

How to Succeed as an Expert Witness

*By Lisa Kahn, JD, and Daniel Feldstern, JD
Los Angeles County District Attorney's Office,
Los Angeles, CA*

This article provides advice on expert witness testimony from two prosecutors. Much has been written about how to be an effective expert witness. However, the skills involved are best learned by actually performing the task of testifying. While the most obvious prerequisites for testifying as an expert witness are academic and technical qualifications, it is also helpful to know and understand the legal system, including the courtroom setting, the attorneys and judges involved and the jury. The general discussion below is applicable to any field, but the focus is on DNA profiling in criminal cases.

THE PLAYERS—FRIEND AND FOE

To understand your role as a DNA expert, you should first appreciate the contrasting roles of the other participants in the trial. As prosecutors we are bound by a legal and ethical obligation to search for the truth. The burdens of proof and of producing competent evidence are ours. Our primary focus is the presentation of legally sufficient evidence to support a conviction of guilt in a manner that is fair, unbiased, easily understandable and fully appreciated by the trier of fact.

You will encounter prosecutors of all types. Most are competent and well-prepared and will review your testimony carefully before trial. However, novices, unused to dealing with scientific evidence, may rely on you to do most of the work with little guidance. An unprepared prosecutor may not review your testimony with you before trial and may expect you to “carry the ball” with little or no prompting. Other prosecutors may appear to be well-prepared and organized, but plan a lengthy and overly technical presentation. In each instance, your interests are best served by preparing a brief and concise presentation of your testimony beforehand.

The defense attorney's charge is to zealously represent the defendant. This does not require any consistency in practice. The same

attorney may argue in one case that a DNA inclusion is unreliable and is based on unproved technology but, in the next case, may argue that the same technology is ironclad if it excludes the defendant. There is nothing improper about this duality of advocacy; it is an accepted part of the system. Also, because criminal trials generally revolve around the prosecution's witnesses, a defense attorney spends most of the time trying to raise doubts about the prosecution's evidence. Since your testimony will usually incriminate the defendant, the defense attorney will do everything possible to confuse the issues, undermine your credibility and minimize the weight of your testimony.

Defense attorneys also come in all types, and you will learn to recognize them. Most will treat you in a professional and straightforward manner. They will have thoroughly reviewed your reports, networked with other attorneys about your laboratory and, in many cases, consulted with DNA experts who review the case materials and advise on strategies of attack. You will know how knowledgeable and prepared the attorney is by the questions he/she asks.

Occasionally you will encounter attorneys whose trial tactics are more aggressive and sometimes deceptive. Ones to be wary of include, for example, the “gentleman lawyer”. This person is quite charming. You know you should be on your guard, but he has you chatting away like old chums in the hallway. In reality, he is pumping you for information, and you later worry that you said something he might use to impeach you. Avoid getting into this kind of situation at all times. Other types include the “conspiracy theorist”. Nobody can convince this individual that you are not part of a conspiracy to frame an innocent man. To him/her your science is bogus, your motives are suspect and you are the enemy. Remember, the more you remain cool and collected, the more paranoid he/she will appear.

Then there is the judge. The judge's aim is to ensure that both sides receive a fair trial and that only legally admissible evidence is presented to the trier of fact. The judge is always mindful that a conviction will be followed by an appeal, and that the appellate court will scrutinize the evidence to determine if the defendant received a fair trial. For that reason, the judge will pay close attention to the “record”, including whether the court reporter can produce an accurate transcript of your testimony. Every effort you make to assist the reporter—including clear pronunciation and spelling of technical terms and scientific jargon—will help ensure the accuracy of the record. We have seen some experts bring glossaries to court. The judge and the reporter will appreciate your efforts.

Judges are often in a hurry. They manage heavy daily calendars and would much rather have your case settle in a plea bargain than proceed to trial. They want witnesses and attorneys to get to the point quickly. The judge is supposed to be in control of the courtroom, but this is not always the case. Some judges allow attorneys wide latitude in questioning witnesses, others are very restrictive. You are at their mercy and you may have to field difficult or confusing questions. Remind yourself of this in advance; it will help you maintain poise.

Recognizing the scientific ignorance of most judges and attorneys is as important as understanding their roles. Most attorneys—and this includes most judges—did not choose law school because they excelled in science. Most entered law school with degrees in English, political science or history, and even those with the most intellectual firepower may not have been inside a laboratory or read much scientific literature since high school. For some of our older colleagues, this translates to before the discovery of the double helix.

Many attorneys and judges not only lack an aptitude for science, but often they may

Panel A. Questions establishing your qualifications as an expert witness:

Where are you employed?

Is your laboratory accredited for DNA testing?

What is your job title? What are your duties?

What education do you have that qualifies you to perform these duties?

Have you taken any specific courses or workshops related to your duties?

Does your laboratory conduct any type of training?

Are you a member of any professional organizations?

Do you attend professional meetings?

Do you read the scientific literature that is relevant to your job?

Have you ever testified before? Approximately how many times?

Have you ever qualified in court as an expert in DNA identification testing? How many times?

be intimidated by DNA subject matter. This means that, as an expert witness, you run the risk of losing your audience and having your testimony misinterpreted. It is therefore important to listen carefully and to assume that all parties do not share your familiarity with the subject matter. Always remember you are speaking to nonscientists who will require some degree of spoon-feeding when it comes to scientific testimony.

THE JURY—YOUR ULTIMATE AUDIENCE

The twelve jurors selected from the community are average folks. Most will have graduated from high school; some will have college degrees. On rare occasions one or two will have an advanced degree. Most will hold a blue-collar job. The majority will either be retired or in their early twenties. This is especially true in longer cases where those least likely to suffer financial hardship often make up the jury pool. Most will have never sat as jurors before and are unfamiliar with the rules they are required to follow.

Prosecutors often worry that jurors will not think critically or will be misled or distracted by trivial details rather than focusing on the more compelling evidence of guilt.

As jurors are generally not permitted to ask questions or seek clarification, we do not know the answers until the verdict is read. Most litigants realize that a jury is what is left over or “deselected” after both sides have kicked off the undesirables. Since most states require unanimous verdicts, every prosecutor and defense attorney appreciates that it only takes one juror to “hang up” a verdict.

The good news is that most jurors want to believe in the prosecution’s case and want to give great weight to the evidence. It has been our experience that most jurors understand and enjoy DNA evidence. In fact, when DNA testimony is properly presented, most jurors feel empowered by their newly found understanding of this important forensic evidence.

How do you prepare to testify in front of twelve average citizens? One way to assess your ability is to practice on friends who have no scientific background. Explain DNA testing to them simply and see how they respond. This will give you a sense of whether you are reaching your audience. It is also helpful to be familiar with the basic content of most expert testimony and to review these areas in advance each time you testify.

THE CONTENT OF EXPERT TESTIMONY

All expert testimony is presented in the same general format. This is true regardless of the scientific discipline involved. The format can be divided into three parts. The first consists of establishing the expert’s qualifications. This “foundation” must be presented in order for you to be legally permitted to render expert opinions. In most states the rule reads like California’s Evidence Code section 720: “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates”.

The prosecutor will ask about your educational background, training and work experience. Specifically, you will be asked to explain where you received your education and what degrees you have. You will also be asked about the duties and responsibilities of your current position, including any special training or continuing education you have received. You will be asked about any publications you have authored, whether you are a member of any scientific societies and the number of times you have testified as an expert witness. Some sample questions are given in Panel A.

These questions establish the legal foundation for your expert opinion and give you credibility. Ultimately, the attorney who called you as a witness will be asking the judge or jury to give great weight to your opinions. The better your qualifications, the more powerful your testimony will be.

Ironically, if the prosecutor is unprepared or unfamiliar with your field of expertise, this foundational testimony may not be presented artfully. Instead of leading you through each category of your experience, the prosecutor may simply prompt you with a single general question: “Please tell the court and jury about your background, training and experience that qualifies you for your present position.” You should therefore be prepared to cover all areas in one concise but thorough statement.

The second part of your testimony includes questions that deal with the general scientific concepts and technologies used in the case. The prosecutor will want to educate the jury and give you a chance to gain their confidence by having you briefly explain what DNA is and how the testing works. This should be informative and educational but as brief and nontechnical as possible. Jurors almost immediately tune out technical jargon, which can render even the most qualified expert ineffective. Jurors attach themselves to experts who can teach the basic concepts in simple layman’s language. Sample questions in this category are given in Panel B.

The aim of this type of questioning is to help the jury conceptualize the basics of the technology so that the results you present will have the impact they deserve. Lose the jury at this point and your effectiveness as an expert will also be lost. One of the ironies here is that a less qualified expert who is adept at explaining these concepts may be more effective than a more qualified expert who cannot communicate with the jury.

The last category of questions will be about the testing performed in the case. This testimony will focus on your opinions and conclusions about the evidence—opinions the prosecutor wants the jury to remember. Your responses to these questions should be short, direct and simply stated, e.g., “In my opinion, the genetic profile of the crime scene blood sample and the known blood sample, identified as belonging to (the defendant), are a match.” You will be asked to explain the basis for that opinion. Sample questions are given in Panel C.

The entire presentation of direct testimony should last no more than sixty minutes. If presented properly, the opinions and conclusions you offer will be the highlight of your testimony.

The defense attorney will then have the opportunity to cross-examine you and try to undermine your credibility. Again, most states have rules like California's Evidence Code section 721, which provides "[A] witness testifying as an expert... may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion".

The defense attorney often follows the same basic format as the prosecutor, starting with your qualifications and ending with questions challenging your test results and expert opinions. If you hold a B.S. degree, the attorney may suggest that only a Ph.D. is suitably qualified in this area. The attorney may show that you have not published, have not attended significant scientific meetings, or that you are biased in favor of the prosecution because you normally testify as a prosecution witness. Your laboratory may be another target during cross-examination. For example, is the laboratory accredited? Has the laboratory or the witness ever missed on a proficiency test, or made an error in reporting? Most of these questions are more cosmetic than substantive and jurors are generally as interested in how you handle them as they are in what you actually say.

Attacking the credibility of the science is the defense attorney's most difficult job. Many attorneys will concentrate on more fruitful areas such as weaknesses in your laboratory's procedures. What will most likely continue to be one of the best lines of attack is to try to use your testimony to undermine those who collected or handled the samples. The attorney may ask, "Isn't it possible that a sample collected in a careless or sloppy manner can create a potential for contamination?" and "Isn't it true that this can affect the integrity of your testing?" The strategy here is to use your testimony to undermine other aspects of the prosecution's case. Do not fall blindly into such broad hypothetical questions. A "yes" answer is surely incomplete and misleading. In truth, even sloppy

sample collection will often yield reliable results. Your answer should convey that balance. Be responsive and to the point, but do not cheat the jury with a partial answer. Your response may be, "Yes, it is possible that sloppy evidence collection can contaminate samples; however, in my experience, given the many controls performed, such contamination would be detected." Beware of "Isn't it possible" questions. Although they have little probative value, they can carry an emotional payload and a pat affirmative answer may create an unfairly negative impression. What is needed is a complete answer; one that admits such possibility (if it is true) but which also conveys how rare such a possibility is in the real world.

Another area of attack includes pointing out artifacts. Most DNA tests have artifacts of some kind. An example question might be, "Can stutter bands be interpreted as DNA from another unknown source and suggest a mixture?" Here the defense attorney's aim is to highlight the artifact in the hope that the jury will become confused or give it greater significance than it deserves. Hopefully, your answer will restore proportion by explaining the artifact within the context of the overall analysis. There will also be questions on the sufficiency of the databases. For example, "How can you generate a number in the millions from a database in the hundreds?"

In every respect, the defense attorney's job is to create "reasonable doubt" about the defendant's guilt. The primary goal of the defense is to neutralize the expert's evidence by creating doubt or confusion in the hope that the jurors will disregard the DNA evidence. If this happens, a powerful forensic identification tool will have been wasted.

CONCLUSION

In many ways, the expert witness has the easiest job in the courtroom. If you are qualified and prepared, testifying should be an enjoyable and rewarding experience. An outstanding expert witness is one whose demeanor does not change from direct to cross-examination. If a person walks into the courtroom while you are testifying, they should find it difficult to tell whether you are still under direct examination, or are under cross-examination.

Panel B. Questions about the technology used:

What is DNA?

Is DNA the same in every cell of the body?

With the exception of identical twins, is a person's DNA unique?

Are there tests available to detect an individual's genetic type?

What test was used in the present case?

Is this test used in other fields, such as medical diagnostics, paternity testing or for the identification of missing persons?

Can you explain briefly how this test is conducted?

Are controls performed to ensure that a reliable and accurate result is obtained?

Can you describe the safeguards and controls used to ensure the integrity of the test?

Panel C. Questions about the testing performed in the case:

Did you conduct a DNA test on the crime scene and reference samples in this case?

What were the results of the test?

What is the chance that this same genetic profile would be found in a random member of the population?

Are there samples remaining to retest, should someone wish to dispute the accuracy of the result?