

ABA CRIMINAL JUSTICE STANDARDS ON DNA EVIDENCE

**APPROVED BY ABA HOUSE OF DELEGATES
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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.

