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THE USE OF INDIVIDUAL PHOTOGRAPHIC CHARTS IN PRESENTING QUESTIONED DOCUMENT TESTIMONY

George G. Swett

George G. Swett has had a long experience in questioned document work. For 12 years he was associated with the Post Office Inspection Service, and as an examiner of questioned documents for that organization, qualified and testified in some 30 states. He was one of the examiners responsible for establishing the original questioned document laboratory of the Post Office Department at Washington. Later, he established a similar laboratory at St. Louis, Missouri, under the Inspection Service plan of decentralized technical laboratories. Mr. Swett resigned from the Postal Service on April 1, 1951, to enter private practice at St. Louis as an examiner of questioned documents.—EDITOR.

An examiner of questioned documents in the employ of the Federal Government enjoys certain definite advantages. Conversely, there are definite disadvantages to such employment. It is not the purpose of this paper to weigh those advantages and disadvantages but to discuss one facet of a paradoxical situation—a feature which is at once an advantage and a disadvantage.

The Government examiner is retained on an annual salary basis; therefore, the million dollar mail fraud case and the fifty dollar postal money order forgery are handled on the same basis so far as remuneration is concerned. This is not advantageous for obvious reasons.

On the other hand it would be fallacious to allege that the Government, the investigator, the prosecutor or anyone else—including the document examiner—will evidence the same degree of interest in the cases. Thus, a paradox is established. While the examiner in Government service receives no additional compensation for the big case (a disadvantage), he may enrich his store of knowledge on the smaller one (an advantage). This is for the reason that in the smaller one he may experiment quite properly so long as he stays within reasonable bounds.

The impression should not be gained that the examiner becomes indifferent to the smaller case and handles it accordingly. This is not true. A federal prosecutor is aware that the presence and testimony of a salaried "handwriting expert" will not add appreciably to the cost of the prosecution. So, although he may have one or more identifying eye-witnesses in a minor forgery case, still he will subpoena the "expert" and present his testimony. By the time a case is ready for trial, the examiner usually knows whether he will carry the burden of the prosecution or whether the case is a good one sans the expert testimony. Consequently, the examiner will know whether he is to have a certain latitude in his presentation. Thus, during some twelve years of government service, it was possible and proper for the writer

to experiment during the trial of certain cases. There was no lessening of the effort in presentation, only procedural changes. There were noted, among other things, a favorable reaction by both Courts and juries to curtailed qualification procedure; to brief, concise, non-technical testimony; and to the small, individual photographic chart. This paper will discuss the latter.

It is the considered judgment of the writer that the small, individual photographic exhibit (not to exceed 11 x 14 inches in size) is superior in most respects to the larger type photographic exhibit in the presentation of testimony in cases involving questioned handwriting and typewriting. That is the rule. There will be exceptions, of course, but they should be few in number.

The word "individual" in the above paragraph has a dual connotation. It contemplates that photographs should be presented individually (not bound in volumes or otherwise) and to the jurors as individuals, to a certain extent. To explain the latter, twelve jurors should not be handed twelve photographs but should receive six.

At the beginning of his career, the writer invariably testified from one large chart which was placed before the jury. The first consciousness that this procedure was incorrect came when, at each appearance, the witness was obliged to leave the stand and take his place beside the chart before the jury. The expert witness enjoys privileges not accorded other witnesses who testify and is permitted to leave the stand. It is argued by some that when he steps before the jury he adds to his importance from a psychological standpoint. The writer does not believe so but holds rather that the end effect is detrimental. Because of the somewhat technical aspect of this feature, it has never been discussed with jurors as have other points to be covered. Therefore, this is the expression of an opinion.

Many times, because of the physical arrangement of the Court room or because of light conditions, the enlarged chart must be placed before the jury so that it is not visible to the Judge on the bench. One of two things occurs. Either the Judge leaves the bench to sit or stand among the jurors or he remains on the bench and does not observe the pictorial portion of the testimony. Some witnesses feel that by leaving the bench to observe the testimony, the Judge adds stature to it. So it may be, but in those instances where the Judge deems it improper or inadvisable to leave the bench the opposite effect may be gained. This is particularly true if the Judge in listening and concentrating assumes a position that the layman (juror) could interpret as one of repose and inattention. With a chart in hand, few Judges will assume

an attitude which could be misconstrued as one of detachment. For this reason whenever the use of a bromide is contemplated, a smaller identical photograph is prepared for the Court. Additionally, it is not believed that the Judge should be placed in the position of having to leave the bench if he wishes to view the exhibit during testimony and the separate exhibit in his hands prevents this.

Before proceeding with this text, it is felt that a few words are in order concerning certain portions that are to follow. Individual photographic charts were originally employed because it was felt that, better than enlargements, they would serve to assist Courts and juries in determining the true facts in a case. So far as the writer is concerned, their use has proven this to be true. The use of the individual exhibit, however, created certain jury reactions not at first contemplated and had the effect of impeding somewhat a certain type of rather undesirable cross-examination. To have withheld from this text these facts would have been a form of dishonesty—by omission; therefore, they are included. The reader must bear in mind that individual charts are not advocated because of the unusual reactions they may cause but because a weighing of advantages and disadvantages on an over-all basis has favored their use.

Seldom, during the presentation of a case from a single enlarged chart (or group of large charts presented individually) have jurors been observed to confer. Yet, almost invariably during presentations from the individual small photographs, jurors have been observed pointing out salient features to their fellow jurors and even discussing points in whispered tones. This is for the obvious reason that six charts distributed among twelve jurors gets six groups of two heads each together. Some objection has been raised concerning this, certain individuals believing that the charts foster a disregard for the Judge's admonition to jurors to refrain from discussing the evidence with each other or anyone else until all evidence is complete. The writer does not believe that in such instances the jurors can be considered as "discussing the evidence" in the sense intended by the Judge. If a Judge feels the jurors are acting improperly he can certainly so advise them, and if opposing counsel believes an objection is in order, he may certainly enter it. The point to be made is that jurors apparently better understand the smaller chart—get more out of it.

Along this line, it is believed that the intimacy of the small photograph enhances the value of the chart; that is, it is believed to be of tremendous value to have a juror holding in his hands the photograph being discussed *while* it is being discussed. He feels that he is being

let on the inside of some very important testimony to an extent not felt when he is viewing a single chart concurrently receiving the attention of everyone else.

As an experiment in a number of cases, most important points of agreement have been placed prominently on charts and then purposely ignored during testimony. In nearly every instance in discussing the testimony with jurors, attention has been drawn to the fact that the testimony had not covered, let us say, the letter "t," which the juror being interviewed considered most important. Such omissions were not made primarily in the belief that every juror likes to be his own expert. They were made for the purpose of observing reactions to the smaller charts. But they did also establish to the writer's satisfaction that jurors enjoy being their own experts and derive some peculiar kind of satisfaction from pointing out an agreement missed by the witness.

If this is so, there are two factors which could prevent an intelligent juror from making his own comparison when testimony is from a single chart. One is hearing; the other sight. For some unfathomable reason some victims of partial deafness are extremely sensitive to their condition. A word to the Judge would in nearly every instance excuse such persons from jury duty. Yet, because of a sensitiveness or because of a will to discharge the functions of good citizenship regardless of a slight handicap, many persons hard-of-hearing serve daily upon juries. While such persons might not follow the testimony from a single chart, the assistance of a fellow juror following a common chart could be of inestimable value.

In ordinary lawsuits, involving only oral testimony, the juror with defective eyesight could function nearly as well as the individual boasting twenty-twenty vision. But in cases involving expert testimony where an enlarged chart is used, the witness may be at a distinct disadvantage with one juror, and possibly more, who cannot see the chart as the testimony progresses. Very nearly all persons with defective vision have their eyes corrected with optics which permit them to read an ordinary newspaper. Therefore, smaller charts, in the hands of the jurors, will invariably accommodate all save persons nearly blind who are not likely to serve anyway.

It is not desired to intentionally place opposing counsel at a disadvantage during cross-examination, particularly if he is inquiring in an earnest manner, attempting to have answered good questions which are vital to his client. On the other hand, the same feeling is not held for the over-zealous advocate who, having the wrong side of the case, will attempt to befuddle the jurors through a display of histrionics,

including the sly or knowing smile which is cast at the jurors upon every reply by the witness whether the reply be foolish or wise. These fellows sometimes present a good psychological demonstration by striding around in front of an enlarged chart and "picking it to pieces" as they state it. Every examiner is familiar with the *modus operandi* of this type of advocate. It has been observed that he has considerably more difficulty with the small photograph than with the larger exhibit. In his direct testimony the examiner, who is thoroughly familiar with the exhibit, can point out in a concise manner all the features he desires to discuss. Experience has given him a facility in locating his points to the satisfaction of the jurors. In the heat of cross-examination, opposing counsel on a "fishing expedition" will rarely proceed in a manner sufficiently deliberate to permit him to locate his alleged points on a small photograph so that the jury will follow him. Consequently, his cross-examination in this respect will be a hodge-podge rehash of material already clearly covered by the witness in his direct testimony.

There is an apparent disadvantage to the use of tremendously enlarged photographs concerning which the writer cannot speak with authority for the reason that such enlargements have never been deemed necessary. This does not refer to the degree of enlargement of photomicrographs or photomacrographs designed to show pen lifts, typewriter defects, etc., but refers to enlargements of ordinary comparison charts. One large laboratory, apparently by policy, consistently uses what the author has dubbed "24 sheets." Some readers may know that in the theatrical trade the large billboard posters are termed "24 sheets." While this is a gross exaggeration, the charts do more closely approximate in size a "24 sheet" than they do, say an 11 x 14-inch print. One member of the staff of the laboratory confided that this type of enlargement sometimes accomplishes weird results. He related that he had prepared an excellent case involving a questioned letter and had aligned his known and questioned material in juxtaposition on a chart which was subsequently enlarged to a very great degree. When the finished product emerged the writing had lost its "character" because of the tremendous enlargement. Similarities readily discernible to the layman on the makeup chart could be observed on the finished product only through careful guidance by the witness.

The enlarged single exhibit has one advantage over the multi-copied smaller one. In cases where two or more exhibits are necessary, the witness can more easily control the jurors by testifying from a single illustration and presenting additional single illustrations as his testimony requires. It has been determined that if jurors are handed more

than one small photograph—regardless of explanations from the stand, numbering or lettering of exhibits, or other means of identification—while the witness is testifying from one chart, the jurors will be thumbing through the others. This is not necessarily because they do not understand which photograph is the subject of testimony, but perhaps only because they are exercising the human prerogative of curiosity. It does not seem to matter whether exhibits are hinged, bound in pretty volumes or simply submitted unattached—the jury explorations persist. This has the effect of preventing the jurors from properly following the testimony and is overcome by the very simple expedient of introducing the small exhibits one set at a time. It is deemed most advisable for the witness to hand counsel one set of exhibits, proceed until finished with the exhibit, then produce the second set of photographs for distribution. Counsel should collect from the jurors the first set of exhibits before presenting the second and so on.

There can be no doubt but that the system of small photographs here advocated poses a greater problem at the trial than does the single exhibit. However, most of the difficulty arises from an uneasiness on the part of counsel who is, in many instances, trying his first case involving document testimony. There have been instances wherein men known to be good attorneys have handled a case in their usual competent manner *until* the expert testimony is reached. At that point there has been observed a reaction which can only be described as akin to a siege of stage fright. Cases have been presented wherein attorneys have been unable even to follow properly the list of prepared qualifying questions, explaining later that they could not account for what occurred. This, of course, is the exception. As previously stated, the expert witness has great latitude and the competent, confident, and experienced document examiner can not only at the pre-trial conference, but actually during the progress of the trial offer guidance to counsel in the proper presentation of the photographic exhibits. It is the judgment of the writer that the few difficulties encountered in introducing small charts are more than compensated by the added effectiveness of the testimony.

It has been the policy of the writer to prepare the small photographic charts in groups of ten. This allows six prints for the jury (one for each two jurors) one for the Court, one for counsel, one for opposing counsel, and one for the witness. There is an economic advantage to this plan in that six less photographs are needed than if each juror were to receive a copy. Also, the problem of transport is lessened. If, for example, a case requires the use of four sets of photographs, forty

exhibits are carried to Court as against the sixty-four necessary if each juror were furnished a copy. The only mention of the size of the individual chart has been an expression that the maximum size should not exceed 11 x 14-inches, and the adoption of the 11 x 14 print for all-purpose use is looked upon favorably. The writer has, however, on a number of occasions used 8 x 10-inch photographs without adverse effect. In one instance there was adverse comment. A prosecutor expressed the opinion that the photographs were too small. Questioning developed that he had observed handwriting testimony on one or two previous occasions, and in each instance the witness had testified from a single enlargement. He believed that enlargements had sufficient psychological effect to justify their use. Except in unusual cases where circumstances dictate their use, 8 x 10-inch charts are not recommended.

In these days of inflated equipment and material costs, it is believed that the economy of the small photograph is one of the strong points in its favor. It is contemplated, of course, that 11 x 14-inch and smaller charts will be produced by the contact printing process. Once a proper negative is produced and set on the surface of the printer, chart production is a rapid, inexpensive procedure. Contrariwise, although the production of a proper negative is a large obstacle overcome in projection production, there are some major and many petty difficulties which can arise to add to costs in time and material expenditures.

If the examiner of questioned documents is using bromides not produced in his laboratory, he has noted during the past few years, if his experience is typical, a steadily increasing cost in the outside production of such exhibits. As yet the end of these cost increases is not in sight.

To conclude this paper it will be stated that the writer, after a complete weighing of advantages and disadvantages, has found most effective in Court room presentation, the small individual photographic chart, not to exceed 11 x 14-inches in size. Experience has further shown that used consistently, such photographs are economically advantageous.