CHAPTER 12

Ethical Duties of Attorneys and Experts in Cases Involving Forensic Evidence, from the Perspective of the Defense

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1. INTRODUCTION

As a function of their dual role as advocate and officer of the court, criminal defense attorneys face the challenge of navigating simultaneous legal and ethical obligations to their client, the government, and the public. This challenge is even more pronounced in cases involving forensic evidence. As complex scientific evidence has become a regular feature of criminal trials, and not merely in rape and homicide cases, the defense bar – particularly those representing indigent defendants – have struggled to meet their legal and ethical duties in the face of limited training and resources. Unlike their brethren in prosecutors’ offices, who often have more immediate access to the forensic evidence and experts in a case, defense lawyers and experts must work from the outside in. And unlike the prosecution and its experts, whose primary mission is to promote justice and the search for truth through the adjudicative process, defense attorneys and the experts they retain have additional obligations – often in apparent tension with this truth-seeking mission – to enforce their clients’ procedural rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution and to protect their clients’ confidential information and other interests pursuant to applicable statutes, case law, and professional codes of ethics. At the same time, defense forensic experts retain many of the same ethical responsibilities as government experts, including promoting a culture of science, avoiding cognitive bias, being truthful about their qualifications and experience, and refusing to testify beyond their sphere of competence.

While taking on these challenges is no easy task, being willing to serve as a defense attorney or defense forensic expert in cases involving forensic science is a public service critical to ensuring the fairness of modern criminal trials. As explained in a 2009 National Academy of Sciences report,1 most traditional forensic disciplines could be argued to suffer from a real or perceived lack of independence from law enforcement, a lack of peer-reviewed research properly validating the reliability of the government’s methods, and a lack of accurate measures of uncertainty. Moreover, the adversarial

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process relies on a diligent defense team to unearth and resolve potential ethical issues related to the deliberate refusal or inadvertent failure of the prosecution and its experts to disclose, preserve, and allow full access to forensic evidence.

This chapter provides an overview of the ethical duties of defense attorneys and defense experts to their clients, the government, and the public in cases involving forensic evidence. It also, however, provides a defense perspective on certain recurring ethical problems related to prosecutors and prosecution experts. Given a defense attorney’s own ethical duty to determine and enforce the government’s obligations, and the government’s occasional but well-documented failure in certain cases to disclose defense-favorable evidence regardless of perceived materiality, those entering the forensic science profession and serving as an expert for either side of the criminal justice system should be aware of the defense perspective on the government’s own duties.

2. THE DEFENSE ATTORNEY’S AND DEFENSE EXPERTS’ ETHICAL DUTIES IN A CASE INVOLVING FORENSIC EVIDENCE

While defense attorneys and the forensic experts they hire have ostensibly distinct professional roles that are governed by separate laws and rules of professional conduct, their legal and ethical duties in a criminal case are inexorably linked. Although defense experts are not—and, indeed, should not purport to be attorneys themselves (even if they hold a law degree in addition to being a forensics practitioner—unless retained to specifically act as counsel), by virtue of their status as “agents” of the defense they are indirectly bound by many of the same rules as the attorney who hired them. A defense expert’s failure to abide by these rules, or to act in a way that does not impede the attorney’s ability to abide by these rules, can result in formal sanctions against the expert, such as a court order prohibiting the expert from receiving fees or from “working for a particular client or a particular lawyer.” Obviously, many ethical rules directly governing defense experts, such as those requiring client confidentiality and candor to the tribunal, mirror the rules governing the conduct of defense counsel. At the same time, defense counsel has an ethical obligation to ensure that the expert, as a non-lawyer agent of the defense, acts in a manner consistent with the rules governing attorney conduct. Thus, both attorneys and experts for the defense should be intimately familiar with, and expect to be indirectly governed or constricted by, the ethical duties—and compliance—of the other.

Nearly all of the ethical obligations of defense counsel and defense forensic experts that follow can be said to serve one of two ultimate goals: the search for truth, or the encouragement of future lawful behavior. Even those rules that appear at first glance to be antithetical to truth-seeking, such as rules against disclosing client confidences, exist because they are thought to promote the free flow of information between client and counsel that, over the long run of cases, best facilitates the discovery of truth, and are further thought to promote compliance with the law. Thus, while the defense forensic
expert is required by the profession to seek justice in every case, the expert must keep in mind that the ethical and legal rules governing criminal defense – even those that prevent the expert from making certain truthful disclosures of material evidence to the prosecution – are enforced strictly by the courts precisely because they are necessary to promote justice.

2.1 The Duty to Render Effective, Quality Representation

A defense attorney’s failure to render effective representation is a violation both of professional ethics and of his/her client’s constitutional rights. The American Bar Association’s (ABA’s) Criminal Justice Standards require defense counsel to “render effective, quality representation”.7 In turn, courts look to “prevailing professional norms”, such as “the [ABA] standards”,8 in determining the scope of the Sixth Amendment right “to have the assistance of counsel”.9 which the Supreme Court has interpreted as the right to the “effective assistance of counsel”.10 The right extends from the pre-trial investigation stage11 to sentencing12 and through appeal.13 When counsel’s “deficient performance” under professional norms “prejudice[s]” the fairness of the proceedings, the defendant is entitled to legal relief.14 Thus, defense lawyers and experts should be aware both of professional rules and constitutional case law in determining their ethical duties to the client.

Neither the ethical rules nor the right to counsel contemplates any exception or modification for cases involving forensic evidence. Indeed, the danger of an unfair trial from a failure to provide effective assistance of counsel is presumably heightened in a case involving complex scientific evidence, where the defendant is even more dependent than in a typical case on “access to counsel’s skill and knowledge”.15

The Duty to Conduct Pre-trial Investigation, Seek Discovery, and File Relevant Pre-trial Motions Related to Forensic Evidence

The ABA Model Rules of Professional Conduct require that counsel cultivate the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation” of the client.16 More specifically, the ABA Criminal Justice Standards require that counsel “conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction”.17 These directives may seem particularly daunting in a case involving complex scientific evidence, as a lawyer might need to conduct extensive studies and consult with colleagues and experts just to determine what investigative leads to pursue. Yet counsel’s duty of competence is not relaxed based on the difficulty or novelty of the subject matter involved in a case.18 To the extent the defense bar faces systemic barriers – such as a dearth of funding for forensic experts or attorney trainings – to meaningfully challenge forensic evidence, policymakers and judges should recognize that such funding might well be necessary to avoid large-scale ethical and Sixth Amendment violations in cases involving such evidence.19
Defense counsel should ensure that the mere presence of apparently inculpatory forensic evidence against a client, such as a reported DNA match between the client’s DNA profile and DNA found at the crime scene, does not alone determine counsel’s decision whether to conduct further investigations or to advise the client to plead guilty. First, counsel should review the forensic evidence and investigate other aspects of the case to know whether such evidence is truly inculpatory. It might not even be evidence in the first place – only items actually admitted in court are “evidence” and if the sample were inappropriately obtained, counsel should be able to have it excluded. Further investigation might reveal that the evidence is either unreliable or reliable but suggestive of innocence. Second, even in the face of seemingly reliable, inculpatory scientific evidence, the client may well have a viable defense or basis for suppressing or excluding the evidence. Conversely, an attorney should not fail to look for exculpatory material, including forensic evidence, merely because a client has confessed to the crime. The ethical duty to investigate “exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty”. Indeed, several cases exist in which a client who confessed was later exonerated with the assistance of DNA or fingerprint evidence.

The failure to conduct a proper investigation is also “deficient performance” for Sixth Amendment purposes. According to the Supreme Court, “counsel has a duty to make reasonable investigations” or to make a reasonable decision that makes particular investigations unnecessary. Of course, “when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable”. The ultimate question for constitutional purposes is whether counsel’s investigations are reasonable under the circumstances.

The duty to investigate includes the related duties to request all disclosable evidence from the prosecution and to file appropriate pre-trial motions to exclude or suppress evidence. Specifically, counsel should request discoverable material, pursuant to discovery rules; material favorable to the defense, pursuant to Brady v. Maryland; and any other items disclosable under applicable rule, statute, or case. The scope of the prosecutor’s and prosecution expert’s duties under these various regimes is discussed more in depth in Section 3 below. Notably, most federal courts of appeals have refused to find a Brady violation where counsel could have found the evidence through reasonable self-investigation.

Given that an attorney’s meaningful review of forensic evidence may well – more so than most other types of evidence – require consultation with an expert or independent testing, it is especially critical that the attorney makes timely discovery requests in cases involving forensic evidence. The timeliness of the request is important not only for the client’s sake, to avoid unnecessary delays in the litigation or problems
with evidence preservation, but also for the sake of the prosecution, which is entitled to reciprocal discovery of materials generated by the defense’s expert.\textsuperscript{32}

In some cases involving forensic evidence, counsel will also have a duty to seek material from non-governmental sources. To the extent a defense attorney learns that it would be in the defendant’s interest to seek fingerprints, biological material, a handwriting exemplar, or other forensic material from a third party (for example, to determine whether a third-party perpetrator is the source of a fingerprint, DNA, or document found at the crime scene), and the third party does not voluntarily acquiesce in a request for the material, counsel should seek a court order compelling the third party to provide the material. Likewise, if a defense attorney is denied access to the crime scene, a court order should be sought to allow counsel and/or the investigator “reasonable access” to the location and, in a DNA case in particular (but not necessarily exclusively), “[permit[ting] a representative of the defendant’s attorney properly trained in the identification, collection, and preservation of DNA evidence to collect DNA evidence”.\textsuperscript{33}

Counsel’s decision whether to consult a forensic expert or pursue independent forensic testing must also be the result of investigation or a reasonable decision not to investigate. Counsel’s failure to call a forensic witness when one is necessary to meaningfully rebut the government’s case is a constitutionally deficient performance.\textsuperscript{34} At the same time, courts will not construe the failure to call an expert as deficient where the decision was a reasonable strategy at the time, even if the decision turned out to be unfavorable to the client.

The Supreme Court’s most recent pronouncement on when counsel’s failure to consult an expert or conduct independent testing is ineffective is \textit{Harrington v. Richter},\textsuperscript{35} in which the Court held that a state court was not unreasonable in ruling that an attorney who failed to call a blood spatter expert at trial and to conduct independent testing of a particular pool of blood at the crime scene was not constitutionally ineffective. The defendant, Richter, was accused along with another man, Branscombe, of shooting and wounding a drug dealer, Johnson, in his apartment bedroom, and fatally shooting a second man, Klein, on Johnson’s living room couch. Richter’s defense was that he was never in the apartment, that Branscombe had shot Johnson in self-defense, and that Klein was caught in the crossfire while standing in the doorway of Johnson’s bedroom. To rebut the defense theory, the government called a serologist and blood spatter expert to testify — among other things — that a blood stain near a larger pool of blood in the doorway belonged to Johnson, not Klein. Richter offered affidavits from experts in post-conviction proceedings stating that the large pool of blood in the doorway may have been a mixture that included Klein’s blood, that the pool was likely too large to be only Johnson’s blood, and that the absence of “a large number of satellite droplets” in the area around the blood in the doorway suggested that the blood pool was not Johnson’s.\textsuperscript{36}
While acknowledging that “[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence”, the Court concluded that trial counsel’s decision not to consult blood experts could have stemmed from a concern that the blood, when tested, would “demonstrate that the blood came from Johnson alone,” exposing “Richter’s story... as an invention.” Counsel could also have reasonably considered, according to the Court, the “possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether Johnson was telling the truth, or transform the case into a battle of the experts”. Notwithstanding the ultimate denial of relief in Richter based on the facts of the case, the Court reaffirmed the need for counsel to understand the forensic issues in a case well enough, based on proper factual and legal investigation, to know whether consultation with an expert or introduction of defense forensic evidence is necessary to meaningfully rebut the government’s case.

Based on the foregoing principles, during pre-trial preparation counsel should do the following – or have a legitimate reason, based on reasonable investigation, not to do the following – with respect to forensic evidence:

- Conduct an appropriate factual investigation of the case in general, so that counsel understands the potential relevance of any forensic evidence, tested or untested, to both the government and defense cases;
- Request all disclosable materials from both the government (pursuant to Rule 16, Brady, etc.) and third-party sources (pursuant to consent or court order);
- Interview the government’s forensic experts;
- Check the experts’ curriculum vitae for inaccuracies;
- Determine if government expert(s) are certified and/or licensed (where appropriate);
- Go to the crime scene, with an expert where appropriate;
- Inspect the government’s laboratory and/or request permission for a defense attorney or expert to be present for government testing;
- Determine whether the governmental expert(s) lab is accredited;
- Consult independent experts if necessary to determine whether and how to challenge the government’s forensic evidence or to offer defense forensic evidence;
- Conduct independent testing of the government’s forensic evidence or of previously untested but material evidence;
- Conduct independent mental or physical examinations of the client, as needed;
- File appropriate motions to enforce disclosure requests and to suppress or exclude evidence as needed, including:
  - motions to suppress forensic evidence on search and seizure or self-incrimination grounds;
  - motions to exclude forensic evidence or methods on grounds of scientific invalidity (“Daubert” motions) or lack of general acceptance in the relevant scientific community (“Frye” motions) or their jurisdictional equivalents;
Ethical Duties of Attorneys and Experts in Forensic Cases

In discharging these duties, counsel should “not knowingly use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so”, or “use methods of obtaining evidence that violate the legal rights” of a third party. While defense attorneys and experts cannot lie or misrepresent their role to potential witnesses during an investigation, they need not “caution the witness concerning possible self-incrimination and the need for counsel”.

The Duty to Effectively Challenge – and, When Appropriate, Introduce – Forensic Evidence at Trial and Post-Trial Proceedings

Counsel’s duty to be a “vigorous advocate of the defendant’s cause” is no more critical than in a case involving forensic evidence, where the potential for jury prejudice and confusion at trial may be particularly high, and where numerous traditional methods have recently come under attack either for failing to adhere to the scientific method or because certain laboratories or analysts have become embroiled in scandals involving gross negligence or malfeasance. Even those methods deemed relatively reliable, such as PCR-STR DNA testing, are potentially subject to interpretive error, contamination, and erroneous or overstated match probabilities. Moreover, while prosecutors often lament the “CSI effect,” which allegedly causes jurors to irrationally acquit in the absence of scientific evidence of guilt, some have written of a competing “white-coat syndrome,” whereby overly impressed jurors overestimate the probative value of scientific evidence, or expect the defense to counter government forensic evidence with such evidence of its own.

Potential trial-related ethical duties of defense counsel and experts that could arise in a case involving forensic science include:

Motions in limine to limit the scope of testimony or argument. Counsel should be prepared, when appropriate, to litigate the proper scope of government expert testimony before the expert is called to the stand. Thus, for example, counsel might wish to file a motion to preclude a fingerprint expert from testifying that the method has a “zero error rate” or to preclude a toolmark analyst from claiming that a particular bullet was fired from a particular gun “to the exclusion of all others in the world”. Depending on the jurisdiction, counsel might also seek to preclude the government from mentioning to the jury that the defense had a right to independently test forensic evidence but either did not test the evidence or tested the evidence but did...
not disclose the results; that the defense consulted a forensic expert but did not call the expert as a witness; or from asking the jury to draw a negative inference against the defense based on such information.\(^{62}\) Some authors have noted that such a negative inference, even if constitutionally permissible, will usually be logically unwarranted; for example, the decision “to consult an expert witness, when it comes to second-generation forensic evidence [such as DNA evidence and fMRI imaging], is as much an attempt to understand the evidence as to challenge it”.\(^{63}\) The ABA, for its part, precludes such arguments by the prosecution unless necessary to fairly rebut a defense argument.\(^{64}\) In any event, counsel should be aware of the consequences of any decision to conduct or forego testing or expert consultation.

**Direct- and cross-examination of the government’s forensic experts.** Counsel should be prepared to object if a government expert testifies contrary to stipulated or court-ordered parameters, or testifies outside the specific sphere of expertise,\(^{65}\) such as a DNA analyst without training in statistics attempting to justify the population genetics assumptions underlying the government’s match statistic, or a forensic odontologist claiming to be an expert in video enhancements.\(^{66}\) Counsel must also adequately prepare for impeachment and, where applicable, live cross-examination of the government’s experts. Absent a strategic reason to do otherwise, counsel should object if the government attempts to call a surrogate witness, such as a laboratory supervisor, in place of the analyst who actually conducted the forensic testing in the case.\(^{67}\) However, sometimes a supervisor will testify as “custodian of record” if an analyst is “double booked”. This is not done for strategic reasons but merely out of necessity if neither trial date can be rescheduled. Counsel should be prepared to cross-examine experts about topics as varied as chain of custody; credentials; limits of expertise; failure of the government’s procedures to correct for cognitive bias; other arguable forms of potential bias, such as affiliation with law enforcement or knowledge of the case; error rate or failure to calculate one; lack of population frequencies to determine probative value of pattern evidence such as fingerprints or toolmarks;\(^{68}\) other aspects of the discipline or method that fail to adhere to scientific principles;\(^{69}\) failure to preserve or test all relevant evidence; potential for false positives and/or negatives due to contamination or interpretive error; alternative theories of innocence not inconsistent with the evidence; and so forth. In doing so, counsel and the judge should be aware that “[d]efense counsel’s belief or knowledge that the witness is telling the truth does not preclude cross-examination”.\(^{70}\)

**Statements and arguments to the jury.** The ABA rules state that counsel “may argue all reasonable inferences” to the jury “from the evidence in the record”, so long as counsel does not “intentionally misstate the evidence or mislead the jury as to the inferences it may draw”.\(^{71}\) Defense counsel need not call their own forensic expert(s) to argue to the jury why the government’s forensic evidence is invalid or may actually be exculpatory.\(^{72}\)

**Allocation of trial decisions between client and lawyer.** A client has the right under ethical and legal rules to decide certain issues regardless of whether the decision goes
against the advice of counsel, including what pleas to enter, whether to enter a plea agreement, whether to request a jury trial, whether to testify, and whether to appeal. Depending on the jurisdiction, a client might also have a statutory right – not waivable by counsel – to seek independent testing of biological material before or after trial. Nearly all other strategic decisions in a case involving forensic science, such as whether to consult or call an expert, whether to seek independent testing or introduce defense evidence, “whether and how to conduct cross-examination” of forensic experts and other witnesses, and what motions to file with respect to forensic evidence, are determined by counsel after consulting with the client. Indeed, an attorney may well be deemed unethical or even ineffective for acquiescing in the decisions of a mentally impaired client, such as to forego an insanity defense or competence testing.

2.2 Defense Attorneys’ and Experts’ Duties of Confidentiality and Loyalty to the Client

The duty of confidentiality is a “fundamental principle” that “contributes to the trust that is the hallmark of the client–lawyer relationship.” ABA Model Rule 1.6 states that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation”, or the disclosure is necessary to prevent various enumerated future harms or harms perpetrated unknowingly using the attorney’s services. This ethical rule is broader than the related “attorney-client privilege”, an evidentiary rule that legally shields certain information from compelled disclosure. A defense forensic expert, as a non-lawyer retained to assist in the client’s legal defense, is generally bound by the confidentiality rule under the ethical codes of both the legal and forensic professions, and as such any communications with the lawyer and client are protected by privilege. For example, the AAFS admonishes that:

> When a forensic scientist accepts any privileged information from an attorney, care should be taken to ensure that all such information is kept confidential and does not reach the opposing side. After accepting such information, forensic scientists should not provide their services to the opposing side unless legally ordered to do so. Forensic scientists should alert attorneys not to make payment or provide privileged information, if they wish to retain the option to be employed by the opposing side.

Thus, for example, absent the client’s permission, a defense expert should not:

- disclose to the prosecution the results of independent forensic testing conducted at the defense’s request;
- work for the prosecution on the case once he/she is privy to client confidences, even if he/she is not called as a witness by the defense;
- disclose to the authorities information that the defendant tells him/her about a past crime he/she has committed;
● disclose on a curriculum vitae that he/she has worked on a particular client’s case;\textsuperscript{85}

● disclose to the prosecution, even in a later, unrelated case, information learned through representation of a client about a particular defender office’s strategies or practices, unless generally known;\textsuperscript{86}

● use the defendant’s confidential information for educational or research purposes, except under limited circumstances;\textsuperscript{87}

● allow any disclosures of client information by employees of the forensic expert, including laboratory personnel, administrative assistants, “and even garbage men”;\textsuperscript{88} or

● consult another expert about the case without the permission of defense counsel, who may wish to take steps, through wording of a retainer agreement or otherwise, to ensure that the second expert is covered by the confidentiality rule and the attorney-client privilege.

The confidentiality rule is somewhat more complicated in a case involving mental health or mental retardation issues. A mental health expert may be called upon by the defense for any number of purposes, including to evaluate whether the defendant is legally “competent” to stand trial or waive certain rights, to evaluate what the defendant’s mental state was at the time of the alleged crime, or to evaluate the defendant’s current mental state for purposes of sentencing or commitment proceedings. While the results of any mental examination of the client are presumptively confidential under Rule 1.6 and medical ethics rules,\textsuperscript{89} the defense attorney or expert may have to disclose the existence or results of an examination under certain circumstances. First, if the trial court orders a competence evaluation, the court will likely disclose the results to the government.\textsuperscript{90} Note, however, that the expert should ensure that his/her evaluation relates only to competence and does not include other unnecessary disclosures of client information.\textsuperscript{91} Second, if the defense gives notice that it will offer mental health evidence at trial, the defense will have to disclose the expert’s evaluation.\textsuperscript{92} Third, even if the expert is not asked to evaluate competence, if the expert at any point “concludes that the defendant may be mentally incompetent to stand trial, presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention, the evaluator should notify defendant’s attorney. If the evaluation was initiated by the court or prosecution, the evaluator should also notify the court”.\textsuperscript{93} The expert should make clear these disclosure requirements to the client before the evaluation begins.\textsuperscript{94}

Defense attorneys and experts also owe the client a duty of loyalty, which prohibits them from engaging in conduct that creates or appears to create a conflict of interest.\textsuperscript{95} One implication of the rule is that an expert cannot be “paid on a contingency basis, [lest] the perception of the veracity or reliability of the forensic professional’s opinion is reduced for the fact finder because of the expert’s interest in the outcome”.\textsuperscript{96}
2.3 Defense Counsel’s Duties to the Defense Expert

Counsel also owes ethical duties to the defense’s own experts. First, the defense should never ask the expert to destroy evidence, make misleading statements, or to commit any other type of misconduct that, if defense counsel committed it, would be a violation of counsel’s ethical or legal duties, including asking the expert to testify falsely or “ask[ing] a question” of the expert on the stand “which implies the existence of a factual predicate for which a good faith belief is lacking.” Second, counsel should not expect the expert to be a “hired gun” whose conclusions, after analysis, will necessarily be pro-defense. Specifically, the ABA standards require that:

Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert’s opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

Counsel should also confer with the expert to prepare him/her for his/her testimony and, in the case of mental health experts, ensure that the expert understands the purpose of the evaluation, as well as any relevant law or facts. When a mental examination covers areas other than legal competence, the attorney should respect the expert’s request that counsel not be present during the examination.

2.4 The Defense’s Duties to the Government and the Court

Disclosure and preservation requirements. “Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.” Upon request, the defense must typically provide, in a timely fashion, any items such as documents, papers, and physical objects within the defense’s possession, custody, or control that the defense intends to introduce in its case in chief, other than anything covered under the attorney-client privilege or work-product rule. Specifically, defense attorneys and experts should comply with any requirements with respect to disclosure of results or reports of examinations or tests, and summaries of expert testimony and qualifications. Both defense attorneys and experts have duties not to tamper with, destroy, or obstruct access to, forensic evidence. Counsel should also ensure that the defense does not unnecessarily use up a forensic evidence sample without giving the opposing side a chance to object. In particular, the ABA Standards include numerous requirements for preservation of DNA evidence by both parties. Note that absent client consent, counsel should not acquiesce in a prosecutorial request for a DNA sample from the defendant, absent certain procedural protections. Also note that the defense has no “reverse Brady duty” — that is, no general duty to disclose inculpatory evidence to the government.
Access to witnesses. Defense counsel should not “discourage or obstruct communication between prospective witnesses and the prosecutor”. Yet counsel may, under the ABA rules, request that a retained expert not give certain information to the government, so long as counsel does not seek to obstruct the prosecution’s legitimate access to evidence and “reasonably believes that the [expert’s] interests will not be adversely affected by refraining from giving such information”. Absent such admonition from counsel, defense experts should be willing to answer questions about their analysis, so long as they abide by the confidentiality rule in any dealings with government attorneys.

Presenting and challenging forensic evidence at trial. Neither the lawyer nor expert may present evidence they know to be false or intentionally misrepresent matters of fact or law to the court. The consultant should not misrepresent training or experience, including “[e]xaggerating credentials”, even in a manner that may appear subtle to the practitioner. While the expert should never knowingly assist counsel in “creating a false impression in the minds of the jury”, the consultant should be aware of counsel’s obligation to put the government to its burden on each and every element of the offense and of the fact that the practitioner’s role is not to assess the credibility of the evidence him/herself. Thus, for example, the expert should freely testify as to whether or not a victim’s or defendant’s wounds are consistent with the defendant having acted in self-defense, regardless of what the expert learns during the course of his/her employment about whether the defendant allegedly confessed to the crime.

2.5 Defense Experts’ Broader Duties to Their Profession

Defense experts, like their prosecution counterparts, have general duties to their profession that relate to promoting good science, integrity of process, and a culture of openness. Experts should eschew unreliable methods and strive to remain “unbiased”. The latter might be argued to be difficult as the consultant was obviously retained by a defendant and therefore has a pretty good idea what outcome(s) might be desired. An expert’s proper discharge of these duties inures to the benefit of the court and the parties in a criminal case. For example, a consultant cannot ensure truthful testimony without ensuring that the results are based on valid science and reliable methodologies, and cannot speak to what is “generally accepted” in the scientific community for purposes of a Frye hearing without “keep[ing] abreast of new developments” in the field.

Defense consultants very often are not specialists in the specific field for which they are consulted and lack recognized certification in the specialty. Those who do claim “certification” may have acquired the same from questionable sources. Counsel would be well-served to ensure the caliber and reputation of the expert’s scientific background before bringing such a practitioner into the case. The duty to “strive” for professional excellence through “publications and presentations at meetings”
is perhaps especially critical for defense experts, who may not be part of the “forensic science community” and who may therefore not routinely write or speak about the particular forensic discipline about which they are called to consult or testify. A population geneticist, for example, might only be aware of the FBI’s technique for calculating match statistics in a mitochondrial DNA case because a defense attorney has called him/her for advice. While this fact does not necessarily make the witness any less qualified, scientists from the derivative sciences would be well-served to keep abreast of related fields to their own and should strive to be aware of and write about issues in forensic science. While government laboratories that routinely conduct forensic work should maintain accredited status from governing forensic agencies such as ASCLD, the defense would prefer leeway in seeking testing from laboratories that do not necessarily have accreditation from such agencies or their equivalent. The defense often argues it must venture outside the “forensic science community” and into the derivative sciences to find experts who are not affiliated with law enforcement and yet are qualified to consult with the defense or conduct independent testing. So long as such professionals meet the standards of their respective disciplines – for example, the CLIA standards for clinical laboratories – and the evidence they provide is otherwise reliable and admissible, their work is often accepted by courts. Independent laboratory directors should, of course, implement all proper quality control and assurance measures, especially measures designed to minimize contamination, given that at least one reported DNA exclusion has been attributed by prosecutors to contamination rather than the defendant’s innocence. This is an interesting dichotomy, as on one hand arguments are to require accreditation and certification for governmental entities and employees but eschewing same for defense consultants. In sum, the defense is left with an “it’s the best we can do” argument. In addition, defense counsel should be aware that the fact that a chosen laboratory was not accredited will likely be highlighted by the prosecution, especially if the state lab is accredited, and results favorable to the defendant may be afforded less weight by the jury because of this.

3. A DEFENSE PERSPECTIVE ON THE ETHICAL DUTIES OF THE PROSECUTION AND ITS EXPERTS IN A CASE INVOLVING FORENSIC SCIENCE

This section does not purport to cover the comprehensive ethical requirements of prosecutors and prosecution experts with respect to the preservation, testing, disclosure, interpretation, and presentation of forensic evidence in criminal trials. Rather, it highlights certain uncommon but recurring ethical issues related to government forensic experts. In particular, it suggests that – given recent laboratory scandals, DNA-assisted exonerations involving convictions based on arguably questionable forensic “science”, deliberate refusals by prosecutors or investigative agencies to disclose
or preserve forensic evidence, and critiques by the National Academy of Sciences (NAS) – prosecutors and prosecution experts should be especially vigilant about:

- Ensuring that traditional forensic disciplines and all government expert testimony comport with principles of good science and the search for truth;
- Ensuring a culture of openness in responding to defense requests for access to forensic databases, forensic experts, and data underlying government analyses;
- Ensuring that forensic experts assist prosecutors in determining which forensic evidence may be exculpatory under Brady v. Maryland or otherwise subject to disclosure and preservation requirements;
- Considering issues of privacy and civil liberties when using forensic databases for investigative purposes.

3.1 Ensuring that Forensic Disciplines and Expert Testimony Comport with Principles of Good Science and the Search for Truth

The ethical codes of each forensic science professional organization require that forensic experts promote reliable science, follow the scientific method, promote peer review of their work, and not become an advocate for one side or another. Yet the 2009 NAS Report on the state of forensic science describes in detail how many traditional forensic disciplines – such as toolmark analysis, fingerprint examination, and forensic odontology – have not been properly validated, have not developed accurate measurements of uncertainty, are not yet reliable bases for claims of individualization, and have not been subject to the rigors of review by the larger scientific community. The reason for these shortcomings is not a lack of talent or sincerity on the part of forensic experts, but structural and institutional issues arguably related to the law-enforcement provenance and focus of these disciplines. Prosecutors’ and experts’ efforts to improve the quality of forensic science should include the following:

Avoiding cognitive bias. As the NAS Report makes clear, all humans, and thus all forensic scientists (be they prosecution or defense experts), are subject to unconscious cognitive bias. One hesitates to change a formed opinion, reach a conclusion contrary to expectations, or engage in cognitive dissonance. The goal of the scientist should be to implement policies intended to naturally minimize such bias when it could affect the accuracy of one’s analysis. Indeed, ethical codes for the forensic profession require as much. Towards this end, scientists could take steps such as incorporating “sequential unmasking” in DNA analysis; otherwise ensuring that an analyst does not know the suspect’s profile before making a comparison with the evidence sample; and, more generally, endeavoring to assure continued operational independence from law enforcement.

Properly limiting the scope and ambition of expert testimony. Prosecutors should ensure that the expert limits his/her testimony to the sphere of expertise, and does not make claims that are scientifically unsupportable or not validated, such as that the
expert’s method has a “zero error rate” or that the evidence is unique to the defendant or a tool used by the defendant “to the exclusion of all others in the world”. 61,62

**Reporting an estimated error rate.** The NAS Report makes clear that calculation of an accurate error rate or other measure of uncertainty is critical to determining the probative value of forensic evidence and is missing in several traditional forensic disciplines. 137 Academic commentators have explained that, with respect to DNA typing in particular, the chance of a false positive from laboratory error surely dwarfs the chance of a coincidental match, making the presentation of only the random match probability to the jury – and no mention of the chance of a false positive due to error – highly misleading in terms of meaningfully expressing the true probative value of a reported match. 138

### 3.2 The Prosecutor’s and Government Experts’ Duties to Promote a Culture of Open Review of the Government’s Methods

As a matter both of good science and due process of law, government forensic experts should embrace a culture of open access to data underlying government methods and encouragement of peer review. “Policies that interfere with the peer review process – such as ... unwillingness to release data (including bench notes, electronic data, procedural manuals, developmental data, and the like) – are inimical to the scientific method”. 139 This is all the more true given that traditional forensic disciplines arguably “suffer from an inadequate research base” and thus should affirmatively reach out to the broader scientific community to encourage review of forensic methods. 140

Yet defense attorneys sometimes face difficulty when seeking standard operating procedures (SOPs), validation studies, accreditation reports, and aggregate proficiency data for forensic tests relied upon by the government at trial. 141 Some commentators have suggested that the unwillingness to share data with the defense is a result of the forensic community’s official or unofficial affiliation with law enforcement. 142 Yet scientists should not be advocates for one side or the other, and should presumably welcome the desire of independent experts and academic researchers to become more engaged in forensic disciplines. Accordingly, government experts should make every effort to allow reasonable access to data without relying on “secret processes” 143 or a trade-secrets privilege if such a privilege would “unduly interfere” with the defense’s ability to meaningfully challenge the government’s forensic evidence. 144 Likewise, laboratory records should be open to inspection. 145

One recurring issue along these lines is the FBI’s unwillingness to release its vast CODIS database, in anonymized form, to academic researchers to test the validity of the government’s reported match statistics in nuclear DNA cases. In the wake of evidence that certain state DNA databases have a surprising number of closely matching profiles, 146 a result that is arguably inconsistent with the FBI’s assumptions of statistical independence in calculating DNA match probabilities, 147 numerous members of the
scientific and legal communities\textsuperscript{148} – along with the ABA\textsuperscript{149} – have called on the FBI to give access to the database so that the allele frequencies and use of the product rule can either be properly validated or appropriately modified. As of this writing, the FBI not only refuses access to CODIS but routinely seeks to preclude the defense from mentioning the state database results to juries.\textsuperscript{150}

A related recurring issue is the FBI’s and some state agencies’ refusals to honor defense requests to run a DNA profile found in an evidence sample through an offender database, where the defendant him/herself has been excluded as a source. Several courts have forced such agencies to run the searches.\textsuperscript{151} Again, the ABA standards,\textsuperscript{152} and legal commentators,\textsuperscript{153} have urged investigative agencies to allow such searches.

\textbf{3.3 The Government Forensic Expert’s Duty to Assist the Prosecutor in Meeting Disclosure and Preservation Duties, and the Scope of Those Duties}

The failure of government officials to preserve and timely turn over disclosable evidence to the defense is, in the words of the Department of Justice, “a serious matter.... [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our efforts to achieve justice in every case”.\textsuperscript{154} The duty to disclose stems primarily from ethical rules, court discovery rules, statutes, and the Due Process Clause.

Prosecutors have an ethical duty under ABA Model Rule 3.8(d) to turn over “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”,\textsuperscript{155} a duty the ABA has recently interpreted to apply to all evidence “favorable to the defense”, regardless of its potential materiality to the trial’s outcome.\textsuperscript{156} The United States Attorney’s Office (USAO) Manual similarly requires timely disclosure of all favorable evidence to the accused, regardless of the prosecutor’s own prediction of the evidence’s materiality.\textsuperscript{157} Thus, for example, the ABA recently issued a formal ethics opinion stating that a prosecutor has an ethical duty to turn over evidence in a robbery case that a non-testifying witness failed to identify the defendant in a line-up, even if the prosecutor interviewed the witness and found the account to be unreliable.\textsuperscript{158} Prosecutors do not, however, have to “conduct searches or investigations for favorable evidence and information of which they are unaware”.\textsuperscript{158}

This ethical duty to disclose evidence favorable to the accused is arguably broader than the prosecutor’s constitutional duty under the Due Process Clause, as recognized in \textit{Brady v. Maryland},\textsuperscript{159} to disclose all evidence that is either affirmatively “exculpatory” or “impeaching” of government evidence, a duty the violation of which requires reversal of a conviction where there is a “reasonable probability” that disclosure would have affected the outcome of the proceeding.\textsuperscript{160} While “strictly speaking” a \textit{Brady} violation requires reversal only when the evidence turns out to be material to the outcome, the
Supreme Court has made clear that the prosecutor’s duty of disclosure is “broad”, and some lower courts have interpreted the duty to exist independent of materiality. Lower courts have noted that this broad interpretation makes sense, given that defense counsel, and not the prosecutor, is in the best position to determine how exculpatory or impeaching evidence might make the government’s case less compelling or bolster the defense case.

The ethical and legal duty to disclose favorable evidence is also distinct from the prosecutor’s separate duty under discovery rules or legislation, such as Federal Criminal Rule 16 or innocence protection statutes, to disclose or preserve various items of evidence that the government intends to introduce at trial or that are material to the reparation of the defense. The ABA also has separate ethical rules dedicated to the discovery process that are broader than Rule 16’s requirements, requiring the prosecution to, for example, disclose to the defense the persons it intends to call as witnesses at trial.

In discharging his/her disclosure duties under these various regimes, the prosecutor is ethically and legally responsible for ensuring that government experts comply with discovery requests and for alerting the defense to discoverable items that are in the possession of government agencies, such as forensic laboratories, including those “not reporting directly to the prosecution”. Similarly, as a matter of constitutional law, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case”.

In turn, the government’s forensic experts themselves are ethically and legally responsible for assisting the prosecutor in meeting disclosure obligations. Specifically, the ABA rules require that investigative agencies, laboratories, and experts use “diligent good faith efforts” to provide discoverable material to the requesting party, and numerous ethical codes require experts to properly preserve, and in some cases collect, physical and documentary evidence. For example, experts have a duty to preserve relevant DNA evidence through the appellate process, to preserve enough evidence for retesting by the defense where possible, to preserve work notes, data, and peer review, and to collect any “relevant” items that can be tested for DNA from the crime scene. Courts take these duties seriously. One state supreme court, for example, reversed a murder conviction where one of two primary pieces of evidence against the defendant was a bite mark from a bologna sandwich at the crime scene, and the bitemark expert threw away the sandwich after analyzing it.

While forensic experts are not expected to know the intricacies of legal doctrines, they are expected to be sufficiently “conversant with the requirements of the law” to assist the prosecutor in determining whether forensic evidence of which they are aware is subject to disclosure. This duty requires the expert “to make a reasonable effort to determine what the issues are in an incident, what potential arguments might be put forth by either side, and what value any objects or observations might be to supporting or refuting those arguments”. Indeed, the expert has an independent duty...
to inform the court of the impact of forensic evidence – on the defense side, subject to confidentiality and loyalty duties – even if the parties have not disclosed it.\textsuperscript{176}

Thus, for example, an expert would need to alert the prosecutor to disclose:

\begin{itemize}
  \item Evidence tending to show that a methodology underlying government evidence is either not generally accepted in the larger scientific community or is unreliable;\textsuperscript{177}
  \item Evidence of an “exclusion”, i.e., evidence tending to show that the defendant is not the source of the tested evidence, or that another person is the source;\textsuperscript{178}
  \item Evidence tending to impeach the result of a test offered as proof of identification of the perpetrator at trial, including:
    \begin{itemize}
      \item A previous or subsequent inconsistent result by the same or another analyst, such as a finding by another expert that the evidence is inconclusive or otherwise could have come from a source other than the defendant;\textsuperscript{179}
      \item Evidence of contamination, interpretive error, or other error potentially leading to a false inclusion of the defendant as a suspect;
      \item Where the expert makes a point of testifying that the evidence is “consistent with” the defendant being the source, any evidence showing that other persons are equally likely to have been the source, such as evidence of other database DNA or fingerprint profiles just as consistent with the evidence as the defendant’s profile;
      \item Forensic evidence known to the expert that negates or mitigates the defendant’s involvement in a crime, e.g., in an arson case, any evidence that suggests the fire could have been started accidentally rather than by an accelerant;
      \item Forensic evidence tending to impeach the testimony of a government witness, such as the presence of semen in an intimate sample in a rape case that includes DNA of someone other than the defendant, or a mixture of the defendant and other sources, where the alleged victim or other eyewitness claims there was only one assailant;
      \item Any evidence that the testifying expert him/herself has made inconsistent statements or taken inconsistent positions on the results of the analysis conducted;\textsuperscript{180}
      \item Evidence casting doubt on a particular element of the offense, such as evidence in an aggravated assault case tending to show that the victim’s wounds are not permanent or that the victim did not likely suffer extreme pain;\textsuperscript{181}
      \item Any evidence tending to cast doubt on the expert’s credibility;\textsuperscript{182}
      \item Evidence tending to show any pro-government bias on the part of the expert, including evidence that the expert has received funding from the government for research that will promote his/her professional interests;\textsuperscript{183}
      \item Any information that tends to support an affirmative defense, such as evidence that the defendant had defensive wounds or evidence that the victim had PCP in his/her blood at the time of the incident and was likely to be aggressive, supporting a self-defense theory;\textsuperscript{184} or
      \item Evidence tending to reduce the defendant’s culpability, such as evidence that the defendant has an organic brain dysfunction.\textsuperscript{185}
    \end{itemize}
\end{itemize}
These requirements apply to oral and electronic communications between an expert and prosecutor or between experts, and not merely written or hard copy materials.186

3.4 Ethical Issues Related to the Government’s Use of Forensic Databases

The use of forensic databases has contributed to the efficiency and effectiveness of modern criminal investigations, and is sure to play an ever-increasing role in law enforcement. Yet left unchecked, the government’s unfettered use of such databases poses potential legal and ethical problems. For example, a growing number of states have begun to engage in “familial searching”, a term encompassing two related agency policies:

1. reporting to law enforcement any inadvertently discovered partial DNA match between an evidence sample and a profile listed in an offender database, in case the perpetrator turns out to be a relative of the partially matching suspect; and

2. deliberately searching for partial matches for this purpose.

While at least one high profile case has been solved through this process, the technique is controversial to some because, among other objections, it subjects the other, non-offending family members to police scrutiny based solely on the potential misdeeds of their relatives, potentially interrupts family integrity by revealing previously unknown biological information, and is argued to disproportionately affect minority communities.187

More generally, government officers, judges, and policymakers should weigh citizens’ privacy interests when determining the legality of, or implementing, policies for collecting DNA samples of citizens for inclusion of their profiles in searchable law enforcement databases.188 At a minimum, profiles should remain anonymous “unless a match is declared”,189 and samples should be destroyed the moment the legal basis for their inclusion disappears.190 Indeed, the ABA urges that a person’s profile be expunged from the database as soon as the conviction is vacated, and that “[m]ethods should be devised to expunge routinely” any profile not belonging in the database.191

NOTES AND REFERENCES


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[6] See, e.g., ABA Model Rule 1.6 Comment [2] (“The lawyer needs this [confidential] information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.’’).

[7] ABA Criminal Justice Standard (Defense Function) 4-1.2(b) (2010) [hereinafter ABA Def. Std.].


[9] U.S. Const. amend. VI.


[14] To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his/her “counsel’s performance was deficient” and that counsel’s errors or omissions “prejudiced” the defendant, i.e., “deprive[d] the defendant of a fair trial.” Strickland, 466 U.S. at 686. Of course, if the allegation relates to sentencing, the defendant would be entitled to a new sentence, not a new trial.


[17] ABA Def. Std. 4-4.1(a).

[18] See, e.g., ABA, Report to House of Delegates, Recommendation 111B (Aug. 2004), available at http://www.nacdl.org/sl_docs.nsf/freeform/crimelab_legislation_attachments/$FILE/CrimeLab_ABA2004.pdf (“Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case.”). Counsel should be aware of any ethical rules that apply specifically to the type of case he/she is litigating, such as the ABA’s Criminal Justice Standards for DNA, mental health, and death penalty cases.

[19] See, e.g., id. (“Training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.”)

[20] For example, a reported DNA match may be unreliable because of contamination or interpretive error. Even if reliable, the match may be consistent with innocence because it is coincidental, the result of DNA transfer (such as between clothes in a laundry basket), the result of the defendant’s innocent presence at the scene at an earlier time, or the result of actions that were consensual or in self-defense. In any event, if a defense lawyer believes the client has been falsely inculpated through forensic evidence, the lawyer would presumably “be unethical in failing to seek assistance” from an expert to understand the evidence. Murphy, E.E., Inferences, Arguments, and Second Generation Forensic Evidence, Hastings Law Journal, 2008, 59:1047–1076, at p. 1073 [hereinafter Murphy (2008)].

[21] Cf Holmes v. South Carolina, 547 U.S. 319, 329 (2006) (holding that a state may not prevent a defendant from presenting evidence of third-party guilt merely because the state has presented “forensic evidence” that, if believed, would “provide strong support for a guilty verdict”). Notably, over half of the 271 DNA-assisted exonerations through the Innocence Project have involved ostensibly inculpatory non-DNA forensic evidence later determined to be “unvalidated or improper” by the Innocence Project. See http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php.

[22] See, e.g., Other Convictions in the Face of Exculpatory DNA, Bluhm Legal Clinic, Center on Wrongful Convictions, Press Release May 2010 (giving summaries of 19 cases in which defendants
have been convicted of rapes or rape-murders despite exculpatory DNA testing,” 15 of which involved confessions).

[23]  

Strickland, 466 U.S. at 690–91.

[24]  

Id. at 691.

[25]  

Wiggins v. Smith, 539 U.S. 510, 534 (1995). In Wiggins, the Supreme Court held that two public defenders in Maryland were ineffective in failing to fully investigate potential mitigating information for capital sentencing purposes about their client’s sympathetic childhood history of brutal sexual and other abuse. Id.

[26]  

See, e.g., ABA Def. Std. 4–4.1 (requiring that an attorney’s “investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities”); Rompilla v. Beard, 545 U.S. 374, 387 n.6 (2005) (quoting 4–4.1). Counsel cannot, however, make a “frivolous discovery request”. ABA Model Rule 3.4(d).

[27]  

Kimmelman v. Morrison, 477 U.S. 365, 385–86 (1986) (concluding that counsel was deficient in failing to file a motion to suppress evidence seized from the defendant’s apartment without a warrant, and that the stated reason for failing to file — that counsel did not know of the seizure until the first day of trial — was itself a result of an incompetent failure to request discovery).

[28]  

See, e.g., Fed. R. Crim. P. 16. Under Rule 16, the defendant is entitled to, inter alia: disclosure of all forensic reports and testing results and underlying data, and a written summary of any experts’ anticipated testimony and qualifications, along with analysts’ bench notes, laboratory records, manuals, and standard operating procedures (SOPs), see Fed. R. Crim. P. 16(E)–(G); ABA Criminal Justice Standard (Discovery) 11–2.1(iv) [hereinafter ABA Discov. Std.] (requiring disclosure by the prosecutor not only of scientific reports but all “written statements of experts made in connection with the case”); disclosure of all physical evidence, including biological material not tested and the location and existence of known biological material not recovered, Fed. R. Crim. P. 16(E); and a chance for the defense or defense expert to view the laboratory where testing occurred. Id.

[29]  

373 U.S. 83 (1963) (requiring disclosure of evidence favorable to the defense). See discussion infra at II.C.

[30]  

See, e.g., Jencks Act, 18 U.S.C. § 3500 (requiring, in prosecutions brought by the United States, disclosure by both sides of prior verbatim statements of witnesses about the subject-matter of their testimony).

[31]  

See, e.g., United States v. Skilling, 554 F.3d 529, 574 (5th Cir. 2009) (“[A] defendant must establish that his or her failure to discover the evidence was not the result of a lack of due diligence.”). See generally Kate Weisburd, “Prosecutor May Hide, Defendant Must Seek”: Brady v. Maryland & Defendant’s Due Diligence (forthcoming 2012).

[32]  

See ABA Discov. Std. 11–3.1.

[33]  

ABA Criminal Justice Standard (DNA Evidence) 2.1(c) [hereinafter ABA DNA Std.].

[34]  

See, e.g., Howard v. State, 945 So.2d 326, 352 & n.16 (Miss. 2006) (concluding that counsel was deficient in failing to call a defense expert to rebut the questionable findings of dentist Michael H. West, DDS, who was ultimately suspended from the American Board of Forensic Odontology and hastily resigned from the American Academy of Forensic Sciences and International Association for Identification when faced with mounting ethical violations, including a unanimous vote by the AAFS ethics committee for his expulsion).

[35]  


[36]  

Id. at 783.

[37]  

Id. at 789.

[38]  

Id. at 790.

[39]  

Id. See also id. (“To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates.”).

[40]  

Counsel should ideally conduct this interview in the presence of a third person so as not to turn counsel into a potential witness. See ABA Def. Std. 4–4.3(e).

[41]  

An indigent defendant has a constitutional right to state-funded expert assistance where necessary to a fair trial. See Ake v. Oklahoma, 470 U.S. 68 (1985).

In deciding whether to conduct independent testing, counsel should be aware of the jurisdiction's law as to whether the government can alert the jury to the defense's decision whether to test. See discussion infra.

Counsel has special duties with respect to clients with mental health issues. See discussion infra.

As forensic evidence has become more complex and database-driven, the government's methods of discovering such evidence have arguably become more intrusive. These methods may well be deemed legal by courts, see, e.g., United States v. Kincaid, 379 F.3d 813 (9th Cir. 2004) (en banc) (holding that federal law requiring parolees and felons to submit DNA samples for inclusion in CODIS database did not violate Fourth Amendment), but counsel should be aware of possible challenges, especially to modern, novel techniques. See, e.g., Murphy (2008) at pp. 332–33 (discussing possible Fourth Amendment issues with familial searching of DNA databases); Farahany, N., Incriminating Thoughts, Stanford Law Review (forthcoming 2011) (suggesting new Fifth Amendment framework for claims related to brain scanning evidence), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783101.

See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (interpreting Federal Rule of Evidence 702 to require courts to assess validity of proffered scientific evidence); Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1932) (requiring courts to exclude scientific evidence if based on a methodology that has not gained “general acceptance” in the relevant scientific community). A failure to file a meritorious Daubert or Frye motion based on a failure to investigate the bases for such a motion would presumably be deficient performance under Strickland. See, e.g., Shoemaker v. United States, — F. Supp. 2d —, No. 4:07-CV-00169-RP, 2010 WL 5514366, at *2–3 (S.D. Iowa Sept. 27, 2010) (suggesting, without deciding, that counsel's failure to pursue Daubert motion to exclude conclusion from federal auditor that defendant’s wealth must have derived from drug conspiracy would have been ineffective).

Such motions might include a motion to exclude particularly graphic autopsy and/or crime scene photographs if they are repetitive and/or unnecessary to assist the trier of fact in understanding medical testimony about the cause of death.

Other motions might include a motion to exclude identification procedures as unduly suggestive based on proffered expert testimony from a psychologist.

Such motions might include a motion to preclude a DNA technician from testifying about principles of population genetics underlying the state's DNA match statistic, a motion to preclude a toolmark or bite mark analyst from claiming that the marks came from the defendant's gun or person “to the exclusion of all others in the world”, or a motion to preclude a fingerprint analyst from testifying that the methodology has a “zero error rate”.

ABA Def. Std. 4–4.2.

ABA Def. Std. 4–4.3(a).

See ABA Model Rule 4.3 (Dealing with Unrepresented Person).

ABA Def. Std. 4–4.3(c).


[62] See Murphy (2008) at pp. 1052, 1059 (arguing that the results of the defense’s independent testing, unless introduced at trial, should generally be protected by the attorney-client privilege and work-product doctrine).

[63] Id. at 1066.

[64] See, e.g., ABA DNA Std. 5.4(a) (Prosecution comment on defense response to tests) (“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.”).


[66] See Stubbs v. State, 845 So.2d 656, 670 (Miss. 2003) (acknowledging that dentist Michael H. West, DDS was allowed, based on counsel’s failure to object, to testify beyond his area of expertise and “caution[ing] prosecutors and defense attorneys, as well as our learned trial judges, to take care that West’s testimony as an expert is confined to the area of his expertise”).

[67] The Supreme Court will decide this term, see Bullcoming v. New Mexico, S. Ct. No. 09-10876, whether such a practice violates the Sixth Amendment Confrontation Clause under Crawford v. Washington, 541 U.S. 36 (2004), which prohibits the government from introducing “testimonial” hearsay absent a prior opportunity for cross-examination and a showing of the live witness’s unavailability. Crawford applies to drug laboratory certificates and other scientific reports. See Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). Even if the analyst does not testify live, counsel should request impeachment material related to the witness. See Fed. R. Evid. 806 (allowing impeachment of hearsay declarant “by any evidence which would be admissible for those purposes if declarant had testified as a witness”).


[69] Chapter 4 of the 2009 NAS Report summarizes the steps of the scientific method and the definition of terms such as error rate, validity, and accuracy. NAS Report at pp. 111–25.

[70] ABA Crim. Just. Std. 4–7.6(b). Nonetheless, the federal government has argued in at least one case that the defense forfeits the right to cross-examine a government’s expert about forensic evidence where the defense has failed to seek independent testing of the evidence or to introduce the results of any such testing. See, e.g., United States v. Young, D.C. Super. Ct. No. 2009-CFI-20533 (Dixon, J.).

[71] ABA Def. Std. 4–7.7(a).

[72] See, e.g., Roberts v. United States, 916 A.2d 922, 935–36 (D.C. 2007) (holding that trial court erred in ruling that the defense was precluded – based on its decision not to call a defense expert – from arguing that a peak on DNA electropherogram was an allele rather than machine-related “stutter” based on government expert’s own testimony and standard operating procedures).

[73] ABA Def. Std. 4–5.2(a); see also, e.g., Jones v. Barnes, 463 U.S. 745, 751 (1983) (stating in dictum that “the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”).

[74] See, e.g., Veney v. United States, 929 A.2d 448, 462 (recognizing that right to request pre-trial DNA testing under D.C.’s Innocence Protection Act is personal to defendant and cannot be waived by counsel, but that defendant constructively waived right to pre-trial testing based on unusual posture of case), modified on other grounds, 936 A.2d 809 (2007).

[75] ABA Def. Std. 4–5.2(b).


[77] Defense counsel and experts should be aware of the scope of the local jurisdiction’s “future harm” and crime/fraud exceptions to the confidentiality rule, as such rules vary. Compare Calif. R., Professional Conduct, 3–100, available at http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=8qtKWP-Kjw%3d&tabid=1223 (allowing disclosure of client confidence only to prevent a future act likely to result in death or “substantial bodily harm”), with ABA Model Rule 1.6 (allowing disclosure of confidences to prevent physical harm, as well as future harm to financial interests or property of another when client has used lawyer’s services “in furtherance” of plan).

[78] Notably, the privilege typically applies only to communications, and only those that are intended to be and actually are confidential. See, e.g., Calif. Evid. Code § 954.

[79] See, e.g., ABA Model Rule 5.3 (noting that attorney must ensure that non-lawyers “employed or retained by or associated with” the defense respect confidentiality and other rules); ABA Mental Health Std. 7–1.1(c) (“When providing consultation and advice to the prosecution or defense on the preparation or conduct of the case, the mental health or mental retardation professional has the same obligations and immunities as any member of the prosecution or defense team.”); Code of Ethics of the California Association of Criminalists IV-D [hereinafter CAC] (Apr. 24, 2010) (“Generally, the principle of ‘attorney-client’ relationship is considered to apply to the work of a physical evidence consultant, except in a situation where a miscarriage of justice might occur. Justice should be the guiding principle.”); Graham and Hanzlick at p. 64 (“[M]ost forensic pathologists understand that they should not provide information supplied by one of the parties to the other party without specific permission to do so.”); ABC 2 (“Treat all information from an agency or client with the confidentiality required.”)

[80] See, e.g., Wright C.A., Graham K.W. Jr., Federal Practice & Procedure § 5482 (2010) (“Representative of the Lawyer”) (noting that in the federal system, the privilege is not destroyed by an attorney’s or client’s disclosures to a third party “representative” that are “helpful in accomplishing the purpose for which the attorney was retained”).


[82] To the extent the defendant intends to offer the results of such testing as evidence, the government will have a right to the information under discovery rules.

[83] See, e.g., ABA DNA Std. 4.3(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.”).


[85] See, e.g., ABA Model Rule 1.6 Comment [3] (“The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”); ABA Model Rule 1.9(c) (lawyer [and agents, under Rule 5.3] cannot “use information relating to the representation” to the disadvantage of a former client unless the information is “generally known”)

[86] An attorney – and thus, presumably, an expert – may refer to a client’s information as a hypothetical or for educational purposes with other lawyers or third parties engaged in historical or other public-minded research, so long as “there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.” ABA Model Rule 1.6 Comment [4].
Ethical Duties of Attorneys and Experts in Forensic Cases

See also American Law Institute, Restatement (Third) of Law Governing Lawyers § 60 Comment (b) (2000) (noting that “[w]hen no material risk to a client is entailed, a lawyer may disclose information derived from representing clients for [educational] purposes” or “historical research” by a third party). Lawyers can also use a former client’s information if it is “generally known.” ABA Model Rule 1.9(c)(1). But at a minimum, an expert should not list the client’s DNA profile or other biological or biometric information in a database without the client’s permission, or otherwise use the client’s information in a manner that, if the expert were affiliated with law enforcement, would violate ethical standards related to privacy. See infra at II.G (discussion ethical use of forensic databases). Note that the rule with respect to legal clients is more restrictive than the ethical rules governing the medical professions. See, e.g., APA Std. § 10 (“With regard for the person’s dignity and privacy and with truly informed consent, it is ethical to present a patient to a scientific gathering if the confidentiality of the presentation is understood and accepted by the audience.”).

[89] See, e.g., American Psychiatric Association, Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry, § 4 Comment (2010) [hereinafter APA Std.] (“A psychiatrist may release confidential information only with the authorization of the patient or under proper legal compulsion.”).
[90] See ABA Mental Health Std. 7-3.3(a).
[91] Id. at 7-3.3(a).
[92] See id. at 7-3.3(b).
[93] Id. at 7-3.2(b).
[94] See, e.g., id. at 7-3.6(b).
[95] See generally ABA Model Rules 1.7-1.9; AAFS PG 4 (“Forensic scientists should strive to be free from any conflicts of interest.”).
[96] Yochum (2006) at p. 673; ABA Def. Std. 4-4.4(b); AMA Opinion 9.07; CAC IV-B (“No services shall ever be rendered on a contingency fee basis.”).
[97] See ABA Model Rule 3.4
[98] ABA Criminal Justice Standard 4-7.6(d) [hereinafter ABA Crim. Just. Std.].
[99] ABA Crim. Just. Std. 4-4.4(a).
[100] See, e.g., ABA DNA Std. 5.3(c) (“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.”); ABA Mental Health Std. 7-3.14(a) (“An attorney intending to call an expert witness should assist the expert in preparing for trial.”). Preparation is entirely appropriate and distinct from improper witness “coaching,” such as disclosing the exact contents of prior trial testimony to the expert before testifying, in violation of the “rule on witnesses.”
[101] ABA Mental Health Std. 7-3.6(a).
[102] ABA Mental Health Std. 7-3.6(c)(ii).
[103] ABA Def. Std. 4-4.5.
[105] Note that a mental health expert may give an oral, rather than written, report to defense counsel if the examination is at defense request and counsel prefers that the report be oral. ABA Mental Health Std. 7-3.7(a).
[106] See, e.g., ABA Model Rule 3.4 (cannot restrict prosecution’s access to evidence or alter or destroy a document or other material having potential evidentiary value); ABA Crim. Just. Std. 4-4.1(b) (“Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel’s sole purpose is to obstruct access to such evidence.”); ABC 3 (“Treat any object or item of potential evidentiary value with the care and control necessary to ensure its integrity.”).
[107] ABA Discov. Std. 11-3.2(a); see also ABA DNA Std. 3.4(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.”).
See, e.g., ABA DNA Std. 2.5(a) (each party should “ensure [the evidence’s] availability for testing and retesting”); id. at 3.4(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.”).

See ABA DNA Std. 2.2 (proscribing court order requiring defendant to submit to DNA sample absent probable cause showing and other procedural protections).

ABA Def. Std. 4-4.3(d). See also ABA Discov. Std. 11-6.3 (Investigations Not To Be Impeded) (“Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel’s investigation of the case.”).

ABA Model Rule 3.4(f).

ABA Def. Std. 4-1.2(f). See also ABA Discov. Std. 11-6.3 (Investigations Not To Be Impeded) (“Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel’s investigation of the case.”).

ABA Model Rule 3.4(f).

ABA Model Rule 3.3.

ABA Def. Std. 4-1.2(d); Code of Ethics and Conduct of the AAFS (3) [hereinafter AAFS]; CAC III–G (expert has a “moral obligation to see to it that the court understands the evidence as it exists and to present it in an impartial manner”).

AAFS (2).

For example, one might claim to have performed 5000 autopsies “when, in fact, 3000 autopsies were performed and 2000 cases involved external examinations.” Graham and Renzick at p. 64.

CAC III–H.

ABA Model Rule 3.1 (noting that while the defense should not make frivolous or baseless arguments, counsel “may nevertheless so defend the proceeding as to require that every element of the case be established”).

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See, e.g., CAC I–D; ABC 6; AAFS (1).

CAC I–A.

CAC I–F.

AAFS PG 10.

See Roth A.L., Ungvarsky E.J. Review, Forensic Identification and Criminal Justice: Forensic Science, Justice, and Risk. Law, Probability, & Risk 2009 8:55–66, at p. 58 (“What is clear is the dearth of scientific literature in non-forensic journals discussing government laboratories’ methods of collecting, analyzing and particularly interpreting DNA and fingerprint evidence. With this lack of defense-friendly publications comes a lack of independent experts upon whom defense attorneys would be likely to call at trial”).

See, e.g., ABA DNA Std. 3.1(a)(i) (requiring state DNA laboratories to be accredited every two years).

See State v Rivena, No. 09-1060 (Ill. App. Ct.). The jury in Rivena convicted the defendant notwithstanding the DNA exclusion.

As of this writing, the most recent such reports involve the withholding or misreporting of testing results in over 200 cases over a 16-year period by laboratory personnel working for the North Carolina State Bureau of Investigation (SBI), see http://www.newsobserver.com/agents/ (website detailing months-long investigation of SBI by the News & Observer), and the destruction of key evidence by an analyst, and failure to adequately supervise the analyst and alert defendants to problems in the analyst’s work, at the U.S. Army Criminal Investigation Laboratory. See Taylor M., Doyle M., Army slow to act as crime lab worker falsified, botched tests. McClatchy, Mar. 20, 2011, available at http://www.mcclatchydc.com/2011/03/20/110551/army-slow-to-act-as-crime-lab.html?story_link=email_msg.

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19:145–71, at p. 149 [hereinafter Kaye (2009)] (discussing refusal of FBI to allow researchers access to anonymized version of profiles in CODIS database to check accuracy of government’s reported DNA match statistics).

[128] See, e.g., NAS Report at p. 7 (“With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”).

[129] See, e.g., CAC I–D,V–B.

[130] See, e.g., CAC I–A.


[133] See, e.g., ABA DNA Std. 3.1(v) (experts should “follow procedures designed to minimize bias when interpreting test results”); CAC I–A (criminalists should be “unbiased”); AAFS PG 3, 11 (analysts should be open to “plausible alternative possibilities” and avoid “undisciplined bias”); ABC 14 (should ensure an unbiased analysis of the evidence”).


[138] See, e.g., Thompson W.C., Taroni F., Aitken C.G.G. How the Probability of a False Positive Affects the Value of DNA Evidence, 2003. Journal of Forensic Sciences 48: 1–19 (showing that with RMP of 1 in 1 billion and prior odds of guilt being 1 in 1000, false positive rate as low as 1 in 10,000 still yields posterior odds of only 1 to 1 in favor of suspect being source of DNA).


[141] See, e.g., Giannelli (2011) (discussing refusal over the years of government agencies, particularly the FBI, to turn over database and other information in several fields including DNA and fingerprinting, in absence of court order).


[143] CAC I–C.

[144] See ABA DNA Std. 5.2(b).

[145] See, e.g., ASCLD Code of Ethics (“Disclosure and Discovery”) (“Laboratory records must be open for reasonable access when legitimate requests are made by officers of the court.”).


[149] See ABA DNA Std. 8.3(e).
See, e.g., People v. Santana, No. 00F06961 (Sacramento County Super. Ct.).


See ABA DNA Std. 8.3(b).

See, e.g., Roth and Ungvarsky (2009) at p. 473.


ABA Model Rule 3.8(d).

ABA Committee on Ethics and Professional Responsibility, Formal Op. 09-454 (2009) [hereinafter ABA Opinion 09-454], available at http://www.abanet.org/media/youraba/200909/opinion_09-454.pdf. Note that at least one state has interpreted its own version of 3.8(d) as being no broader than the prosecutor's Brady duties. See Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010).

See USAO Manual § 9.5.001 B, C, & D (requiring disclosure “beyond that which is ‘material’ to guilt as articulated” in Brady and its progeny and that impeachment information “must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal”).

ABA Opinion 09-454.


See Brady, 373 U.S. at 87–88 (must disclose evidence that is “favorable … and material … to guilt”); Strickler v. Greene, 527 U.S. 263, 289–90 (1999) (must disclose both “exculpatory” and “impeaching” evidence).

Strickler, 527 U.S. at 280–81.

See, e.g., Boyd v. United States, 908 A.2d 39, 60 (D.C. 2006) (“The [Strickler] Court thus recognized that a duty of disclosure exists even when the items disclosed later prove not to be material.”).

See, e.g., Miller v. United States, — A.3d —, 2011 WL 721540, at *12 (D.C. Mar. 3, 2011) (citation omitted) (“[T]he critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest from that of the police or prosecutor.”); Leka v. Portuondo, 257 F.3d 89, 99 (2d Cir. 2001) (holding that evidence is covered by Brady if it is “of a kind that would suggest to any prosecutor that the defense would want to know about it.”).

See ABA Discov. Std. 11-2.1(a)(ii).

See, e.g., ABA Model Rule 5.3 (noting that attorney must ensure that non-lawyers “employed or retained by or associated with” the attorney comply with ABA rules); Guidance for Prosecutors Regarding Criminal Discovery [hereinafter DAG Guidance Memo], available at http://www.justice.gov/dag/discovery-guidance.html Step 1.A (“It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.”).

ABA Discov. Std. 11-4.3(c).


See, e.g., ABA Discov. Std. 11-4.3(d) (“Upon a party’s request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party’s efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.”); ABA DNA Std. 3.1(b) (“A laboratory testing DNA evidence should make available to the prosecution the information and material that the prosecutor must disclose ..., and to defense counsel the information and material that the defense must disclose ....”).
169) See, e.g., ABA 3 (“Treat any object or item of potential evidentiary value with the care and control necessary to ensure its integrity.”).

170) ABA DNA Std. 2.6.

171) See, e.g., ABA 8 (expert should “ensure that work notes on all items, examinations, results, and findings are made at the time that they are done, and appropriately preserved”); ABA DNA Std. 3.2(d) (“All case notes made and raw electronic data produced during testing should be preserved”). This author has come across at least one government expert whose peer review process was to place a “post-it” note on any questionable analysis of his peer and then to remove the note once the issue had been resolved. Experts should avoid such practices in order “to not thwart the process of peer review.” Barnett (2001) at p. 58.

172) See, e.g., ABA DNA Std. 2.1(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.”); id. at 2.1(b) (expert should ensure that the collected DNA is “representative of all relevant DNA evidence present” at the scene).

173) Banks v.State, 725 So.2d 711, 713 (Miss. 1997).


175) Barnett (2001) at p. 59. See also ABA 3 (experts must be aware of the “potential evidential value” of objects in their care); CAC IIG (expert should “recognize the significance of a test result as it may relate to the investigative aspects of a case”); AAFS PG 3 (expert should “actively seek all relevant obtainable data that could distinguish between plausible alternative scenarios”).

176) See ABC 13 (“Make efforts to inform the court of the nature and implications of pertinent evidence if reasonably assured that this information will not be disclosed to the court.”).

177) See, e.g., USAO Manual § 9-5.001.C.2 (requiring disclosure of information that “might have a significant bearing on the admissibility of prosecution evidence”); D. Mass. L. R. 116.2(A)(2) (requiring disclosure of evidence that “tends to… cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief”). The relevant “scientific community” for Frye purposes includes all those “with sufficient training and expertise to permit them to comprehend the matter at issue, Blackwell v. Wyeth, 971 A.2d 235, 252 (Md. 2009), and not merely – or even primarily – forensic scientists. See, e.g., United States v. Potter, 618 A.2d 629, 634–35 (D.C. 1992) (rejecting limitation of scientific community to forensic scientists for purposes of Frye).


179) See, e.g., D. Mass L. R. 116.2(B)(2)(c) (requiring disclosure under Brady of “[a]ny statement … made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief” regarding the facts of the crime or the alleged conduct of the defendant); Boyd, 908 A.2d at 54-56 (finding Brady violation where government failed to disclose statements of witnesses who saw three rather than four persons present at the time of the abduction, contradicting government witness’s account).

180) Cf. Kyle v. 514 U.S. at 445 (Brady violated where prosecution failed to disclose multiple inconsistent statements by key witness); DAG Guidance Memo Step 1.B.7.1 (requiring review for potential disclosure of “[p]rior inconsistent statements” and “[s]tatements or reports reflecting witness statement variations”).


182) See, e.g., D. Mass L. R. 116.2(B)(2)(a), (g) (requiring disclosure of any information that “tends to… cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief,” including but not limited to “[i]nformation known to the government of any mental or physical impairment [or substance abuse] of any witness whom the government anticipates calling in its case-in-chief”); DAG Guidance Memo Step
1.B.7 (requiring review for disclosure “[k]nown substance abuse or mental health issues or other issues that could affect the witness’s ability to perceive and recall events.”).

[183] See Banks v. Dretke, 540 U.S. 668, 702–03 (2004) (Brady violation where government failed to disclose witness status as paid informant); Giglio v. United States, 405 U.S. 150, 153–55 (1972) (Brady violation where government failed to disclose nonprosecution agreement with cooperating witness); D. Mass. L. R. 116.2(B)(1)(c) (requiring disclosure of information regarding “any promise, reward, or inducement . . . given to any witness whom the government anticipates calling in its case-in-chief”); ABA Discov. Std. 11–2.1(a)(iii) (requiring disclosure of “[t]he relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement” that provides an “inducement” for the testimony). See also Giannelli (2011) at pp. 70–71 (noting one frequent government DNA expert who received funding based on his proposal “to generate publications and make presentations at national meetings that will lend credibility to the FBI’s statistical methods”).

[184] See, e.g., USAO Manual § 9–5.001.C.1 (requiring disclosure of information “that establishes a recognized affirmative defense”); Mahler v. Kaylo, 537 F.3d 494, 500 (5th Cir. 2008) (Brady violated where prosecution failed to disclose witness statements that decedent and defendant were actively fighting when gun went off).

[185] See, e.g., Brady, 373 U.S. at 87 (requiring disclosure of information that is “favorable … and material … to … punishment’’); D. Mass. L. R. 116.2(A)(4) (requiring disclosure of any information that “tends to … diminish the degree of the defendant’s culpability”).

[186] See, e.g., DAG Guidance Memo Step 1.B.1 (“If such information is contained in a document that the [investigative] agency deems to be an ‘internal’ document such as an email, an insert, an administrative document or an EC [electronic communication] … it will be necessary to produce all of the discoverable information contained in it.”); see also id., Step 1.B.5 (“If information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email.”).


[188] See, e.g., ABA DNA Std. 1.2(f) (“The collection and preservation of, access to, and use of DNA evidence should be regulated to prevent inappropriate intrusion on privacy rights.”).

[189] ABA DNA Std. 8.1(e)(iii).

[190] For example, the European Court of Human Rights has ruled that governments should not retain the DNA samples of arrestees whose cases have ended in acquittal or dismissal. Annas, G.J. Protecting privacy and the public: limits on police use of bioidentifiers in Europe. New England Journal of Medicine 2009 361: 196–201.

[191] ABA DNA Std. 8.4(a)–(b).