



F22 Due Process and Ethics: Crime Laboratories Cannot Be Paid for Convictions

Michelle L. Behan, JD*, Behan Ramsell P.L.L.C., Tucson, AZ 85718; Gil Sapir, JD, Chicago, IL 60680

Learning Overview: After attending this presentation, attendees will understand the necessity for identifying, exposing, and mitigating bias due to crime laboratory contingency fee revenue.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by showing that contingency fees paid to laboratories upon conviction are unethical and unconstitutional.

Crime laboratories are bound by legal and scientific standards and a code of ethics to foster integrity, honesty, competency, and public trust. It is a violation of ethical canons, and substantive due process, for laboratory personnel to testify in criminal cases when they receive contingency fees should the defendant be convicted. Government crime laboratories were established to perform objective, reliable analysis to assist the justice system. Conscious and subliminal bias exist in crime laboratories, especially when exclusively controlled by law enforcement.¹ This relationship creates a pro-prosecution culture, with scientists an extension of law enforcement. Contingency fees paid to crime laboratories fosters additional bias and adversely affects both substantive due process and ethics. Public confidence in the justice system and integrity of evidence is paramount. It is eroded when fundamental fairness and trustworthiness are degraded or compromised.

Crime laboratories submit their budgetary requests to the state for funding. The legislature enacts revenue statutes for imposition of fees upon conviction. Currently, 17 states have statutes authorizing contingent fees paid to crime laboratories.² These fees are collected by the court and forwarded either to the crime laboratory or state fund for redistribution.² Contingent conviction fees vary by state and generate enormous revenue.³ This revenue augments state crime laboratory funding. The revenue creates financial and ethical conflicts for laboratory personnel because their objectivity is compromised. Redistribution from a general fund does not remove the conflict; crime laboratories still receive the revenue. Privately funded laboratories may conduct forensic analysis. Unlike government crime laboratories, they are generally liable for the work product.

The laboratory director determines the facility's budget and distribution of funds within the laboratory. The laboratory personnel's testimony is indelibly tainted through their vested interest in securing funding for their laboratory and employment. Model ethical guidelines from professional scientific organizations prohibit any behavior which "diminish(es) confidence" in the laboratory's "competence, impartiality, judgment, or operational integrity."⁴

The 2009 National Academy of Sciences Report recommended mandatory adherence to a code of ethics, with enforcement and sanctions for violations¹. However, laboratories may establish their own voluntary protocols and code of ethics. The International Organization for Standardization, the American Society for Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB), and other organizational guidelines are voluntary and without viable sanctions.⁴

The Model Code of Professional Responsibility of the American Bar Association (ABA) prohibits witnesses from being "bribed or offered compensation that is contingent on the witness's testimony or the result in the litigation."⁵ Forensic scientists are expected to be unbiased and objective and may not participate in any case where a contingency fee is collected. Ironically, scientists who are in violation of ethical canons may still testify. It is unconstitutional for a court budget to be funded in whole or in part by the funds collected upon conviction. The ABA prohibits fines, fees, and penalties from being appropriated to any local unit of government that supports a court.⁶

Criminal defendants have a constitutional right to a fair trial and equal justice. Defendants are deprived of their constitutional rights when a party with a financial or personal interest in the outcome is involved. Courts are expected to protect citizens from statutory legislation that violates due process.⁷ Courts and counsel must act to protect the defendant from wrongful convictions based on biased results. Bias is not limited to any discipline. Prohibiting revenue-generating statutes is the appropriate solution.

Attorneys have a constitutional obligation to challenge evidence against the accused. Bias of a witness is never a collateral matter. Attorney competency includes exposing and eliminating bias. Lack of professional memberships, unenforceable codes of ethics, and non-accreditation do not prevent a crime laboratory from conducting and presenting its work product. Crime laboratory contingency fee payments disregard ethical canons of law and science, violate substantive due process guarantees to criminal defendants, and create an unacceptable conflict of interest for forensic scientists. Laboratories cannot be trusted if they have a financial incentive to produce a conviction.

Reference(s):

1. National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward*. Aug. 2009.
2. Roger Koppl and Meghan Sacks. *The Criminal Justice System Creates Incentives for False Convictions*, Criminal Justice Ethics, Vol.32, No.2, 126-162 2013; exception is North Carolina which includes private laboratories. The 17 states are: AL, AZ, CA, FL, ID, IL, KS, KY, MS, MO, NJ, NM, NC, TN, VA, WA, WI.
3. Over an 11-year period, Tennessee collected more than \$22 million dollars in contingency fees just from DUI convictions.
4. International Organization for Standardization, ISO/IEC 17025:2017. *General Requirements for the Competence of Testing and Calibration Laboratories*, 4.1.3; *ASCLD/LAB Supplemental Requirements for the Accreditation of Forensic Science Testing Laboratories*, 2011 Ed., Append. B, Guiding Principles of Professional Responsibility for Crime Laboratories and Forensic Scientists, p.31.



5. American Bar Association Model Rules of Professional Conduct, 2016, Rule 3.4(b); see also Restatement (Third) of the Law Governing Lawyers, § 117, cmt. D (2002); *City and County of Denver, Colo. v. Board of Assessment Appeals of State of Colorado*, 947 P.2d 1373, 1379 (Colo. 1997) reh'g denied (Dec. 2, 1997).
6. American Bar Association Commission on Standards of Judicial Administration, 107 (1974).
7. Seventeen states permit assessment of crime laboratory fees contingent upon conviction. Only Tennessee held this arraignment to be constitutional under its state constitution. *State of Tennessee v. Rosemary L. Decosimo*, No. E2017-00696-SC-R11-CD (Aug. 23, 2018). No other state has ruled on this practice. The constitutionality however, does not change the ethics of whether this should be permitted. A potential conflict of interest exists. Privately funded laboratories may conduct forensic analysis. Unlike government crime laboratories, private laboratories are generally liable for the work product. North Carolina exempts private laboratories from liability for law enforcement work.

Ethics, Crime Laboratories, Contingency Fees