

Collection, Preservation, and Testing of DNA and Other Types of Evidence

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I. ABA Assessment Guidelines : Summary

Chapter 4 of the ABA Guidelines is dedicated to DNA and other types of evidence. Since DNA testing was advanced and started to be used for criminal investigations, it has proved to be a useful law enforcement tool to establish guilt as well as innocence. In 2000, ABA adopted a resolution urging jurisdictions to ensure that all biological evidence collected in a criminal case is made available to defendants and convicted persons upon request and preserved accordingly. Since that time, over 35 jurisdictions have adopted laws providing for post-conviction DNA testing. However, the use of post-conviction DNA testing is sometimes limited in some states. Thus, many defendants are incapable of proving their innocence as a result of states' failure to properly and/or sufficiently preserve material evidence. In an effort to ensure access to the truth, the ABA adopted a policy recommendation urging states to establish written procedures and policies governing the collection

and preservation of evidence.

Chapter 2 of the ABA Protocol sets recommendation for collection, preservation, and testing of DNA and other types of evidence. It urges states to:

- 1) Preserve all biological evidence as long as the defendant remains incarcerated.
- 2) All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law.
- 3) Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.
- 4) Provide adequate funding to ensure the proper preservation and testing of biological evidence.

When conducting state assessments, ABA recommends that states should collect information on the following questions:

1. Has your state passed legislation on post-conviction DNA testing?
2. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on the preservation of evidence, including DNA, in death penalty cases.
3. Identify the repository in your state for death penalty files. If there is more than one repository, identify which files are stored where.
4. Identify the repository or repositories in your state for all death penalty data, including, but not limited to, profiles of capital

defendants and their victims, including age, race, and mental health problems; the number of capital indictments; the number of aggravating and mitigating factors found to exist by juries and judges; time intervals between indictment and sentencing and sentencing and appeal; the type of defense services rendered; and the length and cost of a death penalty jury trial

However, question 1 does not apply to Japan since there has not yet been a legislation proposed or passed. For questions 2 through 4, as other chapters have explained, there are no rules established especially for death penalty cases. With that in mind, situation in Japan will be described in the following section.

II. Current Situation in Japan

1. Rules on Collection and Preservation of Evidence

In Japan, the law enforcement collects and preserves evidence. How and when evidence is collected is also up to the law enforcement. The Code of Criminal Procedure (刑事訴訟法, *Keiji Soshō Hō*) has general rules on investigation. The Criminal Investigation Code (犯罪捜査規範 *Hanzai Sōsa Kihan*, internal rules of the law enforcement) has provisions concerning collection, preservation and testing of evidence, but they are only advisory and not enforced. For example, the Criminal Investigation Code provides in article 186 that “When testing blood, semen, saliva, internal organs, hairs, drugs and substance, explosive materials, not all but a part of the sample should be used and the rest should be preserved in consideration for retesting,” but this is only advisory

and not followed in actual investigative practice. There are cases where all the samples are consumed for DNA testing and unavailable for retesting when there are doubts on the first testing results.

There are several rules concerning DNA testing. These rules are not legislations but merely internal rules prescribed by the police. Even the DNA database is regulated by internal rules of the police in Japan.

The details of other forensic testing (blood, fingerprints, toolmarks, firearms, etc.) are said to be regulated by internal guidelines. Some prefectures seem to not have any guidelines at all. The details have not been made public.

There is no legislation on preservation of evidence.

Before the court decision becomes final and binding, an internal guideline written 20 years ago in 1995 (証拠物件の適正な取扱いおよび保管のための指針, Guidelines for the Adequate Handling and Preservation of Evidence) provide for a general rule of fair handling and preservation of evidence.

After the court decision becomes final, there are no rules regarding preservation of biological and other physical evidence (on the other hand, for court records, Act on Final Criminal Case Records regulates how and how long they are preserved). For physical evidence, preservation is up to the law enforcement. Since facilities for preserving evidence is lacking, it is becoming a huge problem especially after Japan abolished the statute of limitation for cases of murder in 2010.

Do the defendants have access to biological or physical

evidence? They do not, whether before or after the court decision becomes final. There is no specific process of discovery or disclosure for the purpose of testing the evidence by the defendant. In general, the defendant can access and copy documents during limited discovery, but this does not include using the evidence to test for DNA etc.

Finally, there are no special rules for capital cases.

2. Problems During Each Stage of Criminal Process

1) Investigation Stage

There is no specific and detailed legislation governing collection and preservation of evidence. There is also no uniform system for administration of evidence. As will be explained in the next chapter, Forensic Science Labs are administered by law enforcement agencies in each prefecture. The administrator of the Lab reports to the criminal investigation department of the agency. Independence of the labs is in doubt.

There are no established best practices and standards for forensic testing, other than for DNA testing. Thus, error rates of forensic testing are unknown. There is still use of questionable or questioned science such as video camera analysis, toxicology, etc.

The labs are operated with inadequate funds (see next chapter), and there is no standard terminology for reporting about the results of forensic science investigations. There have been cases of consuming all samples for testing, thus making it impossible to verify the initial testing results.

2) At Trial

Defense has no access to physical evidence. And there is no right to conduct testing for the defense. There is inadequate discovery, and the defense has difficulties in reaching expert witnesses. The standard for the terminology for testifying about the results of forensic testing has not been established. And the admissibility of forensic evidence is rarely questioned by the court to begin with. In Japan, courts will admit forensic evidence when (a) the testing was conducted by someone who has acquired the skills, and (b) the testing was conducted with a scientifically reliable technique. Courts do not necessarily ask whether a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings, error rate, if the theory or technique has been subjected to peer review and publication, or degree of acceptance within a relevant scientific community.

3) Post Conviction Review

There is no right to seek post-conviction DNA testing. Legislation for post-conviction DNA review has never been proposed. There are no laws, rules, procedures, standards, guidelines, or case law on the preservation of evidence in death penalty cases. Only the police or prosecution have the discretion to decide which evidence should be preserved in all cases.

There is no information regarding what evidence is preserved. In several cases in the past, evidence was destroyed, damaged, or lost.

3. ABA Protocol Compliance Level

In light of the situation above, we can conclude that Protocols 1, 2, and 4 of ABA are not in compliance. There are some rules for the preservation of evidence (Protocol 3), but the actual preservation of evidence is up to the law enforcement.

Protocol #1: Preserve all biological evidence for as long as the defendant remains incarcerated.

➤ Not in Compliance

Protocol #2: All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *ABA Criminal Justice Standards on DNA Evidence*.

➤ Not in Compliance

Protocol #3: Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

➤ Partial compliance

Protocol #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.

➤ Not in Compliance

Crime Laboratories and Medical Examiner Offices

I. ABA Assessment Guidelines : Summary

Chapter 4 of the ABA Guidelines is dedicated to crime laboratories and medical examiner offices. It states that with the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of such laboratories and offices cannot be understated.

In the United States, the problems with crime laboratories and technicians have been attributed to the lack of proper training and supervision, non-existent testing procedures or failure to follow existing procedures, and inadequate funding. So ABA adopted a policy recommendation calling for the accreditation of crime laboratories and medical examiner offices, certification of laboratory technicians and medical examiners, the standardization of technical procedures, and the adequate funding of crime laboratories and medical examiner offices across the nation in 2004.

Thus, the ABA protocol recommends the following two:

—Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

—Crime laboratories and medical examiner offices should be

adequately funded.

To assess the situation in each state, the Death Penalty and Due Process Review Project recommends that the assessment should include information to answer the following questions:

- A. Identify all accredited and unaccredited crime laboratories and medical examiner offices in your state.
- B. Identify the total amount of funding of crime laboratories and medical examiner officers and the source of such funding.
- C. Identify and explain all laws, rules, procedures, standards, and guidelines governing the accreditation process for crime laboratories.
 1. Does the process require the establishment of and/or compliance with standardized technical procedures?
 - a. If yes, what are the standardized technical procedures?
 2. How are the laws, rules, procedures, standards, and guidelines monitored?
- D. Identify and explain all laws, rules, procedures, standards, and guidelines governing the accreditation process for medical examiner offices.
 1. Does the process require the establishment of and/or compliance with standardized technical procedures?
 - a. If yes, what are the standardized technical procedures?
 2. How are the laws, rules, procedures, standards, and guidelines monitored?
- E. Identify and explain all laws, rules, procedures, standards, and guidelines on the certification process for forensic examiners.
 1. How are the laws, rules, procedures, standards, and guidelines

monitored?

F. Identify and explain all laws, rules, procedures, standards, and guidelines on the certification process for medical examiners.

1. How are the laws, rules, procedures, standards, and guidelines monitored?

G. Have any of the crime laboratories or lab personnel in your state come under accusations of wrongdoing in terms of processing or interpreting forensic evidence, including DNA, fingerprints, ballistics, handwriting comparisons, and hair samples?

1. If yes, were the allegations investigated?

a. If yes, was any wrongdoing found?

i. If yes, what was found?

ii. If yes, how did the state rectify the situation? Specifically, were the crime laboratories closed and audited and/or lab workers sanctioned? Did the state re-test all of the evidence in cases linked to the wrongdoing?

H. Have any forensic experts admitted or been found guilty of providing false testimony about forensic evidence in criminal cases?

1. If yes, provide the name of the expert and the circumstances surrounding the admission and/or conviction.

II. Current Situation in Japan

1. Crime Laboratories

In Japan, each of the 47 prefectures has its own police system and

each prefectural police headquarters has a forensic science lab (科学捜査研究所, *Kagaku Sosa Kenkyusho*) and criminal identification section (鑑識課, *Kanshiki-ka*). Each science lab is under the supervision of the Criminal Investigation Division of the police. Although the staff in labs are not a part of the police and employed by each prefecture's government, they are under close supervision of the police.

There is also a crime lab at the national level. National Research Institute of Police Science (科学警察研究所, *Kagaku Keisatsu Kenkyusho* or NRIPS) was established in 1959 as an institute for the National Police Agency (警察庁, *Keisatsu-cho*) in Tokyo. There is a training institute and it supervises each lab in every prefecture. At NRIPS, There are about 100-120 employees. The staffing and funding of the prefectural labs differs depending on the size and total funding of each prefectural police headquarters. Expert staff can be 10 up to 90 persons. For example, in Tokyo, the number of staff is about 80-90, whereas in rural prefectures, the number goes down to 10-20. Labs in major cities such as Tokyo, Osaka and Nagoya also have funding to buy state-of-the-art equipment, whereas small labs do not.

For investigations involving forensic toxicology, DNA analysis and odontology, there is no domestic certification system. There are only guidelines. Internal certification system has been established for DNA analysis by forensic scientists at police science institutes, but not for other forensic testing. There is no established and uniform system or Standard Operating Procedure for forensic analysis other than DNA. Internal accreditation is conducted by

NRIPS. No third party accreditation or quality control is in place. Also, the guidelines have not been published. Since testing at labs are closely related to criminal investigations, they are considered as police secrecy. Monitoring of each crime lab is up to themselves.

2. Cause of Death Investigation

Investigation of unnatural death is under the control of police officers (検視官 *Kenshi-kan*, coroners) *without* a medical license. They are accompanied by medical professionals. These professionals are physicians or surgeons, but not necessarily forensic pathologists.

The coroners sort out criminal and non-criminal deaths and decide which cases should be autopsied for criminal investigation. However, only 10% of the bodies go through autopsy by expert pathologists. In Tokyo, medical examiner system was organized in 1946 and six other major cities have the same system under the Law for Examination of Deaths from Unknown Causes (1947)—later Postmortem Examination and Corpse Preservation Act (1949)—, but the medical examiner system is now active only in Tokyo, Osaka and Kobe (in other 4 prefectures, the medical examiner's office closed down because of inadequate funds).

An additional forensic autopsy system for police investigation started in April 2013, provided by a new law (the Cause-of-Death Investigation and Identification act 2012). It established to improve postmortem investigation in regions without a medical examiner system. However, a national cause-of-death investigation system was not established. Thus, the law only recommends the

prefectures to establish an institution with expertise.

There is said to be insufficient funding for maintaining routine activity of forensic or legal medicine. There is also no legal or governmental control except for the approval of medical licenses and qualifications for autopsy. No systematic accreditation or quality control has been organized for university institutes and medical examiner's offices. Quality control is a matter of individual institute.

Media has reported at least 13 homicide cases during 1987-2007 in which victims had been cremated without forensic autopsy. There were also cases of lost evidence due to incomplete or unfulfilled autopsy or serious misinterpretation.

III. Assessment

In the situation described above, we can conclude that neither of the recommendation by ABA is in compliance in Japan.

1. Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.
> Not in Compliance.
2. Crime laboratories and medical examiner offices should be adequately funded.
> Not in compliance.

[Main References]

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