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News Story

Criminal Defense Lawyers Mount New Attack on Forensic Evidence

Handwriting Analysis, Hair Samples, Ballistics, Etc.

By Reni Gertner

Criminal defense lawyers are making successful challenges to forensic evidence under the new standards for expert testimony that were set forth in two recent U.S. Supreme Court decisions and are being adopted in many states.

Lawyers are challenging:

- Handwriting analysis,
- Hair and fiber comparisons,
- Fingerprints,
- Tool mark comparisons,
- Bite marks,
- Voice prints,
- Ballistics, and
- Field sobriety tests.

Raising the issue may cause the court to limit the testimony of the prosecution's key expert, which could lead to an acquittal or lesser sentence – even if the evidence isn't thrown out entirely, experts say.

"In my case, we challenged the linchpin of the government's case," says small-firm attorney Clarence Mock of Oakland, Neb., whose client was acquitted after handwriting testimony was limited in a pre-trial hearing.

A challenge can also "move prosecutors to think about a plea bargain that wouldn't otherwise be offered," says Myrna Raeder, a law professor at Southwestern University in Los Angeles and the co-author of a "Nutshell" on evidence.

After the U.S. Supreme Court's 1993 decision in *Daubert*, some defense lawyers began arguing that forensic evidence, like handwriting analysis, that has traditionally been accepted didn't meet the *Daubert* screening test for scientific evidence.

These challenges have been more successful since the Supreme Court extended the *Daubert* standard to non-scientific evidence in *Kumho Tire Co.* v. *Carmichael* last year, say experts.

However, because both decisions were in civil cases, many criminal defense lawyers are missing their significance.

"Most of the time, it just doesn't dawn on defense lawyers that this evidence is challengeable," says Michael Saks, a law professor at Arizona State University who has testified in several challenges to handwriting evidence and written articles on the issue.

A challenge can be raised with respect to any evidence where "people haven't conducted studies that prove experts can do what they claim," says David Kaye, a colleague of Saks who co-wrote two evidence treatises, including *Modern Scientific Evidence*.

But whether to bring a challenge depends on the case. The downside is that a challenge can be expensive and time-consuming to prepare, and isn't guaranteed to be successful.

Despite that, defense lawyers – including several solo practitioners and lawyers in small firms – say they may be worth pursuing.

"It takes a lot of time and effort, but it's nothing compared to the time the prosecutor wants to give your client," says White Plains, N.Y., attorney Richard Willstatter, who practices in a two-person firm and has a fingerprint challenge pending.

The Standards

Before *Daubert* was decided, forensic evidence was often admitted under the *Frye* test, which required that a theory or technique be "generally accepted in the relevant scientific community."

Even after *Daubert*, much of that testimony continued to escape scrutiny because judges said it wasn't "scientific."

For example, in 1995 a U.S. District Court in New York held that forensic document analysis, including handwriting analysis, didn't meet the *Daubert* test for reliability. However, the court said the evidence wasn't "scientific" and allowed testimony in as "technical" or "other specialized knowledge" under Federal Rule of Evidence 702. (*U.S.* v. *Starzecpyzel*, 880 F. Supp. 1027 (S.D.N.Y. 1995).)

But when *Kumho Tire* extended the *Daubert* standard to nonscientific expert testimony, this paved the way for more challenges.

"*Kumho Tire* put all expert testimony in one bag," says James Starrs, a law professor at George Washington University and the co-author of a book on scientific evidence.

Lawyers who are trying to get forensic evidence suppressed are claiming that it doesn't meet the new standards because the techniques used are subjective, haven't been studied for proficiency and error rates and haven't been peer reviewed.

The *Daubert* and *Kumho Tire* tests were codified by changes to the Federal Rules of Evidence that went into effect on Dec. 1. (See 2000 LWUSA 1021; Search words for LWUSA Archives: Sift and Bianchi.)

Successful Handwriting Challenges

So far, experts say that that defense lawyers have had the most success in challenging handwriting evidence.

"Handwriting identification evidence has, without exception, gotten thrown out or [there have been] limits placed on what experts can say," says Saks.

In such cases, the judge often issues a limiting instruction, allowing the expert to testify about similarities and differences between the party's writing and the document in question, but not draw an ultimate conclusion as to who wrote the document.

Mark Denbeaux, a professor at Seton Hall Law School who has testified in many handwriting cases and written articles on the issue, says that in October a U.S. District Court in Illinois threw out all handwriting evidence in

response to a *Daubert-Kumho* Tire challenge. (*U.S.* v. *Fujii*, No. 00 CR 17 (N.D. Ill. 2000).)

In the past two years, says Denbeaux, he has seen "somewhere between three and five hung juries and at least that number of not guilty verdicts" in cases where he has testified.

Fingerprint challenges haven't met with the same success. In three recent reported cases, the evidence was allowed in without limitation. (*U.S.* v. *Havvard*, 117 F.Supp.2d 848 (S.D. Ind. 2000); *U.S.* v. *Alteme*, No. 99-8131-CR (S.D. Fla. 2000); *U.S.* v. *Mitchell*, 96-407-CR (E.D. Pa. 1999).)

Raeder predicts that hair analysis will be one of the next major areas of litigation because recent DNA tests have exonerated many people on death row who were initially convicted due to hair evidence. One U.S. District Court in Oklahoma refused to admit hair evidence under *Daubert*, but that case was reversed by the Tenth Circuit. (*Williamson* v. *Reynolds*, 904 F. Supp. 1529 (E.D. Okla.1995), *rev'd*, 110 F.3d 1508 (1997).)

In addition, defense lawyers can raise challenges to field sobriety tests like the horizontal gaze nystagmus test.

Case-by-Case Basis

Experts say that criminal defense law-yers must decide on a case-by-case basis whether a challenge is worth pursuing.

"It's a major investment to bring an attack when the prosecution's expert is going to say, 'We've been doing this for 50 or 100 years,'" says Kaye.

One of the first ways to gauge whether it's worth bringing a claim is to evaluate the scientific literature as well as the case law.

For example, challenging handwriting analysis might be easier than challenging bite marks, because there is more published data on why handwriting evidence may not be reliable, says Michael Risinger, a professor at Seton Hall Law School who just published a law review article about *Daubert* challenges in civil and criminal cases.

If there haven't been studies of reliability or error rates, "then it's ripe for attack," says Kaye.

He adds that lawyers should ask, "Has anybody studied this to determine how often the statements made about this evidence are correct? Is there a methodology that would pass *Daubert* or *Kumho*?"

Whether it's worth bringing a challenge also depends on how key the evidence is to the prosecution's case.

"Challenging [forensic evidence] is not going to do much good if there's a lot of other evidence against the defendant," says Saks.

"If they've got a motive and four eyewitnesses and there's a note, the only advantage of calling a handwriting expert is that the government won't call their handwriting expert," agrees Denbeaux.

If the evidence is less important in the case, "you may not want to raise a full pre-trial challenge, but you can still argue it at trial," notes Raeder.

Lawyers should also consider the size and quality of the sample.

For example, for fingerprint evidence, the fewer and less defined the fingerprints, the better the case.

"A full set of matching fingerprints is not going to be as challengeable as smudged or overlapping fingerprints," says Saks.

Willstatter agrees. "The best kind of fingerprint challenges to do are those where we are dealing with a single partial print because there is less surface area for comparison purposes," he says.

For handwriting identification, printing is more difficult to identify than writing, and if you have only a few letters or a few words, that also improves your case, says Risinger.

Similarly, for something like hair, the smaller the sample, the more subjective the identification, says Raeder.

Request a Hearing

The best way for defense lawyers to try to challenge forensic evidence is to bring a pre-trial *motion in limine* and request a *Daubert-Kumho Tire* hearing, say experts.

Because the jury isn't present, "your cross-examination style can be much more aggressive," says Mock.

One key to a successful hearing is narrowly focusing the issue, says Risinger.

"When you look at reliability, you don't look at it globally. You look at it in regard to what's relevant to the task at hand," he says. "Is it dependable as applied in this case?"

If a lawyer chooses not to bring a motion for some reason, but there is evidence of questionable reliability, he or she should at least "make a pro forma objection to protect the record," advises Risinger.

"A lawyer can't be in the position of waiving the objection when someone else wins the issue in a later case and the client is left without recourse," he says.

Education and Experts

Before raising a forensic evidence challenge, lawyers will need to bone up on the relevant science and find a reliable expert.

"As a first step, there are a number of treatises on scientific evidence the lawyer should look at," says Raeder.

Searching the Internet another good way to get information immediately and for free.

"I got an incredible amount of information about fingerprint evidence that way," says Willstatter.

It's also helpful to talk to other lawyers who have brought similar challenges.

"As a solo practitioner, I call everybody. People are always glad to share their experiences," says Boston attorney Michael Andrews, who won a limiting instruction in a challenge to handwriting evidence. (*U.S.* v. *Hines*, 55 F.Supp.2d 62 (D. Mass.1999).)

Also, the federal defender organizations in various cities often offer CLE programs and lectures on bringing these claims.

"That's how I learned about the fingerprint challenges," says Willstatter.

Experts note that having a good expert is crucial in mounting a challenge to forensic evidence.

"Call local universities and ask if they have programs in forensics and talk

to experts there. If you are willing to spend some time on the phone, it will help you develop a challenge," says Willstatter.

You can also call associations in the relevant field, suggests Mock.

It's also essential to talk to an expert who knows about scientific reliability and the studies – or lack thereof – done to evaluate the type of evidence in question.

"Have a conversation with an expert who can deconstruct the evidence, teach you where the weaknesses are and what the flaws are – an expert on what it takes for there to be scientific reliability," suggests Saks.

Although Mock says that the total cost of experts in these cases can be $5,000 to $10,000, he says it's necessary to guide discovery and properly analyze the evidence's reliability.

And in some cases, the court will pay for an expert.

"In my case, I got the expert appointed by the court. My client ran out of money so I filed an affidavit for an expert," says Willstatter.

A Better Deal?

Simply raising this issue may give a defense lawyer leverage in negotiating a better plea bargain.

"If you make a credible claim that you are going to mount a challenge to important expert testimony, that certainly would be a factor the prosecution would look at in evaluating pleas," says Barbara Bergman, a professor at the University of New Mexico School of Law.

And "by filing motions, you don't even need to say anything to the prosecutor about it" in advance, says Willstatter.

When a defense lawyer raises the issue that way, it can leave the prosecution floundering to find studies on the reliability of the evidence, which may be few and far between.

"If you make the government do more work, maybe they'll offer your client a better deal," says Andrews.

Another good tactic, says Raeder, is to push to go to trial quickly, because the prosecutor won't have time to line up experts and prepare.