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A New Look at Qualifying Expert Witnesses and the Doctrine of Privilege for Forensic Scientists

The expert witness looks at the court system from a somewhat different point of view than judges and attorneys. He sees only a small segment of the whole so that the section in which forensic science fits takes on special importance to him. In many respects this area of the law is relatively new and contains problems which have not been fully recognized or considered by the courts.

Only two problems, among the more pressing ones, are to be considered here; how to eliminate, or at least substantially restrict, professionally unqualified expert testimony, and the need for a more adequate doctrine of privilege as applied to the forensic scientist. The legal profession and the courts may recognize the former as a problem of concern since they generally think of the forensic scientist in terms of an expert witness, but the latter problem may seem immaterial to most attorneys and judges since they seldom turn to the forensic scientist as a technical advisor. This latter role, however, will assume more and more significance with the growing utilization of forensic science. It is not too soon to start judicial reforms in respect to both problems.

Eliminating the Unqualified Expert Witness

Present judicial procedure directs that the trial judge must decide whether a witness is qualified to testify as an expert. What guidelines does he have? Decisions say that the witness must have special knowledge or experience relating to the subject at hand. In practice judges are usually concerned with the question of whether the person has previously testified as an expert in this field of knowledge. But this point or other information derived from qualifying statements may have little real value in measuring professional qualifications in many fields of the forensic sciences. This is particularly true of those disciplines in which there are no professional schools for training or education.

Questioned document examination is one such discipline. Undoubtedly there are more unqualified or poorly qualified expert witnesses testifying on questioned document problems than on problems in any other branch of the forensic sciences. This is not a unique situation. Other forensic scientists have similar problems; however, with no formal academic course or degree for questioned document examiners, virtually anyone who can profess some familiarity with handwriting and typewriting examination is able to qualify in the eyes of the trial judge. Not even a formal academic education or a baccalaureate degree is necessary. Handwriting teachers, typewriter repairmen, bank personnel, even housewives who have taken a correspondence course in graphology or grapho-analysis

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(character reading) can claim such knowledge and have been permitted to testify. Some have barely any knowledge of the fundamental principles involved in this complex field. This condition does not mean that trial judges are lax in screening witnesses, but simply, that they have very meager guidelines for the evaluation of a witness's qualifications.

In the case of medicolegal experts the judge at least knows that the witness should have a medical degree while a man testifying about chemical testing or toxicology should possess formal training in chemistry. Undoubtedly specialists in these disciplines would not agree that those who fulfill these minimum standards should necessarily be permitted to testify. Actually the courts are in need of help in screening witnesses so that well qualified experts can actually assist the court in perplexing technical questions, and the unqualified will not unwittingly confuse justice.

Proposals have been made that questioned document examiners should be certified. But there is no judicially or widely recognized organization in a position to implement this. Furthermore, because certification would necessarily be limited to a number of highly trained experts (a few hundred at the most) such action would probably have little impact on the legal profession and the judiciary. One must recognize that with the profusion of documents today a great number of document questions arise in all trial courts, from the lowest to the highest, throughout the country. Since the word "certification" sounds important we already have a mail order correspondence course producing "certified grapho-analysts" and certain of these people feel free upon occasion to testify regarding identification of writing even though their correspondence course has hardly touched upon the subject while professing to train them for a completely unrelated endeavor of personality evaluation.

It has been suggested in some jurisdictions that certain classes of forensic experts should be licensed. Here again trouble is encountered. Because of the large area and number of states in which both qualified government employed and self-employed consulting experts testify, licensing is not the answer. At best it can only control a limited jurisdiction and could conceivably prevent well qualified witnesses from "foreign" jurisdictions from testifying or else do nothing at all to control out of state experts, good or bad. Furthermore, state licensing boards would be ill equipped to screen out the incompetency in the specialized fields of the forensic sciences.

Any attempt to limit or control those who are to testify as expert witnesses in court must recognize that throughout the country there are many forensic scientists who have either federal, state, or municipal civil service status. Some of these appointments are derived from some kind of civil service examination. Any attempt by a group outside of governmental agencies to certify or license will have to contend with the fact that certain workers, whether really fully qualified or not will present themselves to the courts as a civil servant classified in a particular branch of forensic science. This classification may or may not reflect accurately the professional ability of the man. Many have high ability, but unfortunately there are instances in which individuals have obtained such civil service status with very limited specialized training. Civil service commissions, like individual judges and state licensing boards, may have only meager experience in determining what qualifications a questioned document examiner or any other type of forensic scientist should possess. To succeed in eliminating incompetency and mediocrity a system must be devised which is able to override any of these inadequacies.

In approaching the problem one can look at judicial systems outside this country for suggestions. The courts of a number of countries maintain a list of qualified experts in particular fields of forensic science. Direct application in this country would be difficult because we have 51 independent judicial systems—the 50 state courts and the federal

courts—as opposed to a single judiciary system in other countries. Nevertheless, the court list of experts does hold promise as a criterion for determining who is qualified. It would need to be created with the aid of recognized leaders in the field but with the final decision in the hands of the court. It has another advantage in that there is a degree of policing possible which is not present today. As with the legal profession the courts could create a "disbarment" proceeding for the occasional nonethical expert witness.

A court supervised and policed forensic expert list is possible in this country and should be developed. Our federal court system needs to take the lead in screening expert witnesses. A more comprehensive method of investigating the experts qualifications than the present method of a ruling by the trial judge should be developed under its control. Since the federal court system encompasses the entire country as well as some outlying areas, such as the Canal Zone and the Virgin Islands, this would give a nationwide approval and guide to the truly qualified and ethical expert witness. Decisions of the Supreme Court, for example, while not necessarily binding, have a strong influence on all court systems. By the same token if it became necessary for expert witnesses to meet specific high standards in order to be listed as qualified for federal court practice other courts would have a more significant guideline to decide whether or not a witness should testify as an expert. It would not, of course, preclude a trial judge in a state or minicipal court from accepting as an expert any individual who came before him and professed qualifications in questioned documents or some other field, but it would give the fully qualified appropriate stature regardless of the court in which they were testifying.

By creating a federal court list, weaknesses in the federal civil service would be corrected by rulings of a body designed to judge the federal government. Other civil service boards would not be reviewed except as their people might be called upon to appear in federal courts. Here too the system would in time bring about an upgrading of the weaker civil service systems. At the same time consulting practitioners who maintain an office in one major city but who are called upon to testify throughout the United States would be accredited or rejected by someone other than a state licensing board. The private consulting field in questioned documents has no guidelines. No one is available to say whether an individual can or cannot hang out his shingle and start taking cases. Over the years a number of individuals who have retired from law enforcement agencies, and a few who have even resigned under pressure, whose work within these agencies dealt with fingerprints, firearms, or interrogation, primarily, have been able to set-up a practice either in the field of questioned document examination, or in the broad field of criminalistics or as a private detective, and to testify from time to time on various aspects of forensic science well away from their original law enforcement speciality.

The unqualified of this group must be kept off the witness stand, and at the same time it is equally important to create some leverage in order to prevent law enforcement agencies from establishing laboratories and arbitrarily staffing them with interested but virtually untrained individuals who in time will be called upon to testify as their forensic experts. Thus there is a real need for the creation of a recognized list of fully qualified forensic expert witnesses.

A program for developing a meaningful court listing of qualified forensic experts can only come about with the assistance of an organization such as the American Academy of Forensic Sciences. While the federal court system is ideally suited to publish such a list, the federal judges themselves or their administrative assistants who might organize such lists need good professional help. They need especially the advice of leaders in each field. The Academy can provide such assistance. With a proper screening committee and the prestige of the federal court system it would in time become much more difficult for the

unqualified and unscrupulous to continue to appear in trial after trial in both civil and criminal matters, confusing rather than assisting justice.

Privilege and the Forensic Expert

The second problem for consideration involves a privilege relationship between the forensic scientist and the client which arises out of the former's role as a technical advisor. This role can be of nearly equal importance to a litigant as to the role of the expert witness in both civil and criminal cases. Naturally, the first step in any forensic science problem is the examination of the technical evidence to ascertain the facts. There are cases in which this aid is sought without the immediate intention of calling the expert as a witness. The trial attorney, or the attorney who prepares the matter for litigation, cannot evaluate all technical evidence. He needs the forensic scientist for this service. Any findings or discussion regarding the evidence at hand should be protected as privileged just as are all discussions and communications between attorney and client. Of course once that it is decided that the forensic scientist will be called as a witness certain aspects of this privilege must be modified in keeping with trial practices of the jurisdiction. However, as long as he remains as an advisor there should be comparable doctrine of privilege to that governing the client-attorney relationship. In many respects today, this concept, as far as forensic scientists are concerned, is nonexistent or at best has not been fully and completely developed under our system of law.

The forensic scientist's role of an advisor can play a very significant part in the early stages of litigation or even before litigation is definitely decided upon. Technical evidence involved in any legal problem needs to be subjected to competent fact findings. This is true of course of all basic evidence in the case, but upon occasion physical evidence relating to secondary matters should also be subjected to early examination. Pretrial statements of witnesses in some instances can be substantiated or disproved by examination of supporting documents. For example when a witness maintains that he was in a certain city on business on the day in question a hotel registration card should be located and if necessary subjected to examination of the handwriting for the presence of possible alterations.

As a case progresses and the opponent's experts examine technical evidence, similar examinations by one's own experts are in order. In this way the opponent's findings can be quickly checked for accuracy when they become known. This step is not necessarily taken to provide for a conflict of expert testimony, but it does mean that attorneys will be prepared to act if the findings affect their case adversely. When the findings favor an attorney's case however he has available potential expert testimony if other proofs of the facts are weak, and further knows his opponent cannot attack him by means of similar testimony.

Court presentations involve picking and choosing the evidence which is to make up one's case whether it is lay or expert evidence. Without protection through privileged communication expert advice may well work against the interest of the litigant when he has no desire to use the findings. And they need not necessarily be adverse, possibly only inconclusive or of marginal value. Such advice would be no different than his asking advice on a legal question and realizing after he obtained it that legal actions along these lines might not be to his best interest.

There are also certain types of problems, and these occur especially in connection with questioned documents, in which the facts developed can be explained away if a witness or litigant knows of them in advance. For example, if it can be shown that a document was

not prepared in the normal order of sequence but rather that some key part was added after the main portion was prepared, early disclosure of this fact before all witnesses have been carefully examined under oath may make it possible for a dishonest witness to modify his testimony and explain away this defect. On the other hand, if he has no knowledge of what expert examination can disclose, he may well maintain that the document was completed in the normal way and was executed exactly as it now appears. Certainly, information of this type should not be subject to probing by subpeona of reports or other legal techniques until all witnesses have been examined under oath. In fact it is the type of evidence which may have no value whatsoever if those who prepare the document are completely honest and candid, admitting certain reworkings after the main body of the document was completed.

One might argue that a doctrine of privilege that carefully protects all forensic examinations would work against justice. This certainly would not be true today with the availability of qualified forensic scientists. Most technical evidence can be examined by several workers independently and each can make an accurate determination from it. If one litigant engages the services of a forensic scientist in a particular discipline, his opponents would be able to find another qualified specialist to carry out examinations for them. There are exceptional cases of course in which in order to determine the facts an examination must destroy the technical evidence. If such examinations are contemplated, however, steps can be taken to protect the interest of all parties, or under these circumstances protection of findings under a doctrine of privilege might be set aside upon proper application to the appropriate court. Exceptions of this type are relatively rare in most fields of forensic science.

One cannot argue too strongly about the need to know exactly what is contained in technical evidence. This is true in both civil and criminal litigations. In civil cases it seems obvious that there should be a clear cut doctrine of privilege covering all communications between the forensic scientist and his client. They should hold at least until the forensic scientist is listed as a witness for trial.

Criminal law practice however creates complications. In this field recent court decisions are establishing a legal concept which makes a great deal of information developed by the prosecution available to the defense. It is commonplace today for courts to grant review of grand jurys minutes by the defense when in former years it was the exception. Evidence developed by law enforcement agencies is frequently made available to defense counsel prior to trial. Following this trend reports of prosecution experts are becoming available for inspection by the defense even when the expert is not listed as a witness. If these steps are ultimately to be universally permitted by the courts then certainly one cannot argue that the prosecution's expert should have a special privileged relationship with his client.

As far as the defendant is concerned, however, he has a need for some form of privilege in his communications with his forensic expert as long as this expert has not attained the status of a potential witness. The defense should certainly have the opportunity to obtain a skilled review of technical evidence without being placed in jeopardy if this review confirms the prosecution's witness. Disclosure to a jury of such agreement could well have an undeu influence. Documents pertaining to prosecution witnesses which might reflect upon their creditability should be examined. Hopefully they may prove the witnesses are not truthful but they can well substantiate his story showing that the suspicions were unfounded. In these latter instances disclosure that the defense had unjustly suspected the witness again could carry undue weight. In contrast to this, however, if the prosecution had received a report from a forensic laboratory pointing toward the defendant's innocence and this report was not put into evidence, the defense should certainly have the oppor-

tunity to learn of the evidence and to take proper action. In some jurisdictions the law directs the prosecution to bring forward such evidence, in other words, to put forward all testimony pertaining to both guilt and innocence. Since many defendants charged with crimes have very limited means there is a real need for defense access to all law enforcement facts. Often investigation of technical evidence entails expenses well beyond the defendant's means. For these reasons the whole concept of a privileged relationship between forensic scientist and client in criminal cases is far more complex than it is today in civil practice, and if any doctrine is developed it must take into consideration all of the developing concepts of law which are designed to help protect the innocent defendant.

The forensic scientist can play an important role as an advisor in all legal problems. This role, especially in civil litigations, needs the protection of an adequate doctrine of privilege. Under our adversary form of law forensic scientists are generally engaged by those involved in litigation rather than appointed by the court to resolve the technical questions at hand. Under these conditions both sides should have free access in civil litigation to qualified expert advice and this advice should be privileged until it is clear that the information is to be used as part of the trial presentation.

Summary

Present means of deciding whether an individual is qualified to testify as a forensic science expert are inadequate, especially in respect to those branches of the forensic sciences for which there are no established educational requirements and training programs. A possible approach overcoming this difficulty by establishment of a federal court listing of qualified forensic science experts has been presented. The need for further extension of the doctrine of privilege as applied to the forensic scientist has also been discussed.

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