

## TESTIFYING IN THE 2000'S; STILL CONFRONTING THE CULTURE OF THE COURTROOM

### Clay Strange

Assistant District Attorney Austin, Travis County, Texas



Since I last presented on this subject at the Sixth International Symposium in 1995, much has changed in the world of forensic DNA. One of the biggest changes is the manner in which DNA evidence is being presented in court. Nevertheless, the basic precepts for making a good presentation to a judge or jury have not changed. It is still necessary to have a good understanding of what to expect when entering the somewhat atavistic environment of the 21<sup>st</sup> century criminal courtroom.

Because I am a career prosecutor, this paper is necessarily aimed at DNA analyst witnesses for the State. However, most is applicable to expert defense witnesses as well.

### TYPES OF CASES

There are three basic types of trials in which DNA evidence is presented:

- 1) Type #1. The victim can identify the defendant or there is other equally compelling evidence establishing guilt. The DNA evidence is just confirming the other evidence.
- 2) Type #2. The DNA evidence consists of a 9 or 13 loci STR match and is straight forward. The statistical power of discrimination in the match is trillion fold. However, without the DNA evidence, there is no case.
- 3) Type #3. The DNA evidence may be a mixture (and there's little other evidence of guilt), mitochondrial DNA, "Y" chromosome, or SNP's. It's unlikely any of these will be used unless the DNA evidence is crucial.

Quite clearly in Type 1 cases the DNA direct examination should consist of no more than the following:

- a) Who are you and how employed. Name and job title, entity you're with.
- b) What type of work do you do? The very basics of you job description (e.g., "I prosecute felony cases," would by my answer.
- c) How did you become qualified to do that? Education, training and experience.
- d) How do you do what you do? Explain DNA typing and how you perform it in 5 minutes or less. Do not mention capillary electrophoresis by name.
- e) What did you do in this case? Explain what samples were tested and compared.
- f) What was the result? Same DNA profile, etc.

The principal difference in the presentation of a Type 2 case is that more time needs to be spent on the credentials, particularly how often the examiner has performed this work. Talking about proficiency testing results for the examiner and lab would be a good idea. I really don't recommend much additional information on the science of it all.

### THE CULTURE OF THE COURTROOM

No amount of "moot court" conducted by forensic scientists pretending to be judge, jury, prosecutor, and defense lawyer will fully prepare the expert for entry into the world of the criminal court. It has to be experienced to be believed. The particulars vary from jurisdiction to jurisdiction and no short piece such as this can be fully instructive. The following are only general rules but may at least work to confirm your own suspicions.

**Judges** In Texas we have an expression known as "black robe disease." This is a condition in which normal people who attended a law school, look, think, and act like everyone else, suddenly become all-knowing and all-powerful. Often their skills as a trial lawyer are dramatically improved, as they look back on it. The principal symptom is that the person wears a block robe. The condition is considered

incurable. Thank goodness, the condition is not epidemic. Most judges are pretty sharp, hard-working and dedicated and aren't afflicted. Beware the ones that are.

There are some judges--seemingly often located in New York, Massachusetts, Florida and a few other northern states--that view DNA as infringing on and subverting the adversary system. Paradoxically, they don't like the certainty of the findings of highly exacting DNA results. Sort of takes away from the game the advocates play and by extension, the judges' role in it. Fortunately, these judges are now in the minority in most states.

Most criminal court judges, regardless of locale, were not biology majors and few have the slightest interest in getting to know some DNA. Don't get your feelings hurt if they seemingly can't wait till you get off the stand.

It is a absolute fact that within the four walls of the courtroom judges have almost total power and getting them to be impressed with you and what you do is very important. This obviously true is an admissibility hearing but even in a jury trial the jury will often look to the judge for what he or she seems to find important or credible.

**Defense Lawyer** The extent to which the defense attorney will be sufficiently prepared to challenge your testimony will vary greatly. Always get a scouting report. Find out if he/she has a testifying or present-in-the-courtroom expert.

Prepare yourself accordingly for the "flamboyant" defense counsel. Notice how that word doesn't seem to go with anything except "attorney." "Flamboyant accountant" doesn't have the same ring. These guys try to win on style points and will try to get you off your message. They're usually all hat and no cattle. Don't let them bother you.

Never get mad. Recognize that the defense lawyer is simply playing a role and his or her emotion is usually only a part of that role. He she may appear to be angry but it's usually an act. Very few of us think well when we're really angry. "Hothead" and "forensic scientist" don't go well together. Taking a deep breath before responding can help.

It is better to be seen by the jury as person just trying to do your job that is being harshly treated than to be viewed as a combatant. Never, ever lose your moral high ground by smarting off to the defense lawyer.

**Cross-Examination** If the cross-examination is done well, don't expect to be able to explain your answer in detail. A "yes," "no," "I don't know," or "I'm not sure" are all acceptable answers to cross-exam questions. Resist speculating, particularly on wild hypotheticals. Don't worry if you need to explain an answer and the cross-examiner won't let you. If the prosecutor believes your testimony has been damaged he or she will take you on re-direct.

Be certain you're answering the question that was asked. Most defense lawyers (and many prosecutors) have a very hard time framing DNA questions because they want to use words they don't understand. As a result, the question can be convoluted, at best. It's often a good idea to preface your answer with, "If you're asking me if ...." Even to the cross-examiner, resist being pedantic. You want the jury to view you as smart, not a smart aleck.

The key points on cross-examination for an expert to remember, in my opinion, are:

- 1) Make the jury empathize with you, not the cross-examiner.
- 2) Don't meet hostility with hostility.
- 3) Making the jury sympathize with you is O.K. if it comes to that.
- 4) If you take issue with the questioner make sure it's in your area of expertise.

- 5) If asked to do a calculation or analysis on the stand and you're uncomfortable or nervous doing it, explain that this is not the way good science/statistics/whatever is done. Ask for a recess.
- 6) Make sure you come across as the purveyor of truth and try to make it seem that the cross-examiner is trying to stand in the way of that truth being heard.

**The Jury** Except in an admissibility hearing, it's these people that you have to impress. The jury is kept out of some of what happens in a criminal case (evidentiary hearings, motion arguments, etc.) and they don't necessarily like that. Often, to compensate, they are very tuned in to what they can observe. This initial contract – how you dress, how you walk to the witness stand, how you present yourself – can be very important. Dress in a fashion commensurate with a significant occasion. Dress nicely, conservatively, never flashy. If you're a guy, consider ditching the old plaid sport coat. How about a nice blazer?

**The Courtroom** I'm a believer in familiarity building confidence. If you've never been to the courtroom (or one like it in the same courthouse), try to get there early and at least determine where the witness stand is in relation to the lawyers, the judge and the jury. If possible, sit in the witness chair and visualize how you'll present to the jury. Locate the microphone and whether it will need to be adjusted. Sit there long enough that when you actually take the stand it won't be foreign to you.

**Testifying** When it's finally time, don't be afraid. You know more about your topic than anyone in the courtroom, twenty times over. The more confidence you can display in your work, the more weight it will carry.

Try to make good eye contact with the questioning lawyers and with the jury. Receive the question from the lawyer, turn and throw the answer to the jury (or the judge in an admissibility hearing). Just like a shortstop. The only exception to the catch, turn and throw routine is an occasional answering back to the cross-examining lawyer – for emphasis.

**The Prosecutor** Having a good relationship with the prosecutor in any case, particularly a Type 2 or 3 case, is incredibly important. This is the person in the courtroom culture that you can have some effect on. There are ways you can improve that relationship and the more effort you make, the better.

You can encourage them to come to your lab. Tell them what it is and where you do it. Show them the benchwork results on what you did. Make them look at what you may have sent the defense in a discovery order. Don't try to make them understand what they'll forget as soon as you quit talking. Don't give them difficult, lengthy reading assignments. Never underestimate their ability to not get too worried about the DNA portion of their trial until the trial begins. It's not a bad idea to give them some questions you'd like them to ask, if there are some.

In truth, in a type one case sloppy prosecution of the DNA won't make a lot of difference if you do a good job, but in a type three and maybe even type two case such laziness can be disastrous. Here you must do all you can to get the prosecutor educated, particularly if there is to be a testifying expert for the defense. Things to try:

- Have him/her contact the American Prosecutor's Research Institute DNA Legal Assistance Unit in Alexandria, Virginia. Phone number is 703-518-4381. They can send materials, recommend sources for peer advice, and maybe even enable some training. They operate under a woefully inadequate grant from the Department of Justice but still manage to do a good job.
- Have him or her contact a good DNA lawyer you or your lab has worked with in the same jurisdiction.
- Encourage tutoring sessions at your lab.
- Have him or her find out something about the testifying defense expert. APRI can help with that as well.

Finally, throughout the United States there continues to be too little attention paid to DNA training for prosecutors and to giving them technical assistance in DNA cases. The federal government has not

provided sufficient funding for APRI to do its job as well as it could be done and the states are woefully unprepared to fill the gap. An idea we are trying in Austin is a joint training between and among the DNA analysts for the state and the city of Austin, the police and the DA's. We are presenting to each other, helping each to understand the role of the others, then re-creating some sessions we've had in which the three groups working together have made major progress in solving and proving difficult cases. Give it a try. It's fun.