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## The Adversary System: Role of the Document Examiner

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Document examiners, being a heterogeneous group, have as many views as to what role a document examiner should play in the adversary system as there are members. This section is composed of examiners engaged in civil practice, law enforcement, and the academic world. And the law enforcement group is further divided into examiners working for local or municipal police agencies, state police agencies, and federal investigative agencies. Each of these groups views its role in the adversary system differently, and each individual in these groups has his own concept of this role, depending on his position in the group, his philosophy, bureaucratic pressures exerted upon him if he is in governmental service, client pressure exerted on the Examiner in private practice, etc. All these factors influence the document examiner's personal approach as to the role he envisions for himself and which he will play in the adversary system.

Some document examiners feel that the expert on questioned documents should not be part of the give and take of the adversary system but should be court appointed and his findings given judicial notice. Others view with repugnance the very idea of appearing in court and being subjected to a searching cross-examination and they avoid decisions placing them in this position. But still others relish the contest that is part of the adversary system and prepare themselves accordingly.

In this discussion, the views espoused by me are not the result of a canvass of the members of the Document Section. They are not a consensus. No polls were taken. No meetings held. The ideas presented here are strictly my own.

The document examiner does not play a single role in the adversary system. He is involved in a multiplicity of roles which tend to merge into one central character. The role which the document examiner is to play in the drama of the court confrontation is a combination of roles, a melding or merging of many talents into the presentation he is about to make.

At the outset the document examiner must be an educated, trained, and experienced scientist. But in the adversary system this is simply not enough. The world is full of well-educated, well-trained, and frightfully experienced scientists. But most of these would avoid appearing as expert witnesses in any legal proceeding. Most professional men view with distaste even the dim prospect of being an expert witness in a legal proceeding. The idea of being fed specific questions calling for specific answers, of having answers interrupted by objections from opposing attorneys, of being not able to answer at all, of being

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chivvied for being “not responsive,” or “too responsive,” or being directed to answer “yes” or “no,” of being subjected to searching cross-examination where every thought he propounds is disputed—this is anathema.

So the document examiner in the adversary system, in addition to his education, experience, training, and expertise, in this sense must be a “professional witness.” No matter how good his background and expertise, the document examiner is of no value in the adversary system unless he convinces the court and jury of his contention. For expert testimony is essentially information. And the legal action being tried, despite its many details, is simply a contest in court where two parties in contention place a number of items that purport to be facts or information before those who are to decide between them. These parties are the adversaries. They are in conflict. And the triers of fact must come to a conclusion as to which is speaking the truth. In some small way the document examiner in this milieu may have a vital part of the information. It is his task to make these triers observant, intelligent, and reasoning regarding his particular information. And this he attempts to do through explanation and logic. If he convinces the triers that he is well-qualified and truthful, and has persuaded them that his evidence is sufficient to prove his facts, then his conclusion should logically follow and be accepted by them. But this is not always so. Sometimes a different conclusion is reached by the trier of fact despite credible evidence.

It is not only necessary to make the facts stand out with utmost clarity, but the meaning behind those facts must also be brought out. These facts and ideas must be interpreted carefully and cogently, and incidental argument is of special importance in connection with any type of technical testimony. Evidence given by a document examiner is an opinion buttressed with reasons, and this reasoning is a vital part of the testimony.

The document examiner as a “professional witness” must get his point across. And to this end he must utilize a variety of talents. One of these is the effective use of language.

A document examiner should have as good a command of language as an attorney. A ready, forceful command of language distinguishes the “professional witness.” His appearance and manners contribute to the total effect, but the ability to put ideas into words is a mark of distinction. Preparation, ability, and expertise are as nothing if one does not know what to say and how to say it. Long arduous study is necessary for one to know *what* to say, but if that person is inarticulate there will be no results to show for it.

In court, words furnish the principal medium of communication between the witness and the court and jury and should be used to inform and to persuade. The document examiner must know the jargon of his trade but avoid using it in court—keep it for his fellow experts. The skillful use of language is the document examiner’s greatest asset. But it should be tamed, controlled, and loaded with ideas. They are as important as his education, training, and experience. Language is his tool and through it his ideas come to life.

The document examiner as a “professional witness” in our adversary system is involved in a competition of persuasion as each contestant attempts to sway the court and jury to accept his point of view. The success of a document examiner is measured by his ability, using various means at his command, to lead a judge or jury to believe in the accuracy of his testimony. And one of the qualifications of a document examiner affecting his success in this task is his power to persuade.

The art of persuasion is a difficult one to master. It requires patient, industrious, and intelligent labor in acquiring accurate knowledge on many subjects and in training the intellect. One must be able to reason properly and present, in the proper manner, order, and emphasis, the real significance and relationship of the known facts. The document examiner must not only convince the judge and jury, he must persuade them to act. The

art of persuasion embraces a host of intangibles—the personality of the witness; his directness and frankness; his general intelligence; his knowledge; his general appearance and manner; the quality of his voice; his diction; the promptness of his replies to questions; his self-control; his fairness and objectivity. On these and many other points the document examiner is weighed by the court and jury and these many factors may be of assistance in persuading those he wishes to persuade.

The use of a document examiner in a trial indicates that there is an unusual technical question at issue regarding a document or documents. Special study and investigation are necessary. The document examiner and the attorney with whom he is associated are joined in representing one of the opposed parties striving in court. The performance for each contestant is one sided and partisan. One advocate contends for one party that one contention is correct and the opposing advocate makes an opposite claim. Hopefully out of these conflicting contentions the “truthful facts” will become known.

The expert testimony is brought into this performance, which is admittedly a contest, as a part of the partisan attempt to prove one’s contention and undermine the claims of the opposition. And in this particular phase of the proceeding we do not really have all the characteristics of a scientific investigation.

One of the principal criticisms of expert testimony is that it is one-sided and partisan; and the expert taking part in the controversial proceeding bears the brunt of this criticism for being a witness for one side or the other. But it is also obvious that an expert is but one single element in the controversy selected by the advocate to take part in this contest, and his evidence is only part of the total picture.

Expert testimony, however, plays an important part in the contest and should be presented properly. In this respect the document examiner as a “professional witness” should become an “advocate”; that is, an “advocate for his professional finding and opinion,” and an “advocate willing to prepare his attorney and to cooperate with him in the presentation of this evidence.” All the technical facts should be examined and discussed. These technical points at issue must be understood so that the trial lawyer can appreciate the significance of the document evidence. Counsel must be prepared to make necessary arguments and conduct effectively the direct examination of his expert. The force of the document examiner’s testimony depends mightily on the type of question asked, and a thorough knowledge of the problem and its answer is vital. The attorney cannot inquire diligently about a subject which he does not understand.

The attorney and document examiner must cooperate and confer as to how the evidence is to be presented. The order of presentation and the effect of its presentation is important. The evidence must be arranged in a manner so that upon its presentation the court and jury understand and correctly interpret its significance. The document examiner beforehand should assist in this preparation and presentation of the factual data and should not hesitate to make suggestions to counsel. Both attorney and document examiner before trial should get an understanding of each other’s point of view and the questions involved. And the attorney should realize that the competent document examiner will not hesitate to correct his own counsel in any inadvertent exaggeration or statement in a question that is not justified by the facts.

With this combination of efforts, together they will be able to describe, illustrate, and interpret a technical subject so that court and jury can see, understand, and be convinced. And by working in such close cooperation, the examination as it progresses should develop an atmosphere of frankness, accuracy, and thoroughness.

Because of close cooperation between attorney and document examiner, the attorney provided with the necessary information will be able to assist his expert witness in success-

fully withstanding cross-examination. As in any contest, the game is won by team work with a good offense and a good defense. Working together, attorney and document examiner make a formidable opponent—separately they may make an easy mark.

The bane of many a document examiner is cross-examination. But cross-examination is the heart of the adversary system. No witness, no matter how able, should be given the power to decide a question without being open to full, free, and searching attack on cross-examination to determine if his testimony is correct. Document examiners and other expert witnesses should never be given judicial authority and there should not be a so-called "Official Expert" utilized in the courts in this country.

The preparation of any case by a document expert should be done, as it were, in the shadow of cross-examination. Decisions should be made in the light of what an adversary looking for a weak spot will probe. For cross-examination, like conscience, makes expert witnesses a little more honest. It should not make the document examiner timid, but it should make him cautious.

Under cross-examination the conduct of the document examiner as a "professional witness" affects the force of his previous testimony. He must maintain his dignity and self-control and avoid actions or words that interfere with the gravity of the matter. He should avoid personal feelings and strive to be impersonal and objective. At this moment, more than at any other time in the trial, the document examiner is the focus of all eyes; his every word and movement receives minute attention and may be the basis of favorable or unfavorable inferences on the part of court and jury. The evidence which the document examiner has presented, despite its competence, may be seriously weakened, if, under cross-examination he shows ill-temper, conceit, insolence, or bad manners.

When cross-examination becomes severe and provocative, he should remain still and keep physical movements under control. In his attitude, tone, and appearance he should avoid criticism; and by his manner and answers, he should make clear to court and jury that he is there to give positive aid in proving a fact. His testimony is enhanced when, under severest provocation, the witness remains unperturbed and courteous. There is no need for the witness to be a cringing martyr under attack; but the occasion should not be used to make his testimony more damaging just to punish his oppressor. The legitimate, competent document examiner knows that as far as the effect of testimony is concerned there need be no fear of cross-examination if the truth has been told and he knows what he is doing. The ordeal may be dreaded but the results should be proper. The mark of a "professional witness" is coolness under fire and courage when faced with adversity. The document examiner as a "professional witness" should act in like manner.

The intelligent cooperation of expert and attorney is always necessary in preparing for cross-examination. A series of carefully phrased technical questions to bring out the evidence in sharp perspective should be prepared for possible use in rebuttal. Wrong effects may be produced if answers elicited in cross-examination of the document examiner are not fully explained via judicious questioning in redirect examination. Evidence may be only partially given because it was only partially asked for.

Again, as in all testimony, the expert must use forceful and accurate language. This is most important. Effective answers, particularly in responding to questions posed in cross-examination, require use of exact, simple words to clearly express the ideas to be conveyed. Avoid being pedantic at any cost.

### **Summary**

The document examiner in the adversary system must have more than technical knowledge and experience. These are prerequisites and essential to his role as a "professional

witness." But to really play the role of "professional witness" successfully, he must have the ability to use simple, understandable language. He must be able to project his voice (not all court rooms are provided with electronic aids—in fact, very few) and should be capable of being heard in a crowded court room. He should be calm under stress and able to control his temper when provoked. He should be persuasive, able to convince others of what they understand. He should be unafraid of aggressive opponents but not dogmatic nor conceited.

And he should be an effective teammate for the attorney he is associated with in the contest. He should provide this attorney with a detailed report of his findings so that the attorney may determine the value of his proposed evidence. On the other hand the document examiner should be aware of the major facts of the case and the investigations surrounding these facts so that he can more intelligently evaluate his own findings. It is to the advantage of both attorney and document examiner to know as much as possible about the issue, and accurate information at this juncture will determine the future course of action. In any event, the attorney should be qualified to understand, at least in a general way, the basic methods used in the examination and comparison of documents. Thus, the attorney will be able to estimate correctly the value of this assistance and can discuss it intelligently in court and also effectively cross-examine those he believes in error.

The role the document examiner plays in the adversary system is that of a "professional witness." Though not strictly an advocate in the general sense of the term, by giving evidence for one side or the other in this legal contest, he becomes an advocate for his own contention. And being a professional, and now part of the team, he must strive his utmost to have his contention accepted. He cannot be completely neutral and aloof in this contest and convince the court and jury of the validity of his evidence; he must argue; he must persuade; he must be an advocate for his opinion.

And here in the advocacy of his contention, the document examiner merges all his talents into the role he now plays—that of a "professional witness."