PODIUM

DOJ erred on Waco test

By Andrew Good SPECIAL TO THE NATIONAL LAW JOURNAL

EVEN IF government experts are correct in interpreting the simulation of the assault on the Branch Davidian compound in Waco, Texas, the Justice Department's bungling resistance may prove very costly to its credibility and its budget.

Experienced litigators understand the perils of conducting discoverable scientific tests or simulations unless one is absolutely confident that the outcome will be favorable. The proponents of such a test or simulation plays high-stakes poker: Just ask Christopher Darden about having demanded that O.J. Simpson try on the bloody gloves to see if they fit.

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An even dicier quandary faces the litigator who opposes such a test or simulation. Conduct that conveys reluctance to subject one's version of the facts to valid scientific testing can be both admissible and devastating.

A litigant's unsuccessful but scientifically substantial objections to the admissibility of a proposed test or simulation often are rejected because the court rules that the objections go to the weight rather than the admissibility of debatably reliable results. No conscientious fact-finder will fault a litigant whose scientifically based objections and arguments appropriately indicate why test results may be unreliable.

In fact, an aura of scientific integrity can surround the litigant who raises these cautionary points honestly and without appearing to be defensive. The objecting party's experts can gain credibility as a result.

Scientific opinions concerning simulation results should be expressed with quantified levels of confidence, or discounted by an estimated margin of error, to account for faults in the simulation's design. Properly litigated, legitimate scientific disputes, in which experts render honestly held but opposing opinions, can and should shed much of the bombast that surrounds disputes involving nonscientific evidence.

In the Waco litigation, a team of experts is creating an elaborate simulation of an infrared recording of the alleged shooting and other events during the assault on the Branch Davidian compound. The government hopes that simulation will prove scientifically that its agents have been truthful in their denial of firing any weapons other than tear gas grenades.

Its mistake has been in straying from scientific objections to a simulation that may or may not be scientifically sound enough to determine reliably whether rhythmic flashes, visible in a recording the FBI made during the siege using a thermal imaging camera, depicted muzzle flashes produced by automatic gunfire from government positions.

According to Lee Hancock's series of reports in the *Dallas Morning News*, the government's opposition to a simulation included assertions, eventually established to be false, that there was no infrared camera available that would be sufficiently similar and that the system's features could not be revealed because they were classified as national security and law enforcement sources.

The *Dallas Morning News* also reported that, according to testimony provided to congressional investigators, the Justice Department resisted this court-supervised field simulation even though a U.S. Air Force research physicist told Justice Department lawyers as early as 1996 that the FBI's infrared recording might have picked up gunfire flashes and that verifying field testing could and should be conducted.

Not surprisingly, immediately after the simulation was conducted, both sides' experts claimed that their version of the events at Waco had been borne out. Indeed, they disagree about the interpretation of images made during the simulation, just as they disagreed about images made during the Waco siege.

Unfortunately, the government's reluctance to participate may well have torpedoed confidence in an accurate verdict, which should be heavily influenced by the merits of the scientific debate. When the government urges, at congressional hearings and at the civil trial scheduled to begin on May 15, that its experts' testimony about the simulation's reliability and results be believed, it may be burdened by the appearance of having dissembled earlier.

In court, science can fail

In theory—and sometimes in practice—scientifically conducted forensic testing can be virtually unimpeachable. Using such techniques as double-blind testing, meta-analysis and peer review, science struggles to remain unbiased and dispassionate. However, when science enters the courtroom or congressional hearings, where adversarial investigation and advocacy prevail, its credibility and even its forensic utility can be undermined.

Nonscientific evidence can heavily influence a fact-finder's determination. This is true particularly when the tribunal is presented with a scientific deadlock: diametrically opposed, honestly held opinions rendered by eminently qualified experts. In the case of Waco, it remains to be seen whether the government has badly damaged the credibility of its case, including that of its own experts.

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