

Presenting DNA Evidence at Trial: The “K.I.S.S. Principle”

By James R. Wooley, JD

When a prosecutor seeks to use DNA evidence in a criminal case today, he or she generally has no concern regarding whether the judge will allow the evidence to be presented to the jury. This was not always the case, but a decade of battles over the admissibility of DNA evidence has yielded a legal landscape where juries, with few exceptions, are allowed to hear the results of DNA testing. The issue facing the prosecutor now is how to best present the evidence to the jury.

DOING IT THE HARD WAY

There are two basic approaches to presenting DNA evidence to juries. One approach involves a prosecutor using expert witness testimony to present a detailed explanation of the underlying scientific principles and techniques involved in DNA testing, in the hopes of creating a scientifically savvy jury which will be able to appreciate the scientific basis of the test results. The actual results are often presented to the jury hours (or even days) after the jury first was told about “A” always binding with “T”. We have all seen this approach on television in that California case involving several current television celebrities, authors and a star athlete.

KEEPING IT SIMPLE

A second approach, and the one advocated by this prosecutor, is to apply the “K.I.S.S. Principle”. The K.I.S.S. Principle advises trial lawyers who are presenting complex evidence to juries to “Keep it Simple, Stupid”. When the K.I.S.S. Principle is applied, DNA evidence is presented to the jury in about half an hour, at the conclusion of which the jury has a full appreciation of the power of the DNA test results in the case. When this approach is used, the jury will know that a reliable, powerful, widely accepted scientific procedure has demonstrated that a piece of biological evidence is

highly likely to have come from a suspect. The jury will also know that the suspect’s complaints regarding possible problems with the test result are without merit. The jury will not know that “A” binds to “T”, but I respectfully submit that they never needed or wanted to know that anyway.

When applied to the presentation of DNA evidence, the K.I.S.S. Principle works in the following way: The prosecutor calls the DNA expert who performed the tests and conducts a nontechnical direct examination. The examination focuses on the experience and integrity of the expert, the basic goal of DNA testing, the widespread usage and acceptance of DNA testing techniques, the test results and the fact that the evidence can be retested by anyone who claims the results are wrong. Breaking down the half-hour direct examination into separate lines of questioning, it goes something like this:

Who are you and what is it that you do?
(questions and answers to explain the basic goal of the test)

Why are you qualified to do it? *(the knowledge and experience of the expert)*

Do you and others perform DNA testing often? *(the widespread usage and acceptance of the test)*

What was the result of DNA testing in this case? *(the DNA test result showing that the suspect’s DNA has the same rare characteristics that were detected in the crime scene evidence)*

Have your DNA test results ever excluded a suspect? *(the integrity of the expert, who calls exclusions where appropriate)*

If someone disagrees with your result, is there a scientific way to check if you got the right answer? *(the defendant has the ability to retest the evidence if he really wants to challenge the accuracy of the test result)*

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ADVANTAGES OF USING THE "K.I.S.S. PRINCIPLE"

The advantages of this simple approach are many. First, by not conducting long, technical, direct examinations, the prosecutor has made sure that the most important part of the DNA evidence – the result – is not obscured. In that certain California case, the results were powerfully presented, but only after days of articulate, yet totally mind-numbing, technical background was presented to the jury.

Second, by presenting DNA evidence in a nontechnical way which focuses on the power of the results and the ability to retest, the prosecutor has made it very difficult for the defense attorney to score points with the typical "something may have gone wrong with the testing procedure" attack which has been so prevalent in DNA litigation. Most defense attorneys decline the invitation to have the evidence retested and, instead, try to impress the jury with questions about possible technical problems with contamination, ethidium bromide, population substructure, etc.

A defense attorney will have a tough time making these possible technical problems clear to the jury if that attorney must first attempt to explain the technical background through cross-examination of the prosecution's DNA expert. Even if the defense attorney succeeds in making these possible tech-

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nical problems clear for the jury, he or she will have even more difficulty making the jury see the importance of the "something could have gone wrong" argument without presenting contradictory DNA test results.

Third, the simple presentation reflects the way in which lay jurors are presented with expert information in everyday life. When a juror meets a doctor who recommends a course of treatment for an ailment, the juror does not make the important decision whether to follow the doctor's advice by spending days trying to understand all of the scientific underpinnings of the problem. Instead the juror considers whether the doctor has experience and knowledge to render the advice and whether the advice is based on medical procedures that are widely used and accepted as reliable. Other factors he or she may take into consideration include whether the doctor's opinion is corroborated by other expert or nonexpert information and whether the advice is contradicted by a doctor who is more experienced and who may have used a more widely accepted diagnostic procedure. Lawyers who take a highly technical approach to arguing DNA evidence to juries are asking lay people to assess expert information in a way that is totally foreign to most of them.

Fourth, presenting DNA evidence in a nontechnical manner will mean that this type of forensic evidence will not be singled out for special scrutiny in the minds of the jury. In most cases involving DNA evidence, the prosecution will also present the results of other types of forensic science testing, including ballistics testing, serology, hair and fiber evidence, etc. The K.I.S.S. Principle is almost always invoked in the presentation of these other types of forensic evidence. Treating DNA evidence differently creates the erroneous impression that there is more reason for the jury to be concerned about the reliability of this particular type of forensic science. The fact is that DNA testing is a mature forensic science and it should be presented to the jury in the same manner as other mature forensic science evidence.

THE SCIENTIFICALLY ASTUTE JURY

Balanced against the advantages of the K.I.S.S. Principle approach is the idea that it is valuable to have a scientifically astute jury – one that really knows where to put its "A's, T's, G's and C's". Forgetting for the moment whether it really is valuable to have this type of jury, I question whether it is even remotely realistic to believe we can ever obtain such a jury in our system. I have spent significant portions of the last few years attempting, as a lay person, to understand the scientific theories, principles and techniques involved in DNA testing. I have been able to **truly understand** a small amount of the science involved only by talking to experts for extended periods of time, asking them to explain things to me over and over again, asking follow-up questions, reading and re-reading scientific publications, and then going back to the experts with even more questions. It has taken literally months of interactive study and I still place myself on the steep part of the learning curve. I accept and recognize that I may not be the best control for this type of study (I did once ask a human population geneticist who had written a paper on phylogenetic trees when he had first developed his interest in plants), but my experience makes me believe that twelve lay people cannot truly learn about DNA typing technology by silently sitting in a jury box for two days (or three, or four), certainly not to a level that would enable them to question the technical conclusions of any defense or prosecution expert in DNA testing. In other words, it is naïve to think that the only arguable benefit of the technical approach – the creation of a scientifically expert jury – will ever materialize in our system.

In closing, let me state that, while the K.I.S.S. Principle may not be as important to DNA testing as the ceiling principle approach for estimating DNA profile frequencies (although it is at least as scientific), proponents of DNA evidence in criminal cases would be well served to employ it when presenting this powerful evidence to juries.