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# POLICE SCIENCE

## PREPARING TO TESTIFY

CLARK SELLERS

Clark Sellers is an examiner of questioned documents in Los Angeles, California and is recognized as the dean of document examiners in this country. He is a charter member of the American Society of Questioned Document Examiners and a past president of the organization; a fellow of the American Academy of Forensic Sciences; one of the convenors of the First International Meeting in Questioned Documents, London, 1963; and author of articles which have appeared in this Journal and other leading technical and legal publications. Mr. Sellers, an outstanding expert witness, has appeared in many prominent cases throughout the United States, and we are very pleased to be able to publish his remarks on this subject which were presented at the 1964 meeting of the American Society of Questioned Document Examiners.—EDITOR.

The document examiner has a *dual* objective: first, to discover the facts; second, to prove the facts. The first without the second is futile. It is not enough to merely ferret out and assemble the facts. The document examiner who would truly serve the ends of justice must go to the witness chair fully prepared to support his conclusions with testimony that is factual, clearly understandable, and persuasive. Dean John H. Wigmore, the perceptive writer on law and evidence, states that expert testimony should be "measured by its convincingness."

Preparation to testify as an examiner of questioned documents is in effect preparation to convince—convince the jury, the judge, or whoever is to pass judgment on the testimony that the conclusion reached by the witness is correct.

In order to give testimony of exceptional caliber, it is necessary to make exceptional preparation. The expert witness should be physically, psychologically, and factually prepared if he is to rise to his highest capabilities.

In preparing to testify in a truly expert manner, that witness has a tremendous advantage who maintains the open mind of a true scientist, possesses an imagination that allows free rein to every phase of the problem, and has a temperament in which courage predominates over fear, principle over expediency, and thoroughness over half-way measures.

It is most unlikely that any document examiner can reach his highest potential unless he acquires a vivid imagination and effectively utilizes it. The higher the degree of intelligence, the keener the imagination. Imagination as used here has no

reference to fancy, fantasy or day dreaming. Rather, it is used in the sense of creativeness: the faculty to conceive, to think, to conjecture, to form a mental picture, to invent. The active use of a trained imagination stimulates man's inherent creative force and lifts him above the commonplace. Thomas A. Edison, undoubtedly one of America's greatest exponents of the value of creative imagination, stated that the man with the most keenly developed imagination is the man who is in position to accomplish the greatest results. Preparation to testify effectively entails the use of developed imagination.

No man is endowed at birth with the ability to be a great expert, but he can become one provided he is not born with blind spots which prevent him from seeing, understanding, and reasoning logically. Irrespective of the extent of their study and experience, it is impossible for some individuals to ever learn to be proficient document examiners. Some persons are fundamentally incapable of becoming skilled lawyers, doctors, or document examiners even though they might devote a thousand years to study and practice. Fortunately, this is true of only a small minority. Mediocrity may sometimes be due to mental deficiency, but too often it results from lack of intelligent and zealous application to the project at hand. It is certain we are not born with knowledge. We must dig to acquire it.

People come into this world with certain aptitudes which indifference or neglect may cause to decay, or which careful nurturing may eventually develop to a high degree of competence. On the other hand, it frequently happens that a person

without aptitude for a given pursuit may nevertheless by study and intelligent application surpass the man who fails to cultivate his natural talent.

Preparation to testify envisages the expert being the perfect witness; yet regardless of his natural aptitudes, education, and extent of training, no document examiner reaches perfection as a witness. In that phase of the work there exist all degrees of attainment, from mediocrity to consummate skill. Fortunately, a document examiner, whatever his degree of proficiency, can through zeal, diligence, study, and practice constantly improve his performance as a witness.

To the document examiner who aspires to reach the heights and remain there, two bedrock qualities are imperative—honesty and sincerity.

By honesty is meant that the document examiner performs his services to his best ability, that he is free from deception, that he has no reservations as to his testimony unless he states on the witness stand what those reservations are, and that he is completely fair to himself, to those who employ him and to those before whom he testifies. Simple and straightforward honesty inspires confidence and is a fundamental requirement in the preparation to give testimony. Honesty is an attribute to be acquired in daily living and is not a cloak to be put on or taken off merely to meet a situation.

Sincerity, likewise, is a necessary requisite to the preparation to give convincing testimony. An earnest witness whose whole bearing evinces sincerity may in effect climb from the witness chair into the lap of judge or juror. No single attribute is more conducive to belief than sincerity. He who, year after year, would give convincing testimony must build a reputation for sincerity and honesty—for without these qualities a questioned document examiner is doomed to frustration and eventually to failure.

No phase of the intricate processes of examining a document and preparing to testify can be said to be without special importance. Every individual step merits that degree of attention which is warranted in order for the document expert to go to the witness stand with absolute confidence that his conclusion is correct and that he is thoroughly prepared to give cogent and persuasive reasons for that conclusion. The wisest of men are constantly on the alert not only for new ideas, but for ways of adapting old ideas to new uses.

One of the most valuable resources of a qualified document examiner in his preparation to testify

is the utilization of past experience. Every seasoned document examiner has a veritable gold mine of experiences upon which he can draw in preparing to testify, experiences that are waiting to be reviewed, analyzed, and put to use in a present case. By reading former reports, by reviewing methods previously employed in preparing demonstrations, and by reliving past testimony, a document examiner can keep active and at his finger tips for instant use his store of valuable experiences. These can be made to serve him again and again and often with increased effect.

Unfortunately, however, even an experienced witness will sometimes overlook a procedure he has used effectively in other cases, or has read of in the literature, or has heard of in the conclaves of document examiners. For this reason it would be helpful to most expert witnesses if they would prepare lists of effective methods of demonstrating document evidence, and of other procedures to follow. These lists could profitably be reviewed just before starting to prepare a case for trial.

The man who is momentarily lost, or not quite sure where he stands, can often clarify the situation by climbing to an eminence which affords an unobstructed view of his surroundings. So it is in preparing a case for trial, the expert has the opportunity, if he will but use it, to mentally climb the peaks of acquired knowledge and experience and look in every direction. From this lofty vista it is possible for him to survey one by one the various aspects of his problem, and decide which course will best serve the ends of justice.

In the preparation of a case for trial document examiners who draw liberally on experiences of the past have a decided advantage over those who think and act only in the present. A person may become so engrossed with routine that meditation, review of past experience, and the devising of new procedures, are all but impossible. In his endeavor to reach the ultimate, a document examiner is wise to take time away from the grindstone to think, to meditate, to review past experience, and to plan systematically to present his testimony in the most effective way of which he is capable.

Another important step in preparing to testify is that of clarifying and defining the issues. Writing questions is one way of accomplishing this. When a case is first accepted it is well to write down a series of questions, the answers to which may solve the problem. It is here suggested that as a part of his preparation the document examiner should write out not only the main question about

a disputed document, but also related questions, the answers to which may throw additional light on the matter. In fact, the question originally asked when the case is first submitted may not be the question which eventually leads to solution of the problem.

Testimony is, of course, more effective if accompanied by suitable illustrations. Perhaps no phase of preparation to testify by a document examiner is more important than the making of photographic illustrations to demonstrate the reasons for his opinion. Such illustrations should have a logical sequence, they should be readily understandable, and they should be convincing. The preparation of effective demonstrative photographs is an art in itself.

Before making photographs it is well to evaluate the relative convincingness of each point to be illustrated. Which are strong, which are stronger, and which are the strongest of all? It is usually a combination of features that confirms a conclusion. In most cases there are significant features which if properly emphasized, will establish conviction in the minds of the judge and jurors. In arranging photographs it is well to have in mind that too many points illustrated on one photograph may be confusing. An important principle of salesmanship is to have the eyes focused on one single thing at a time.

As a part of the preparation to testify the expert usually prepares a set of questions which the trial lawyer can use to qualify him as an expert witness. Also as a rule the lawyer desires the expert to furnish him questions to bring out all facets of his testimony as well as the reasons for his conclusion. It is helpful from the standpoint of convincingness if this list includes questions which point up the extent and thoroughness of the examination made by the expert. Judges and juries are impressed, sometimes even amazed, when a recounting is made of the many things investigated and considered by the qualified expert during the examination of the documents.

Preparing to testify includes preparation to cope with possible emergencies or surprise testimony which may arise during trial. It may be that by careful attention in advance to possible emergencies, these may be averted entirely or even turned to advantage. By considering before trial what these emergencies may be the document examiner and trial lawyer can take steps to meet them.

One such emergency may be that when the docu-

ment expert arrives in court to testify he learns that needed standards of comparison have not been placed in evidence, and that his lawyer does not know how to get them in evidence, or that the proper witness is not in court to identify the standards. Such unfortunate situations probably would not have arisen had the subject of standards been thoroughly discussed in advance between the document expert and the trial lawyer. The lawyer should know exactly what standards are necessary, and he should know the law pertaining to their introduction in evidence.

Another emergency may be the objection by the opposing lawyer to the document examiner giving reasons for his opinion on direct examination. The trial lawyer should be fully armed, of course, with legal decisions showing that the expert witness should be permitted to give the reasons for his opinion on direct testimony. If the expert is not allowed to give reasons he is robbed of his most effective weapon with which to establish the truth.

Still another emergency may be the objection by the opposition to the introduction in evidence of the expert's demonstrative photographs. Here, too, the trial lawyer should be prepared to meet such objections by having readily at hand law decisions upholding the introduction of photographs in evidence.

As a part of his preparation to testify the expert document witness should anticipate the possibility that the opposition may submit a test to him designed to trap him into rendering a snap judgment opinion which may later prove to be wrong. If the test is a fair one, which is seldom the case, the expert should attempt to answer it to the best of his ability under the circumstances, having in mind the extreme care he exercises in his own office before rendering an opinion. The qualified expert will be on the alert for an opportunity to state that he does not give snap judgments in his office, and prefers not to be forced to do so in court.

It is well for the expert to prepare in advance some stock answers that he can use to protect himself against possible error when confronted with surprise test problems.

Special preparation should, of course, be made for cross-examination. One of the most effective ways of successfully meeting cross-examination is for the expert to anticipate the points that will be inquired about on cross-examination, and wherever possible to cover these points on his direct testimony, thus beating the opposition to the punch. If there is any weakness in the docu-

ment evidence the worthy document examiner will not hesitate to point it out.

One way for the witness to anticipate the questions that will be asked of him on cross-examination is to search for weak or adverse evidence in the documents, and to criticize his own intended testimony as well as his own illustrations.

In trial preparation it is wise to consider that an opposing qualified document examiner may critically scrutinize the expert's testimony and demonstrative illustrations for the express purpose of finding something wrong or unfair. Is there justification for criticism? If so, what is it, and how should it be met?

If testimony is to be convincing it must be understood. If the testimony is a hazy mass of jargon the jury will remember little or none of it. Jurors have no time, and probably limited ability to clarify or to arrange in logical sequence the thoughts which a slipshod witness has expressed. The expert should, of course, make sure before he takes the witness chair that his testimony will be clearly understandable and in logical sequence.

Some experts who are highly impressive and convincing witnesses have become so by practicing aloud in private their intended testimony. In the course of this practice the construction of sentences, the sequence of ideas, and the choice of words can be rearranged and improved upon so that the meaning becomes more and more clear, more logical, with the emphasis in just the right places. The selection of descriptive "words and phrases that stick" should be carefully considered. "Phrases that stick" can be attention-getters and memory hooks.

In preparing to testify the qualified expert will keep in mind that his testimony may be reviewed by an appellate court. Since the justices of the appeal courts can neither see nor hear the testimony, the expert should be ever careful to state clearly his opinion and the reasons for it. In preparation, the witness should place himself in turn in the position of the jurors, the trial judge, and the appellate justices. He should consider whether or not the testimony he is to give will be clear to each of them and whether it precisely sets forth what he intends to convey.

Attention should be given to the fact that the appeal courts may not be able to follow the testimony unless the expert describes the exhibit by giving the exhibit number and the precise location of the particular point about which he is testifying.

Another phase of preparation to testify is the

anticipation of the possible testimony of an opposing expert. It is suggested that the document examiner and his trial lawyer discuss in detail possible opposing expert testimony and devise ways and means of meeting it. One of the helpful preliminary steps in accomplishing this is to make a careful analysis of the strong and weak points of the document evidence. Another step is to write out suggested questions to be asked the opposing expert on cross-examination, and wherever practical construct these questions so they will call for a "yes" or a "no" answer. The questions, of course, will be designed to show the opposing expert did not make accurate observations of the evidence or that his reasoning was not correct, or both.

In considering the various aspects of trial preparation there is one important phase that is frequently entirely overlooked and this is "courtroom atmosphere." Cases are sometimes lost solely because of an unfavorable trial atmosphere.

Recognition of what may create an unfavorable atmosphere is helpful in guarding against such a situation. Jurors may be influenced by things other than the evidence. A lay witness may have created a poor impression by his mannerisms or personal appearance, or the trial lawyer may have been impulsive, or arrogant, or unduly argumentative, or his handling of the case may have revealed that he was not well prepared, or there may be an antagonistic attitude toward expert testimony, with the result that when the well qualified document examiner takes the witness stand there is a hostile atmosphere that places him in an unfair position.

One of the steps the trial lawyer can take in building a favorable attitude is that of carefully selecting the witnesses and the sequence in which they are to testify, leading up to the all important testimony of the expert witness who must be believed if judge and jury are to reach the correct verdict. If the expert witness takes the stand in an atmosphere of doubt or distrust, if he is not treated with dignity and respect, if there is any faltering or fumbling in presenting the evidence logically step by step, the expert is placed at a distinct disadvantage irrespective of how correct his testimony may be.

There are, of course, many important things a skillful trial lawyer can do, not only in preventing an unfavorable courtroom attitude, but in creating a desirable one. One of the important things that he can do is to build up his own expert. By his language, by the inflection of his voice, and by his

demeanor he can show the utmost confidence in the honesty and in the outstanding qualifications of his expert and most important of all, his conviction that his expert has reached the correct opinion.

If the examiner of questioned documents does find himself confronted with a bad courtroom atmosphere he can do much to overcome it. In the first place his entire conduct throughout can be diametrically opposed to that which may have caused the unfavorable atmosphere. He can be patient and courteous, pleasant, tactful, and well poised. He can present his testimony in an interesting and impartial manner, at the same time displaying such thorough knowledge of the subject about which he is testifying that hostility and antagonism will be replaced by confidence and trust, and even admiration.

A famous trial lawyer in commenting on how a juror may be favorably or unfavorably impressed by a witness even before he has said one word stated: "Jurors are often influenced by first appearances. Make sure your first appearance before them is a good one."

In the effort to present expert testimony convincingly much depends on the cooperation of the trial lawyer with the document expert. Strictly speaking, it is the duty of the trial attorney to handle the legal phases of the case and the duty of the document examiner to handle the expert testimony. But experience has shown that better results have been obtained in trials involving a questioned document problem if there is intelligent and wholehearted cooperation between the trial lawyer and the expert.

It seems common sense that the lawyer and the examiner of questioned documents should hold pretrial talks during which the questions to be asked the expert and his answers are fully explored. The standards of comparisons needed and how they are to be introduced; what demonstration photographs are to be used and when and how they are to be presented in evidence, are all points which can be advantageously discussed in advance of trial. In addition the expert may be of direct assistance to the lawyer by referring him to books and treatises applicable to the questioned document problem at issue. Likewise, other phases of the trial which may affect the expert testimony, such as emergencies to be anticipated, how to cope with opposing expert testimony, the creation of a proper courtroom atmosphere, may all properly receive attention in pretrial discussions.

The intricate process of effectively trying a questioned document case is a team effort between the lawyer and the expert in which the ends of justice can best be served if the evidence given by the expert flows smoothly, understandably, logically, and convincingly. Anything which may aid in producing such a result is justifiably a part of trial preparation.

As a part of his preparation to testify an experienced document examiner is mindful that everything he does or says from the time he is first interviewed on a particular case until he is sworn as a witness is subject to cross-examination.

From the instant the expert witness is first interviewed respecting a case he begins to make a record, written or unwritten. The date the case was first discussed, the statements made at that first interview, as well as statements made at subsequent interviews, dates on which documents were examined, types of examinations made, when photographs were made, when reports were rendered, when written notes were made, are all a part of preparing to testify. Records that are kept in a businesslike manner lay the foundation for the confidence and poise of a witness; furthermore, they impress the judge, the jury and the lawyers that here is a witness who knows his business.

In preparing to give convincing testimony the expert's own mental attitude is of paramount importance. He should justifiably have a deep-seated conviction that his work is one of the most important functions in the whole administration of justice.

Individuals whose interest it is to win lawsuits at any cost are willing, yes, even searching for the opportunity, to downgrade this great profession. Often the attempt to do this is made by casting aspersions, by making pawns of the weak or unqualified, or through the clever use of words arguing the ridiculous, yet somehow too often making the ridiculous sound plausible to the unknowing. Every hypocrite, every grandstander, every would-be-winner-at-any-price is a potential enemy of justice.

Accurate. Fair. Courageous. Those three words epitomize what a document examiner can be—what he should be. Such descriptive terms are mere words to some, but to others they are the fundamental truths on which the secure foundation of this profession is built.

It may be stated with pardonable pride that from the ranks of document examiners have come

leaders in developing scientific procedures, leaders in devising means of demonstrating evidence in court in a convincing manner, and leaders in setting and upholding highest ethical standards. This profession has produced men who have nationally and world-wide influenced for the better, the administration of justice, and this influence has extended beyond its own confines. The outstanding reputation acquired for ability and honesty in a particular field has always carried over to and filtered through the thinking of those in related fields, assisting them to a better performance of their work.

The worthy document examiner begins the preparation of every case for trial with the firm conviction that it is his responsibility to serve the ends of justice. The fidelity with which the administration of justice is served by the profession of questioned document examination is the rod by which its usefulness to society is measured.

It can be truly said that a man's accomplishments are in direct proportion to the amount of intelligent preparation that goes into his endeavors. In the words of the late great General Douglas A. MacArthur: "Preparedness is the key to victory."