

Blocking a Blitz of Lab Tests

In a divorce case, the husband faxed to his attorney an agreement whereby the wife agreed to go away poverty-stricken. The husband claimed he only had a copy faxed to himself, having lost the original. His attorney faxed it on to the wife's attorney, who faxed it to me. Since there were multiple significant differences between the faxed signature and the wife's exemplars, and none could be credited to the faxing process, I reported that the signature was false. The husband's attorney retained a document examiner who had two-years' government training plus apprenticeship, FBI and Secret Service courses, retirement out of California Department of Justice laboratory, certification by American Board of Forensic Document Examiners (ABFDE), membership in American Academy of Forensic Sciences (AAFS), etc. This examiner demanded the fax received in my office be sent to his lab for a plethora of unsupervised tests, all of which could only properly be run either on the nonexistent original or on the husband's copy. The case settled before this forensic fiasco could go forth.

A colleague consulted me in a second case where this same examiner demanded unsupervised testing of a will in his lab in a different county, using several unspecified procedures. I suggested compelling the examiner to make specific disclosures as follows:

- a) State each issue of fact he was asked to address;
- b) State each proposed test to be done to address each issue of fact;
- c) State relevance of such test to the issue of fact addressed; and
- d) State these in writing under penalty of perjury.

The judge ruled the will stayed in the court files. The examiner never went there.

In a third case the same examiner made the same demand of two dental records. He said ultraviolet (UV) light was nondestructive of documents, and he claimed an observer would cause a list of difficulties. Defense attorney consulted me. I explained how UV harmed documents and cited authorities. Apparently government courses and certification tests by ABFDE fail to cover commonly known dangers of UV. The opposing examiner replied to my strictly technical critique with personal insults. The judge ordered that I deliver the documents, witness the testing, and return the documents to defense counsel's office, all in the same day. See the following redacted copy of my declaration.

In a fourth case counsel for plaintiff called, saying defendant had retained this same individual to examine a key document defendant denied signing. Later, counsel told me that right after he disclosed me, this examiner had withdrawn from the case unexpectedly and without explanation. Before trial defendant stipulated to having signed the document. Did the examiner become gun-shy? Who knows? But these cases show that you need not surrender original documents to unsupervised and possibly destructive testing just because examiners with impressive paper credentials and government background demand it. Contact me for evaluation of the relevance and effects of tests on your valuable evidential documents.

FILE COPY

1 A [REDACTED] ESQ. (Bar No. [REDACTED])
 2 THE [REDACTED] LAW FIRM
 3 The [REDACTED]
 4 [REDACTED] Main Street
 5 Tiburon, CA [REDACTED]
 6 Telephone: (415) [REDACTED]
 7 Facsimile: (415) [REDACTED]
 8
 9 Attorney for Defendant [REDACTED]

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 COUNTY OF ALAMEDA, NORTHERN DIVISION
 12 UNLIMITED JURISDICTION
 13

14 [REDACTED])	Case No. 2002 [REDACTED]
)	
15 Plaintiff,)	DECLARATION OF
)	MARCEL B. MATLEY IN
16 v.)	OPPOSITION TO PLAINTIFF'S
)	MOTION TO COMPEL DEFENDANT
17 [REDACTED], DDS,)	[REDACTED] ORIGINAL TREATMENT
18 [REDACTED], DDS, and)	<u>RECORDS FOR PLAINTIFF</u>
19 DOES 1 through 40,)	Date: [REDACTED] 2003
20 inclusive,)	Time: [REDACTED] a.m.
)	Dept: [REDACTED]
21 Defendants.)	Trial: [REDACTED], 2003
)	

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 24 I, Marcel B. Matley, declare:

25 1. I am an Examiner of Questioned Documents and have
 26 been so employed since 1985. My business office is located
 27 at 3092 Cesar Chavez St., San Francisco, CA 94110. I have
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1 been certified as an expert witness in the field of
2 questioned documents in Federal Bankruptcy Court, California
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4 Municipal and Superior Courts, in Arbitration and
5 Administrative Hearings in the State of California, and in
6 Probate Court in the States of Texas and New Jersey, and I
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8 have testified regarding documents in each of these areas.
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10 A copy of my current Curriculum Vitae and General Resume,
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12 outlining my training, experience, qualifications and
13 professional activities, is attached hereto as Exhibit A and
14 incorporated herein as if set forth in full.

15 2. Today Mr. [REDACTED] faxed to me a document titled
16 "DECLARATION OF [REDACTED] IN SUPPORT OF PLAINTIFF'S
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18 MOTION TO COMPEL DEFENDANT [REDACTED] ORIGINAL TREATMENT RECORDS
19 FOR PLAINTIFF," dated on page 4 of 4 pages as "[REDACTED]
20 [REDACTED] B," and filed in the above referenced case. I was
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22 asked to evaluate the reasons given for the expert tests
23 requested in light of relevant and authoritative texts in
24 the field of questioned documents examination.

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26 3. There are several difficulties in so evaluating the
27 cited declaration, among which are:
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1 (a) No tests are specified, so one cannot make any
2 intelligent evaluation of the proposed testing without
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4 making assumptions as to what tests might be intended;

5 (b) No purposes for any test is specified, so one
6 cannot make any intelligent evaluation of the propriety of
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8 the intended test for the intended purposes without making
9 assumptions as to what purposes might be envisioned;

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11 (c) No reasons are given for objecting to supervision
12 by a representative of Defendant except two:

13 A. that such person would have "interests opposed
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15 to my client's" and thus might be disruptive in several
16 ways; and

17 B. that declarant might have to make
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19 accommodations for another professional.

20 I shall proceed to consider some statements in the
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22 cited declaration in the order that they are made.

23 4. At page 2, line 22, declarant states that "various
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25 tests using my laboratory equipment will likely be
26 necessary." Which equally means they will likely not be
27 necessary. For an intelligent understanding of an
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1 intelligent proposal one needs all relevant data, including,
2 but not limited to, which tests are proposed, what their
3 purpose is in the instant case vis-a-vis discovery of
4 potential evidence relevant to a fact at issue which is
5 within the expertise of the tester. There is no rational
6 way to agree or disagree with a statement of intent which
7 has not been stated.
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11 5. At page 2, line 23, declarant states that "all
12 examinations I would conduct will be entirely non-
13 destructive...." In the field of questioned documents
14 examination "destructive testing" only means that a test has
15 some, however minuscule, effect on a document. There is no
16 way for me to know whether that is the case absent statement
17 as to what the test is and how it is to be performed. As an
18 example of how an ordinarily non-destructive test can be
19 destructive if performed on certain types of materials, the
20 electrostatic detection apparatus (ESDA) can remove writing
21 medium from a document. See Diane K. Tolliver,
22 "Electrostatic detection apparatus (ESDA); is it really non-
23 destructive to documents?" 44 *Forensic Science*
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1 International, 7-21 (Jan. 1990). Damage to documents from
2 ESDA testing was reported in the paper by [REDACTED],
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4 "Electrostatic detection apparatus and its effects on latent
5 prints on paper." [REDACTED] *Journal of Forensic Sciences*, [REDACTED],
6 [REDACTED]. At page 371 the author candidly states: "It
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8 must be admitted that there have been rare instances in the
9
10 past when documents have been placed in the humidity cabinet
11 and inadvertently left for extended periods of time." The
12 author describes the harm such practices can do. It is a
13 known fact that moisture can harm paper, so any
14 humidification for examination purposes necessarily makes
15 some change in the document.
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18 6. A common testing document examiners employ and
19 almost universally claim it is non-destructive is use of
20 ultra violet light. Ultra violet light waves are the
21 destructive element in sunlight, causing the commonly
22 observed discoloration in paper. Wilson R. Harrison in his
23 book *Suspect Document: Their Scientific Examination*, at
24 page 459 describes the damage examination employing ultra
25 violet light, infra red light and heat can cause to
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1 documents. Further, Donna M. Grim, et al., report how ultra
2 violet light can be used to age inks artificially.

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4 "Evaluation of laser desorption mass spectrometry and UV
5 accelerated aging of dyes on paper as tools for the
6 evaluation of a questioned document," 47 *Journal of Forensic*
7 *Sciences*, 1265-73 (Nov. 2002). Subsequent testing for ink
8 dating or ink comparisons would give false results.

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11 7. At page 3, lines 3-4, declarant states that in his
12 "professional opinion that it shall not be detectable that I
13 have performed any of the aforementioned examinations." His
14 not having aforementioned any proposed tests, his reader is
15 prevented from either agreeing or disagreeing with him.
16 Then at line 8 he states that he will use tests that are
17 "routine in cases of this nature." If they are routine,
18 then the description of them and their value ought to be a
19 routine matter of no particular difficulty. Then further
20 down in the same paragraph he states it is imperative to
21 control lighting conditions strictly. Without description
22 of the required lighting condition for the unnamed testing
23 or of the arrangement of the lab in question, I can give no
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1 evaluation whether such control can occur outside a
2 laboratory or within one with another person present.
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4 However, in my limited imagination I cannot fathom an
5 observer being an element in any lighting system.

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7 8. On page 3, lines 16-20, declarant states that lack
8 of examination in a laboratory setting "may result in loss
9 of valuable evidence...." How evidence could ever be lost
10 if no examination is performed is beyond my capacity to
11 comprehend. If one leaves the documents alone, nothing is
12 lost. The statement merely begs the question as to whether
13 something will be lost through any proposed testing.

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16 9. Line 24 at page 3 begins the contention that
17 presence of a representative from opposing counsel would be
18 a contentious presence. I have had persons present while I
19 have examined documents, and whatever party they were for
20 none have ever been the source of any disturbance to me.
21 Most get quite bored watching the examinations and turn
22 attention to their other work. Further, a document examiner
23 has the ethical obligation to be neutral at to any
24 litigaitonal contentions of the parties.
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1 10. At page 4, lines 5 and 6, declarant states: "I
2 may have to alter my testing protocol in order to
3 accommodate defense counsel's retained observer, including
4 his/or her time schedule." We do that routinely in every
5 case we are retained in. Courtesy and accommodation are, it
6 seems to me, our ethical obligation as professionals and our
7 social obligation as citizens. Like all statements in the
8 declaration, it is conclusory, without any bases offered so
9 that it might be verified or the difficulty, if there be a
10 difficulty, overcome.
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15 11. It can be an examiner's own protection to have
16 witnesses for either party present during testing. In one
17 case a colleague said she was present by court order in the
18 lab of opposing examiner. He tested the document on the
19 ESDA only to discover he had defaced it substantially with
20 his own fingerprints. Her presence would protect him if
21 such fingerprints were claimed by anyone to have been put on
22 before he had examined the document. We examiners are all
23 human and subject to err and benefit by supervision and by
24 the ethical and reasonable disclosure of our intended
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1 actions which might affect the interests of others.
2 Further, an opposing party has as much right to know what
3 evidence testing has not revealed as to what it has. I have
4 been in cases where opposing examiners testified to many
5 tests performed, without revealing whether results were had
6 or what they might be. Many keep careful laboratory
7 records, as the scientific standards require. The standards
8 are set forth in American Society of Testing and Materials
9 (ASTM) documents. My ASTM book of forensic standards is on
10 loan to another examiners so I cannot provide specific
11 reference beyond Volume 14.02.

12 12. I, Marcel B. Matley, declare under penalty of
13 perjury, pursuant to applicable laws of the State of
14 California, that the foregoing is true and correct to the
15 best of my knowledge and belief. This declaration was
16 executed on this Twenty-fourth Day of
17 April, 2003, at San Francisco, California.

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26 Marcel B. Matley
27 Marcel B. Matley
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