: THE SECRET OF LIFE* 231 (2004) (“Every day each of us sloughs off a vast number of dead skin cells, showering our DNA into the environment to wind up we know not where. [One procedure] is so sensitive that it can act upon a single molecule . . .”).

Part VIII: DNA Databases

Standard 8.1 authorizes the maintenance and use of databases for DNA profiles. However, privacy concerns demand stringent regulation. The legislature should authorize the kind of criminal identification databases that may be maintained, and any other kind of criminal database should be prohibited. Other protections include (1) significant criminal and civil penalties for unauthorized databases and unauthorized dissemination of database information, (2) use of anonymous profiles, and (3) use of noncoding DNA loci.¹⁴ In addition, confirmatory retesting with fresh samples is mandated (Standard 8.1(c)). The main privacy concern, however, is not the computerized profile, which is like a Vehicle Identification Number (VIN), but the *sample* itself and whether it should be retained at all. Standard 8.1(e) permits retention but only for limited purposes.

Standard 8.1(b) limits offender databases to persons (1) convicted of crimes designated by the legislature, (2) found not guilty of those crimes by reason of insanity, and (3) adjudicated delinquent of those offenses. The Standard neither endorses nor prohibits *arrestee* databases. Unlike convicted-offender databases, the constitutionality of arrestee databases has not been extensively litigated and only a few states presently authorize them. Instead, the Standard provides alternative language in the event other jurisdictions sanction arrestee databases and their constitutionality is upheld. The Standard does permit local quality-assurance databases, something not considered in most database statutes. Recognizing the increased value of more inclusive databases in convicting the guilty and exonerating the innocent, and cognizant of the racial disparities in databases that include only those convicted or arrested for crimes, Standard 8.1(g) encourages the further expansion of databases, but only as the resources necessary for such expansion become available, and only after the increased concerns for privacy and the security of the information included in an expanded database can be adequately addressed.

Standard 8.2 restricts the use of databases. A database can be used in two ways: (1) a profile can be permanently entered into the database and (2) a one-time search may be conducted (“keyboard search”). Elimination samples from victims and other innocent persons should not be entered into a database or compared with database profiles. However, it is often difficult to know if crime scene samples are from victims or innocent parties until the profiles have been developed and compared. For this reason, Standard 8.2 permits inclusion of a crime scene sample in an appropriate database, but requires its removal if and when its source is identified as a victim or innocent party. Other use restrictions pertain to consent searches and judicial orders. Commentators on privacy have identified a principle called the “purpose specification principle”, which “sets out the requirement that personal information collected for one purpose cannot subsequently be used for a different, incompatible purpose.”¹⁵ This principle is incorporated in the Standard 8.2.

¹⁴ At one time, noncoding loci were called “junk” DNA, but that term has fallen out of favor among geneticists.

¹⁵ Viktor Mayer-Schonberger, *Strands of Privacy: DNA Databases, Information Privacy, and the OECD Guidelines*, in *DNA AND THE CRIMINAL JUSTICE SYSTEM* 225, 229 (David Lazer ed. 2004) (eight principles were developed by the Organization for Economic Cooperation and Development (OECD) originally designed to address information privacy issues in health care in the United States).

Standard 8.3 governs defense access to databases, as well as access for quality-assurance and research purposes. Only anonymous profiles are available for the latter uses.

Standard 8.4 provides for expungement of profiles from databases under specified conditions. If the justification for entering a person's DNA profile in a database is predicated on a conviction, the profile should be expunged from the database if the conviction is vacated.

Respectfully submitted,

Michael S. Pasano
Chair, Criminal Justice Section
August 2006

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Criminal Justice Section

Submitted By: Michael Pasano, Chair

1. Summary of Recommendation(s).
The Criminal Justice Section recommends adoption of a set of “black letter” ABA Standards on DNA Evidence set forth in the August 2006 document entitled “Proposed American Bar Association Criminal Justice Standards on DNA Evidence.” If approved, the proposed Standards will be published along with commentary as a new volume of the multi-volume series of ABA Standards on Criminal Justice. The proposed Standards address collecting, preserving and use of DNA evidence; testing of DNA evidence; pretrial proceedings; trial; post-conviction; charging by DNA profile; and DNA databases.

2. Approval by Submitting Entity.
The proposed Standards were approved by the Criminal Justice Section Council on April 29, 2006 at the second of two Council readings required under the procedures for adoption of ABA Criminal Justice Standards. The proposed Standards had been transmitted from the Task Force that drafted them to the Section’s Standards Committee in April 2005 and were approved by the Committee in September 2005.

3. Has this or a similar recommendation been submitted to the House or Board previously?
In August 2000, the House of Delegates approved the following resolution:

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions adhere to the following Principles concerning Biological Evidence collected in conjunction with the investigation of a criminal case:

All biological evidence should be preserved.
All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.
All necessary funding to accomplish these principles should be provided.
Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.

In August 2004, the House of Delegates approved the following resolution:

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.
2. Crime laboratories and medical examiner offices should be adequately funded.
3. The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense.
4. Training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.
5. Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case.

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

The proposed Standards would elaborate considerably on relevant existing Association policies (cited in full, in #3, above) by providing specific guidance to law enforcement, prosecutors, defense counsel, judges, legislators and others concerning all aspects of DNA collection, preservation and use from investigative through post-conviction phases.

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

Criminal justice practitioners, courts, and legislators are increasingly defining the role of DNA evidence in growing numbers of criminal cases, from the investigative stage through post-conviction proceedings. For example, police departments in New York City, Miami-Dade, and Palm Beach have recently been using DNA to solve property, as well as violent, crimes. A New Jersey appeals court has recently ruled that the state can keep DNA samples of all convicted criminals on file indefinitely. The Kansas Supreme Court will soon consider the legality of a “John Doe” warrant based on DNA, a case likely to have national implications. In addition, there is a flurry of activity in state legislatures (see #6, below). It is important that these policymakers and practitioners who are now laying the groundwork for DNA use have the earliest possible benefit of the ABA Standards.

6. Status of Legislation. (If applicable.)

We are aware of no pending federal legislation. However, there is considerable legislative activity in the states that would benefit from the Standards. Under the FBI's Combined DNA Index System (CODIS), states may exchange and compare DNA profiles on a state and national level while operating their databases according to their own specific legislative or legal requirements. While all 50 states require that convicted sex offenders provide a DNA sample, states are increasingly expanding these policies to include offenders who have committed other serious crimes; to date, more than 40 states require that all convicted felons provide a DNA sample to the state's database. A bill pending in New York not only calls for DNA samples to be collected from anyone convicted of a crime but also for eliminating the statute of limitations in cases where DNA evidence is found, even when a suspect has not been identified, so that such cases can remain open. New York, New Jersey, Michigan, Illinois and Tennessee are currently considering legislation to include in their databases DNA samples from persons arrested for violent felonies and certain aggravated offenses. Last year, Texas enacted legislation addressing quality assurance in forensic laboratories. Additional legislation addressing various DNA-related issues is expected to continue to be considered at the state level.

7. Cost to the Association. (Both direct and indirect costs.)

The only direct costs associated with approval of the recommendation will be a modest fee for the DNA Evidence Task Force reporter to prepare commentary to the Standards, meeting-related expenses for the Standards Committee to review, revise, and approve the draft commentary, and expenses associated with printing the Standards. Funds for these purposes have been anticipated in the proposed Standards Committee budget for 2006-07. Staff lobbying of the Standards, as other ABA policies, would continue to be undertaken by existing Governmental Affairs staff, with assistance from existing Criminal Justice Section staff.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

Throughout the drafting process, drafts have been widely circulated both within and without the ABA. Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the House of Delegates agenda, the report is being circulated to staff and chairpersons or executive directors of the following:

ABA

Coalition for Justice
 Coordinating Committee on Gun Violence
 Coordinating Committee on Immigration Law
 Death Penalty Representation Project
 Governmental Affairs
 Government and Public Sector Lawyers Division
 General Practice, Solo and Small Firm Section
 Individual Rights and Responsibilities Section
 Judicial Division
 Litigation Section
 National Conference of State Trial Judges
 State and Local Government Law Section
 Special Commission on Domestic Violence
 Standing Committee on Legal Aid & Indigent Defendants
 Standing Committee on Substance Abuse
 Steering Committee on the Unmet Legal Needs of Children

Other

Administrative Office of the U.S. Courts
 Conference of Chief Justices (State)
 National Association of Attorneys General
 National Association of Criminal Defense Lawyers
 National Center for State Courts
 National District Attorneys Association
 National Judicial College
 National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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