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HANDWRITING, TYPEWRITING AND DOCUMENT EXPERT TESTIMONY TESTED BY ITS CONVINCINGNESS

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Professor Wigmore says in the latest edition of his great work on evidence (2014), "The progress of modern chirographic science makes it all the more possible, as well as desirable, to discriminate between witnesses according to the convincingness of the reasons that may be given by them for their conclusions." The new laws and procedure regarding the introduction and use of genuine writings as standards of comparison, the sensible permission now given to the witness to state the full and definite reasons upon which his opinion is based,[1] and the practical application of scientific instruments to the discovery and illustration of facts in a disputed document all make possible a new convincingness in testimony of this character. These conditions when employed by an intelligent witness and a prepared attorney whose contention agrees with the facts lead toward, if they do not insure, a convincing presentation.

The value of document expert testimony is measured by its convincing quality,[2] and convincingness must necessarily depend upon

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[1]*Brindisi* v. *People,* 76 Colo. 244, 230 P. 797 (1924). "In such a case to forbid the witness to make comparisons and point out therefrom the reasons for his conclusions would greatly weaken the force of his testimony and seriously cripple that cross-examination which is its only safe test. To forbid full examination by jurors is to withhold from them the only means by which they can judge the credibility of the expert and determine the weight of his opinion."

State v. *Ryno,* 68 Kan. 348, 74 Pac. 1114, 64 L. R. A. 303 (1904). An expert in handwriting may give the reasons for his opinion on direct examination. "His opinion, unexplained, might have little value, but when the reasons upon which it was based were given, the jury could then determine the soundness of his reasons and the correctness of his conclusions."

Price v. *Railroad,* 38 S. C. 199, 213, 17 S. E. 732 (1892). "If the witness testifies as an expert, the sense of the rule would seem to indicate that the jury ought to know upon what he gives his opinion as an expert. After all, they are the judges of the facts."

[2]*Richards* v. *Huff,* 104 Okla. 221, 231 Pac. 76 (1924). "Each of the witnesses pointed out in detail the distinctive features of the genuine signature upon which they reached the conclusion that the questioned signature was a forgery. . . . After considering all of the expert testimony, and examining the photographic copies of the questioned signature and the genuine signatures incorporated in the record, we think the testimony of the experts who thought the signature a forgery the more convincing."

Syde's Case, 143 Atl. 777 (1928). "The value of an opinion may be much increased or diminished by the reasons given for it. *Palmer* v. *Blanchard,* 113

certain fundamental factors which in combination produce this desirable effect. These factors are: (1) the facts in the case; (2) the witness; (3) the lawyer, and (4) the law in the jurisdiction in which the testimony is given. Testimony to be convincing must be true; it must be in conformity with the facts in the document and therefore given in support of a correct conclusion.[3] The witness must be qualified, honest, and capable of stating the truth in a convincing manner. The case must be adequately prepared by both the witness and the lawyer and complete and helpful cooperation between them is an absolute necessity if the testimony is to be presented convincingly. Finally, the law in the jurisdiction must be such as to permit the testimony to be presented and considered in the modern common-sense way. An intelligent discussion of the modern view of the value of document expert testimony is found in the opinion of

The Burtis Will case, 43 Misc. Rep. 437, 89 N. Y. Supp. 441. "Of course, in cases where the handwriting or signature of a person, since deceased, is attacked as a forgery, the party defending it is apt to ridicule the value of expert evidence, because, almost invariably evidence of this character is the only kind available to the party attacking the signature. He often has no other means at hand to show the court or jury that the singature may be or is a forgery; while on the other hand the party defending the signature usually has the aid of one or more wtinesses to testify to the act of signing, etc. If the court were to adopt the view that expert evidence is of little value and disregard it, the party attacking the signature ordinarily would have but little chance of success, and it would create unlimited opportunities for designing persons to forge the name of deceased persons to important documents and then swear it through."

This opinion shows the necessity for expert testimony and emphasizes its value in cases of this kind. An increasing number of similar intelligently reasoned opinions[4] has made it more difficult to

Maine 380, 94 Atl. 220, Ann. Cas. 1917A, 809. Its value may be diminished to the point where it has no probative value."

[3]*Rogers* v. *Kendall,* 122 Maine 248, 119 Atl. 616 (1923). "Opinion evidence is entitled to weight only when fortified by established facts and consistent with probability and reason."

[4]*Castner* v. *Castner,* 245 S. W. 281 (1922). "The argument that the verdict is flagrantly against the evidence is based upon the fact that one witness testified for plaintiff that she saw decedent execute and deliver the notes, and that such evidence cannot be overcome by simply proving by experts and those familiar with the decedent's signature and handwriting that in their judgment he did not sign his name to the notes. No authority is cited in support of this novel proposition, which, in our judgment, cannot possibly be the law."

Baird v. *Shaffer,* 101 Kan. 585, 168 Pac. 836 (1919). ". . . the plaintiff's evidence discrediting the will was practically that of expert testimony and opinion evidence which tended to prove that the will was not genuine. . . . The

validate a forged document and at the same time has made the crime of forgery a more dangerous occupation.

In former days when the testimony of document witnesses consisted mainly of mere opinions there was no convincingness in the testimony, but a mere dogmatic statement; there was little from which to distinguish the value of the testimony of one witness as compared with that of another; and when experts testified on opposite sides of a case the testimony on one side practically nullified that on the other. There was no way to tell from the testimony itself which side was right. The modern practice in many courts, however, permits the witness on direct examination to give his opinion and specifically point out the definite, illustrated physical facts on which the opinion is based.[5] When this method is combined with a clear interpretation of the facts and the complete process of reasoning leading up to the final conclusion, the testimony then contains the elements of convincingness. This common sense procedure enables a court and jury to understand the exact basis for the expert's conclusion and correctly estimate its value.[6] Such testimony was the basis for the opinion in

Latham v. Jordan, 3 S. W. 2nd, 555. "J. F. Wood, * * * His analysis of the letter, as he discussed the different characteristics of forgery was absolutely convincing that the letter of July 24, 1928, was not in the handwriting of G. W. Jordan."

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testimony of attesting witnesses to a will may be overcome by any competent evidence . . . expert and opinion evidence is just as competent as any other evidence. Indeed, where the signature to a will is a forgery, and where the witnesses have the hardihood to commit perjury, it is difficult to see how a bogus will can be overthrown, except by expert and competent opinion evidence. . . . The rule contended for would frequently baffle justice and give judicial contenance to many a high-handed fraud."

[5]*Marshall* v. *Thomas,* 31 Ohio C. C. 363 (1909). "The value of an opinion of a handwriting expert must depend upon the clearness with which the expert demonstrates its correctness."

Fenelon v. *State,* 217 N. W. 711 (1928). ". . . but when experts have testified, and upon their direct and cross examinations have fully explained the reasons for their opinion, the issue becomes cleared of many of its perplexities."

[6]*Weaver* v. *Scripture,* 125 Misc. 741, 211 N. Y. S. 593 (1925). "The rule is well settled that the weight to be given to opinion evidence is, within the bounds of reason, entirely for the determination of the jury. This is so whether the subject of the inquiry be a question of value, or other matters concernnig which the skilled and learned are more competent to speak than the layman."

Green v. *Terwilliger,* 56 Fed. 384, 394 (1892). "The value of expert testimony depends, to a certain extent, upon the general knowledge and experience of the witnesses, their competency, character, and reputation. It depends more or less upon the facts stated by them, which form the basis of their judgment, and the reasons given for their opinion."

This reasoning method at once distinguishes the unsupported statement of a stupid or dishonest witness from the reasoned conclusion of one who is qualified,[7] as is pointed out in the opinion in

Venuto v. Lizzo, 148 App. Div. 164; 132 N. Y. Supp. 1066, "The conclusion of a handwriting expert * * * standing alone, would be little or no value, but supported by sufficiently cogent reasons his testimony might amount almost to a demonstration."

And also in Ort v. Fowler, 31 Kan. 486: "Of course, the value of such testimony will vary with different witnesses and this is a matter to be determined by the jury * * *."

As a matter of fact the ability of witnesses varies as widely as the ability of lawyers; there are the capable, the mediocre and the stupid; and the bare opinion method of testifying makes the poorest witness practically equal to the best. With the reasoning requirement, however, the convincing quality of document testimony depends upon the witness[8] as stated in

Gordon's Case, 50 N. J. Eq. 397; 26 Atl. 268. "Handwriting is an art concerning which correctness of opinion is susceptible of demonstration * * * the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness."

[7] *Magnuson* v. *State*, 187 Wis. 122, 203 N. W. 749 (1925). "A rule of law that would permit an expert to take the stand and state his conclusion without doing any more would place the least qualified, most prejudiced expert on the same level as the best qualified and most conscientious expert. Particularly is this true in regard to the testimony of a handwriting expert, which rests very largely for its convincing power upon the similarities and peculiarities which enable the expert to arrive at his conclusion."

In re *Gordon*, 50 N. J. Eq. 397, 26 Atl. 268 (1892). ". . . the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and successful."

[8] *Fekete* v. *Fekete*, 323 Ill. 468, 154 N. E. 215 (1926). ". . . the opinion of an expert may be of great value where it calls the attention of the court to facts which are capable of verification by the court, which the court otherwise would have overlooked, and the opinion of the expert is based upon such facts and is in harmony therewith."

Handwriting of Junius, by Hon. Edward Twistleton, pp. 91, 92. ". . . comparison of handwritings, as an instrument for ascertaining who is the handwriter of a disputed document, seems very superior to the declaration of a witness as to his belief, however familiar he may be with the hand of the supposed writer. If there are sufficient materials for comparison, this superiority is great, even when there is no disguise; and in the case of a really good disguise, the superiority is overwhelming.

"If the expert has skill in analyzing his own impressions, he can go through the proofs of everything which he asserts and can make others see what he sees. If he makes a mistake, his error admits of proof. Hence the case with which he deals, however complicated, becomes merely one of reasoning in which internal circumstantial evidence is applied to demonstrate a disputed fact."

And in Strong v. Brewer, 17 Ala. 706. "* * * proof of handwriting, under proper restrictions * * * is everywhere admitted. Moreover, as has been well said, it seems that this kind of evidence, admits of every degree, from the lowest presumption to the highest moral certainty."

Convincing document expert testimony such as is referred to above is not accidental nor is it extemporaneous, but it is an intellectual performance which grows out of thorough study and special preparation of the case. Such testimony states facts in their correct and related order; it avoids unnecessary technical terms and employs the proper words in statements and descriptions; and it interprets facts, qualities and conditions in the document so that their significance can be clearly understood. This effective testimony includes a complete discussion of principles and an illuminating interpretation of facts, conditions and comparison by which the jury is aided in reaching a correct conclusion.[9]

This persuasive testimony must necessarily come from a witness who is technically qualified;[10] and when there is added to these technical qualifications desirable personality, adequate education, extended experience, necessary intelligence, common sense and honesty, combined with a complete preparation of the case in hand convincing testimony may be expected. This convincing character of testimony given by the late William J. Kinsley justified the opinion in

Boyd v. Gosser, 82 Southern 758, "* * * but the error in the conclusion arrived at upon the first hearing consisted in treating the testimony of the witness, William J. Kinsley, the expert on handwriting as merely opinion evidence. It was something more than the mere opinion of the witness. It was a detailed statement of facts relating to the questioned signature * * *; facts which were revealed by the use of mechanical instruments and scientifically established to the degree of demonstration."

Weak and ineffective testimony is not always the fault of the witness who may be called into the case so late that there is no time for preparation; the necessary demonstrative illustrations cannot be

[9]*Wright* v. *Flynn*, 69 N. J. Eq. 753, 61 Atl. 973 (1905). ". . . such evidence opens to our observation what would not have been observed without the aid of examinations made by those who by practice and experience have acquired facility in such observations. I apprehend that this is the most important function of expert testimony and the weight and force of such evidence is dependable upon its exhibiting to our senses that which our unaided observation would not discover."

[10]Estate of *Thomas*, 155 Calif. 488 (1909). "Certainly in the majority of instances the mind of the expert and trained observer, disciplined to discern not only obvious similarities but to detect as well dissimilarities, disguised under the appearance of similitude, will arrive at a result more correct than will that of the untrained observer."

made, conferences cannot be held; and the result is an unnecessary weakness due to a lack of time. In these hurried preparations one important point overlooked may lose the case. No investment in a cause pays better dividends than time spent in preparation.

Another condition which may greatly affect the convincingness of document expert testimony is the degree of cooperation between the witness and the lawyer. The lawyer should know exactly what the witness is going to say and the way he is going to say it; it is also important to know what he will *not* say. The testimony even of good witnesses can be improved by a thorough understanding of the technical phases of a case by the lawyer. Eminent advocates sometimes do not make proper preparation on the specific problems regarding which they are to present document expert testimony. While these important facts pertaining to his cause are unknown to him he cannot examine his own witness intelligently and is wholly unable successfully to cross examine opposing witnesses. Disaster usually rides in the cockpit with unpreparedness.

If testimony is to be brought out with the utmost clearness and force, this cooperation between lawyer and witness must cover every element of the technical proof. It is not enough that the witness understands the technical phases of the case, the lawyer also should have a thorough understanding of exactly what was done and discovered in the investigation, he should know the value and the significance of all the technical facts, and he should know the exact purpose of every illustration. Brief conferences are not sufficient to develop a clear and comprehensive knowledge of every phase of the testimony which should be discussed and rehearsed. Complete preparation gives the lawyer and the witness that confidence and power which are the results of definite knowledge.

Excellent technical books are now available which discuss the principles involved in the proof of the facts in a disputed document case. No lawyer should go into the trial of an important document case without securing all the assistance that this printed matter gives. Too often lawyers do not understand what the case is about until after they are defeated.

Lack of preparation may be shown by too much participation by the lawyer as well as too little. The proper part of counsel in the performance is assisting the witness to present the testimony in the clearest and most forceful way. After the necessary preliminary questions by which the competent witness is qualified and brought to the point where the real evidence begins, he should be allowed to give his ex-

planations, interpretations and reasoning without constant interruptions by counsel. Thus intelligently aided a competent witness is able to make the clearest and most powerful impression that the particular evidence can produce.[11]

It should not be understood that the attorney has no part to perform, because it is a fact that testimony can be greatly enforced by timely and intelligent questions and comments, but one cannot ask intelligent questions about a subject he does not understand. Participation by an attorney may confuse and weaken or may clarify and strengthen, depending upon how and when it is done. Fortunately for clients and justice there are lawyers who spare neither time nor effort in preparing a case. No detail is considered too elementary for their attention and consequently they have that rare trial sense that knows what to ask and when to ask it.

The convincingness of document expert testimony has been greatly increased by the use of the various kinds of modern document microscopes, the photographic camera with accurate, high grade lenses, and especially designed precision measuring instruments.[12] By means of these modern optical and measuring instruments clear, illuminating and easily understood illustrations can be made of each point about which the witness is testifying. It is now possible to prepare a document case so that a jury can actually see the facts on which they are to give their judgment. There is no amount of explanation, however clear, but that it can be enforced by illustrations which permit the jury to use their eyes as well as their ears. Such illustrations are accurate, enlarged photographs. They take the statements of the witness out of the opinion class and make them so definite and positive that they are in fact demonstrations,[13] as the Supreme Court of Florida said in

[11] *State* v. *Swank*, 99 Ore. 571, 195 Pac. 168 (1921). "Wood's testimony was clear, analytical and convincing and the reasons for his belief were stated in concise language from which the jury could and did find that the two notes were prepared by the same person on the same typewriter."

[12] "The opinion of the Supreme Court emphasizes the feature that modern expert testimony no longer can be disparaged by that doubt which hesitates to accept 'mere opinion'; because what scientific methods and apparatus has been able to do is to reveal *facts*, and these facts can be made, by microscopy and photography, as plain to the tribunal as to the expert; so that the observer may form his own opinion adequately from these facts." . . . Excerpt from Dean Wigmore's Review of *Lyon* v. *Oliver*, 316 Ill. 292, 148 N. E. 251, Illinois Law Review of November, 1926.

[13] *Lauderback* v. *Multnomah County*, 111 Ore. 681, 226 Pac. 697 (1924). "The notice introduced in the record is demonstrative evidence. Referring to the weight of evidence: 'The highest proof of which any fact is susceptible is that which presents itself to the senses of a court or jury.' 2 Moore on

Boyd v. Gosser, 82 Southern, 758. "The questioned signatures and photographs of them are before the court, as well as signatures admittedly genuine and photographs of them some enlarged for convenience of comparison. So that the facts to which the expert witness testified concerning the characteristics and construction of the signature are matters within the field of demonstrative evidence."

Expert testimony in response to a hypothetical question is often the weakest and the least convincing of any testimony presented in court as it contains no rational quality and is a mere assertion by the witness.[14] Unlike this weak character of testimony, document expert testimony given by a qualified witness on the right side of a case is not a mere assertion, but is based on a physical thing actually in hand and before the court, which can be seen, examined and compared by those who are finally to answer the question in the case. This testimony is almost in a class by itself as it permits reasoning and demonstration not possible with many other kinds of problems requiring expert solution.

Document expert testimony and its value in court would not be fully considered without looking at the other side of the picture. The so-called document expert witness whose technical qualifications are inferior and whose lack of ethical principles borders closely on dishonesty is to be condemned with as much vigor as a fakir in any line. No less condemnation belongs to the lawyer who employs these witnesses. A lawyer who "shops around" with a crooked case until he finds a crooked expert to agree with his contention is perhaps the worse of the two. This combination of witness and lawyer, both of questionable ethics, has undoubtedly influenced the critical decisions by the courts of document expert testimony. These criticisms justly deserved should have gone a step further and placed the blame where it belongs—equally with the lawyer and the witness. However, the courts are wisely recognizing the testimony of the qualified, honest document witness as a valuable aid in the administration of justice.[15]

Facts, Weight of Evidence, Sec. 1206 . . . The exhibit is dumb, but as evidence it is most effectual."

[14]*Pannell* v. *Louisville Tobacco Warehouse Co.*, 113 Ky. 630, 68 S. W. 662 (1902). "The mere opinions of witnesses without the facts on which they are based are of very little value."

In re *Varney*, 22 Fed. (2nd) 230-237 (1927). "As to the testimony of the five bankers, relied on by the claimants, it is greatly weakened by the consideration that not one of them gave a reason for the faith that was in him. . . . I was entitled to have the basis of the opinions of these bankers in order that it might test their soundness, and this has not been afforded me. I never like to follow anyone blindly."

[15]*Burnham* v. *Grant*, 24 Colo. App. 131, 134 Pac. 254 (1913). "An imposing array of authority lays down the rule that expert testimony is to be considered

The final test of the convincingness of document expert testimony is its persuasive power upon those who are to decide the case. No more emphatic demonstration of this power could be found than in numerous cases during the last few years where either opposing counsel withdrew from the case or the document upon which the claim was made was withdrawn after the expert document testimony had been given.

Good document testimony must be understood, it must appeal to the hearers as reasonable and fair, it must be believed, and it must present the solution of the problem in a clear, logical and forceful manner. When document expert testimony regarding the genuineness, the origin, the date or the alteration of handwriting or typewriting contains these important qualities, it has that persuasive power which convinces.

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the same as any other, and that the jurors' attention should not be called specifically to such testimony, either in the way of discrediting it or giving it undue prominence."

In re *Nelson's Estate,* 191 Cal. 280, 216 Pac. ... (1923). "Appellant contends that the trial court erred in refusing an instruction to the effect that the testimony of expert witnesses should be received with great caution. This instruction was properly refused."