

National Conference of State Legislatures

~ Emerging Forensic Science Issues ~

This chart identifies two emerging policy areas of interest to state lawmakers – the use of *Familial DNA Searches and Partial Match Analysis* and *Remote Testimony by Lab Analysts*. Each issue is addressed separately below.

Familial DNA Searches and Partial Match Analysis

When a DNA sample is analyzed, a DNA profile is created that identifies DNA sequences at 13 specific locations. Each person (except identical twins) has a unique DNA profile. When a match is made to a profile already in a DNA database, it means that both profiles share identical DNA sequences at each of the 13 locations. If a profile is compared against the database and does not identify an exact match, it may show profiles that share enough similarities to indicate that they belong to related individuals—this is a partial match. Actively searching for these family relationships through statistical analysis software is called familial DNA searching.

Currently, Maryland (Public Safety, § 2-506(d)) and the District of Columbia (§ 22-4151) are the only jurisdictions to have enacted laws addressing familial searches and partial match analysis—and both have banned its use. At least four states—California, Colorado, Texas and Virginia—have administratively developed procedures for the use of familial searching and partial match analysis. A common element in these policies is that partial match analysis and familial searches may only be used once all other leads have been exhausted. Lawmakers considering this issue weigh the crime fighting potential of these procedures against the Fourth Amendment and privacy concerns of pursuing a suspect based on the DNA of a family member. The United States Supreme Court has not addressed law enforcement’s use of leads developed from partial matches and familial DNA searches.

Remote Testimony by Lab Analysts

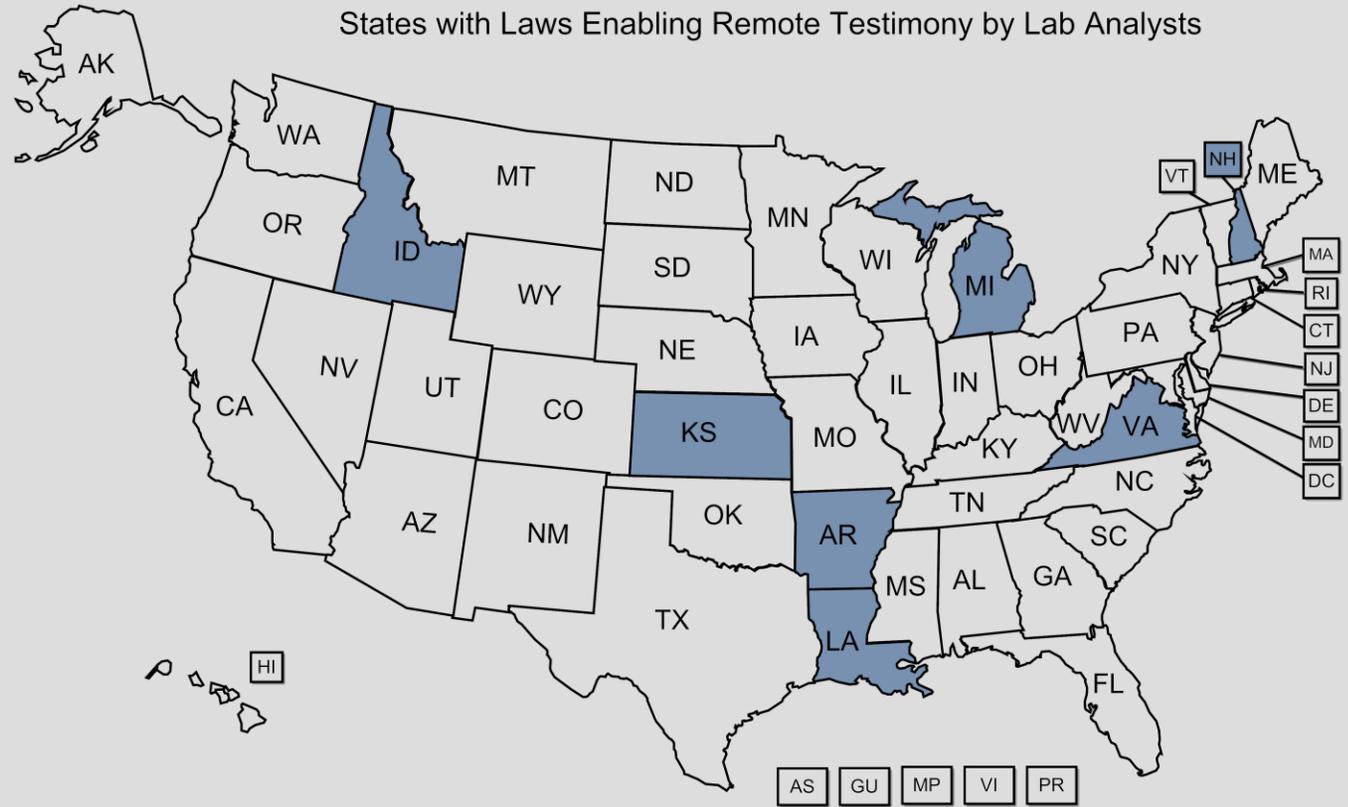
After a lab analyst tests and creates a report on a piece of evidence, prosecutors or defense attorneys may use those findings during a legal proceeding. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” Due to this requirement, on days when an analyst’s work is produced in court, the analyst must be available to testify. When a lab analyst is in court, they are unable to continue their daily work at laboratories, which can result in a strain on lab resources. In an effort to maximize forensic science resources while complying with the confrontation clause, at least seven states—Arkansas, Idaho, Kansas, Louisiana, Michigan, New Hampshire and Virginia—have enacted statutes that enable analysts to testify remotely. The reasoning is that if analysts are able to testify from their labs, they are able to work on other tasks before and after their testimony, rather than committing a full day to the courthouse.

The United States Supreme Court has not yet ruled directly on whether video conferencing for lab analysts is within the bounds of the Constitution, but has ruled on other aspects of forensic analyst's testimony. The Court's ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), held that a live competent witness had to be available to testify to the truth of a report created to serve as evidence in a criminal proceeding. The Court further ruled, in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709 (2011), that the analyst who made the report must be the one who provides testimony, unless that analyst is unavailable for trial and the accused had a different opportunity to cross-examine them.

Each state statute addressing remote testimony enables some form of simultaneous, two-way, audio-visual communication that allows courtroom participants to see and interact with the analyst. Arkansas law also authorizes videotaped testimony to be presented at trial if the defendant was given an opportunity to cross-examine the analyst when it was recorded. If the videotaped presentation is used, the prosecutor or the defendant's attorney can still call the analyst to testify in person if "is necessary to serve the interests of justice."

Each remote testimony law also requires notice to the court and/or opposing counsel for its use. For example, Idaho's law requires the party intending to use video conferencing to give 28 days notice to opposing counsel and the court while Louisiana law requires 30 days notice to opposing counsel. Both laws place responsibility for arranging the audio-visual feed into the courtroom on the party intending to use it.

Three states—Arkansas, Michigan and New Hampshire—restrict when remote testimony may be used. Michigan limits remote testimony to preliminary and grand jury proceedings, while Arkansas prohibits its use for prosecutions of capital crimes and murder. New Hampshire prohibits its use for any felony prosecution unless opposing counsel consents.



State & Statute	Live-Simultaneous Testimony Authorized	Recorded Testimony Authorized	Notice to Opposing Counsel Required	Notice to Court Required	Limitations on Remote Testimony
Arkansas Title 12 § 12-313	X		X	X	May not be used in criminal trials for capital crimes and murder
Title 16 § 43-215		X	X	X	
Idaho Crim. Court Rule 43.3	X		X	X	
Kansas § 22-3437	X				
Louisiana Title 15 § 502	X		X		
Michigan § 600.2167	X		X		Limited to preliminary hearings and grand jury proceedings
New Hampshire § 516:37	X		X		May not be used in felony prosecutions unless the opposing counsel consents
Virginia Title 19.2 § 187.1	X		X		