May 8, 2019

The Honorable Jehan Gordon-Booth
632 Capitol Building
Springfield, IL 62706

Dear Representative Gordon-Booth,

I write to you on behalf of the American Bar Association (ABA) to express our opposition to your bill, H.B. 1447. We are concerned that your bill would permit a forensic scientist to make the decision to deplete forensic evidence in testing even when such depletion may deny due process to a person being investigated for or accused of a crime. If this legislation is intended to address a gap in the law, we urge your consideration of the ABA Standards on DNA Evidence\(^1\) in developing legislation. Those standards require, for example, the involvement of the prosecutor in any decision by the state to deplete an evidentiary sample. The standards would further require that any time testing by either the prosecution or defense would deplete a sample, the other party is to be notified, given a chance to object and be heard by the court.

The ABA is comprised of more than 400,000 members representing all aspects of the legal system with a commitment to improving the administration of justice. Our Criminal Justice Section is comprised of over 16,000 members including prosecutors, private and public defense counsel, appellate and trial judges, law professors, correctional and law enforcement personnel, and other criminal justice professionals. For fifty years, such professionals have worked deliberatively in producing the ABA’s Standards for Criminal Justice, which have been cited in thousands of federal and state appellate court opinions. Our standards governing DNA evidence were promulgated in 2006, embracing principles that are as relevant today as then.

Simply put, the ABA Standards on DNA Evidence stand for the proposition that:

> 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…. 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. Standard 16-1.2

\(^1\) [https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_dnaevidence/](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_dnaevidence/)
The Standards apply as early as the criminal investigation and continue so long as a person’s liberty interests remain at stake. Under Standard 2.6 Retention of DNA Evidence, Section (a) provides that “[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.” In other words, the decision of when it is appropriate to destroy or deplete such evidence should not be left to law enforcement or laboratory staff alone. Section (b) makes clear that this compelling interest in the preservation of the evidence continues through all legal proceedings related to the evidence, including appeals and the completion of a given person’s sentence.

Standard 3.4 Consumptive Testing covers those situations in which it is not possible to preserve an evidentiary sample. Under Section (b), before undertaking any testing that would completely consume an evidentiary sample, a laboratory should notify the requester of that fact, and under sections (c) and (d), the opposing party should be notified and given the opportunity to object. Such notice and opportunity are already part of 725 ILCS 5/116-4, which requires a judge’s evaluation before the state may destroy impounded evidence following a finding of guilt. It would be problematic to allow an individual to fully consume an evidentiary sample prior to a finding of guilt without similar procedural safeguards in place.

For the reasons cited above, the ABA opposes H.B. 1447 and similar legislation that would grant forensic scientists an unreviewable authority in the depletion or destruction of evidentiary samples. We believe that any time vital evidence will be fully consumed in a laboratory analysis, all parties should be notified and the opposing party given the opportunity to object. If you have questions about our views on this matter or the ABA Standards for Criminal Justice, you may contact Ken Goldsmith, Senior Legislative Counsel, at (202) 662-1789 or kenneth.goldsmith@americanbar.org.

Sincerely,

Robert M. Carlson