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## Lie Detector Evidence - New Mexico Court of Appeals Holds Voice-Stress Lie Detector Evidence Conditionally Admissible: *Simon Neustadt Family Center, Inc. v. Bludworth*

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**LIE DETECTOR EVIDENCE—New Mexico Court of  
Appeals Holds Voice-Stress Lie Detector Evidence  
Conditionally Admissible:  
*Simon Neustadt Family Center, Inc. v. Blutworth***

In *Simon Neustadt Family Center, Inc. v. Blutworth*,<sup>1</sup> the New Mexico Court of Appeals ruled that the trial court may, in its discretion, admit voice-stress lie detector evidence when the proponent of the evidence meets certain conditions.<sup>2</sup> New Mexico is one of the few states which has considered the use of this relatively new device, technically known as the psychological stress evaluator or PSE, and is the only jurisdiction which expressly has ruled such evidence admissible in the absence of stipulation.<sup>3</sup>

The *Neustadt* decision alone is not likely to have dramatic, far-reaching effects. Decisions in the area of innovative scientific evidence are notable, however, as courts increasingly consider the admissibility of evidence produced by modern scientific devices. The court of appeals in *Neustadt* somewhat predictably analyzed the question along the lines of earlier New Mexico decisions which considered the admissibility of polygraph evidence.<sup>4</sup> This Note analyzes the *Neustadt* opinion in light of the New Mexico polygraph cases and cases that have considered the use of voice-stress lie detectors.

**VOICE-STRESS ANALYSIS**

PSE is a device which purportedly allows a trained operator to detect deception from inaudible changes in the testing subject's voice.<sup>5</sup> Like the polygraph, the older type of deception-detecting device, the PSE operates

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1. 97 N.M. 500, 641 P.2d 531 (Ct. App. 1982).

2. *Id.* at 506, 641 P.2d at 537. The evidence may be admitted when the proponent of the evidence has established the qualifications of the examiner, reliability of the test in general, and validity of the particular test.

3. Trial courts in several jurisdictions have admitted PSE evidence upon stipulation in criminal trials in which the state was willing to rely on the device. See Note, *The Psychological Stress Evaluator: Yesterday's Dream—Tomorrow's Nightmare*, 24 Clev. St. L. Rev. 299, 319 (1975). Two cases cited in *Neustadt* as having rejected PSE evidence are more typical of the way courts handle the evidence. In both *Smith v. State*, 31 Md. App. 106, 355 A.2d 527 (1976), and *State v. Schouest*, 351 So. 2d 462 (La. 1977), the courts rejected the PSE evidence primarily on the basis that polygraph evidence had been rejected in their jurisdictions and the PSE is simply another type of lie detector.

4. See, e.g., *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975); *State v. Brionez*, 91 N.M. 290, 573 P.2d 224 (Ct. App. 1977); *State v. Alderete*, 86 N.M. 176, 521 P.2d 138 (Ct. App. 1974).

5. Kenety, *The Psychological Stress Evaluator: The Theory, Validity, and Legal Status of an Innovative "Lie Detector"*, 55 Ind. L.J. 349 (1980) [hereinafter cited as Kenety]. The court of appeals relied on this article for information about the operation of the PSE. 97 N.M. at 503, 641 P.2d at 534.

on the premise that a person experiences stress when lying and as a result undergoes measurable physiological changes.<sup>6</sup> To detect stress, the polygraph measures changes in blood pressure, pulse, respiration, and electrodermal response.<sup>7</sup> A person taking a polygraph test must, therefore, be attached to a variety of sensors. In contrast, a PSE test can be administered without the subject's knowledge, and under normal testing circumstances requires no elaborate machinery in the testing area.<sup>8</sup> Only a tape recorder is needed to administer a PSE test; the examiner performs the actual evaluation later by playing the tape while it is attached to the PSE. Neither the polygraph nor the PSE detects deception per se, but only stress.<sup>9</sup> Therefore, the less formal atmosphere of the PSE test is less likely to induce stress and offers an attractive benefit in that any stress indicated is "more likely to be the result of deception rather than a reaction to the equipment."<sup>10</sup>

The underlying theory of the PSE is that the human voice has two components: an audible amplitude modulation (AM) component and an inaudible frequency modulation (FM) component. Under stress, the FM component diminishes or disappears. The PSE measures the decrease in the FM component and thus detects stress. The operator's job, as with the polygraph, is to interpret the information given by the PSE.<sup>11</sup>

#### STATEMENT OF THE CASE

Simon Neustadt Family Center, Inc., and its insurance company, Commercial Union Assurance Companies, Inc., sued Mark Blutworth, Neustadt's employee, for conversion. Commercial Union insured Simon Neustadt against employee theft<sup>12</sup> and had paid the full policy amount for the loss allegedly caused by Blutworth's conversion.<sup>13</sup> The trial court ruled against Blutworth and he appealed the court's refusal to admit evidence of a psychological stress evaluator test he had taken at Neustadt's request.<sup>14</sup>

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6. Kenety, *supra* note 5, at 350.

7. *Id.* at 351 n. 15. Electrodermal response is the electrical conductivity of the skin; the response varies as the amount of perspiration varies.

8. *Id.* at 356.

9. *Id.* at 350.

10. *Id.* at 356.

11. *Id.* at 353-55.

12. The complaint alleged that Blutworth converted \$44,403.00 in cash from a cash register. Record on Appeal at 1, *Simon Neustadt* [hereinafter cited as Record]. The jury returned a verdict for Neustadt for the full amount. Record at 146. The insurance policy issued by Commercial Union covered Neustadt for employee theft up to \$25,000. 97 N.M. at 502, 641 P.2d at 533. One can see why both Neustadt and Commercial Union felt the suit would be a worthwhile effort. [The Record on Appeal, which does not include the briefs, is available at the University of New Mexico Law Library.]

13. 97 N.M. at 502, 641 P.2d at 533.

14. Blutworth also raised issues of failure to join an indispensable party (Supermarkets of New Mexico, Neustadt's parent company), failure to admit business records containing PSE evidence,

Bludworth had sought to have the PSE test admitted to prove his innocence.<sup>15</sup> Simon Neustadt's president had asked Bludworth to take the test because Bludworth worked in the area of the store where "substantial sums of money had been withdrawn from the cash register. . . ."<sup>16</sup> The PSE operator, Mr. Sinowitz, told the company president that he "felt that Mr. Bludworth had truthfully answered all the questions in denying involvement in any of the misappropriated funds."<sup>17</sup>

The trial court had refused to admit the PSE evidence on three grounds: (1) an expert did not present the results; (2) psychological stress analysis is not recognized as a true science in New Mexico; and (3) prejudice from introducing the PSE evidence would outweigh its probative value.<sup>18</sup> The court of appeals held that the trial court correctly refused to allow the PSE evidence under the circumstances and then stated that it would discuss the issue of PSE evidence "[b]ecause of the importance of the issue and the fact that the question is likely to arise again. . . ."<sup>19</sup>

#### COURT OF APPEALS DECISION

Bludworth argued on appeal that the court should allow the PSE evidence because the outcome of the case turned on his denial of involvement in the conversion.<sup>20</sup> He noted that New Mexico courts "have been nationwide leaders in the admission of polygraph tests."<sup>21</sup> His major substantive argument was that the test for admissibility of such scientific

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error in directing a verdict on his counterclaim, and improper jury instructions. *Id.* The court of appeals found that Neustadt and its parent company acted as a single entity and that their interest was identical. *Id.* The court also noted that there was no "evidence or reasonable possibility that the defendant will be subject to future claims by Supermarkets," and that Bludworth did not show he was harmed in any way by the absence of the parent company. *Id.* at 502-503, 641 P.2d at 533-34. The court addressed briefly the claim of failure to admit the business records containing PSE results by noting that the "prejudice which would have resulted from the admission of the business records containing the PSE results outweighed any probative value." *Id.* at 506, 641 P.2d at 537.

Bludworth had counterclaimed for pension plan contributions he had made. *Id.* Prior to trial, Neustadt had paid Bludworth the full amount of his contributions. *Id.* On appeal, Bludworth argued that the issue of punitive damages (Bludworth sought such damages because Neustadt withheld the payments pending trial) should have gone to the jury. The court of appeals stated that this claim had "no basis in fact or law." *Id.* at 507, 641 P.2d at 538.

On the issue of improper jury instructions, the court found that "the instructions read as a whole fairly presented the issues and applicable law. Defendant was not prejudiced in any way and his claims are unfounded." *Id.*

15. Record at 432-37.

16. Brief for Appellant at 1, *Simon Neustadt*.

17. *Id.*

18. 97 N.M. at 503, 641 P.2d at 534. Reason (3) can be only dictum because reasons (1) and (2) mean that the evidence is not relevant; however, this dictum raises the interesting question of whether evidence prejudicial to the prosecution in a criminal case should be excluded under N.M. R. Evid. 403.

19. 97 N.M. at 503, 641 P.2d at 534.

20. Brief for Appellant at 7-8.

21. *Id.* at 8.

evidence should no longer be one of general scientific acceptance, but rather, one of "relevancy based upon the reliability of the test in question."<sup>22</sup> Without citing authority, Bludworth's brief stated "[t]here is evidence that PSE tests are reliable."<sup>23</sup> Bludworth's argument concluded with the idea that because Neustadt had originally requested the test, it must have had faith in its validity, and therefore should not be allowed to argue that the operator lacked expertise after unfavorable results had been obtained.<sup>24</sup>

Neustadt's arguments on appeal against admission of the PSE evidence centered on the district court's finding that the PSE operator was "not an expert in this particular field."<sup>25</sup> Counsel noted that the "expert" offering the evidence had three weeks of instruction in the operation of the PSE, had trained under another operator for six months, and had been operating the device for four years.<sup>26</sup> The PSE expert, Mr. Sinowitz, testified that he had no training in psychology and was not qualified to determine if a person was "psychologically fit to take the test. . . ."<sup>27</sup> As an additional point, the appellees also noted that "[t]here was no evidence that the test has a 'reasonable measure of precision in its indications' as required [sic] by the *Alderete* case."<sup>28</sup>

The court of appeals began its analysis of the issue with a brief exposition on the operation of the PSE.<sup>29</sup> The court stressed the importance of a properly trained examiner to interpret the results of a PSE test. It then stated that when a party seeks to introduce PSE evidence, a court must apply the three-prong test for admissibility of polygraph evidence set forth in *State v. Dorsey*.<sup>30</sup> *Dorsey* is a 1975 New Mexico Supreme Court case which held polygraph evidence admissible without stipulation. It is the New Mexico authority on admission of polygraph evidence.<sup>31</sup> The *Dorsey* test, as stated by the *Neustadt* court, allows admission of polygraph results "when evidence is introduced concerning: (1) qualifications and expertise of the polygraph operator; (2) reliability of the testing

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22. *Id.* at 9. For this proposition the brief cited Romero, *The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. Rev. 187 (1976) [hereinafter cited as Romero].

23. Brief for Appellant at 9.

24. *Id.* at 9-10.

25. Brief for Appellees at 5, *Simon Neustadt*.

26. Record at 423.

27. *Id.* at 425.

28. *Id.* *State v. Alderete*, 86 N.M. 176, 521 P.2d 138 (Ct. App. 1974), is the New Mexico Court of Appeals case holding polygraph evidence admissible without stipulation. See *infra* text accompanying note 53.

29. The court's authority for the operation of the PSE was Kenety, *supra* note 5. 97 N.M. at 503, 641 P.2d at 534.

30. 88 N.M. 184, 539 P.2d 204 (1975).

31. See Romero, *supra* note 22. Professor Romero's article discussed *State v. Dorsey* at length.

procedure employed as approved by authorities in the field; and (3) the validity of the test made on the subject."<sup>32</sup>

The first prong of the *Dorsey* test disposed of the issue in *Neustadt*. The evaluator who performed the test "was not a licensed polygrapher, had no training in psychology or medicine, and testified he could not determine if a person was psychologically fit to take the test."<sup>33</sup> Because the expertise of the examiner is a critical factor in lie detection,<sup>34</sup> the appellate court upheld the trial court's refusal to accept the PSE operator as an expert.<sup>35</sup>

The court relied on *State v. Alderete*<sup>36</sup> for the preferred qualifications of a polygraph examiner. These criteria require that the examiner have a college degree,<sup>37</sup> at least six months training under an experienced examiner providing opportunity for frequent supervised testing, five years experience as a specialist in the field of polygraph examinations, and that the examiner's testimony be based upon records he produces in court and which are available for purposes of cross examination.<sup>38</sup> Although the *Alderete* court stated that "[t]hese standards have been accepted in the courts,"<sup>39</sup> the *Neustadt* court only noted that "[a]lthough these qualifications are not legal requirements . . . they may be helpful to a trial court."<sup>40</sup>

The *Neustadt* court discussed reliability of PSE, the most important issue in determining its admissibility, in its application of the second prong of the *Dorsey* test. To evaluate the reliability of the PSE, the court looked to the rule for admissibility of scientific evidence found in *Frye v. United States*.<sup>41</sup> In the words of the New Mexico Court of Appeals,

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32. 97 N.M. at 504, 641 P.2d at 535.

33. *Id.*

34. Kenety, *supra* note 5, at 355-56. The examiner's expertise is a critical factor because the PSE, like the polygraph, does not actually detect "lies," it only detects stress. The examiner interprets the stress indications and determines whether the subject is lying.

35. 97 N.M. at 504, 641 P.2d at 535.

36. 86 N.M. 176, 521 P.2d 138 (Ct. App. 1974). The *Alderete* court relied on J. Reid & F. Inbau, *Truth and Deception* 235 (1966) [hereinafter cited as Reid & Inbau], for these criteria.

37. Neither the *Alderete* court nor Reid & Inbau, *supra* note 36, state that the college degree should be in any particular area. Reid & Inbau suggest only that the college degree is an indication that the examiner is an intelligent person. Reid & Inbau, *supra* note 36, at 235.

38. 86 N.M. at 177, 521 P.2d at 139.

39. *Id.*

40. 97 N.M. at 504, 641 P.2d at 535.

41. 293 F. 1013 (D.C. Cir. 1923). The *Frye* court considered the admissibility of results from the systolic blood pressure deception test. The "*Frye* test" has been applied to determine admissibility of various types of evidence. See *State v. Washington*, 229 Kan. 47, 622 P.2d 986 (1981) (blood analysis in murder case held admissible); *State v. Cavallo*, 88 N.J. 508, 443 A.2d 1020 (1982) (psychiatric testimony as to character traits common to rapists held inadmissible); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981), *cert. quashed*, 98 N.M. 51, 644 P.2d 1040 (1982) (hypnotic evidence held admissible). *State v. Washington*, 229 Kan. at \_\_\_\_, 622 P.2d at 991, contains an extensive list of types of evidence to which courts have applied the *Frye* test.

"Frye held that for expert testimony concerning scientific evidence to be admissible the scientific technique must have gained general acceptance in the particular field in which it belongs. At some point, a new scientific technique becomes reliable enough to be used in court."<sup>42</sup> The *Neustadt* court emphasized that reliability is the most important consideration in deciding whether to admit PSE evidence.<sup>43</sup>

After noting that there is a diversity of opinion on the reliability of PSE, the court cited two studies which obtained very favorable results with the PSE.<sup>44</sup> The court did not follow cases from Maryland and Louisiana rejecting use of the PSE "because both Maryland and Louisiana reject polygraph evidence."<sup>45</sup> The court concluded, with seemingly little support for the reliability and validity of PSE testing, that "a rule of per se inadmissibility is unnecessarily broad and may result in the exclusion of evidence that may be valuable and accurate."<sup>46</sup>

Turning to the third prong of the *Dorsey* test, the court stated that if the first two elements of the test are met, evidence must be introduced establishing that the test performed on a particular person is valid.<sup>47</sup> This foundation evidence includes testimony about the condition of the PSE equipment, proper use of procedures,<sup>48</sup> and the subject's psychological state at the time of testing.<sup>49</sup>

The *Neustadt* court stated that if the proponent of the PSE evidence has met the three prongs of the *Dorsey* test and the court has admitted the PSE evidence, then the court should give Uniform Jury Instruction 2.13.<sup>50</sup> This instruction relates to the weight the jury is to give to expert testimony and allows the jury to reject the expert opinion if it concludes the opinion is unsound.<sup>51</sup>

42. 97 N.M. at 504, 641 P.2d at 535.

43. *Id.* at 505, 641 P.2d at 536.

44. The two studies are M. Kradz, *The Psychological Stress Evaluator: A Study* (1972), reprinted in *Hearings on the Use of Polygraphs and Similar Devices by Federal Agencies Before Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations*, 93d Cong., 1st Sess. 14-15, 225, 228, 435-436 (1974), and J. Worth & B. Lewis, *An Early Validation Study with the Psychological Stress Evaluator (PSE)* (1972).

45. 97 N.M. at 505, 641 P.2d at 536. The cases are *Smith v. State*, 31 Md. App. 106, 355 A.2d 527 (1976) (the New Mexico Reports and Pacific Reporter Second publications of *Neustadt* incorrectly cite this case at 335 A.2d), and *State v. Schouest*, 351 So. 2d 462 (La. 1977). Both *Smith* and *Schouest* rejected PSE evidence simply because their courts do not admit polygraph evidence. The *Smith* court stated: "A lie detector test by any other name is still a lie detector test." 31 Md. App. at \_\_\_, 355 A.2d at 536.

46. 97 N.M. at 505, 641 P.2d at 536.

47. *Id.* at 506, 641 P.2d at 537.

48. Because the PSE does not detect deception per se, but rather stress, a pretest interview is essential to determine if the subject may be experiencing stress from other factors. See Kenety, *supra* note 5, at 372, for more details of the operation of PSE.

49. 97 N.M. at 506, 641 P.2d at 537.

50. *Id.*

51. N.M. U.J.I. Civ. 2.13 (Expert Testimony) provides in full:

The rules of evidence do not ordinarily permit a witness to testify as to an opinion or conclusion. An expert witness is an exception to this rule. A witness who, by

## THE DORSEY TEST

The *Dorsey* test is a product of judicial development in New Mexico. This development began in 1961 with *State v. Trimble*,<sup>52</sup> a case in which the New Mexico Supreme Court held it error to admit results of a polygraph test over an objection. The next step in the development of the *Dorsey* test came in *State v. Alderete*,<sup>53</sup> in which the court of appeals stated that “[s]cientific recognition of polygraphic tests has now arrived,” and held that a court may admit polygraph test results when the proponent lays a proper foundation.<sup>54</sup> The *Alderete* court stated that the required foundational elements were as follows: “The polygraphist must be qualified as an examiner. The proposed test must be accepted in his profession. The proposed test must show that it has a reasonable measure of precision in its indications.”<sup>55</sup> These foundation requirements contain the essential elements of the *Dorsey* test.

The New Mexico Supreme Court partially overruled *Alderete* in *State v. Lucero*.<sup>56</sup> *Lucero* required five elements for admission of polygraph evidence: (1) Both parties must stipulate to the test, (2) there must be no objections at trial, (3) the polygraph operator’s qualifications and expertise must be established, (4) the reliability of the testing procedure must be established, and (5) the validity of the test on the particular subject must be established.<sup>57</sup> The last three requirements are similar to the three requirements imposed in *Alderete*. The *Lucero* court did not provide an express rationale for the five requirements, but the opinion did cite four New Mexico cases and a Tenth Circuit opinion as supporting these requirements.<sup>58</sup>

A short time after the *Lucero* decision, the court of appeals decided *Dorsey* and eliminated the first two elements of the *Lucero* test.<sup>59</sup> On certiorari, the New Mexico Supreme Court upheld the court of appeals decision in *Dorsey*<sup>60</sup> on the grounds that the first two requirements, stip-

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education and experience, has become expert in any art, science, profession or calling may be permitted to state an opinion as to a matter in which the witness is versed and which is material to the case. An expert may also state the reasons for such opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You may reject it entirely if you consider the opinion is unsound.

52. 68 N.M. 406, 362 P.2d 788 (1961).

53. 86 N.M. 176, 521 P.2d 138 (Ct. App. 1974).

54. *Id.* at 178, 521 P.2d at 140.

55. *Id.*

56. 86 N.M. 686, 526 P.2d 1091 (1974).

57. *Id.* at 688, 526 P.2d at 1093.

58. *Id.* The court cited *Chavez v. State*, 456 F.2d 1072 (10th Cir. 1972); *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961); *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961); *State v. Chavez*, 82 N.M. 238, 478 P.2d 566 (Ct. App. 1970); and *State v. Chavez*, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

59. 87 N.M. 323, 532 P.2d 912 (Ct. App. 1975).

60. 88 N.M. 184, 539 P.2d 204 (1975).

ulation and lack of objection, were: "(1) mechanistic in nature; (2) [i]nconsistent with the concept of due process;" and "[r]epugnant to the announced purpose and construction<sup>61</sup> of the New Mexico Rules of Evidence."<sup>62</sup> Thus, the *Dorsey* test came to be the standard for the admissibility of polygraph evidence.

#### ANALYSIS OF DECISION

In *Neustadt*, the "expert's" lack of qualifications was sufficient reason to affirm the trial court's refusal to admit the PSE evidence. The New Mexico Court of Appeals, however, chose to go beyond the situation before it and address the PSE issue at large.

The *Dorsey* test is an appropriate means of determining whether lie detector or other scientific evidence should be admitted. The court should always consider the qualifications of an expert witness<sup>63</sup> and the validity of a particular scientific test. The second prong of the *Dorsey* test is the key issue, however, and the New Mexico Court of Appeals may not have made sufficient inquiry into the reliability of the PSE. The two cases cited as rejecting PSE did so only on the basis of rejecting all lie detector tests; the court of appeals therefore properly distinguished those decisions.

The court cited *Frye* for the proposition that "to be admissible the scientific technique must have gained general acceptance in the particular field in which it belongs."<sup>64</sup> This requirement creates the weak point in the *Neustadt* opinion because there is no consensus that the PSE has gained general acceptance in the field of deception detection. The only cases cited in *Neustadt* as addressing the issue of reliability held PSE evidence inadmissible. A law review article,<sup>65</sup> cited in *Neustadt* for its discussion of the operation of the PSE, also states:

There have been no controlled scientific field studies of the PSE conducted by a disinterested party. The results of laboratory simulations have been inconclusive and conflicting, and although field results and manufacturers' studies have indicated that the PSE may have considerable utility, as yet they have not been validated by independent research. . . . [T]he extent of its validity remains undetermined.<sup>66</sup>

61. The court quoted the "announced purpose and construction" from the New Mexico Rules of Evidence (then N.M. Stat. Ann. §§ 20-4-101 to -1102 (1953 Repl. Vol. 4, Supp. 1975, Interim Supp. 1976, & Interim Supp. 1976-77)): "These rules shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.M. Stat. Ann. § 20-4-102 (1953 Repl. Vol. 4, Supp. 1975). This statement is now at N.M. R. Evid. 102.

62. 88 N.M. at 185, 539 P.2d at 205 (1975).

63. N.M. R. Evid. 702 requires that a witness be "qualified as an expert by knowledge, skill, experience, training or education."

64. 97 N.M. at 504, 641 P.2d at 535.

65. See Kenety, *supra* note 5.

66. *Id.* at 357.

The court cited this article for details of how the PSE operates, but apparently overlooked the author's suggestion that the device may not produce reliable results.

In addition to the questions about the reliability of PSE, there is evidence that this technique has not gained general acceptance in decisions refusing to license PSE operators. In *Heisse v. Vermont*,<sup>67</sup> a PSE operator challenged the constitutionality of a Vermont statute<sup>68</sup> that restricted licensing of "deception detectors" to users of polygraph devices. The United States District Court for Vermont upheld the statute, noting that "there is disagreement in the scientific community about the validity of PSE testing."<sup>69</sup> Another decision rejecting licensing of PSE operators, *Illinois Polygraph Society v. Pellicano*,<sup>70</sup> upheld a statute<sup>71</sup> requiring "detection-of-deception" examiners to use polygraph-type equipment. The *Pellicano* court found that the statute required that "cardiovascular and respiratory-pattern recordings must be used in any analysis of a detection-of-deception examination."<sup>72</sup>

The fundamental question to be answered about any evidence is whether it is relevant:<sup>73</sup> does the evidence tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>74</sup> This question of relevancy, the *Neustadt* court correctly noted, is "inextricably linked" to a scientific technique's reliability: "once the technique is shown to be reliable it is relevant to prove what it purports to prove."<sup>75</sup> The *Neustadt* court's use of the *Frye* test implies that the reliability of a technique is to be shown by general scientific acceptance.<sup>76</sup> Although a device or technique would probably not be generally accepted if it were not reliable, it is possible that a new technique could be shown to be reliable before it has gained general scientific acceptance. This situation is especially likely to arise in today's environment of rapid scientific advancements.

The *Frye* test has been criticized for lacking guidelines for its appli-

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67. 519 F. Supp. 36 (D.Vt. 1980).

68. Vt. Stat. Ann. tit. 26, § 2903 (Supp. 1982). New Mexico has a similar statute which provides that: "It is unlawful for any person to practice polygraphy, for any consideration, without a license issued by the attorney general in accordance with the Polygraphy Act." N.M. Stat. Ann. § 61-26-4 (Repl. Pamph. 1979).

69. 519 F. Supp. at 41.

70. 83 Ill. 2d 130, 414 N.E.2d 458 (1980).

71. Ill. Rev. Stat. ch. 111, § 2403 (Supp. 1982-83).

72. 83 Ill. 2d at \_\_\_, 414 N.E.2d at 462.

73. N.M. R. Evid. 402 provides that: "All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." (Emphasis added.)

74. N.M. R. Evid. 401.

75. 97 N.M. at 504, 641 P.2d at 535.

76. "*Frye* held that for expert testimony . . . to be admissible the scientific technique must have gained general acceptance in the particular field in which it belongs. At some point, a new scientific technique becomes reliable enough to be used in court." *Id.*

cation and for rejecting potentially valuable evidence.<sup>77</sup> A test of reliability, on the other hand, would allow unique forms of evidence which have not gained general acceptance to be admitted, if the evidence was shown to be reliable.<sup>78</sup> A proponent could show reliability by a controlled scientific experiment. The adoption of a reliability test would have been appropriate with a relatively new technique such as the PSE. But even if, as suggested in Bludworth's brief, the *Neustadt* court had used a test of reliability rather than one of general scientific acceptance, the court would have been hard pressed to find substantial evidence of the PSE's reliability. At least one court<sup>79</sup> has gone so far as to state that "all authorities agree [PSE] is unreliable. . . ."<sup>80</sup>

Because juries may be awed by "scientific evidence" and may tend to give too much credence to evidence offered by "experts,"<sup>81</sup> courts should be wary of allowing the introduction of such evidence. A conservative attitude is especially appropriate where, as in the case of the PSE, there is much controversy about the reliability of the evidence. The directive given by Uniform Jury Instruction 2.13, that the jury may reject scientific evidence if it thinks the evidence unsound, may not be sufficient to overcome the effect of a jury's fascination with a "miracle" that appears to allow an examiner to detect lies merely from a person's voice.

### CONCLUSION

If the PSE does prove to be a reliable tool, the New Mexico courts will be far ahead of other jurisdictions in the use of PSE, as they are now with the use of polygraph evidence.<sup>82</sup> The *Neustadt* court clearly indicated that PSE results would be admissible under the right circumstances, even though the requirements were not met in the case before the court. Perhaps the most powerful support for the *Neustadt* court's decision to allow use of PSE evidence is found in its quotation of Rule 102 of the New Mexico Rules of Evidence: "These rules . . . shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."<sup>83</sup> This policy, combined with Rule 403 (the trial judge has discretion in determining whether to allow the evidence),<sup>84</sup> and Jury Instruction 2.13 (the jury may

77. See, e.g., *Romero*, *supra* note 22, at 189-92.

78. *Romero*, *supra* note 22, at 206.

79. *People v. Vinson*, 104 Misc. 2d 664, 428 N.Y.S.2d 832 (Sup. Ct. 1980).

80. *Id.* at —, 428 N.Y.S.2d at 835.

81. See *Romero*, *supra* note 22, at 208.

82. New Mexico is the only state which allows polygraph evidence in the absence of stipulation. *Kenety*, *supra* note 5, at 353.

83. 97 N.M. at 505, 641 P.2d at 536 (quoting N.M. R. Evid. 102).

84. N.M. R. Evid. 403 allows the judge to exclude evidence if it is overly prejudicial, confusing, misleading, cumulative, or a waste of time.

reject expert scientific evidence), may be sufficient to temper the effects of allowing the admission of such evidence. But the evidence is relevant *only if* it is reliable. Therefore, a court should not admit PSE evidence until it is determined to be reliable.

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