

HISTORICAL REVIEW

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The three classes of experts whose testimony often lead to error and which are described in "Errors in Verdicts Based on Handwriting Testimony" continue to appear in courts today. The Daubert and Kumho decisions and other measures to more readily empower the presiding judge as gatekeeper certainly were intended to limit the effects of erroneous conclusions by incompetent experts. While these measures are often distorted by attorneys to limit the competent expert, diligence, communication and continued empirical research in our field have helped to correct such distortions. Despite this, there is a genuine need to

continually educate both the bar and the judiciary regarding the dangers of accepting amateur experts. The relevance and importance of our field is called into question each time deciders of fact are presented with incompetently developed conclusions which smack the face of logic. Unfortunately, and often due to a lack of knowledge as to what constitutes a legitimate and competent document examiner, courts continue to be infected with the testimony of experts who are, at a minimum, merely incompetent and sometimes just plain crooked.

Errors in Verdicts Based on Handwriting Testimony

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The interests of justice are endangered in numerous courts in numerous states by the incorrect or corrupt testimony of witnesses who testify regarding handwriting. At the risk of giving aid to guilty defendants and to their attorneys, the truth should be told regarding these errors in the identification of handwriting. Recent authentic reports from several sources contain the alarming information that convictions and indictments in increasing numbers have resulted from erroneous handwriting testimony and errors in civil cases are still more numerous. The proof of handwriting during recent years has received a recognition and attained a standing that it has never before received and it may perhaps be partly due to this wider recognition that the subject is being ex-

ploited in a dangerous manner.

There are three classes of witnesses whose testimony may lead to error in these cases. The first of these is the untrained, inexperienced but usually conscientious witness who has been persuaded by a zealous attorney to testify as an expert. This witness may appear against his own best judgment but is assured that "the law" permits him to testify. This class of witnesses includes bookkeepers, bank clerks, penmanship teachers, or those who do commercial pen work, none of whom, as a rule, has made any special study of the subject of disputed documents. They often give incorrect testimony but generally their testimony is not very convincing and therefore is not very dangerous.

The second class of witnesses whose testimony often leads to error are ordinary detectives, amateur investigators, and handy men of many trades, who sometimes testify as experts on other subjects, who are led to testify on the subject of dis-

Editor's Note: This article, provided by the Osborn family library, was written by Albert S. Osborn more than 60 years ago. It is unknown whether this article was ever published or presented.

puted documents, or on their own initiative they make a superficial study of the subject and perhaps once in a year or two testify on some simple phase of the subject. These witnesses may have heard a special lecture or two on the subject and may perhaps possess a magnifying glass and a foot rule. Some of them testify with proper restraint and on cross-examination admit their limitations and the possibility of error in their testimony. Unfortunately, however, in this class of witnesses with limited qualifications and little or no experience, are occasional conceited actors who, flattered by the term expert, and hoping to make a place for themselves in the expert field, give the most positive testimony on almost any problem and in certain ways often are not quite sincere. These witnesses usually testify that any disputed writing is genuine and, as a rule, their testimony is unreliable. They also may give incorrect testimony upon which a criminal indictment is based and, in many instances, they are dangerous witnesses.

The third class of witnesses who give erroneous document and handwriting testimony is the small class of actual charlatans and confirmed perjurers whose testimony is for sale to either side of any case. They usually appear for guilty defendants, or fraudulent claimants, and are relied upon by a class of attorneys who appear for any defendant or who take claim cases on a contingent fee for any claimant. By the aid of these witnesses these attorneys may defeat justice; they pride themselves on winning cases *against the facts* and by their activities have developed this undesirable class of witnesses. The modern practice requiring experts to give reasons on handwriting cases does not, however, give as free a field for these fakirs as when they could give only a very positive but entirely bare opinion. The abuse from this source is serious but not as extended as might be expected. Witnesses of this class can often be very effectively cross-examined if proper preparation is made.

In desperate cases correct handwriting expert testimony is usually attacked by those against the facts, not by conflicting testimony but by unfair cross-examination, violent argument, and reliance upon the ancient criticisms of expert testimony still in the books. These undeserving attorneys and witnesses are also sometimes aided by the ancient procedure, long overruled, that is dragged into the case because it is in the old books. These old arguments have been practically nullified by one question by the presiding judge who asks,

"What is the date of that decision?"

The practical question arises as to what can be done to remedy the conditions. To abolish handwriting testimony altogether, of course, is impractical although this action would be recommended by certain defense attorneys and others who seek a fortune based on a written document. There have been certain writers and advocates in the past whose method has been the slurring and belittling of all expert testimony, both good and bad, which practice, when permitted, to some extent has been the same as abolishing the testimony. These attacks can now be effectively answered from up-to-date decisions in most states. Another proposed remedy is the appointment of exclusive official experts to whom such questions are to be submitted. Still another method is that of giving the presiding judge in any case the power to appoint for that case an expert, especially in case of conflict in the expert testimony. The serious objection to the official exclusive expert is that it gives a witness almost a judicial standing so that in some instances he would practically decide a case. The temporary appointment practice is less objectionable and is being tried in California.

The worst abuses of expert testimony of all kinds can be traced back to the excesses of advocacy especially by defense and claim case attorneys. The corrupt expert is brought in to aid in winning a desperate case and where the judge has no power a jury may be misled and deceived. The interests of justice are, of course, served when correct expert testimony is emphasized and defended and when incorrect and dishonest testimony is shown to be just what it is. This desirable end can hardly be reached until the fair and competent judge is given back the powers that have been taken away and until that time none of the proposed reforms will be wholly effective.

No doubt the outstanding fault in legal procedure leading to error in handwriting cases is the free manner in which witnesses are permitted to testify as experts and give bare opinions or, what may be even more misleading, incorrect reasons for opinions. No matter how inexperienced and poorly qualified a proposed witness may be, he is usually permitted to testify as an expert if a lawyer brings him forward. Zealous attorneys in this way attempt to bolster up weak cases. These weak cases are often based on personal identification of a suspected writing by a witness who saw the party only once long before when there was no occasion for careful scrutiny of the indi-

vidual. Testimony of this kind is always very dangerous.

In many instances there is no one present at a trial technically qualified to measure the fitness of the witness, not even he witness himself, and he complacently expresses the most positive opinions which may be erroneous. The witness may be entirely conscientious but this does not correct his error. He may be one of those who are surprised to know that the law permits him to testify.

One of the results of thorough knowledge and extended experience in any technical field is the development of the ability to measure the difficulty of its problems. This qualification the novice does not possess and he is inclined to attack any problem and express an opinion. As is well known, there are zones of doubt in every technical field and the specialist with the most extended knowledge and the highest skill considers certain problems with the utmost caution and often refuses to give a positive opinion on a mooted point.

The identification of a handwriting is not a simple and easy task, as it often is assumed to be, and there are many document and handwriting problems of extreme difficulty. A frequent inquiry is, not whether a signature is genuine, but who actually wrote what is known to be a forgery. This is a difficult question that, as a rule, cannot be answered with a reasonable degree of certainty, but the novice promptly answers it. It is easy to understand that it is seldom that a forged signature contains enough of the actual writer's own handwriting characteristics to identify him as the actual writer. Errors are also made because of too limited amount of disputed writing or of standard writing; printed letters are compared with script writing as the only standard and an opinion given, or a positive opinion is based on a tiny bit of writing, or on one poor signature written many years before a disputed signature was alleged to have been written.

Another common source of error arises from lack of knowledge of the subject of disguise in writing. Two writings are compared and the opinion is expressed that they are by the same writer. The opinion is based on certain similarities without proper consideration of the differences. The differences are either ignored or may be incorrectly attributed to disguise. What it is reasonable to construe as disguise is given no consideration. Alleged disguise is, in some cases, repeated consistently, showing that it is a habit and not a disguise.

There are two common errors frequently made by the incompetent handwriting witness. The first of these is the decision that a forgery is a genuine writing. The reason for this is that the incompetent examiner is not able to recognize the evidences of forgery and decides that a disputed writing is genuine unless it is a perfectly obvious forgery. This first error may defeat justice and help a fraudulent claim to succeed but, as a rule, does not lead to the criminal courts. The second error, more serious than the first, is the decision that any two writings of the same general class are by the same writer. Any two writings in the same language, especially in the form of pen or pencil lettering, are bound to be similar in some ways, and two writings following the same system will necessarily be alike in some ways, and these likenesses, to the incompetent examiner, are proof that both writings are by the same writer. This error may lead to the arrest and conviction of an innocent person.

The two most effective remedies for this abuse of handwriting expert testimony are, first, stricter requirements, especially in criminal cases, regarding the qualifications and experience of the proposed witness, and second, the requirement that the witness should give detailed and understandable reasons for his opinion, including in certain cases suitable illustrations. If the reasons are not clear and convincing, the judge should be permitted to interrogate the witness. The precedent should also be definitely established by the higher courts that the judge has full power to say that "the qualifications of the witness are not satisfactory to the court."

Definite reasons for expert opinions and enlarged illustrations have two separate and distinct values in a trial of a case, the facts of which can be illustrated. The first and direct value is to demonstrate the correctness of the opinion expressed, and the second, and a highly important reason, is to furnish the means of showing the incorrect or inadequate basis for the opinion expressed if the basis is incorrect and inadequate.

The courts of numerous states have spoken plainly on this specific point and in these states, in his charge to the jury, the judge is permitted, on request, to say that in the absence of convincing reasons the expert testimony on a subject regarding which reasons for an opinion can be given and illustrations offered, should be received with extreme caution. In New Jersey courts the judge is permitted to make this sensible comment on the evidence as it is being presented. This of

course tends to prevent error as a statement in a "charge to the jury" may be too late to prevent error.

It should, by the way, be better known that in some phases of proof this particular state on this subject, as well as some others, is about a hundred years ahead of certain other states. It would have been difficult to convict Hauptmann, the kidnapper, in certain states on the handwriting and circumstantial evidence available, even though it was overwhelmingly strong. There would have been a long fight over this expert testimony, and all of the old criticisms of circumstantial evidence would have been brushed up and brought out and repeated and emphasized over and over again and, in some states, there would have been worked up an artificial quarrel with the judge day after day and the prosecutor would have been accused of all kinds of unfairness of almost a criminal nature, and numerous false issues would thus have been brought before the jury in order to bring about uncertainty and confusion. Under these well known tactics it often is impossible for the most competent witness to present handwriting expert testimony in a convincing manner, and the door is wide open to error. The well known trial tactics of defense and claim case attorneys do not prosper so well in the New Jersey courts because, as in England, there is a judge present who has, not nominal, but actual charge of the proceedings.

There are certain old, almost unbelievable, legal fictions regarding proof of handwriting that also contribute to error. One of these is that the law presumes that an observer is qualified to testify regarding a disputed handwriting if he saw the writer write only a signature once twenty years before. Another of the old fictions, now nearly passed away, except in the courts of Michigan and one or two other states, was that casual and uninterested observation of the act of writing was more effective as a method of qualifying one to testify on the subject than the most extended and thorough scientific study. There are many old opinions in which this claim is actually made and by it the value of the testimony of the lay witness "who had seen the person write" is greatly emphasized. The "have seen him write" witnesses should never be allowed to testify on either side of a criminal case.

Another unscientific and ridiculous old legal fiction that ran through the courts for several generations, that also contributed to error and still has some influence, was the positive pronounce-

ment, in cumbersome legal language, that the general appearance or "general character" of a handwriting furnished a more reliable test of genuineness than any scientific and detailed study of the writing, including its history and development. The ridiculous rule of course applied to no other department of human knowledge. Even the beginners in the study of handwriting identification know that any fair imitation of a writing will have the same "general appearance" as the writing imitated. This old fiction is practically dead but still appears now and then in argument and in print. There are those who apparently still believe in the old fictions.

Justice may also be defeated in a handwriting case by the testimony of the third class of witnesses, described above, the presumptuous fakirs. There are a few in every technical field who are allowed to testify as experts. These witnesses may give alleged reasons and also may present misleading photographs. This testimony is not merely erroneous but is outright perjury that the industrious attorney has procured. Witnesses of this class may defeat justice but they bring their reputations with them and their spurious testimony can often be successfully attacked by the technically prepared and informed trial attorney if he is present. Witnesses of this class, who become well known, are not permitted to testify again and again in other countries than the United States of America.

During the last thirty years there has been a revolution in the conditions surrounding handwriting testimony in American courts that has tended to prevent error. In most courts the rule now is that the testimony is to be received on its merits with the full opportunity to explain and interpret it. It is true, as stated above, that there still are grave errors in verdicts in these cases but these errors are not all directly due to errors in handwriting testimony. Erroneous verdicts are also due to trial counsel's ignorance of the technical subject and to the imposing of the old rules by an occasional presiding judge. These are plain words but they tell the plain truth. In an atmosphere of prejudice and ignorance it does not matter much whether testimony is good or bad.

In a few jurisdictions it is still advisable in certain cases for those who represent justice in a disputed document case to seek as favorable a settlement as can be secured as it is almost impossible to prove the facts. Testimony is not received on its merits and good testimony is not distinguished from poor testimony. Most of the old judges with

the ancient prejudice have gone but a few of the new ones apparently have learned only from the old opinions in the books. The only legal opinion on handwriting cited in the Hauptmann defense appeal was written fifty-seven years before the trial. Those nearer in date were distinctly unfavorable to the defense.

During recent years there has been developed in most American courts the sane and sensible idea that handwriting testimony should be measured by its convincingness, as stated by Professor Wigmore (1923), and this change in attitude of the courts has swept away many of the old fictions and abuses and has rendered the testimony of the incompetent witness less dangerous. It is now assumed that in any important matter reasons will be given and illustrations provided, and if this practice is strictly followed incompetent witnesses and witnesses who testify against the facts are not so dangerous as they otherwise might be but errors are still made.

The unfortunate miscarriages of justice of the present day would mostly be prevented if, as already stated, only those who are qualified to testify as experts were allowed to testify, and if every witness should be compelled to give definite reasons for the opinion he expresses as an expert or be compelled to say that he has no reasons.

Errors would also be less frequent if trial counsel and judges were better qualified on the technical subject so that they could better judge the value of technical testimony. Finally, and perhaps most important of all as a means of preventing error, is the presence in every court of an able, long term judge who is permitted to take part in a trial, as is permitted in New Jersey and in English courts.