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AMERICAN PROSECUTORS RESEARCH INSTITUTE

DNA LEGAL ASSISTANCE UNIT

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DNA LEGAL TRAINING AND TECHNICAL ASSISTANCE UNIT

Final Report

I. INTRODUCTION

DNA evidence has become a crucial tool in the investigation and prosecution of violent crimes. In homicide cases, where the proof is often circumstantial, the addition of DNA, with its unique power of discrimination, has proven to be invaluable. Many times DNA supplies the only link between killer and victim. In sexual assault cases, DNA evidence can corroborate a victim's story giving the victim both courage and credibility.

Genetic testing or identification, which is the basis of DNA analysis, was originally developed for diagnostic, clinical, and research purposes in the medical field. By using DNA analysis in the forensic setting, these principles of genetic identification have been brought to bear within the criminal justice system. Forensic laboratories increasingly analyze genetic samples derived from blood, semen, other bodily fluids and tissues to be used by law enforcement agencies and prosecutors as an investigative tool. Currently, over 200 federal, state, local and private laboratories are conducting forensic DNA analysis.

It is now incumbent on prosecutors in jurisdictions throughout the United States to use DNA evidence. Because DNA evidence can provide a link to guilty suspects as well as exonerate innocent suspects, it is imperative that prosecutors use it as they strive to determine the truth. However, to use it effectively in investigations and convincingly in trials, prosecutors must have a basic understanding of what DNA is and how to interpret DNA test results. Most prosecutors have discovered that understanding DNA evidence is quite different than understanding and presenting other forensic evidence. Intensive training, current resource materials and qualified technical assistance are needed to overcome the difficulties of using this evidence. Providing prosecutors with that fundamental knowledge will offset the intimidation that results from the technical nature of the information that must be understood and presented but is generally beyond the ordinary prosecutors' scope of understanding.

In 1994, with the power of DNA evidence and the needs of prosecutors in mind, The National Institute of Justice and the Bureau of Justice Assistance awarded a \$350,000 grant to APRI, to provide technical assistance in the form of general and specific case support, to develop a model training curriculum for prosecutors and investigators and to act as a clearinghouse for information for prosecutors. The grant enabled APRI to create the first national DNA Legal Assistance Unit available to state and local prosecutors and investigators for national, state and local training, for daily technical assistance with pretrial and trial issues and for providing materials for use in direct and cross-

examination. APRI is also the only entity that developed and continues to maintain a national network of prosecutorial and scientific experts as well as a database of defense expert transcripts.

When APRI's DNA Legal Assistance Unit was created, significant responsibilities previously carried by the FBI's DNA sub-unit were assumed by APRI. The FBI continues to assist federal and local prosecutors whose cases are analyzed by the FBI's DNA laboratory. APRI supports all state and local prosecutions where the analyses were performed by state, local or private laboratories. APRI continues the efforts of the FBI by aggressively advocating for prosecutors' effective use of forensic DNA. APRI offers technical assistance in the form of basic information packets concerning the scientific basis of DNA, consultation on individual cases and courtroom presentation strategies. Also provided are model discovery responses, sample admissibility hearing motions, transcripts of expert witness testimony and support to state legislatures drafting DNA related statutes.

Since its inception, the DNA Unit's training and technical assistance has been very hands-on and "case specific". The Unit has consulted on hundreds of cases including a number of nationally recognized, high profile cases:

- Lewis Korngut, assistant prosecutor for Mercer County, NJ was the prosecutor assigned to the DNA portion of the case of New Jersey v. Jesse Timmendequas, the case in which Megan Khanka was raped and murdered by a previously convicted pedophile. This case was the impetus behind the passage of numerous "Megan's laws" throughout the country. In order to prepare for his participation in this nationally publicized case, Mr. Korngut attended APRI's training entitled, *DNA: Witness to the Truth* in Charleston, South Carolina in November, 1996. The jury recently convicted Mr. Timmendequas and sentenced him to death.
- Special Assistant Attorney General for the New York State Attorney General Medicaid Fraud Center, Jerry M. Solomon, also attended the Charleston conference. Mr. Solomon was assigned to prosecute the case of New York v. John Horace, a case in which a young, permanently comatose woman was raped and impregnated by a hospital worker. Paternity testing was used in that case to convict the defendant and resulted in a maximum sentence of twenty five years.
- District Attorney William LaFortune from Tulsa, Oklahoma attended APRI's conference in Seattle, Washington to prepare for the case of Oklahoma v. Durham. This case involved the rape of an eleven year old girl. While convicted in 1994, Durham's case has been overturned as a result of the efforts of the Innocence Project, a project that investigates cases in which DNA was not used at trial but could possibly exonerate a defendant previously convicted. The extent to which a DNA non match necessarily exonerates a defendant, however, is a difficult issue, the complexities of which are often overlooked when discussed by the Project and the press. The Durham

case has in fact been the subject of a recent ABC, "Prime Time Live" segment in which the District Attorney was criticized for failing to simply dismiss all charges when posttrial exculpatory DNA tests were performed. However, new mitochondrial DNA evidence, unavailable at the time of the first trial, may reconvict the defendant.

In addition to assisting prosecutors with cases of national recognition, the Unit has also consulted on numerous cases in which issues have arisen for the first time *ie*: cases of first impression. For example, these cases include the first mitochondrial cases in Tennessee and South Carolina, the first "cold hit" cases (cases in which perpetrators were discovered only by the use of the DNA database) and cases in Florida, Missouri, and Nebraska in which DNA was used to establish location of a homicide in the absence of ever finding the victim's body.

The following sections provide an overview of the DNA Unit's efforts in training prosecutors and investigators and in providing daily technical assistance to practitioners throughout the United States.

II. TRAINING

APRI's efforts in providing comprehensive DNA training are revolutionary for the forensic arena. For the first time, a plan has been initiated and tested for intensive training in the basic science underlying DNA technology, an in-depth examination of the forensic applications, and a step-by-step guide for how to handle the legal obstacles facing the prosecutor, especially in cases in which the DNA evidence is hotly contested.

Development of the Training Curricula

Before establishing its training program, APRI's DNA Unit conducted a thorough review of the training resources and literature on the use of DNA as a law enforcement tool. APRI staff has also identified films, videotapes and other visual aids that are useful in presenting the information. All of these items were assembled, catalogued, and abstracted and assessed for their value as training tools.

To formulate this special training program and to provide continuous guidance to the DNA Unit, an advisory group was assembled in June 1995. The group consisted of six prosecutors, one judge, four forensic DNA analysts, a population geneticist, a professor of forensic science, and an attorney with prosecution, defense and scientific background. The advisory group assessed the training needs, identified attitudes, skills and knowledge required of the constituent groups, wrote training objectives for each discipline, developed and selected material, made a plan and selected methods. The group was instrumental in formulating the curriculum for a two-and-a-half-day pilot training program held in November, 1995 in Alexandria, VA. The training was attended by fifty carefully selected prosecutors and investigators. APRI targeted and gave priority to prosecutors with at least four to five years of prosecution experience handling violence against persons, murder cases and sex crimes who had handled at least one case involving

forensic DNA. Investigators and detectives assigned to violence against persons, homicide or sex crimes were also targeted. The attendees had a variety of exposure to and experience with DNA in the courtroom. The feedback from the session was extremely positive with many stating that it was the best continuing legal education program they had ever attended.

APRI's training philosophy incorporates adult learning principles applying a wide variety of training methods with frequent review exercises to reinforce information. In order to train the faculty members in these specialized techniques, in February 1996, the Unit conducted a two-day faculty training in creative training/adult learning techniques. The training, attended by 15-20 selected prosecutors, scientists and investigators introduced the faculty members to the fundamentals of effective communication and the training philosophies of APRI.

The advisory group reconvened in August, 1996 to further assess the training needs of the participants and to refine the curriculum. The revised training curriculum included a case study approach to teaching DNA. In addition, the curriculum was expanded to four days and oriented to prosecutors and investigators having little or no knowledge of forensic DNA. The first revised training program was held in November, 1996 in Charleston, South Carolina and the second was held in April, 1997 in Seattle, Washington. There has been an overwhelmingly positive response to the case study approach from the participants. Over the past two years, the Unit has trained over 200 prosecutors from 39 states through its *DNA: Witness to the Truth* conference.

The current curriculum provides a basic foundation of the scientific principles underlying forensic DNA technology and a brief history of DNA in the criminal justice system. The participants are then introduced to a specific case scenario and are provided with actual evidence collection issues, laboratory results and actual autoradiographs produced in the case. The entire course spans all phases of a DNA trial in the context of this specific case.

Training Products

In addition to the comprehensive four-day curriculum, APRI has developed a standard half-day program designed for presentation to prosecutor organizations as a part of a larger continuing legal education course. This program is jointly presented by the DNA Unit director or other experienced prosecutors and a forensic DNA analyst. The presentation weaves the legal and scientific issues together to give a brief explanation of the essentials of a DNA case viewed chronologically.

In order to respond to the many requests from prosecutor's associations who would like to incorporate DNA introducing into a broader conference, a third type of training is offered. It is a one hour introduction to DNA presentation given by an attorney well-versed in DNA. This format presents a cursory overview of the science of DNA.

The products completed in the training component during the initial grant period were:

- training curriculum for the pilot program
- training curriculum for the revised course
- list of potential faculty members
- an agenda for the train the trainers
- course outlines and supporting documentation
- evaluation reports for each training

State Training

The DNA Legal Assistance Unit continues to make itself available to state and local prosecutor associations for training adapted to the associations' needs. One hour, three hour and day long trainings have been developed and presented to numerous state prosecutors' association meetings. Similarly, APRI has utilized the resources of the Unit in programs developed under other grants such as the grant APRI received from the Violence Against Women grants office to develop training efforts that target violence against women. DNA presentations have been incorporated into several VAWA funded training workshops, specifically in the area of sexual assault.

III. TECHNICAL ASSISTANCE

During the initial grant period, two types of technical assistance, general information and specific case support, have been provided to prosecutors and investigators. The services offered by the DNA Unit involved providing prosecutors with current legal and scientific literature related to DNA evidence, distributing literature to prosecutors seeking general information, answering specific DNA related questions particular to a case and evaluating prosecutors' responses to technical assistance.

General Assistance

General technical assistance support has focused on the development and distribution of packets of basic information to prosecutors with little or no knowledge of forensic DNA. Regularly updated, these packets contain copies of recent legal decisions involving DNA evidence rulings, scientific articles describing specific testing methods, articles on statistical reliability and the validity of standard DNA analysis results and other information regarding legal and scientific issues the defense may raise.

Case Specific Assistance

Case specific support entails legal assistance on case specific issues. In exercising this function, APRI responds to case specific requests, often consulting with prosecutors on presentation strategies and pre-trial and appellate issues. Case specific support has been provided to local and state prosecutors, crime laboratories, members of the judiciary, law enforcement personnel, foreign prosecutors, and forensic scientists.

To support its technical assistance capabilities, the Unit maintains a comprehensive and up-to-date resource collection of books, manuals, research reports, studies, state legislation, case law, journal articles, newspaper and magazine stories, trial transcripts, trial and appellate briefs, motions, memoranda and other pleadings. The Unit also subscribes to legal and scientific research publications. In continuing its original technical assistance functions, the Unit performs regular library, LEXIS/NEXIS and internet searches for relevant case law and statutes related to the admissibility of DNA evidence. The Unit further summarizes case law on topics of particular relevance for prosecutors.

Learning how to use and apply DNA evidence can be a daunting task for an otherwise harried prosecutor and APRI has tried to capture and summarize the vast array of information in reading material that is easy to read, providing a glossary of terms, table of contents, additional reading bibliography and helpful depictions of the forensic applications of DNA technology. APRI has collected hundreds of legal and scientific articles about forensic DNA which are referenced in a bibliography and are provided to those who request them.

Defense Expert Database

One of the most often accessed resource of the DNA Legal Assistance Unit is its defense expert database. This database was created by the FBI and has been expanded and maintained by the DNA Legal Assistance Unit. Computer files have been created which index the available information collected on DNA experts who have been identified as defense-oriented. Currently, there are over 40 files in the database. Typically, the materials include the curriculum vitae, articles and reports written by the expert, a list of prosecutors who have examined the expert, any correspondences to or about the expert and trial transcripts. Prosecutors are encouraged to contact the Unit once they are aware of the identity of the defense expert in their case. In exchange for this valuable service the Unit has been successful in soliciting any new or relevant information from prosecutors who receive this type of information to keep the Unit's preparatory materials current.

Expert Network

Through its research and technical assistance activities, the Unit staff has identified and developed a network of prosecutors, investigators and scientists who possess expertise in the area of DNA evidence. These experts are called upon frequently to assist the Unit in responding to requests for technical assistance or specialized expertise. The Unit has continued to expand and access this network to remain current on DNA related issues. Through referrals by APRI, these prosecutors regularly assist others who face similar issues and experts. Their experience is essential to the successful prosecution of cases involving DNA evidence. More experienced individuals are being identified as the networking and training process continues.

Technical Assistance Database

APRI has designed a text database for easy storage and retrieval of all technical assistance requests. The database allows Unit staff to track cases in which the Unit has provided assistance and to follow-up with requests for trial transcripts, motions and briefs as well as other relevant information. This follow-up procedure also enables the Unit to remain current on the changing status of forensic DNA in the courts. As such, the Unit's collection of transcripts, briefs and sample motions are updated regularly to provide rapid response to prosecutors facing last minute challenges to DNA evidence. The database contains information on the caller's profession and jurisdiction, the date and type of request, and the amount of time spent responding to the call. Summary information concerning the Unit's services and appropriate reallocation of resources is also automatically generated by the program. During the initial NIJ funded grant period, recipients of technical assistance were sent a letter and questionnaire asking for their feedback on the usefulness and timeliness of the assistance. They were also asked for their suggestions for improvement. Research assistants worked with the Unit to identify areas of improvement in response to this feedback.

IV. INFORMATION MATERIAL AND PUBLICATIONS

During the NIJ funded grant period, The DNA Unit developed a quarterly newsletter, *The Silent Witness* and an assessment of state legislation related to mandatory submission of blood samples for convicted felons. The newsletter has become a popular publication in the forensic DNA community with articles of a legal nature, pieces about new genetic markers, news about the Unit and upcoming training opportunities as well as lists of DNA related publications. The newsletter is produced specifically for prosecutors but laboratory personnel have also actively sought to be included in the mailing list.

The initial distribution list for the newsletter already included a broad audience including local prosecutors' offices, state and federal crime laboratories involved in DNA analysis, and other relevant agencies. Today, the Unit's mailing list includes over 4,000 professionals who have asked to be placed on the list. Subscribers to the *Silent Witness* include elected prosecutors, assistant and deputy district attorneys, judges, police, researchers, professors and forensic scientists. These individuals also receive notices of conferences and other announcements and it is evident from technical assistance inquiries that these publications are distributed far beyond the named subscribers.

APRI further conducted a review of the status of state legislation pertaining to the mandatory submission of blood samples for convicted felons. This review not only details the particulars of each such statute but also provides a commentary. The review is organized alphabetically by state and contains the complete statute, a brief discussion of its elements and matrices summarizing the narration. This review has allowed prosecutors to examine and compare, in one source, the structure and content of all relevant state statutes. This capability is important as prosecutors respond to legal challenges to statutorily authorized, involuntary sample donations. In such case,

challenges to the law's structure, content, and implementation may be compared with other state statutes. Additionally, the Unit conducted a telephone survey of prosecutors and legislatures in states with mandatory submission of blood statutes. The purpose of the survey was to gain insight into practical interpretation of the statutes including weaknesses or legal "loopholes" discovered after enactment. This information enables legislatures to discern, at a glance, strengths and weaknesses of these statutes which will ultimately bring the FBI's Combined DNA Identification System (CODIS) concept to fruition. CODIS and the versions of the same implemented by the states, enables police to compare evidentiary samples in cases in which there is no suspect with a computerized database of DNA profiles generated from tissue samples of convicted felons.

V. SUMMARY

The analysis of DNA is an increasingly crucial tool in criminal investigation and prosecution. During the past decade the use of DNA analysis and typing has become an essential part of criminal investigations to establish the identity of individuals committing crimes ranging from homicide to sexual assault. Technology is rapidly providing more precise DNA results; hence, prosecutors and other law enforcement officials will continually require training and technical assistance in the most current developments in the DNA field.

APRI's DNA Legal Assistance Unit has enhanced prosecutors' utilization of DNA evidence in several ways. From a broad based training perspective, the Unit has begun to establish a basic level of competence and confidence in the use of forensic DNA by prosecutors throughout the country. Three national trainings, over ten state and local trainings and presentations incorporated into Violence Against Woman Act funded conferences have resulted in educating more than 500 prosecutors from over 45 states in the science and presentation of DNA evidence. On a daily basis the unit has become a resource for hundreds of prosecutors to access with the assurance of a quick response, referrals to experts all over the country, immediate information on defense experts, written resource materials and knowledgeable advice on trial strategies. To date the Unit has responded to over 400 requests for technical assistance.

APRI's DNA Legal Assistance Unit, established through the National Institute of Justice and the Bureau of Justice Assistance grant, has been successful in meeting the needs of prosecutors, investigators and DNA analysts. APRI has provided invaluable services to these disciplines by providing written materials concerning scientific developments, case law and recent legislative enactment's; consultation and advice concerning the application of DNA technology in individual cases; and developing and presenting training on DNA analysis. The continuation of the DNA Legal Assistance Unit has insured that this important tool for criminal justice practitioners continues to be used to the maximum extent possible in the nation's war against crime.