Date: 01/28/2015
Subject: Protest Resignation from the National Commission on Forensic Science

Dear Fellow Commissioners:

Last evening, January 27, 2015, I was telephonically informed that the Deputy Attorney General of the U.S. Department of Justice has decided that the subject of pre-trial forensic discovery -- i.e., the extent to which information regarding forensic science experts and their data, opinions, methodologies, etc., should be disclosed before they testify in court – is beyond the "scope" of the Commission's business and therefore cannot properly be the subject of Commission reports or discussions in any respect. Because I believe that this unilateral decision is a major mistake that is likely to significantly erode the effectiveness of the Commission -- and because I believe it reflects a determination by the Department of Justice to place strategic advantage over a search for the truth – I have decided to resign from the Commission, effective immediately. I have never before felt the need to resign from any of the many committees on which I have served over the years; but given what I believe is the unsupportable position now taken by the Department of Justice, I feel I have no choice.

This issue first arose last October when the Subcommittee on Reporting and Testimony, which I have the honor to co-chair along with Wyoming prosecutor Matt Redle, presented to the full Commission for discussion a draft report, authored by Prof. Paul Giannelli, recommending, in essence, that federal prosecutors go beyond what is presently required by federal criminal rules and make available in cases in which they intend to call forensic experts the same particularized information that forensic experts are required to provide in federal civil cases. The Commission then debated the draft report on the merits, and many helpful suggestions were offered, reflecting the broad composition of the Commission and its ability, unlike judicial rule-making bodies or the like, to ascertain what makes sense in the specialized area of forensic science. However, the Department's co-chair of the Commission, having expressed his view that the entire discussion was beyond the Commission's scope, then determined that the issue, not of the merits but of whether such discovery matters could even be considered by the Commission, would be put to the Deputy Attorney General for decision. Matt Redle and I then requested the opportunity to submit a memorandum stating our

views; this was permitted (a copy is here attached), and, as I understand, was attached as one of several appendices to a memorandum taking the opposite view that was submitted to the Deputy Attorney General in late November but never shared with Matt, me, our Subcommittee, or the Commission. After a substantial delay, the Deputy Attorney General adopted the view that any discussion of discovery changes was entirely outside the Commission's purview, and this decision, without further explanation, was telephonically conveyed to me last night.

The notion that pre-trial discovery of information pertaining to forensic expert witnesses is beyond the scope of the Commission seems to me clearly contrary to both the letter and the spirit of the Commission's Charter. That Charter specifies six duties that the Commission is commanded to fulfill. The third of these duties is "To develop proposed guidance concerning the intersection of forensic science and the courtroom." A primary way in which forensic science interacts with the courtroom is through discovery, for if an adversary does not know in advance sufficient information about the forensic expert and the methodological and evidentiary bases for that expert's opinions, the testimony of the expert is nothing more than trial by ambush. Indeed, from the standpoint of improving forensic science and making its application to criminal prosecutions more accurate (which were key reasons for the very creation of the Commission), discovery is probably the most important area of intersection between forensic science and the courtroom, because it is only through adequate discovery that forensic science can be meaningfully scrutinized in any specific case. The notion that improved discovery, going beyond what is minimally required by the federal rules of criminal procedure (which were drafted without any consideration of the difficulties unique to forensic science) , is somehow outside the scope of the Commission's work thus runs counter to both the mandate of the Commission's Charter and the Commission's overall purpose.

One might add that it seems unlikely that the Commission, at its Very first meeting, would have created a Subcommittee on "Reporting and Testimony" if it were not concerned with how information about a forensic expert's opinions was reported in advance of his testifying, i.e., discovery. And the written instruction that was sent by the Department of Justice's liaison to the Subcommittee expressly stated that the Subcommittee should consider, inter alia, "legal issues inherent in reporting and testimony, such as discovery."

As the federal rules of criminal procedure now stand, prosecutors who intend to call forensic experts to testify do not have to supply the same full pre-trial discovery about those experts and the methodological and evidentiary bases for their opinions that parties calling forensic experts in civil cases are required to supply under federal rules of civil procedure. But none of these rules focuses on the unique problems presented by forensic science, where there is much greater variance in standards, credentials, testing, and the like than in other scientific disciplines. That is why this Commission, which has such a broad range of participants in the field, is so well suited to consider whether, under the circumstances, greater pre-trial discovery, even though not required, should be embraced by the Department of Justice, both as a matter of fairness and also to help insure the determination of the truth. Does the Department have to be reminded of the many cases of grossly inaccurate forensic testimony that led to the creation of the Commission?

It is hard to escape the conclusion, therefore, that the Department's determination that pre-trial discovery relating to forensic expert testimony is beyond the "scope" of the Commission is chiefly designed to preserve a courtroom advantage by avoiding even the possibility that Commission discussion might expose it as unfair. Prior to this decision, I have felt privileged to have been part of the Commission, not least because of the many wonderful fellow Commissioners with whom I have had a chance to work. I have also felt that, as the sole federal judge on the Commission, I could perhaps provide a useful perspective. But I cannot be a party to this maneuver by the Department to cabin the Commission's inquiries, and I therefore must resign in protest.

Jed S. Rakoff

To: Brette Steele
From: Jed Rakoff and Matt Redle, co-chairs, Subcommittee on Reporting and Testimony
Date: November 6, 2014

Re: Why discovery is within the scope of the Commission's mandate

At the October meeting of the National Commission on Forensic Science, the Subcommittee on Reporting and Testimony presented a draft report on discovery that, reduced to essentials, recommends that the Attorney General direct his prosecutors to require that forensic science experts testifying on behalf of the Government make considerably fuller disclosure of their data, methodology, experience, and results than is presently disclosed. While the discussion that followed suggested a number of helpful ways in which the Discovery Report could be improved (and will undoubtedly lead to a better draft in the near future), the argument was also made that the report's recommendations exceeded the scope of the Commission's authority. We respectfully suggest that this is erroneous and unsupportable.

The Commission's Charter specifies six specific Duties that the Commission must fulfill. The third is "To develop proposed guidance concerning the intersection of forensic science and the courtroom." A primary way in which forensic science intersects with the courtroom is through discovery. Indeed, from the standpoint of improving forensic science and making its application to criminal prosecutions more accurate (which were key reasons for the very creation of the Commission), discovery is probably the most important area of intersection between forensic science and the courtroom, because it is only through adequate discovery that forensic science can be meaningfully scrutinized in any specific case. The notion that improved discovery is therefore not within the scope of the Commission's work seems to us to be counter to both to the plain words of the Charter and to the Commission's overall purpose.

At the Commission's first meeting, moreover, the Commission, without objection, created a Reporting and Testimony Subcommittee which, by its very title, is concerned with how forensic science is reported in advance of testimony, i.e., discovery. This was further confirmed by the mandate that was sent by Robin Jones to the Group on Legal Issues (the sub-subcommittee that initially drafted the Discovery Report), which states in its first sentence: "This Group should consider the legal issues raised by recommendations made by other groups as well as other legal issues inherent in reporting and testimony, **such as discovery**." (emphasis supplied)

Among the other "scope" objections raised at the Commission's October meeting was the argument that problems with forensic science discovery was not one of the issues raised by the National Academy of Science's report, Strengthening Forensic Science in the United States (hereinafter "the Report") that was one of the catalysts for the Commission's creation. This is doubly erroneous, first, because the Commission's work is expressly not limited to the issues raised by that Report, and second, because it is, in fact, an issue raised by that Report.

As to the first point, the section of the Commission's Charter in which its Duties are specified requires, as already noted, developing guidance for the intersection of forensic science and the courtroom. By contrast, nowhere in the Charter is there any indication that the Commission's

scope is limited to the specific issues raised by the National Academy's Report. And it would have been artificial indeed to cabin the work of the Commission on the happenstance of whether the Report happened to refer to a particular issue or not. The gist of the National Academy's Report was that forensic science, i.e. science used in criminal cases, was problematic in its standards, accuracy, assessment, and use, and it was this broad sweep that helped lead to the Commission's creation.

Second, and in any event, it is simply not accurate to suggest that the National Academy's Report neglects the issue of discovery, even though it may not use that specific term. For example, Chapter 3 of the Report, which is concerned with strengthening forensic science in the context of the legal system, recommends, in terms very similar to our subcommittee's Discovery Report, that laboratory reports of forensic science be much more detailed than they often are at present, stating:

> As a general matter, laboratory reports generated as the result of a scientific analysis should be complete and thorough. They should describe, at a minimum, methods and materials, procedures, results, and conclusions, and they should identify, as appropriate, the sources of uncertainty in the procedures and conclusions along with estimates of their scale (to indicate the level of confidence in the results).

Report, *id.* at page 6-3. This recommendation would be meaningless if the reports were not disclosed to adversary counsel in advance. [1]

As we were requested to keep this memorandum to two pages, we will not multiply examples, but we suggest that any fair reading of Chapter 3 of the National Academy's Report shows that its authors were concerned that complete and useful information was not being adequately provided by forensic experts, and this concern would have been pointless unless it was assumed that such information would be provided by way of discovery. At the October meeting of the Commission, moreover, two Commissioners who were involved in preparation of the National Academy's Report confirmed as much.

In sum, we believe that recommendations regarding discovery fall easily within the scope of the Commission's mandate, and for the Commission to fail to address such issues would be a distinct disservice to all concerned.

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[1] At the Commission meeting in October, it was suggested, as an objection to the Discovery Report's recommendation regarding release of reports, that federal law already requires the release of certain such reports if requested by adversary counsel. Without getting into a debate here as to what the scope of such discovery might be under current federal law, it should be noted that this very objection presupposes that the Commission's scope includes making recommendations in this area, i.e., the objection is that such a recommendation is unnecessary, not that it is beyond the Commission's scope.