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# Effective Utilization of A Questioned Document Examiner

Winsor C. Moore\*

## I. INTRODUCTION

Countless cases have been lost unnecessarily because the attorney neglected to utilize effectively the unique qualifications possessed by the skilled questioned document examiner. Too often the attorney is entirely uninformed relative to the available services of the technical examiner who has devoted years of intensive study and diligent research in his profession. At present, the law school curricula do not emphasize this particular phase of trial technique and consequently, any knowledge possessed by the average trial attorney has been acquired through experience in his rather infrequent cases involving questioned documents.

With the increase in population and likewise in business transactions, questioned documents are becoming more numerous in the daily activities of the attorney. It therefore behooves the attorney, especially if he is actively engaged in practice, to become well acquainted with the variety of services which can be rendered by a qualified document examiner. Should a document be disputed, the attorney should know immediately what precautionary steps are necessary to protect his client. Time is usually of the essence in disputed document cases and reference material on the subject in the average law office is often exceedingly limited.

This article has been prepared to outline succinctly for the uninformed practicing attorney, who has inadequate library facilities, exactly what protective measures should be employed in a disputed document case and how the qualified document examiner might be utilized effectively as the case develops. The basic ideas presented are also applicable to local county and city attorneys in prosecuting criminal cases. Inasmuch as disputed handwriting is involved in a vast majority of questioned document cases, this phase is emphasized in this article although the rudimentary principles discussed are pertinent to all types of questioned documents whether they be disputed handwriting, typewritten material, handprinting, or the like.

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## II. DOCUMENT EXAMINATION AS A PROFESSION

## A. HISTORICAL DEVELOPMENT

Scientific examination<sup>1</sup> of questioned documents<sup>2</sup> developed into a distinct profession about 1870 when changes were made in the old laws regarding proof of handwriting. Under the common law, the only person who could testify concerning the genuineness of a writing was one who had witnessed the writing and his testimony was restricted to the act of writing and did not extend to the style or character of the disputed writing. This common law rule prohibiting comparisons was premised upon the primary concept that the determination of the genuineness of any writing would raise a collateral issue. Furthermore, in earlier days, nearly all persons composing the jury were unable to read and write and therefore, were incapable of making a comparison.

Commencing about 1870, many of the states began to enact statutes permitting genuine writings for comparison by experts.<sup>3</sup> Thus, one who possessed special skill and experience could make a comparison by placing that which had been established as genuine handwriting in juxtaposition with that which was disputed and form an opinion whether the writings were made by the same person. The theory upon which the expert witness has been permitted to testify is that every time a person writes, he automatically and unconsciously stamps his individuality in his writing.<sup>4</sup> This indi-

<sup>1</sup> A "scientific examination," broadly stated, is one conducted by scientific principles wherein the similarities and differences are observed and given proper weight in accordance with their general or individual characteristics.

<sup>2</sup> Osborn, *The Development of the Document Specialist*, 33 *J. Crim. L. & C.* 476 (1943); Osborn, *A New Profession*, 24 *J. Am. Jud. Soc.* 20 (1940); Sellers, *Science and Advancement in the Examination of Questioned Documents*, 3 *J. Police Sci.* 110 (1932).

<sup>3</sup> Nebraska has permitted genuine writings for comparison since its statehood in 1867. *Neb. Rev. Stat. § 25-1220* (Reissue 1956) provides that evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same person which is proved to be genuine. Such genuine writings upon proof should be admitted in evidence for the purpose of permitting the jury as well as experts to make the necessary comparison. *First Nat. Bank v. Carson*, 48 *Neb.* 763, 67 *N.W.* 779 (1896). Introduction of signatures for comparison raises question of fact for jury. *Wells v. Cochran*, 78 *Neb.* 612, 111 *N.W.* 381 (1907). Comparison may be made by expert or by jury. *Grand Island Banking Co. v. Shoemaker*, 31 *Neb.* 124, 47 *N.W.* 696 (1891). If neither party offers the court the benefit of the advice of an expert witness, the court, as trier of facts, may make comparison with magnifying glass. *Sack v. Siekman*, 147 *Neb.* 416, 23 *N.W.2d* 706 (1946).

<sup>4</sup> *In re Gordon's Will*, 50 *N.J.Eq.* 397, 26 *Atl.* 268, 277 (1893).

viduality is reflected in such writing habits as spacing, arrangement, pressure, shading, style, slant, size, proportion, pen lifts, alignment, manner of crossing a "t" and dotting an "i," manner in which the pen was held, grammatical construction, and fluidity.<sup>5</sup> Hence, in every person's writing there are characteristics or writing habits which distinguish that person's writing from all others. Rarely do two persons have the same combination of characteristics in their writings. When, therefore, the same combination of characteristics appears in the disputed writing and also in the genuine writing, identification becomes almost conclusive.<sup>6</sup> The handwriting of a person may vary superficially from time to time and in different writings but his habitual writing characteristics will remain unchanged.

In the development period commencing about 1870 there were innumerable controversies over the admission of photographs, charts, drawings, and other illustrative material. Microscopes, measuring and testing devices, and all other instruments were for years excluded in many cases. Furthermore, no definite reasons could be given for such opinions. Through the untiring efforts of Dean John H. Wigmore, Northwestern University Law School,<sup>7</sup> and Albert S. Osborn,<sup>8</sup> who is often cited as the dean of the questioned document examiners, progressive opinions began to appear discussing the subject of document expert testimony. The ancient restrictive rules were openly repudiated. The subject, in its new concept, became more and more an accepted and approved part of a trial.<sup>9</sup> In the celebrated *Loeb-Leopold* case<sup>10</sup> in 1924, for instance,

<sup>5</sup> Herzog, *Camera, Take the Stand* Ch. 7 (1940).

<sup>6</sup> *In re Hopkins' Will*, 35 Misc. 702, 72 N.Y. Supp. 415 (1901), *rev'd.*, 172 N.Y. 360, 65 N.E. 173 (1902). Only one distinctive characteristic in the disputed writing seldom or never justifies a definite conclusion, but when the number of identifying characteristics increases, the weight of the evidence multiplies by geometric progressions until all probability of coincidence disappears. Baker, *Law of Disputed and Forged Documents*, § 18, p. 23 (1955).

<sup>7</sup> Author of *Wigmore, Evidence* (1904, 1923).

<sup>8</sup> Author of *Osborn, Questioned Documents* (1910, 1929).

<sup>9</sup> See, e.g., *State v. Gummer*, 51 N.D. 445, 200 N.W. 20 (1924). "The study of handwriting has become a scientific matter, and with modern theories as to individual characteristics as expressed in handwriting and the scientific means for measurement and demonstration that have been devised the status of handwriting evidence has wholly changed. This being the case the rules of evidence with respect to handwriting have had to be enlarged accordingly. It is another case of the growth and progress of the law to meet modern requirements."

<sup>10</sup> Wood, *The Loeb-Leopold Case*, 1 J. Police Sci. 339 (1930).

identification of typewriting and handprinting became important issues at the trial. Also, scientific examination of handwriting was recognized in the *Lindbergh-Hauptmann* kidnapping trial<sup>11</sup> during the early thirties when eight of the foremost document examiners in the country made independent examinations, reached identical conclusions, and testified concerning the identity of the ransom letters.

#### B. QUALIFICATIONS OF THE DOCUMENT EXPERT

The qualification of an expert to testify upon the subject of questioned documents is committed to the sound discretion of the trial court. No precise rule exists relative to how much experience or knowledge of handwriting a witness must possess in order to qualify as an expert. Unless an abuse of discretion is shown, the discretion exercised by the trial court will not be disturbed on appeal.<sup>12</sup>

In some courts, the judges have been extremely lax in permitting persons to testify as handwriting experts.<sup>13</sup> Many times, graphologists, grapho-analysts, bank tellers,<sup>14</sup> penmanship instructors,<sup>15</sup> photographers, and others are permitted to testify as "handwriting experts" concerning the validity of a particular document. These persons profess to have expert ability because they have read "a" book on the subject; are engaged in some occupation where numerous specimens of handwriting are constantly observed; or have undertaken a study of character and personality through handwriting analysis. Without additional scientific training, such persons should not be permitted to testify as expert document examiners. For the most part, they possess no laboratory equipment

<sup>11</sup> *State v. Hauptmann*, 115 N.J.L. 412, 180 Atl. 809 (1935).

<sup>12</sup> *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833 (1945).

<sup>13</sup> Court, in one well-known case, unwittingly accepted the "expert" testimony of a witness who, it was afterward proven, was unable to write even so much as his own name. *Lavay, Disputed Handwriting* 82 (1909).

<sup>14</sup> See *Bank of Commerce v. McCarty*, 119 Neb. 795, 231 N.W. 34 (1930); and *In re O'Connor's Estate*, 105 Neb. 88, 179 N.W. 401 (1920) where a bank teller of many years' experience was allowed to testify. In 34 Ill. L. Rev. 433, 440, n. 10, *Law Witness Identification of Handwriting* (Inbau), results indicated that persons who had no special training or experience in handwriting identification achieved approximately the same degree of accuracy as bank employees.

<sup>15</sup> *Heffernan v. O'Neill*, 1 Neb. Unof. 363, 96 N.W. 244 (1901) (witness who stated he had made a special study of handwriting as an instructor for 25 years, and who had given special attention to comparison of signatures, was permitted to testify as an expert).

and they formulate their opinion solely from a cursory examination, perhaps using no instrument other than a magnifying glass. They base their opinion merely upon the general appearance of the writing.<sup>16</sup> Mere similarity in handwriting does not necessarily prove that it is genuine.<sup>17</sup> These pseudo-experts, because of their limited knowledge, obviously make poor witnesses for the attorney who attempts to use them and cause embarrassment when an alert cross-examiner attacks their qualifications.

In contrast, a skilled questioned document examiner today is much more than a person who merely calls himself a "handwriting expert." A qualified examiner is one who not only has read and studied most, if not all, of the leading books on the subject of disputed handwriting, but who owns and knows how to make a scientific examination of the disputed document by the use of such precision instruments as microscopes, micrometers, protractors, test plates, photographic equipment, and similar devices, and who has accomplished the art of giving clear and convincing testimony of his scientific findings in a court of law. Some legal training in the law of evidence is exceedingly beneficial in this regard. In addition to being an expert in handwriting identification, the qualified examiner of questioned documents knows, for example, how to differentiate inks; how to restore the readability of charred documents; how to identify typewritten material; how to identify checkwriters

<sup>16</sup> "The untrained 'experts' do not know how to examine handwriting and most of them have no equipment or instruments to assist them. They are also not trained to interpret and reason. Their examinations simply consist of 'looking at the general appearance of the writing' and guessing, and they may be right half of the time." Ashton, 1 J. Forensic Sci. 101, 105 (1956). "To the inexperienced eye of an observer the deviations in pen movement, which weave inwardly and outwardly in a line forming part of a letter, have no other significance than as an irregularity in the writing." Hagan, Disputed Writing 13 (1894).

<sup>17</sup> "The incompetent and inexperienced observer, whose only practical qualification is that he can read writing, as a rule reports that all suspected writing is genuine because he does not recognize and understand the qualities that show forgery, and in his comparisons he makes no distinction between similar and same. This observer is inclined to decide that similarity (and there is always some similarity in a forgery) indicates genuineness, but, on the other hand, he may make the error of deciding that any natural variation indicates forgery. In these inquiries there should, if possible, be a consensus of opinion of those best informed, after considering all the circumstances, but it must be said that, where only inexperienced lay witnesses are available, it is safer in some cases to decide on other evidence than on the handwriting itself." Osborn, The Investigation and Trial of a Questioned Document Case, 31 J. Crim. L. & C. 236, 240 (1940).

and similar machines; and how to decipher altered and obliterated writing by ultra-violet, infra-red, and other techniques. In essence, the qualified examiner must be thoroughly trained in not only the principles of handwriting identification, but must know the fundamental concepts of chemistry, physics, microscopy, and photography. A knowledge of photography is indispensable because he must be able, in an appropriate case, to prepare enlargements of the disputed document for presentation to the court and jury at the time he testifies.<sup>18</sup> Finally, the document examiner must possess that quality of the mind known as "scientific objectivity" which permits no outside influence or other factors aside from the physical evidence itself to interfere with his opinion. Actually, the work of the questioned document examiner is divided into two principal problems: (a) discovery of the facts, and (b) demonstration of the facts.<sup>19</sup>

An increasing number of lawyers and judges are becoming informed of the progress that has been made in the field of questioned documents and are turning to the trained document specialists to determine the facts in contested document cases. There are, however, still many lawyers and judges who have no idea or only a remote knowledge of the difference between a trained document examiner and a person whose only qualification is that he has, per-

<sup>18</sup> "The equipment, training, and experience of the expert on forged documents makes of him a special functionary for the illumination of facts which are not readily discernible by the nonexpert. While the character of a handwriting may be distinguished by a peculiarity in the formation and union of letters, it is not readily noticeable by the nonexpert; yet when analyzed by one who has devoted years to the study of questioned documents such character may be quickly determined, and from his conclusions it may be established that a writing imputed to another may be shown to have been forged and the alterations or changes in a document may be made clear to the untrained eye." *People v. Horowitz*, 70 Cal.App.2d 675, 161 P.2d 833, 841 (1945).

"The practiced eye of the expert will enable him to perceive the distinguishing characteristics or features in different specimens of handwriting, and at once to indicate the points of similarity or dissimilarity, though he may be entirely unacquainted with the specimens presented. By long practice and observation he has become skilled in such matters. Not so with the nonexpert. It is only when he has become familiar with the peculiarities of handwriting, as one becomes familiar with the countenances of his friends or the characteristics of objects of common observation, that he is able to distinguish between it and other specimens that may bear only a slight resemblance to it." *Copeland v. State*, 66 Ga. App. 142, 17 S.E.2d 288, 290 (1941).

<sup>19</sup> Black, *The Microscope in Document Examination*, 42 J. Crim. L., C. & P. S. 810 (1952).

haps, read a book or has observed an unusual quantity of specimens.<sup>20</sup>

In 1942, the American Society of Questioned Document Examiners was organized by the outstanding examiners in the country at the time. Membership is limited to invitation only and the invitees must be persons of high moral character with a thorough technical training in questioned document work. The Society is the only organization of its kind in the United States composed of private document examiners. It has its own Code of Ethics and holds extensive annual conferences so that its members are able to keep abreast with the latest developments in the scientific techniques for examining disputed documents. Examiners of questioned documents are for the most part either self-educated or received their training as an apprentice under the supervision of an experienced examiner. It is one of the functions of the Society to assist prospective members in broadening the scope of their training while at the same time making available to attorneys throughout the country a qualified group of document examiners.<sup>21</sup>

### III. DEVELOPMENT OF A DOCUMENT CASE BY THE ATTORNEY

#### A. GENERAL

Many attorneys think of a document examiner only when they are confronted with a forged or altered instrument. However, there are numerous instances where it would be wise for the attorney to have the genuineness of a document established at an early stage of the controversy, even though there is no superficial indication of forgery or alteration. For example, if the attorney is suing on a promissory note, and the note is first referred to an examiner of questioned documents for verification of its genuineness, the attorney can better prepare his case, advise and work out settlements before the trial, test the truthfulness of his own witnesses concerning the preparation of the document, or cross-examine an opposing witness on testimony pertaining to it. It is much more judicious to verify the genuineness of a document at the beginning of a case than after the case is ready for trial.<sup>22</sup>

<sup>20</sup> Ashton, *Questioned Documents and the Law*, 1 *J. Forensic Sci.* 101, 102 (1956).

<sup>21</sup> Hilton, *Education and Qualifications of Examiners of Questioned Documents*, 1 *J. Forensic Sci.* 35 (1956); Lacy, *A New Profession Has Lawyers as Clients*, 39 *A.B.A.J.* 477 (1953).

<sup>22</sup> Hilton, *The Examination of Questioned Documents*, 6 *Western Res. L. Rev.* 45 (1954).



If the document is disputed at the outset of the controversy, the average attorney is at a complete loss to know what procedure to pursue. His law books contain numerous decisions on the subject but usually nothing about the preliminary investigative steps which he should follow. The attorney, on first impulse, might be inclined to transmit the instrument directly to a document examiner but usually at this stage, without corroborating evidence, the referral would be premature. It is, therefore, imperative that the attorney have some concept of what should be undertaken from the moment the questioned document enters his office until the case is ready for trial. Without an adequate preparation in the investigative phase, the success of a questioned document case is doomed.<sup>23</sup>

#### B. EVIDENCE OF INVALIDITY

Invariably attorneys handle instruments which should be investigated to determine their validity in a set pattern. Fortunately, most attorneys approach documents with a questioning mind and if there is the slightest evidence of forgery or fraudulent alteration, they are diligent in gathering additional data to satisfy themselves concerning the authenticity of the document. Some attorneys, on the other hand, are inclined to accept documents on their face because they are unable to recognize even the most common traits of invalidity. A few of the traits of invalidity which should alert any attorney for further scrutiny are: (a) yellowish appearance from ink eradication; (b) strike-over on a typewriter; (c) under-writing and over-writing; (d) different size pages of typewritten material; (e) different size type on typewritten material; (f) different alignment of typewritten material; (g) signatures which have a drawn rather than a written appearance; (h) interlineations; (i) signature written with tremorous lines; (j) different color ink used in the written part of an instrument; (k) two or more identical signatures; (l) variation in line quality which might indicate that more than one pen was used; (m) new condition of the paper where the instrument is purported to have been executed years ago; and (n) any evidence of attempted disguise, such as backhand writing.<sup>24</sup>

If the attorney entertains any doubts about the validity of any instrument and does not know how to establish its validity, a qualified document examiner can assist the attorney in discovering the true facts. The available services of the trained examiner at this stage are often overlooked by the attorney.

<sup>23</sup> For a detailed general discussion, see Osborn, *The Investigation and Trial of a Questioned Document Case*, 31 J. Crim. L. & C. 236 (1940).

<sup>24</sup> *Ibid.*

### C. CLASSIFICATION OF QUESTIONED DOCUMENTS

Regardless of how infrequently an attorney might be confronted with a questioned document case, he should be cognizant of the various types of disputed instruments. A great majority of questioned papers are included in one of the following classes: (a) documents with questioned signatures; (b) documents with alleged fraudulent alterations; (c) documents in which the writing of the entire instrument is questioned; (d) documents attacked on the question of their age or date; (e) documents attacked on the question of materials used in their production, such as paper and ink; (f) documents typewritten and identification of the machine is sought; and (g) documents or writings involving the identification of some person, such as anonymous writing. In the last analysis, however, from a consideration of the various classes of disputed papers, it is apparent that there are only two distinct problems involved, namely, (a) whether a certain writing is genuine or forged, and (b) whether a certain writing identifies the writer.<sup>25</sup>

### D. CAPABILITIES OF A QUALIFIED DOCUMENT EXAMINER

Many attorneys are unaware of exactly what the trained document examiner is capable of doing and therefore they are hesitant to contact an examiner. Some of the many questions which might confront an attorney in a questioned document case and which the trained document examiner will usually be able to answer are: Is the signature genuine? Is the handwriting in the body of the document genuine? Was the anonymous letter written by a certain suspected person? Are there any material erasures or alterations? Was a certain writing written before or after the paper was folded? Is there any fraudulent substitution of pages? Was the writing continuously written in the order that it appears? Was more than one kind of ink used in writing the document? Is the paper as old as the date the document bears? What was the original writing obliterated by blotting out? What make of typewriter was used to write the document? Was the typewriting written on a particular typewriter? Is the typewriting consistent with the date of the instrument? Was the page written continuously without being removed from the typewriter? Was the same typewriter ribbon used on all of the pages? Were any sentences, phrases, words, letters or figures added to the original writings? These are

<sup>25</sup> Osborn, *Questioned Documents* Ch. II (1929). A trained examiner of questioned documents is capable of restoring the contents of charred documents but in many cases, the contents are not questioned.

only a few of the many questions that a trained document examiner will be able to answer and illustrate, in general, what the trained examiner is capable of doing.<sup>26</sup>

#### E. CARE AND PRESERVATION OF DISPUTED DOCUMENT

Upon receipt of the disputed document, it becomes incumbent upon the attorney to examine its condition and preserve it. The document should be maintained in its original condition by inserting it in a protective envelope without further folding. It should be kept in a dry place away from excessive heat and strong light. The document should not be handled excessively nor should it be mutilated by repeated folding, cutting, or tearing. Should it become necessary to handle a fragile instrument repeatedly before the case comes to trial, a cellophane or some other type of transparent covering should be employed. Moreover, if the situation warrants, it might prove fruitful if the attorney had an enlarged photograph made, depicting the condition of the instrument when he received it.<sup>27</sup>

#### F. INTERVIEWS WITH PROSPECTIVE WITNESSES

After the attorney has taken steps to preserve the instrument in the condition in which he received it, his next step in determining whether the instrument is valid or forged is to interview all persons who have an interest in the suspected document. This should be done without delay. If possible, a stenographer should be present to make a verbatim report of the interview. Otherwise, copious and careful notes should be made of all statements. Many times claimants under a suspected document are inclined to talk freely during this investigative stage but later, after reflecting about its particular significance, will deny a statement.

Should there be witnesses to the suspected document, they too should be interviewed to ascertain what would be the scope of their testimony if called to testify at the trial. The expected testimony often will appear too definite. Witnesses to a disputed will, for instance, may remember all of the minute details concerning a will executed years before. When such minute details are related, the attorney should become suspicious about the authenticity of their prospective testimony.

<sup>26</sup> Lacy, A New Profession Has Lawyers as Clients, 39 A.B.A.J. 477 (1953).

<sup>27</sup> Hilton, The Care and Preservation of Documents in Criminal Investigation, 31 J. Crim. L. & C. 103 (1940).

## G. ACQUISITION OF STANDARDS

1. *General*

The acquisition of proper standards<sup>28</sup> is perhaps the most important function of the attorney during the preliminary stage of a case involving a disputed document.<sup>29</sup> Special care is required to insure that the selected standards are representative of the genuine writing of the person whose writing is in dispute. Too often insufficient attention is given by the attorney to this important task. It is often assumed by the attorney that an unqualified identification can be made from one or two genuine signatures. Unless adequate standards are obtained, the proficiency of the document examiner will be restricted.

In acquiring standards, the attorney should adhere to the rules of legal ethics. If the attorney, for instance, desires a specimen of a writing and the person whose writing is sought has employed counsel, the counsel should be consulted before the person is requested to give a specimen of his writing. The attorney should also be especially careful to be sure that the standards are admissible in evidence. Writings cannot be admitted as standards of comparison if there is the slightest doubt concerning their genuineness.<sup>30</sup> The genuineness of a standard writing may be established (a) by the admission of the person sought to be charged with the disputed writing made at or for the purpose of the trial, or by his testimony; (b) by witnesses who saw the standards written or to whom or in whose hearing the person sought to be charged acknowledged the writing thereof; (c) by evidence showing that the reputed writer had acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns;<sup>31</sup> or by a responsive communication, as a letter directed to the suspect, and testified to by the person who sent the com-

<sup>28</sup> "Standards" in questioned document investigations means such items known to be genuine as can be used without question for comparison with any disputed handwriting, handprinting, typewriting, printing, etc. Smith, *Obtaining Document Standards for Comparison*, 40 J. Crim. L. & C. 105 (1949).

<sup>29</sup> Hilton, *The Collection of Writing Standards in Criminal Investigation*, 32 J. Crim. L. & C. 241 (1941).

<sup>30</sup> Only a genuine signature admitted or proven can be submitted to a jury for comparison with disputed writings. *Link v. Reeves*, 3 Neb. Unof. 383, 91 N.W. 506 (1902).

<sup>31</sup> *Snider v. Preachers Aid Society*, 111 Ind. App. 410, 41 N.E.2d 665 (1942).

munication and received the specimen in reply.<sup>32</sup>

Standards are usually divided into (a) collected standards and (b) requested standards. "Collected standards" consist of specimens written or printed in the course of daily transactions whereas "requested standards" are specimens executed upon request for the sole purpose of making a comparison with the questioned document.

## 2. *Collected Standards*

In collecting standards from daily transactions, the attorney should adhere to certain rudimentary and common-sense principles. Obviously, a sufficient quantity of the suspected person's handwriting should be gathered. If a signature is in dispute, at least eight or ten genuine signatures would be desired by the examiner. Should the identity of a writer of an anonymous letter or of a document be solicited, four or five pages of the natural writing of the suspect should be obtained. Likewise, should the questioned document be handprinted, four or five pages of undisguised handprinting should be collected for comparison.

The subject matter of the collected standards should be similar to the suspected writing. For example, if the signature to a check is in dispute, the standards should also be signatures on genuine cancelled checks. The reason for this requirement is that oftentimes a person writes his name much differently on a check than shown in a signature to a letter. Furthermore, writers sometime intentionally employ different signatures for different purposes.

Collected standards should have been executed as closely as possible to the date of the disputed document because writing varies according to the age and according to the mental and physical condition of the person. Unless there is some extraordinary intervening factor such as a severe illness, standards written within two or three years of the date of the disputed document will usually be satisfactory.<sup>33</sup>

<sup>32</sup> *Violet v. Rose*, 39 Neb. 660, 58 N.W. 216 (1894). This is true although the witness who testifies to the handwriting never saw the writer and could not testify to have seen him write. *Western Union Telegraph Co. v. Goodman*, 166 Miss. 782, 146 So. 128 (1933).

<sup>33</sup> The time factor of the writing goes to the weight of the evidence to be determined by the jury and not to its admissibility. *Martin v. Webb*, 300 Ky. 11, 187 S.W.2d 828 (1945). Signatures can be offered in evidence as standards of comparison, regardless of the time of writing, but the presiding judge will use his discretion as to which signatures should be accepted as proper standards of comparison. *State v. Lucken*, 129 Minn. 402, 152 N.W. 769 (1915); *State v. Melson*, 186 Wash. 8, 56 P.2d 710 (1936).

The conditions under which a standard was written should be known because signatures written under natural conditions are usually preferable in all instances for standards of comparison.<sup>34</sup> As such, they contain the habitual characteristics of the writer without disguise or distortion. However, if it is definitely known that the person suspected wrote the disputed writing while in an unnatural writing position, such as while standing, walking, reclining, or riding in a moving vehicle, it would be desirable, if possible, to obtain a standard written under the same physical condition. If the disputed document was written in ink, the standards should be in ink; if the disputed document was written on ruled paper, standards should also be written on ruled paper.

The foregoing principles for the collection of standards represent a few of the basic requirements for questioned document examination. Many times the attorney will be unable to comply with all of the fundamental requisites, especially in collecting the desired number of standards. Oftentimes, though, if the attorney will communicate with the questioned document examiner who later will make the comparison, the attorney might receive suggestive leads for the collection of additional standards.

Potential sources of standards for collection are cancelled checks; signature cards for bank accounts and safety deposit boxes; receipts for private communications such as telegrams, special delivery or registered letters; signatures on legal documents, such as deeds, mortgages, bills of sale, contracts, and promissory notes; public records, such as application for marriage and driver's licenses, automobile registrations, and tax returns for real and personal property;<sup>35</sup> signature on a bond;<sup>36</sup> applications for gas, electricity, water, and telephone service; court papers, such as probated wills, pleadings filed in civil actions; private records such as payrolls, application for employment, and other personnel matters; and in the case of students, the class registration cards should not be

<sup>34</sup> "It is only when the paper is written, not by design but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness." *Hickory v. United States*, 151 U.S. 303, 307 (1894).

<sup>35</sup> See *First Nat. Bank v. Carson*, 48 Neb. 763, 67 N.W. 779 (1896).

<sup>36</sup> In an action on the bond of a notary public for making a false certificate of acknowledgment to a deed, the official signature on her bond filed with the county clerk may be received in evidence for the purpose of comparison of handwriting. *Harrington v. Vogle*, 103 Neb. 677, 173 N.W. 699 (1919).

overlooked. If the identity of handwriting other than a signature is sought, such as to establish the writer of anonymous letters, specimens of the suspect's handwriting might also be obtained from acquaintances, correspondents, business reports, club membership applications, and similar sources.<sup>37</sup>

Actually, in locating existing standards of handwriting in any given case, the matter rests largely upon the ingenuity of the attorney who is undertaking the search. It may be that the attorney desires to hire some investigative agency or person to perform this arduous task, but nevertheless, in the last analysis, the responsibility remains with the attorney to be sure that proper and adequate standards for comparison are referred to the questioned document examiner.

### 3. *Requested Standards*

Whenever signatures or general writings of the accused are needed to be used as standards of comparison, they must be obtained from him in a lawful manner. Specimens of writing that are obtained in violation of law will not be admitted in evidence.<sup>38</sup> When the accused is requested to write and he objects, his privilege against self-incrimination prevents him, in some courts, from being compelled to write. However, where the defendant testifies in his own behalf, is requested to write, and does write his name as a specimen for comparison with other signatures at the trial, and no objection is made on the ground of self-incrimination, the written specimen will be admitted in evidence as a standard of comparison.<sup>39</sup>

A requested specimen of the handwriting of the suspect perhaps is the easiest way to prove genuineness but it might not be the best specimen for comparison by the document examiner. This is because the specimen may have been written under strain and stress when the writer is innocent, or, on the other hand, if the writer is guilty, efforts have been made to disguise the writing. Under such conditions, it is imperative that the attorney endeavor to have specimens written under normal conditions.

When the identity of a particular writing or printing is sought and the suspect is voluntarily willing to cooperate by giving a specimen, the attorney should control the conditions under which the writing is performed. In this regard, the attorney should dictate

<sup>37</sup> Hilton, *The Collection of Writing Standards in Criminal Investigation*, 32 J. Crim. L. & C. 241 (1941).

<sup>38</sup> *Kennison v. State*, 97 Tex. Crim. App. 154, 260 S.W. 174 (1924).

<sup>39</sup> See *State v. Renner*, 34 N.M. 154, 279 Pac. 66 (1929).

material without suggestions pertaining to the arrangement of the material, spelling, punctuation, capitalization, or any other point which might cause the writer to disguise his natural writing habit. The dictation should be continuous and permit the writer to stop and start at frequent intervals. An increase in the speed of dictation lessens the opportunity for the writer to disguise his writing. Having the suspect copy typewritten, handwritten, or printed subject matter is unsatisfactory because the produced copy is not continuous writing.<sup>40</sup>

The type of subject matter to be used in requested standards depends upon the circumstances. In one case it might be well to dictate the contents of the questioned document; in another it would be appropriate to have the suspect write similar material containing the same words, phrases, and letter combinations; and in other cases it would be proper to dictate a standardized form which includes all the letters of the alphabet and a number of the more common words used in the disputed writing.<sup>41</sup> A combination of these three alternatives might be practicable in a given case.

In order to be sure that the requested specimens are free from disguise or nervousness, the requested subject matter should consist of at least five or six pages. In the case of signatures, at least ten or twelve specimens, each on a separate sheet of paper, should be gathered. Also, it is advisable to repeat some of the dictated subject matter because if the suspect attempted a disguise on the first writing it will be difficult for him to repeat the deliberate disguise when writing subsequently. Moreover, by repeating some of the subject matter, the writer becomes more familiar with the text and thus writes with a more natural style.

In requested standards, the writing instrument and the paper used should be the same as that used in the disputed document. The writing position should conform to that used in writing the disputed document. Thus, when it is known that the writing in dispute was written in a standing position at a counter, this situation should be duplicated. If the attorney suspects that the person wrote a particular paper with his left hand when he is right-handed, it might be well for the attorney to request a specimen from both hands.

The acquisition of standards, as has been illustrated, is much

<sup>40</sup> Hilton, *The Collection of Writing Standards in Criminal Investigation*, *supra* note 37.

<sup>41</sup> For suggested forms for dictation, see Osborn, *Questioned Documents*, at 34 (1929), and *Problem of Proof*, at 346, 347 (1926).



more than a perfunctory task. It is much more than merely obtaining one or two genuine signatures on cancelled checks or merely having the suspected person write his name one or two times upon a blank sheet of paper. Photostatic copies of standards should be gathered only if all details of the writing are clearly reproduced. If the attorney wants to be conscientious in his investigation, he must practice perseverance and know exactly what he needs. His research should be exhaustive, and he should not be content until after further efforts would prove futile. He should realize that no questioned document examiner can render an accurate opinion based upon inadequate standards and that the primary duty rests with the attorney to furnish the examiner with sufficient specimens. Unless the attorney fulfills his obligation, the examiner will have no alternative but to render only a qualified opinion.

#### H. COLLATERAL STUDY

During or subsequent to the acquisition of standards, the attorney should undertake an intensive study of questioned documents by reading at least one outstanding book on the subject<sup>42</sup> so that the evidence can be correctly and convincingly presented on direct examination, on cross-examination, and especially in final argument and arguments on objections. Many a case has collapsed at the trial because the attorney has neglected to inform himself sufficiently about technical words and phrases or procedure.<sup>43</sup> The prosecutor or trial attorney must recognize that he has a highly technical problem to put before the jury, and he must be in a position, both in his arguments and during his witness' testimony, to discuss intelligently the basis of the technical identification. Another important step in the attorney's pretrial work is briefing himself on the law peculiar to this type of evidence. When the

<sup>42</sup> Hilton, *Scientific Examination of Documents* (1956); Busch, *Law and Tactics of Jury Trial* (1950) (Ch.XX); Scott, *Photographic Evidence* (1942) (Ch.12); Osborn, *Questioned Documents* (1929); Osborn, *Problems of Proof* (1926).

<sup>43</sup> "To the lawyer having on trial a case in which the charge of forgery forms a feature, a knowledge of the facts relating to forged writings, and their production becomes very important. One understanding the causes conditioning the appearances of genuine, as contrasted with those of simulated writing, is better enabled to try a case of this kind intelligently than another, who has not a knowledge of these facts at his disposal." Hagan, *Disputed Handwriting* 9 (1894).

<sup>44</sup> Hilton, *Pre-Trial Preparation and Pre-Trial Conferences in a Questioned Document Case*, 27 *Tul. L. Rev.* 473 (1953).

expert witness begins to testify, periodic objections are raised to photographs, reasons, and specific statements. To prevent obstruction by these tactics, pertinent citations should be kept for ready reference.<sup>44</sup>

#### IV. FUNCTION OF DOCUMENT EXAMINER UPON REFERRAL AND BEFORE TRIAL

##### A. REFERRAL TO DOCUMENT EXAMINER

When a disputed document is submitted to the trained document examiner for preliminary examination concerning its validity, his primary function is to apply the principles of science and logic and render an impartial opinion.<sup>45</sup> He is not to be influenced by suggestions or innuendos from his client for a favorable opinion. His opinion should be strictly in accordance with the physical evidence in the document and only to the extent justified by the facts. He should be ready to admit frankly that certain questions cannot be answered due to the nature of the problem, the available material, or an insufficient opportunity for examination.<sup>46</sup>

All information received from the client by the reputable document examiner will be deemed confidential, and once a matter has been undertaken, the document examiner should refuse to perform any services for any person whose interests are opposed to those of the original client, except by express consent of all concerned.<sup>47</sup>

The selection of a competent questioned document examiner is of utmost importance to the attorney after he has completed his investigation and has procured all of the available and necessary standards for comparative examination. There are "pseudo-experts" and there are "experts." The attorney should never be content to employ less than the best person available. The name and location of a trained document examiner can be obtained from a number of sources. A local attorney might know about the ability or reputation of a document expert in the vicinity. The classified section of the telephone directory lists questioned document identification experts, but before the attorney utilizes this medium he should investigate thoroughly the qualifications of the purported expert, unless the expert is known personally. Also, Martindale-Hubbell legal directory might be consulted. The American Bar Journal carries advertisements of document examiners who list

<sup>45</sup> Code of Ethics No. 1, Am Soc of Questioned Document Examiners. (The entire Code of Ethics of the Am. Soc. of Questioned Document Examiners, can be found in 40 A.B.A.J. 690 [1954]).

<sup>46</sup> Code of Ethics No. 4, 40 A.B.A.J. 690 (1954).

<sup>47</sup> Code of Ethics No. 3, 40 A.B.A.J. 690 (1954).

their qualifications. Lastly, the attorney might write to the president of the American Society of Questioned Document Examiners<sup>48</sup> or to the chairman of the Questioned Document Section, American Academy of Forensic Sciences,<sup>49</sup> who will recommend an examiner who is either a member or associated with their respective organizations.

Needless to state, in referring exhibits to a document examiner by mail, the attorney should safeguard the material by designating the transmittal either registered or certified mail.

#### B. TYPES OF EXAMINATION MADE BY TRAINED EXAMINER

In general, the questioned document examiner deals only with evidence that can be seen, measured, and tested.<sup>50</sup> His conclusions result from sound reasoning and proper interpretation of a comparison of visible tangible things. As indicated heretofore,<sup>51</sup> the scientific document examiner does not merely look at the writing but will literally take it apart and examine every minute detail, including the speed of writing, whether the speed is constant throughout, or varied in portions; the line quality, pressure exerted on the writing instrument; hesitations; lifting of the pen; patching, retracing; slope of writing; whether angular or rounded arches or a combination of both; position of "i" dots, "t" crossings, periods, commas and other marks; relative height of letters; whether there is evidence of tracing or simulating another person's writing, and other things too numerous to mention. He will be aided in making these examinations by special instruments, such as microscopes; micrometers; glass test plates for accurately measuring slope, angles, curves, et cetera; hand magnifiers; special photographic equipment, lens, filters and lighting equipment for making infra-red, ultra-violet and all other kinds of photographs; and various chemicals and acids for testing inks and papers.<sup>52</sup>

<sup>48</sup> George Lacy, Esperson Building, Houston, Texas.

<sup>49</sup> Lt. David J. Purtell, Chicago Police Department, 1121 South State Street, Chicago, Illinois.

<sup>50</sup> Doud, *The Questioned Document Examiner*, 42 Ill. Bar. J. 914 (1954).

<sup>51</sup> II-B. Qualifications of the Document Expert, *supra*.

<sup>52</sup> Ashton, *Questioned Documents and the Law*, 1 J. Forensic Sci. 101, 104, 105 (1956). "We are not unmindful of the fact that . . . much progress has been made in the means and methods of detecting forgeries. By microscopic inspection, and by magnified photographs and sometimes by chemical tests, the expert may be able to discover and to demonstrate the existence of facts which negate the genuineness of the signature. Such facts, when proved, become substantive evidence, rather than mere expert opinion." *Keeney v. De La Gardee*, 212 Iowa 45, 235 N.W. 745, 749 (1931).

When the trained examiner discovers a sufficient number of individual writing habits shown in the genuine specimen corresponding to the same individual writing habits shown in the questioned writing, he can be sure that the concurring combination of writing habits in each specimen substantiates his conclusion that both writings were written by the same person.

#### C. REPORT OF THE DOCUMENT EXAMINER

After the trained examiner has made his scientific examination, he will usually render a detailed written report of his findings and his opinion. Generally, this report will show the type of examination made, his opinion, and the reasons for his conclusions. The detailed styles of reports will vary with each examiner and often with each case. Sometimes an examiner will merely render a certificate of examination giving his conclusion but with no reasons. However, regardless of the type or style furnished, the competent examiner will welcome any additional questions which the attorney might have. If any portion of the examiner's report, including his reasons, are inconclusive, the attorney should not hesitate to ask the examiner to elucidate because the attorney's lack of conviction concerning the validity of a particular instrument often is reflected in his prosecution or defense of a case.

The judicious specialist does not give an offhand or preliminary opinion before making his report. Normally, notes are made and the facts carefully reviewed and interpreted before a report is rendered. Should the document examiner find that the exhibits furnished are inconclusive for an unqualified report, he will usually relate this fact to the attorney who then must decide whether additional standards are obtainable. When the examiner does furnish a qualified opinion, one view indicates that it is the duty of the expert to aid the court to whatever extent he can, including testimony concerning his qualified opinion. Others believe that qualified opinions should not be the subject of testimony in court because it leaves the expert open to damaging cross-examination and criticism by the court. In one instance an expert was told by the court that he had no business testifying if he could not express a positive opinion.<sup>53</sup>

#### D. PREPARATION OF DOCUMENT EXAMINER FOR TRIAL

To present a questioned document case in court so that it will be convincing to the court and jury, it is necessary that extensive

<sup>53</sup> Doud, *Special Problems*, 2 J. Forensic Sci. 184 (1957).

preparation and cooperation exist on the part of both the attorney and the examiner.

As soon as the attorney, after receiving the preliminary report of the examiner, knows that he will need the testimony of the examiner in the case, he should notify the examiner immediately to allow the examiner sufficient time for preparation. Many attorneys needlessly procrastinate, notifying the examiner only a day or two before the trial. When the attorney delays, he can expect to receive only what the examiner has time to prepare, and, in some cases, an ethical examiner will withdraw from the case rather than give a demonstration based on inadequate preparation. It is unfair to the examiner to request him to prepare and testify on short notice since the examiner has his own reputation to uphold by his appearance in court. Thus he should be given ample time to organize his notes so that he can present his examination results in a logical, convincing, and forthright manner.

Unlike unscientific handwriting experts, modern examiners of questioned documents illustrate their conclusions, whenever possible, with clear enlarged photographs that can be understood by the judge and jury. The document examiner who makes the fullest use of photographs usually produces the most convincing testimony.<sup>54</sup> When the examiner is notified well in advance of the trial, he will be able to prepare adequate photographic exhibits, the value of which is recognized nearly everywhere.<sup>55</sup> No objection should be allowed which will prevent the admission of correct photographs whenever photography can assist the court and jury in arriving at a correct conclusion.<sup>56</sup> The trained examiner usually will know which type of photograph will be the most convincing under the circumstances and how the exhibits should be arranged to enable the untrained person to see the similarities or differences.

<sup>54</sup> Scott, *Photographic Evidence* 330 (1942).

<sup>55</sup> *Leland v. Leonard*, 95 Vt. 36, 112 Atl. 198 (1921).

<sup>56</sup> "It is now usually recognized that photographic evidence, even composite photographs for comparison purposes, are admissible in evidence where the authenticity and scientific accuracy are reasonably accounted for. In this case the expert testified that the composite photograph was made under his supervision and in his presence and was such as suited him for the purpose of comparison and study as the basis for an opinion. We think the admission of this exhibit in evidence was proper and furnished a very convenient method of submitting to the jury the admitted and contested signatures for their study." *Thomas v. State*, 197 Okl. 450, 172 P.2d 973, 976 (1946).

### E. PRE-TRIAL CONFERENCE

After the examiner has made his preparation of the case, it is essential that he and the attorney confer in order that they might consider the best manner in which to present the case. The examiner, at this pre-trial conference, should give the attorney all of the facts and be prepared to assist the attorney, who is on the equitable side of a questioned document case, in the following matters: (a) selection of fair and suitable standards of comparison; (b) order of questioned document proof; (c) introduction and use of photographic enlargements; (d) suggested direct examination for expert witnesses and lay witnesses who are testifying regarding the document at issue; (e) suggested cross-examination of opposing lay and expert witnesses whose opinions are incorrect, especially where the opposing "expert" is a graphologist or one not trained to make a scientific examination; and (f) suggested questioning in any deposition or discovery proceedings.<sup>57</sup> Some legal training on the part of the examiner, especially in the field of evidence, is invaluable at this pre-trial conference, but the legally trained examiner should be ever cautious that he does not become an advocate in the case. After a pre-trial conference has been held with a qualified document specialist, the attorney should realize the strength and weaknesses of his documentary case.<sup>58</sup>

Most, if not all, competent document examiners maintain extensive files containing the latest court decisions relative to questioned documents. These files are usually made available to the attorney. Furthermore, the document examiner usually will own a comprehensive library on the subject of questioned documents which the attorney should not overlook as a source for collateral reading while preparing his case.

## V. TRIAL

### A. GENERAL

Correct presentation of the document examiner's findings to the court and jury does not rest with the witness alone. The attorney must share this responsibility. Before the expert can testify, known specimens must be in evidence.<sup>59</sup> When the document ex-

<sup>57</sup> Lacy, *A New Profession Has Lawyers as Clients*, 39 A.B.A.J. 477 (1953).

<sup>58</sup> Hilton, *Pre-Trial Preparation and Pre-Trial Conferences in a Questioned Document Case*, 27 Tul. L. Rev. 473 (1953).

<sup>59</sup> When the issue being tried is as to the genuineness of an alleged signature of defendant, it is proper to put in evidence signatures admitted or clearly proved to be those of defendant for comparison with the disputed signature. *First Nat. Bank v. Hedgecock*, 87 Neb. 220, 127 N.W. 171 (1910).

aminer testifies, his qualifications must first be established,<sup>60</sup> the various documents presented to him for his opinion, his photographic exhibits admitted into evidence,<sup>61</sup> and appropriate questions asked so that he can fully discuss the facts and reasoning upon which his opinions are based.<sup>62</sup>

#### B. PROOF OF GENUINE SPECIMENS

Proper specimens of genuine writings are necessary standards of comparison so that the characteristics of the writer can be pointed out and shown to the court and jury in order to establish identification. The selection should comprise those writings or signatures known to be genuine and made under favorable conditions and in a natural manner, without design or unusual variations of style and disguise. No specimens should be introduced as standards which do not give the history of the paper, including writing covering its authenticity and when it was written. Otherwise the adversary, upon sufficient grounds, may object to its use as an unfair exhibit. When the statement of the time and source of specimens is offered, the trial judge must rule whether such specimens are sufficient under the rules of evidence and trial procedure.<sup>63</sup> The court may admit writing made during the progress of the trial as a basis for comparison.<sup>64</sup>

#### C. ESTABLISHING QUALIFICATIONS OF DOCUMENT EXAMINER

The general rule is that comparison of handwriting may be made by an expert but he must show himself qualified before testifying to his opinion based upon such comparison.<sup>65</sup> But how can the courts properly determine whether the document examiner is qualified? Actually, such qualifications should be based entirely upon ability to do the work and to reach the correct conclusion. Courts, however, cannot test the expert witness in this manner. They must depend instead upon such factors as the number of years and extent of experience, general and special education, appearances in other courts, general reputation, writings, lectures, membership in professional organizations, and other professional recognitions which might have been accorded the witness. These

<sup>60</sup> *Ibid.*

<sup>61</sup> A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. *Brockman v. State*, 163 Neb. 171, 79 N.W.2d 9 (1956); *Beads v. State*, 160 Neb. 538, 71 N.W.2d 86 (1955); *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953); *Turpit v. State*, 154 Neb. 385, 48 N.W.2d 83 (1951).

<sup>62</sup> *Hilton, Scientific Examination of Documents* 296 (1956).

criteria do give some indication of a person's ability, but there is a tendency to overemphasize the number of years experience and the number of court appearances.<sup>66</sup>

When the attorney calls the document examiner to the witness stand, the opposing counsel may offer to waive the qualifications of the examiner. If there is a trial to a jury or before a judge who is unfamiliar with the qualifications of the expert, the waiver should be declined because otherwise they will not learn about the expert's qualifications.

#### D. DIRECT TESTIMONY

When the document examiner is called upon to testify in court, his true purpose is to assist the court and jury in the rendition of their decision. The examiner is not advocating for either of the litigants. His appearance is only to present his unbiased opinion of what he believes to be the truth from his scientific examination.<sup>67</sup> Thus, in a disputed handwriting case, the true foundation of the testimony of an expert in handwriting is simply to make the jury see with their own eyes what he says is in the handwriting concerning which he testifies. He is, in fact and in truth, merely a trained observer who points out, explains, and evaluates for the purpose of identification the characteristics of the handwriting submitted to him so that the jurors may fully understand and give due consideration to this evidence thus adduced. The expert points out the peculiar characteristics existing in the handwriting which might otherwise pass unnoticed, explaining them in such a way that the jury feels justified in accepting his conclusions.<sup>68</sup>

The value of document expert testimony is measured by its convincing quality.<sup>69</sup> 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. Convincing document expert testimony is not accidental nor is it extemporaneous. It is an intellectual performance which grows out of thorough study and

<sup>63</sup> Baker, *Law of Disputed and Forged Documents* 82 (1955).

<sup>64</sup> *In re Husa's Estate*, 121 Neb. 67, 236 N.W. 177 (1931).

<sup>65</sup> *First Nat. Bank v. Hedgecock*, 87 Neb. 220, 127 N.W. 171 (1910).

<sup>66</sup> Hilton, *Education, and Qualifications of Examiners of Questioned Documents*, 1 *J. Forensic Sci.* 35 (1956). See also, Purtell, *Qualifications*, 2 *J. Forensic Sci.* 178 (1957).

<sup>67</sup> *Code of Ethics No. 5*, *Am Soc of Questioned Document Examiners*, 40 *A.B.A.J.* 690 (1954).

<sup>68</sup> *Wakely v. State*, 118 Neb. 346, 225 N.W. 42 (1929).

<sup>69</sup> Hilton, *Organization of Testimony*, 2 *J. Forensic Sci.* 180 (1957).



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. The persuasiveness of document expert testimony has been greatly increased by the use of the various kinds of modern document microscopes, photographic cameras with high grade lenses, and especially designed precision measuring instruments.<sup>70</sup>

Illustrative photographs aid the court and jury in following and understanding the explanations and reasons given for the opinion expressed by the expert. The kind of photographs used is determined by the nature of the case and what seems to be the best and most convincing manner of showing and illustrating the evidence. In general, small individual photographs or charts, furnished to each juror or to each two jurors, the court, counsel, and the witness, are usually preferred over the large bill-board type of photographs, although in some instances the latter may be used advantageously.<sup>71</sup>

When the examiner testifies, he should refer to the documents by identity as well as exhibit numbers. If the jury is to use any equipment, the equipment should be easy to use.<sup>72</sup> It is not advisable to ask jurors to use a microscope. Most jurors are not accustomed to using such instruments and in all probability they will not be able to make the necessary proper adjustments. A microscope might be used under certain circumstances if the trial is before a judge without a jury. Ordinarily, it is better to provide microscopic evidence in the form of photomicrographs or photomacrophographs. Under certain circumstances, such as showing color differentiations between ink lines, a projector for opaque colored objects may be used if the courtroom can be made sufficiently dark.<sup>73</sup>

<sup>70</sup> Stein, *Handwriting, Typewriting and Document Expert Testimony Tested by Its Convincingness*, 21 *J. Crim. L. & C.* 330 (1930). See also, Hilton, Doud, & Hall, *Effective Expert Testimony and Compensation for Expert Witnesses*, 2 *J. Forensic Sci.* 73 (1957); Doud, *Elements of Effective Expert Testimony*, 44 *J. Crim. L., C. & P. S.* 522 (1953).

<sup>71</sup> Ashton, *Illustrating Testimony*, 2 *J. Forensic Sci.* 181 (1957).

<sup>72</sup> Doud, *Elements of Effective Expert Testimony*, 44 *J. Crim. L., C. & P. S.* 522 (1953).

<sup>73</sup> Ashton, 2 *J. Forensic Sci.* 181, 182 (1957).

Drawings on a blackboard or a pad of drawing paper may sometimes be used advantageously in illustrating and explaining certain portions of testimony. These drawings may be used as an adjunct to photographs or when circumstances do not permit placing photographs in evidence.<sup>74</sup>

#### E. CROSS-EXAMINATION

On cross-examination the questioned document expert should maintain an attitude of helpfulness in bringing out the facts. He is not an advocate. The end objective of his testimony is merely to convince those who are to act on the testimony that it is correct.<sup>75</sup>

Cross-examination may include the classical test of handwriting experts. This is done by handing the witness a piece of paper on which has been written a series of names and insisting that he immediately give an opinion as to whether the series of names were written by one writer or more and, if by more than one writer, how many and, if more than one were written by the same writer, which ones and how many. This is an impossible assignment. It should be anticipated and prepared for by including in the direct testimony an explanation of the method employed in scientific examinations of handwriting.<sup>76</sup> A majority of the courts in which this question has arisen have held that it is improper to cross-examine the expert by the use of experimental tests.<sup>77</sup>

<sup>74</sup> *Ibid.*

<sup>75</sup> Sellers, *Cross-Examination from the Viewpoint of a Technical Witness*, 40 *J. Crim. L. & C.* 654 (1950).

<sup>76</sup> Brooks, *Cross-Examination*, 2 *J. Forensic Sci.* 182 (1957).

<sup>77</sup> *State v. Maxwell*, 151 *Kan.* 951, 102 *P.2d* 109 (1940).

"On the trial of an action on a promissory note, where the principal issue is as to the genuineness of the defendant's signature thereto, it is error to permit the defendant to present to plaintiff's witnesses, who are called to testify as experts, false signatures to notes prepared for the purpose of testing the ability of the witnesses to detect a forgery, and to cross-examine such witnesses as to such false signatures, and thereafter to introduce such signatures in evidence, and prove by another witness the fact that he wrote them himself." *Gaunt v. Harkness*, 53 *Kan.* 405, 36 *Pac.* 739 (1894).

"Next, if the purpose of the expert's study and formation of opinion be considered, it is preposterous to expect him invariably to obtain by a brief inspection on the stand the necessary data for an opinion. Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time but a quantity of apparatus and a certain degree of seclusion. For this reason the opportunity of extrajudicial study is often indispensable." *Wigmore, Evidence* § 2011 (3d ed. 1940).

An expert upon handwriting cannot be cross-examined as to the

Although the majority rule is that books may be used upon cross-examination only when the expert refers to them, a substantial minority of states allow their use even though he does not say that they corroborate his opinion and he does not rely upon them.<sup>78</sup>

Sometimes written standards are taken during the cross-examination but these have their shortcomings.<sup>79</sup> An expert witness may be interrogated as to the amount of fees paid or promised to be paid him in excess of the legal fees provided by statute for ordinary witnesses.<sup>80</sup> Sometimes the attorney will ask the examiner to sit at counsel table with him and aid him in framing questions to an opposing expert. There are cases where compliance with such a request would be appropriate, but usually the examiner will decline because it borders on advocacy. When it is known that the opposing counsel will call an "expert," the questions that might be put to the opposing "expert" on cross-examination could be framed at the pre-trial conference.

#### F. REDIRECT EXAMINATION

Many experts do not favor redirect examination unless some misconception of real importance was established on cross-examination. The following statement has been suggested: "Mr. Witness, has anything been brought out on cross-examination that in any way modified or changed your opinions?" The negative answer to this question takes care of almost any exigency arising out of cross-examination.<sup>81</sup>

#### G. WEIGHT GIVEN TO TESTIMONY OF EXAMINER

As a general rule, the sufficiency of the proof of a handwriting is a question for the court but the weight or value to be given the

genuineness of the signatures of another than the witness as to whose signatures he was examined in chief, where the genuineness of such other signatures is an element which was required to be established by the cross-examining party in order to sustain his defense, and to which he might have made the witness his own. *Schreiner v. Shanahan*, 105 Neb. 525, 181 N.W. 536 (1921).

<sup>78</sup> Nebraska follows the minority rule. *Fonda v. Northwestern Public Service Co.*, 138 Neb. 262, 292 N.W. 712 (1940). See also, Willens, *Cross-Examining the Expert Witness With the Aid of Books*, 41 J. Crim. L. & C. 192 (1950).

<sup>79</sup> *Hilton, Procuring Handwriting Specimens During Cross-Examination*, 28 Conn. Bar J. 168 (1954).

<sup>80</sup> *Wakeley v. State*, 118 Neb. 346, 225 N.W. 42 (1929); *Fetty v. State*, 118 Neb. 169, 223 N.W. 955 (1929). See also, Doud, *Answering the Cross-Examiner on Expert Witness Fees*, 2 J. Forensic Sci. 88 (1957).

<sup>81</sup> Doud, *Special Problems*, 2 J. Forensic Sci. 184, 185 (1957).

evidence by comparison is a question for the jury to determine. The value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics or lack of similar characteristics between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, creating an almost irresistible inference.<sup>82</sup> Thus, the weight or value of opinion testimony as to handwriting depends largely upon the character of the witness, the opportunity he had of acquiring a knowledge of the handwriting in question, and the cogency of the reasons for his opinion.<sup>83</sup>

The testimony of an attesting witness may be overcome by expert testimony.<sup>84</sup> For example, the testimony of a handwriting expert that a will offered for probate is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will executed;<sup>85</sup> testimony of a handwriting expert that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers, if based on sound reasons and

<sup>82</sup> *Murphy v. Murphy*, 146 Iowa 255, 125 N.W. 191 (1910); *In re Gordon's Will*, 50 N.J.Eq. 397, 26 Atl. 268 (1893).

"In the case of expert witnesses, their opinions are valuable only insofar as they point out satisfactory reasons for the ultimate conclusion of the witness. If the witness simply testifies that he believes the signature genuine, or not genuine, as the case may be, and gives no reasons for reaching his conclusion, his opinion is valueless, and the court will not consider it. If he gives reasons for his opinion, then it is the duty of the court to examine into and analyze those reasons, and determine the correctness or incorrectness of the opinion, and not simply consider the conclusion of the witness alone." *In re Burtis' Will*, 43 Misc. 437, 89 N.Y. Supp. 441, 445 (1904).

The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons. *Bank of Commerce v. McCarty*, 119 Neb. 795, 231 N.W. 34 (1930).

<sup>83</sup> *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945); *In re O'Connor's Estate*, 105 Neb. 88, 179 N.W. 401 (1920), *cert. denied*, *O'Connor v. Slaker*, 256 U.S. 690 (1921).

<sup>84</sup> *Wigmore*, *Evidence* § 1302 (3d ed. 1940).

<sup>85</sup> *In re O'Connor's Estate*, 105 Neb. 88, 179 N.W. 401 (1920).

circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed;<sup>86</sup> and a certificate of acknowledgment of a deed or mortgage before a notary public can be impeached by clear, convincing, and satisfactory proof that the certificate is false and fraudulent.<sup>87</sup>

Testimony of experts on the subject of handwriting is circumstantial evidence and is admissible under proper instructions alone or with other evidence to determine the authenticity of the signature on the instrument.<sup>88</sup>

## VI. POST-TRIAL CONFERENCE

### A. CRITIQUE

Subsequent to the trial, it is beneficial for the attorney and the document examiner to have a brief conference to evaluate the presentation of the expert testimony. The examiner is always willing to perfect his style of presentation and the attorney should likewise endeavor to overcome his shortcomings. The examiner who testifies in courts periodically invariably is quite willing to make suggestions as to how the trial technique of the attorney can be improved in future cases. Should the attorney be engaged in prosecuting criminal cases, he should be especially desirous of improving his trial tactics. Hence, through a post-trial conference both the attorney and the examiner can reflect.

### B. FEES

At the post-trial conference, if not before, the question of fees will arise. Some experts charge by the day regardless of whether for office work or court work. Other experts follow the practice of charging separately for the original examination and report, the preparation for trial, and the testimony.<sup>89</sup> In fixing fees, the document examiner relies upon the same basic factors as the attorney when he bills his clients. Thus, the document examiner's fee depends upon the amount of time consumed on the case, the office expenses and materials used in the case, the financial sacrifice in-

<sup>86</sup> *Bank of Commerce v. McCarty*, 119 Neb. 795, 231 N.W. 34 (1930).

<sup>87</sup> *Barker v. Avery*, 36 Neb. 599, 54 N.W. 989 (1893); *Phillips v. Bishop*, 35 Neb. 487, 53 N.W. 375 (1892).

<sup>88</sup> *In re Estate of Parvin*, 131 Neb. 853, 270 N.W. 470 (1936); *Wakeley v. State*, 118 Neb. 346, 225 N.W. 42 (1929).

<sup>89</sup> *Doud*, *Answering the Cross-Examiner on Expert Witness Fees*, 2 J. Forensic Sci. 88 (1957).

curred while attending the trial, the customary fees, and the responsibility assumed by the document expert.<sup>90</sup> It is unethical for a document examiner to take a case on a contingent fee basis.<sup>91</sup>

## VII. CONCLUSION

The trained questioned document examiner is capable of performing numerous services which the average practicing attorney does not know how to utilize to the maximum. Consequently, there are many disputed document cases either entirely neglected or inadequately prepared by the attorney. Once the attorney becomes cognizant of the variety of services that the qualified document expert can render, the better a questioned document case will be handled from its initial stage until there has been a final adjudication in a court of law.

<sup>90</sup> *Ibid.*

<sup>91</sup> Code of Ethics No. 7, Am. Soc. of Questioned Document Examiners, 40 A.B.A.J. 690 (1954).