

APPOINTED EXPERTS AND THEIR DEMANDS TO BE PRESENT IN THE LABORATORY DURING THE ANALYSIS OF DNA EVIDENCE

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The allegations brought against NBA basketball star Kobe Bryant for sexually assaulting a woman in Colorado have resulted in felony charges, with the trial pending as of the writing of this abstract. An issue that has arisen from the forensic DNA testing performed in this case has been the ability for appointed experts to be present in the laboratory during the entire analysis of evidentiary samples. Often, these requests come as the result of concerns over sample consumption or the potential for laboratory error. Unfortunately, having experts view the entire laboratory analysis process can have its own negative affect, potentially causing a problem where one would not have existed. This of course, defeats the original purpose of viewing the analysis; i.e., to protect the integrity of the evidence and the analysis process.

While private forensic DNA laboratories such as The Bode Technology Group have the option to refuse a case when a requirement exists to view testing in the laboratory, public crime laboratories often do not have this option, as they are servants of the State or the court. This is unfortunate, as the presence of an outside expert can be distracting, and documented laboratory-based errors have been directly attributed to this issue (examples of these types of errors will be presented). Agency policies that are written to prohibit an expert from asking questions while observing testing or standing too close to the analysis being conducted, are not always respected. Thus, the integrity of the evidence remains in jeopardy. Are there alternatives to an expert being present for the entire analysis process? Observing the transfer of sample custody and/or the transfer of a portion (or all) of the sample to a tube for laboratory analysis alone, are reasonable requests. The use of video cameras has been an option to document the laboratory analysis, however, this is difficult and can sometimes add unnecessary distraction. Is watching through windows into the laboratory sufficient (when available), or can a higher level qualified analyst or manager observe the testing to ensure that all procedures are being followed? In all of these cases, how comprehensive does the video taping, observation or witnessing need to be? A survey of crime laboratory policies regarding these issues was conducted, and the results of the survey will be presented.

One of the central questions regarding requests to view the analysis of laboratory testing is which party is making the request. The courts generally do not make requests of a laboratory unless compelled to do so by an attorney (assuming that both prosecution and defense agree to the request). In addition, attorneys generally do not make these requests unless their expert(s) have asked them to. Therefore, more often than not it is the appointed expert that is making the request. Aside from the general concerns that often times the expert has little or no experience working in a forensic DNA laboratory, the question arises as to why the expert feels compelled to observe the testing? In the case involving Kobe Bryant, the issue was not whether evidentiary samples would be consumed, but was a concern over how the testing laboratory selected by the

prosecution would process the samples and whether laboratory errors would occur. The prosecution laboratory is ASCLD/LAB accredited, and there was no indication from the expert that the laboratory had been in violation of following validated procedures. In addition, the laboratory agreed to review all procedures and laboratory practices with the expert prior to analysis (and all case file documents before and after each step in the analysis process). Therefore, why was this expert convinced that the DNA analysis needed to be observed? This question will be addressed, and the issues surrounding the decisions of the attorneys and the court in this case will be discussed.

Finally, recommendations or guidelines have not been put forth through scientific and/or authoritative parties (such as SWGDAM or the FBI) regarding the acceptability of experts viewing the entire analysis of forensic DNA evidence. It is hoped that with further examination and discussion of this issue, it may be possible for the forensic community to bring forth an opinion or recommendation.