Getting Involved in the Legal System: Choice or Chance?

The legal system and the laboratory are becoming involved with each other on a daily basis today and the technologist is, willingly or unwillingly, being drawn into this unfamiliar arena. This article will explain some of the manner by which a part of that arena operates, specifically the trial courts. Whether civil or criminal, these courts are governed by rules and methods of operation for the persons in them. In the case of the laboratorian, the role is that of witness, and this article attempts to dispel any fears of that role and teaches how to best prepare for it.

When you chose the laboratory as your life's work, the last thing in your mind was getting involved in the legal system. However, in today's world, and especially in this country, the legal system invades each person's existence more than anyone could imagine. Laboratory medicine is becoming involved in many aspects of law outside of those rules and regulations that govern the daily operation of the laboratory. Personnel are concerned with safety, quality-control standards, and the medical constraints placed on their practice in the laboratory. Involvement with the law may be as simple as filing a report for a minor accident to as complex as being a party to a lawsuit. Our concern in this article is with the presentation of testimony before a court of law.

Unlike chemical formulas or medical principles, the rules that govern the courts of law in this country are not uniform across the nation but differ between each jurisdiction. The Federal Court rules are different from those for the State Courts and some States will have varying rules within their court systems. The prime difference, of course, is that between civil and criminal courts. As a rule, the criminal court rules as to evidence and the presentation of testimony are stricter than in civil courts. This is the case because the standard of proof in a criminal case is "beyond a reasonable doubt," while for a civil case it is usually "a preponderance of the evidence," the latter requiring less proof. Also, the penalties for conviction in a criminal matter are more severe than in a civil matter where the result is money, or "damages" as lawyers like to speak of them. I have seen evidence admitted in a civil matter that was not admissible in a criminal one on the same issue. Any person called to testify in court should find out the nature of the case and the rules that apply.

The cast of characters in both types of courts looks the same: a prosecutor and defense attorney in the criminal, a plaintiff and either a defense or respondent's attorney in the civil. The number of jurors may vary, but this has no effect upon the testimony. The witness should determine which party is putting his testimony before the court and what is to be proved by that testimony. This will enable the witness to be prepared for the examination to be made by the attorney who is calling him to testify and to better foresee the cross-examination by the opposition. The key to preparation is to determine the purpose for the testimony or evidence sought to be introduced. Knowing why is the best way to know how.

Type of Witness

Persons are called to testify because they have personal knowledge of a fact and are able to relate that knowledge to the court, or they are an expert in a field which the court, or the body whose duty it is to find the facts, needs assistance in determining. A witness may never make a decision as to guilt or innocence in a criminal matter or liability for "damages" in a civil matter. If you have been called to testify as a fact witness, you have personal knowledge of facts which must be proven to establish the theory that one advocate is espousing. In the laboratory setting it may be as brief as the date of receipt of a specimen or as complex as the complete procedure used in preparing that specimen for analysis, the analysis itself, and the reporting of the results. Again, knowing the purpose for which you were called will help you prepare your testimony. As such a witness you are limited to those facts that you have personal knowledge of, and you may not give an opinion. In some courts, ordinarily civil courts, a fact witness who is an expert in the field may be allowed to express an opinion, but this is not a regular occurrence. You should always consult with the attorney who is presenting your testimony to see if the judge will allow such questioning on his examination or on cross-examination. If it is allowed, then you should discuss your opinion on the facts and any interpretation you would place on them with the attorney.

If the fact finder, either the jury or the judge, needs assistance in determining the facts in an area of knowledge not generally known in the populace, then an expert may be allowed to testify as to an opinion. The main difference in this type of witness is that an expert need have no personal knowledge of the facts in the matter at all. The expert is allowed to testify from records and facts in evidence or may conduct observations and tests, testifying as to the results of those. The expert's opinion is based on those observations or upon a review of records or facts in evidence. The opinion must be stated in terms of reasonable scientific certainty and cannot reach the question of guilt or innocence, although the opinion may be a critical factor in the decision of that issue. If the knowledge is not one of a specialized concern, an expert may not be used to explain it to the court. For example, an opinion as to intoxication may be based upon observations by any person who has seen persons whom he knew to be intoxicated—an expert is not needed. However, a state of intoxication when the evidence is a value for blood alcohol concentration requires an expert opinion, owing to the specialized nature of the knowledge.

Before a witness may give an opinion, the court must first determine that an expert opinion is needed, and next the expert must be qualified to give testimony and form an opinion. In some areas, the science must also be proven to be acceptable to the court. This was the situation set forth in Frye v. U.S. (54 App. D.C. 46, D.C. Cir., 1923), which involved the admissibility of the polygraph (lie-detector) into evidence. The decision by the court said that the science must be acceptable generally to the community in which it is to be used. In the specific example of the polygraph, the
court said that it was not accepted as a scientific instrument and therefore could not be used in court, and that testimony by experts was not acceptable to prove its results. Since then, many courts have reviewed scientific evidence and have applied the Frye test to both allow and disallow the testimony. Recently, courts have been getting away from that standard and allowing the testimony if the science involved is based upon accepted principles, and they have not been as strict in allowing new techniques and technology into the courtroom. This might be clearer to understand when one realizes that the polygraph attacked the basic premise of our legal system: that the fact finder determines the truth of the testimony and not some machine. Once outside of the field of truth vs lie then the courts have been far more lenient in allowing scientific testing into evidence. The difference is one of weight vs admissibility. Courts, especially in civil matters, are willing to let the testimony be heard and to allow the attorneys to argue its value (weight) to the fact finder rather than not let it be heard at all (not admissible). If substance in science may be found for the evidence, most courts will let the expert testify and be subject to cross-examination. In addition, this attitude allows the other party to utilize its own expert to refute the scientific testimony. This is when the true "Battle of the Experts" is seen in the courts.

Preparation for Court

Therefore it is very important for the witness to meet with the attorney who is calling him to testify or who seeks to obtain an opinion as an expert on evidence to be presented. Let us first discuss the fact witness and the manner in which to prepare for testimony. All records and notes regarding the point to be testified on should be obtained and reviewed in detail. Frequently, the event occurred many months or perhaps over a year in the past. In fact, civil matters are commonly brought to trial many years after the event. Do not expect your memory to retain the facts from the date of occurrence, and thoroughly review the records. If the records are with the attorney, get a copy as soon as possible and review them with the attorney. If the attorney says you may, also discuss the event or procedure with other persons in the laboratory who have knowledge of the procedure or technique you are to testify about. Be prepared to describe in court your preparation and with whom you discussed the matter. This is frequently used by attorneys as a cross-examination technique to attack the witness’s credibility and memory. There is nothing improper or illegal about doing this as long as you are open and did it with the knowledge and consent of the attorney. The key phrase is that you are "refreshing your recollection," and you may review your notes during your testimony if you ask to do so after a question is asked to which the answer may be in those notes and which you cannot recall without assistance. After refreshing your memory, discuss the facts with the attorney and review the questions he expects to ask and let him know what your answers would be to the questions. Learn the weak points of your testimony and determine the best way to respond to possible cross-examination. If you are not able to refresh your memory with the records and notes, let the attorney know as soon as possible. The evidence may be presented with the notes and records used as the recording of your acts as done. In most situations, the records may be put into evidence by your testimony that you made the notes at the time the procedure was done and they were kept in the ordinary course of business of the laboratory. The sooner you inform the attorney of this the better. Once you feel confident in your ability to recall the events properly, determine when you will be needed to testify and what notes and records the attorney wants you to bring to court.

Should you be employed as an expert with no personal knowledge of the facts of the case, your preparation is different from the fact witness. In the first place, your testimony cannot be compelled. That is, you cannot be ordered or subpoenaed to testify against your will. An expert testifies upon agreement with one or both of the parties and in unique circumstances at the request of the court. In the second, as stated before, an expert may form and testify about his opinion. Prior to agreeing to testify as an expert, you should determine what the issue to be proved is and whether your expertise is such as to qualify before the court. I cannot think of anything more embarrassing than to be called to testify and then not be allowed to do so. An analytical chemist with no education or training in clinical chemistry or toxicology should not be qualified as an expert to testify as to metabolism of various substances in the human body, but some have attempted to do so. Therefore, if an attorney wishes to ask you to testify regarding paint analysis, telling you that "chemistry is chemistry," think twice about accepting if you have no background in the field. Being able to learn about it in order to testify will generally not allow you to gain sufficient knowledge to stand up against questioning by a prepared attorney for the opposing viewpoint. By all means though, if you do have expert knowledge about the subject, then agree to testify.

After accepting the challenge to testify, obtain all records about the question in hand and request from the attorney all other information you need to evaluate the evidence or form the opinion. Inquire who the opposition has hired as an expert, if any, and obtain clearance from the attorney to consult with any other persons you need to, to fully prepare your report. If you need further information, get it. If, upon completion of your research, your opinion differs from the theory espoused by the attorney, tell him about it. Your expertise should not be compromised by couching your opinion to prove a point you cannot agree with scientifically.

Perhaps your opinion will lead to a settlement of the matter, or the attorney will seek another opinion. Remember, your job is to evaluate the evidence within a degree of scientific certainty and form an opinion, not to be an advocate for one side or the other. Once you have formed that opinion, inform the attorney verbally unless he has requested a written report. In some jurisdictions, all written reports from an expert must be provided to the opposition, and the attorney may wish to avoid doing that. You should not question his tactics but operate as requested as long as such operation does not violate any laws. If you cannot do so, inform the attorney of this at the start of the procedure before you start work, because he may not want to operate in that manner.

After determining that you will be testifying, if you need any audiovisual aids inquire if they are allowed and what restrictions may exist on their use. Some courts are very liberal on the use of such aids if it helps prove the point. In a hearing before a judge alone, more may be allowed than before a jury, where the constraints of the situation are stricter. In the former situation I have had an expert lecture the court for over two hours, with slides, on the topic of retention of samples, with the lecture being without questioning by the attorneys. At trial, I have had judges restrict charts and diagrams if they were not exact in their wording.
and were subject to misinterpretation. Be prepared for your aids to be made exhibits and kept by the court. If they are your only copies, provide for extras to be prepared before trial. As with a fact witness, go over in detail the questions the attorney expects to ask and your proposed answers.

Perhaps more important than with a fact witness is to review the expected cross-examination. Inquire as to what to look forward to, and educate the attorney as to what areas are weak in your opinion or in the science. In this manner, both you and the attorney will be better prepared to present the testimony.

Testifying in Court

You should now be fully prepared on the substance of your testimony, whether as a fact witness or an expert. If you are not already familiar with the actual courtroom that you will be testifying in, get a good look at it before you testify, perhaps during another trial. This will give you a familiarity with your surroundings, which will allow you to concentrate on your testimony rather than those surroundings.

You will not be able to observe during the trial you will be testifying at unless the attorney has made arrangements for this. In most jurisdictions witnesses are excluded from the courtroom before they testify, some exceptions being granted for experts for which the attorney needs assistance during the testimony of another expert. If you need to hear or know what the other expert says, let the attorney know ahead of time and he may be able to arrange for this. When you learn the day and time that you will be testifying, contact the attorney to ascertain that those are correct.

Frequent delays occur before and during trials. Be prepared to wait when you arrive at the courthouse, because timing is never very precise in matters of trials. I suggest reading material other than the records of the matter at hand to relax you and put you into a less tense mood. This is not to say that you should be withdrawn from the situation but, rather, in a receptive mental state and fully prepared for what comes next. Remember, you already know your material. A few minutes before testifying is not the time to get familiar with it.

Be yourself. Do not attempt to act the part of the academic if you are not one, or the self-centered expert if you really are "one of the guys." Dress in a manner appropriate to the locale, time of year, and the proceeding in which you are involved. Don't run out to buy a three-piece tailored suit if that is not your normal style. I do not suggest jeans either. Proper business attire is appropriate. The image you are trying to portray is yourself, a knowledgeable, professional laboratory scientist. Again, observing other trials should help you to get the feel for what is correct and what "sells." I recall one case where a young physician testified in casual slacks and a tee shirt. Later many jurors did not give credence to his testimony because his appearance did not coincide with their image of what a physician should be. Always keep in mind that the jury is the final arbiter of credibility, and appearances do matter to many people, although on a subconscious level.

How do you act or react when being asked questions during your testimony? Pay attention to the person asking the question and listen carefully. The question may not be asked exactly as you had heard it when preparing with the attorney. Watch the person asking and respond to either that person or the jury (or judge if no jury is present). I would suggest that brief introductory matters should be answered to the questioner and more lengthy answers that deal with the important portions of the subject matter be answered to the jury. Scan the jurors and find some with whom you feel rapport and try to talk to them. Do not answer every question while looking at the same person, because this is very severe in interpretation and some jurors may feel slighted. After the question is asked, pause to gather your thoughts, and respond. Of course, to pause too long, especially when the question is a simple one such as where you are employed, will appear feigned and should be avoided. However, with the more important areas, the pause has a general effect of concern to get things correct and not jump at answers. This enhances your credibility as a witness. If an objection is made, do not take it personally, but pause to let the judge make a ruling as to whether the question or response is proper under the rules of evidence that the court is operating under. If the judge sustains the objection, you will not be able to respond, but if he overrules it you may. Listen carefully, because your attorney may try to explain what he is doing and give you some hints as to the tactic he will be using if the question is allowed or disallowed.

When on the witness stand, your position is one of disattachment and you should present your testimony as a professional interested in the correct science or procedure being explained to the court. Do not become an advocate for either party. That is the position of the attorneys and wears very poorly on the witness. Some attorneys will attempt and succeed in starting an argument with the witness that lowers the witness's credibility with the jury. Let the attorney harass you; your attorney presumably will take steps to protect you from such tactics, but by retaining your professional demeanor you will always be the winner in such a contest. As a witness, it is imperative that you not appear biased in the matter. The better you know your subject matter, the easier it is to avoid falling into this trap. You are not expected to know everything about all areas of your profession. Do not be afraid to respond "I don't know" when a question is asked to which you do not know the answer. Do not attempt to bluff a response or try to fool the questioner. The attorney in most cases has studied the science involved and will be able to tell you are doing just that and, rest assured, he will get that message to the jury.

When giving responses on matters involving scientific procedures, attempt to avoid using laboratory slang or professional jargon. It is very easy to begin to talk as we all do with others of our own professions in the language of shortcuts and abbreviations. This will serve to confuse the jury and require lengthy stops to explain what you are trying to say. Use generally understandable language. If you must use specific scientific terminology, explain it in basic terms at the time you use it without being asked to do so. Do not talk down to the jury when doing this. The best way to prepare is to review with the attorney your testimony and those terms you need to use, and perhaps review them with a friend who is not in your field. Be prepared to explain any special concepts or terms involved, should they come up. Examples help, as do comparisons with items or concepts in everyday life.

A properly prepared witness need have no worries about cross-examination. The purpose of this is to allow the opposing attorney an opportunity to disprove what you testified about. This is done directly by questioning as to the methodology used and its shortcomings, possible alternative methods of performing testing that others may think more reliable, or an attack on the science itself. Knowing your
field is the best way to prepare for this type of attack. Another approach is to raise questions as to your credibility as a witness. Inquiry as to your interest in the outcome of the proceedings, either scientifically or monetarily, is the most common method of doing this. Again, this is the type of attack aimed to get the witness into an argument to show that he is not a dispassionate scientist but an advocate. Questions as to the amount of payment for an expert's testimony are used here, the insinuation being that your testimony is bought rather than you are being paid for your time and expertise. People expect an expert to be paid; there is nothing to be ashamed of on this account. For this reason, it is always suspect when an expert is testifying for no pay or expenses as well as when an expert always testifies for a particular viewpoint. It is for this reason that an expert should never accept a contingent fee for testifying. This is commonly done by attorneys as the attorney for the plaintiff in a civil matter, specifically to take a set amount (usually a percentage) if the matter is concluded favorably and to take nothing if it is not. However, for an expert to do so establishes an interest in the outcome and it is generally considered unethical. If you want to take a case but the party cannot afford to pay your expenses, take it but be prepared to explain your motives in terms of your interest in seeing that the science is explained properly and that justice as a whole is served by your doing so.

After your testimony is completed, go over with yourself how you think you did and make an appointment with the attorney to go over your testimony for weak points or mistakes. This is an area often neglected but of extreme importance for a person who expects to testify again sometime. This critique is a means to smooth out your appearance and presentation. Consideration should be given to obtaining a copy of the transcript of your testimony and reviewing it. If possible, speak to the opposing attorney and ask how he thought you did, also inquiring as to what points he was trying to make with his cross-examination. All the preparation will go for naught if you do not do your after-court homework to become a better witness in the future.

Approach your court experience as another course in the practice of your chosen profession, and it will reward you with knowledge and insight into yourself and your profession.

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