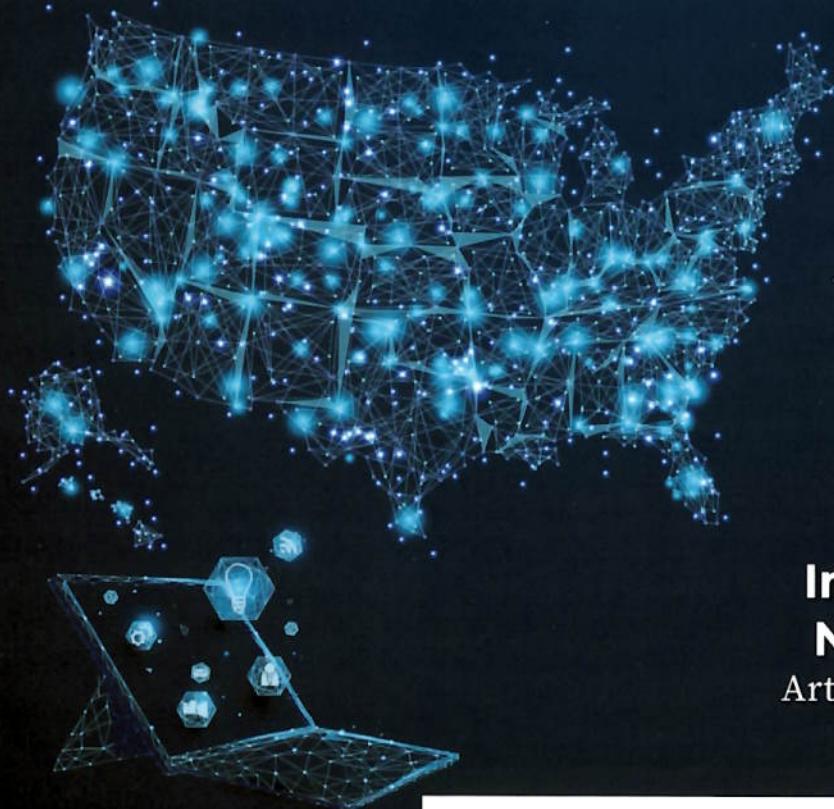


Working PI

Private Investigators

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STATE OF THE PROFESSION: PI SURVEY RESULTS



**A PI's Worst
Nightmare:**
Surveillance Goes
Terribly Wrong

**The Private
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Working PI is the most widely read print magazine for investigators nationwide, reaching over 25,000 PIs. PIs who become OREP Members enjoy an 8-hour CE course at no charge (Visit OREP.org/PI-Members for details). Reach Isaac by email at isaac@orep.org or by phone at (888) 347-5273. CA License #4116465.

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DNA: Do Not Assume (Evidence is Not Always As It Seems)

by Deborah Stonebarger, Analytic Investigations

"Although DNA analysis is considered one of the most powerful evidence tools, its increasing ability to detect DNA can introduce more doubt."

Investigators: If there is DNA evidence or firearm evidence in your case, make sure your clients and attorneys hire an expert to review the data and results. Do not assume that the reported results are as damaging to the client's case as you may have previously believed. The justice system has begun to recognize that some testimony by forensic scientists regarding the results of their evidence analysis can be misleading to the jury.

Jurors usually give heavy weight to evidence analysis results. Jurors and courts aren't scientists, and it can be difficult

to properly educate them during a trial regarding limitations of the significance of forensic evidence analysis results. The use of a qualified expert to review laboratory analysis can ensure that you, the defendants, the attorneys, and the juries have a proper understanding of what analysis was performed, what the results were, what the results mean, and how they can be interpreted.

More on DNA Analysis

DNA analysis has come a long way over the last couple of decades. Analysts now have the ability to obtain partial or full DNA profiles from minute quantities of

DNA/cellular material, and indications are that DNA analysis will be able to be performed on ever-decreasing quantities of DNA/cellular material in the future. Although DNA analysis is considered one of the most powerful evidence analysis tools, the increasing ability to obtain DNA from minute quantities of cellular material can actually leave more room for doubt with regard to the significance of the findings and rendering the tool less powerful in certain situations.

Jurors and prosecutors love to have DNA results to rely on. Both groups of people tend to think that if the suspect's DNA is

present, then the crime in question was committed. Prosecutors take comfort in the fact that juries hear about DNA evidence and trust it regardless of whether they should because they can have the mindset of "I don't understand a lot of what that forensic scientist just said on the stand, but I know DNA evidence is 'good' evidence." However, placing too much significance on the DNA evidence and failing to carefully consider possible alternative interpretations of the DNA evidence can be grossly unjust to the defendant.

There are two specific DNA evidence analysis concepts that courts are taking notice of. One simply has to do with the ability to obtain a DNA profile or partial DNA profile from extremely small samples, samples that amount to the equivalent of a couple dozen or fewer cells. When DNA results are obtained, the analyst cannot state what type of bodily fluid or cellular material it came from without doing additional testing such as looking

for amylase which indicates the presence of saliva, looking for spermatozoa which indicates the presence of semen, or further testing to confirm the presence of blood. Many labs don't routinely perform these additional tests without a specific request from the prosecuting agency or the law enforcement agency.

Prosecuting agencies are all too happy to allow the jury to infer the type of bodily fluid or material present based upon the alleged circumstances of the crime. For example, there is a reported sexual assault history that the suspect licked the victim's breast, the suspect's DNA was found on the breast swab, therefore the DNA came from the suspect's saliva, which validates the victim's reported history and testimony and the State's theory of the crime. However, very small quantities of detectable DNA can be more indicative that a bodily fluid such as semen or saliva was not present. Those bodily fluids have so many cells and are so rich in DNA that the DNA

laboratory would expect to find greater quantities of DNA present. Additionally, if one considers that they don't know the source of the DNA and that a very small amount of DNA was detected, one must take into account that the DNA could be on the swab or evidence item due to indirect transfer as opposed to direct deposit. This is especially true in instances where the victim and the suspect cohabit, and it may be possible to find DNA from all household members on swabs from a person's body due to secondary transfer.

A further illustration would be sharing of items such as bath towels and toilet seats which can transfer someone else's DNA from the towel or toilet seat onto a person's body or sharing of adult bed/bedding by a young child which could easily transfer the adult's DNA on the bedding onto a child's skin or clothing. No inappropriate intimate contact has been made, yet juries may leap to the

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conclusion if they aren't given the proper information to consider while weighing the DNA evidence.

The other significant DNA analysis concept has to do with the ability to interpret complex DNA mixtures with numerous contributors to a DNA mixture. A common example of this is finding a firearm believed to have been used in a crime with four, five, and six DNA contributors to the evidence. It appears that firearms used in gang-related crimes in particular are frequently handled by more than one user.

Laboratories use software to help determine the number of contributors or DNA profiles in a sample, particularly in samples with more than three contributors. They also use software to determine statistics such as likelihood ratios and random match probabilities. These statistics are used in an attempt to quantify the significance of finding a suspect's DNA profile among the possible profile combinations observed in a complex DNA mixture.

Being able to determine the number of contributors and whether a suspect's profile is in the mixture does not inform the courts and juries which one of the contributors (if any) used the firearm in commission of a crime, since it is possible to have an additional user who wore gloves. It was once thought that the person with the strongest profile who deposited the most cellular material would have to be the person who most recently used it, with previous or older users' cellular material being less prominent due to time and handling of the firearm. However, this has recently been proven not to be the case. There are several factors that can contribute to how much DNA is left behind by an individual, but the bottom line is that DNA analysis cannot determine when the DNA was deposited on evidence.

United States v Francisco Ortiz is an example of a recent ruling where DNA evidence was excluded based upon the reliability of DNA software to be able to

"There are instances where some firearms lab analysts call an identification on a piece of firearms evidence, when it should be considered inconclusive."

accurately determine the number of contributors to a sample. *State of Minnesota v Exavier Lloyd Porter* is another example of a ruling where a motion to suppress one item with DNA was granted due to it being a complex mixture from five or more contributors, and for a second item due to the low quantity of DNA present.

Firearms Analysis in the Courts

There are a couple of reasons why you should always recommend your attorneys and clients arrange an expert review of the firearms analysis in your case. One reason is that what constitutes an identification ("match") is ultimately subjective, even though experienced firearms examiners will often agree with one another on an identification conclusion. The reason it is ultimately subjective is that there is currently no method or procedure that can quantify what constitutes an identification over an inconclusive conclusion, and there is no statistical software that can be used to describe the level of certainty in an identification.

There are instances where some firearms lab analysts call an identification on a piece of firearms evidence, when it should be considered inconclusive. This may be due to the inherent bias in crime labs (almost all of which are associated with law enforcement and prosecution), lack of proper training and experience, lack of proper supervision, and/or lack of proper lab procedures. Even if it seems like it is a "battle of the experts" over firearms conclusions, it is worth putting forward to the jury and may be enough to cause reasonable doubt, which will benefit the defendant.

Another reason to have an expert review of the firearms analysis is to ensure that the limitations of identification conclusions are worded correctly. Some

courts have made rulings limiting the way an analyst may word their testimony. Statements such as "the bullet (or cartridge case) was fired from the suspect's firearm to the exclusion of all other firearms" or "only the suspect's gun could have fired the bullet" are no longer allowed in some courts, as discussed in *United States v Marquette Tibbs* or *People v Tidd* of the California appellate courts.

These decisions are, in part, related to the previously discussed subjectivity of conclusions and lack of proper statistical data to support a spent bullet or cartridge case could only have been fired in one specific firearm when it is not possible to compare every firearm ever made to the evidence in question. Opinions such as "the bullet is consistent with being fired in the suspect firearm," "the bullet cannot be excluded as having been fired in the suspect firearm," or that "the bullet was likely to have been fired in the suspect firearm" or similarly worded opinions would be considered more acceptable.

Conclusion

Clients are always entitled to the best defense possible. The best possible defense will include the use of experts to review discovery materials, especially when it comes to DNA and firearms evidence analysis. While the lab work and conclusions of the lab personnel may be acceptable or accurate, using an expert to ensure that the significance of the results are explained properly to the defense team and in court is beneficial to the defendant.

Additionally, if these types of results continue to be properly challenged in court, there will be a growing number of legal opinions regarding forensic evidence analysis that prevent undue prejudice to the defendant. ☀