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# On Playing the Game of Expert Witness in a Two-Value Logic System

The public is easily enamored with beliefs in the magic of science and the finality of expert testimony of all kinds. Upon being exposed to newspaper articles, comic strips, and television presentations concerning the forensic use of radar, lie detection, chemistry, graphology, microscopy, handwriting identification, etc (all of questionable scientific value and all presented with the same rhetorical conviction), the average person tends to place them on the same plane of scientific acceptance and reliability and is apparently unable or unwilling to differentiate between these disciplines. As a result of this unfortunate situation, when expert testimony is presented the average juror expects definite responses to all questions asked of the witness. When the normal pretrial preparations have been made (actually little or none in criminal cases), the direct testimony of the witness will tend to enhance this belief on the part of jurors because, by the nature of the questions asked, all answers are geared to being definite.

On the other hand, when attorneys confer informally, they are usually unable to agree on whether the chief difficulty with the scientific character of handwriting, as practiced by document examiners, is its relative lack of statistical correlations, the subjectivity of almost all of its data, the role of the examiner's personality as an intervening variable, or in general the failure of the mental process involved in the identification of a questioned writing to resemble modern physics in all significant aspects. However, they can usually agree that the testimony of handwriting experts, taken as a group, is suspect, although some experts are viewed as less suspect than others.

Thus, when the expert is called to the stand, the stage is set for what may be considered a game played within our adversary system of justice. Some of the conditions surrounding the game as *actually* played in the majority of criminal cases are: (1) an almost total lack of preparation on the part of both prosecuting and defense counsels; (2) a skepticism on the part of both prosecuting and defense attorneys (as well as judges) regarding the scientific merit of the expert's findings; (3) only a small amount of preparation on the part of the government's witness, who is subpoenaed frequently without ever testifying and, subsequently, only prepares haphazardly for cases in which he is actually called to the stand; and (4) a jury of laymen, whose duty is to decide who won the game of prosecution versus defense on the basis of the two-value logic framework of "Guilty" or "Not Guilty" within which they must operate (and within which they normally operate in their day-to-day affairs).

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The emphasis in this paper will not be to criticize the system but, rather, is intended to indicate how to play the game. To roughly quote George Bernard Shaw, without recalling the source: "The reasonable man will not expect his environment to change but will adapt himself to his environment. However, the unreasonable man will not seek to change himself, but will seek to change his environment. Thus, all progress depends on the unreasonable man." This paper will be presented from a "reasonable man's" viewpoint.

The game will be presented principally through a series of suggested responses to those questions most frequently posed to handwriting experts. Most of the material presented has been garnered in informal discussions with other document examiners over the course of the years and is not really new. It merely seeks to point out some ways of playing the game.

**Definitions of Terms**

For the purposes of this paper the terms *expert* and *witness* shall be understood to mean a document examiner or "handwriting expert" employed by police agencies servicing a wide geographic area. (It should not be construed to include examiners engaged in civil practice.) The term *two-value logic* shall mean that condition of mind which the average juror will have when he is first exposed to expert testimony—usually at the conclusion of direct examination—when the expert summarizes his testimony by identifying an individual as the author of a disputed writing. The term *game* shall mean the verbal contest which ensues between expert witness and opposing attorney for the mind of the jury during cross-examination.

**Some General Considerations in Playing the Game**

Expert testimony may be considered as a game with a dual nature. On the one hand, there is the "getting to know you" process in which the expert reveals to the court and opposing attorney his qualifications and, during direct examination, his degree of expertise and showmanship. On the other hand, there is the "taking advantage of you" process, a process known as cross-examination, in which expert and attorney struggle to capture as large a portion of the mind of the jury as possible.

Upon direct examination, the witness who cooperates too fully in the "getting to know you" process often seriously hampers himself in the second process. Thus, it is necessary not to relax the care with which one responds to questions by a friendly counsel who often wants the expert to overextend the import of his findings in order to impress the jury.

Cross-examination is the "taking advantage of you" part of the game in which the interests of the two contestants (witness and opposing attorney) are diametrically opposed. The witness has a finding to present and it is in his interest to support that finding, while it is in the interest of the opposing attorney to attack the credibility of the witness as an individual, his profession as a whole, and his findings in particular. Thus, at this stage of the game, the witness is already at a disadvantage since he cannot directly attack the attorney on these same points. On the other hand, the witness has the advantage of having an intimate knowledge of his relatively small field of study, his profession, and the validity of the reasons for his findings.

The opposing attorney has the advantage of opening up the game with a question. The witness, in pondering his answer, should think like this: "I have to choose my answer carefully. If I answer like this I have no way of predicting what he will ask next, but I must always assume that he will ask what is best for him and, hence, worst for me."

However, assuming that the opposing attorney is a rational player in this game, there is a further assumption that can be made which is that: "Both he and I should always consider the security level of any one of our questions and answers." The *security level* is defined as the lowest payoff the witness or attorney can receive from a given question or answer. A rational attorney will ask questions for which he knows the answer (or at least thinks he knows the answer). On the other hand, the witness before giving the answer should ask himself: "Does this answer close off further interrogation on the point, or does it suggest a further question which I may not be able to answer or which might cause me to lose points in this game?" Thus, the witness may sometimes have to respond to a question with the answer which loses the fewest points. However, the witness may also consider that if he suggests a further avenue of approach for the attorney it may lead to a question being asked for which the witness knows the answer, or at least a question which lends itself to clarifying the expert's testimony to the jury. Normally, witnesses are instructed not to volunteer information, but it is sometimes useful in clarifying a point which your opponent seems to have made or is about to make.

The question of whether or not to be outspoken about one's thoughts is a dilemma besetting the expert. For example, when it is known that the opposing expert is a graphologist or graphoanalyst the examiner may be asked his opinion of these areas. While he may honestly feel that these studies as commercially practiced in the United States have little or no value, he should consider the possibility that at least one member of the jury may be convinced of the merit of the subjects. The examiner must then beg the question with respect to graphology and respond that graphology concerns itself with correlating personality traits and handwriting characteristics, while he is only engaged in identifying authors of disputed or questioned writings which is the problem before the court. This is a form of ethical evasiveness that is necessary if one desires to "win" the game.

In any courtroom situation the expert must decide whether to be a hard bargainer who makes almost no concessions to the opposing attorney, or a soft bargainer who makes many concessions. The former attitude is indefensible because there will always be differences of opinion, and the latter is inexcusable. Thus, the expert must walk a tightrope somewhere in between the two positions. There is no definite level of bargaining which can be defined.

The expert during cross-examination may be considered to be in a position of antagonistic cooperation. He must answer the questions and his answers should be rational. However, the opposing attorney's questions need not be rational and it is not sensible to expect the attorney to ask a rational question if he thinks he can obtain a bigger payoff with a nonrational one.

**Suggested Ways of Playing the Game**

It has already been noted in answering the question on graphology that it is sometimes unwise to be absolutely candid. It is better to evade the question by giving an answer which the witness feels will not be offensive to any member of the jury. Other questions which are frequently asked and suggested answers are noted below in roughly the order in which they might occur during cross-examination.

The first question of importance normally asked is, "Is handwriting identification an exact science?" This is a question to which no answer will result in a big payoff for the witness. But the witness should seek the highest payoff possible and to do this he must volunteer information in order to educate the jury. The following answer is suggested: "There is only one exact science—mathematics—and there is some question about that.

Handwriting identification is not as exact as mathematics. However, do you mean as scientific as fingerprint identification?" By turning the question around the witness has accomplished several things. First, he has forced the opposing attorney to ask the next question and, if the attorney is poorly prepared, this is what this counsellor is leading up to anyway. Furthermore, fingerprint identification is usually thought by the jury to be infallible and is something the witness can relate to handwriting identification. The attorney will invariably say "Yes" to the expert's question. The witness should then reply, "Well, I would have to know what type of fingerprint identification you are taking about. Do you mean the identification of a latent fingerprint found at the scene of a crime? If so, you would have to tell me how many points of similarity the latent examiner found. It is my understanding that some fingerprint examiners will testify with as few as four points of similarity while others want at least seven and others insist on twelve. If you mean four, then I would say that handwriting identification is more exact than fingerprint identification. If you mean seven, I would say it is as exact. If you mean twelve, then I would have to say it is probably not quite as exact a science, but innumerable identifications are made on fewer than twelve points by latent examiners."

This answer normally terminates the questions on science, particularly since it suggests the next question which concerns the number of points necessary to effect a handwriting identification. The answer to this phase of questioning is well-known to document examiners as being that handwriting identifications are not based on counting numbers, but are effected by noting that all significant characteristics found in the known writing of an individual are reflected in the questioned writing and, further, that no significant differences appear in the two sets of writings.

The next question which is frequently asked is, "Are you absolutely certain that you are correct in your opinion?" At this time, a witness might have a desire to respond, "Well, I didn't travel over 500 miles to perjure myself." Such an answer may be perfectly honest and natural, but this is a hard bargaining point of view and removes the witness from his adopted position of scientific detachment. Thus, a more acceptable response is: "My opinion was reached after a period of careful study and, based upon my experience in evaluating handwritings, I can say with reasonable certainty that both known and questioned writings were executed by a common hand."

A question which sometimes follows the above is, "Have juries ever rejected your opinion?" This is a very broad question and I assume it is intended to show the present jury that there is precedent for rejecting the witness's opinion. If the witness says that he has no way of knowing if juries have rejected his opinion, and attempts to explain all of the reasons why he is unable to determine this, the present jury will either become bored or will think the answer is extremely evasive. A preferable answer is, "Juries consider many aspects of a case other than my testimony. Consequently their verdicts are the results of their deliberations concerning the credibility of all witnesses as well as the intent of the defendant. Thus, a verdict consistent with my findings is not usually reached on the basis on my testimony alone, but is based in part on the testimony of all witnesses. On the other hand, a verdict which runs contrary to my findings does not necessarily mean that the jury did not agree with me since their findings may have resulted from the failure of the prosecution to prove, for example, the element of intent on the part of the defendant. Thus, since I have not had an opportunity to talk to *all* jurors trying *all* of the cases in which I have testified, I have no way of knowing whether any particular jury has ever rejected my opinion." Such an answer tends to flatter the jurors and reminds them that the witness is not trying to usurp their function as triers of facts.

Another favorite question of attorneys which is frequently encountered is, "Isn't it

generally felt among forensic scientists that opinions given by handwriting experts in court are a very low order of expert testimony?" The answer to this could be that there is no way of knowing this since one has never seen any study made on the subject. However, an answer such as this might well lead to *minus* points in the game. Thus, it is better to once again sidestep the question with an answer such as, "I cannot speak for all forensic scientists, but I can speak for myself. I consider my testimony to be a very high order of evidence. For example, when a medical doctor or a psychiatrist [always include this group for obvious reasons] gives evidence, it is very difficult for individual jurors having no experience in these disciplines to determine with any degree of reliability the probability that the witness is right or wrong. However, when a handwriting expert gives his evidence he presents charts and demonstrates to the jury the reasons for his opinion. Each of the features to which the handwriting expert refers is subject to evaluation by jurors, for it is both within the realm of the jurors' experience and concerns something they can see. Thus, I believe the testimony of a handwriting examiner is a very high order of expert testimony."

The most popular question posed by attorneys has to be, "Have you ever been mistaken in an opinion?" There are innumerable answers which might truthfully be given to this question. For example, the expert might respond, "Since I have formed 20,000 judgments concerning handwriting over the past 20 years, the probability that I have never made a mistake is so low that it may be rejected." However, this type of answer is bound to be misinterpreted by the jury and will be most welcome by the opposing attorney. Thus, it is better for the expert to respond with the answer that no one is infallible and that if he has been mistaken in any written opinion he has rendered, it has never been brought to his attention (assuming this to be true). However, this answer will not stop further questions and the attitude of the witness throughout the interrogation must be that, while he is not infallible, he has arrived at a reasonable judgment; he has demonstrated these reasons to the jury; and he is *reasonably* certain that he is not mistaken in this particular case.

"Have you ever been opposed in a case by another expert?" is another popular question. Here, of course, the problem is to differentiate between the individual who dabbles in handwriting on a part-time basis and the relatively well qualified examiner, noting that in a few cases out of the thousands examined disputes have occurred. At the same time it should be noted that these well qualified examiners have not held opposite opinions, but have merely differed in the degrees of their beliefs (assuming that these statements are in fact true). However, there is merit in adding the thought that, "I have no objection to a witness appearing for the other side for it will make the job of the jury easier. For example, on the basis of my unopposed testimony the jury must determine the probability that my reasons are correct reasons. This is somewhat difficult to do. However, if a witness appears for the opposite side it is much easier for the jury to decide which one of us is more probably right in our reasons."

An alternative form of the preceding question is," "Isn't it true that handwriting experts frequently disagree?" With questions of this type one must define "expert," "frequently," and "disagree" and assure the opposing attorney that disagreement is anything but frequent. If pressed on this question an answer such as, "Equally qualified experts disagree so infrequently that when they do it becomes national news," may halt further debate on the point.

During the presentation of one's qualifications, the opposing attorney has an opportunity to note that the witness has not mentioned graduation from a college or university teaching handwriting nor certification by any board. Therefore, the attorney will usually

ask, "Have you ever taken any examination or test to become qualified as a handwriting expert?" After explaining that normal testing procedures similar to those taken by attorneys in order to permit them to practice before the bar are not available, the witness should add that each time he testifies he is, in essence, taking an oral examination. This tends to impress the jury with the similarity between your testimony and more formal testing procedures.

**Summary**

As long as experts (who are usually only slightly prepared) engage in an adversary system of justice played according to cues initiated by attorneys (who are even less prepared) before a jury of non-experts, it will be necessary for the witness to (1) try to avoid statements in sensitive areas that might be subject to misinterpretation by jurors, (2) volunteer a certain amount of information, and (3) attempt to lead the opposing attorney from question to question, in order to educate the jury which usually enters the courtroom with the belief that "Yes" or "No" answers exist in forensic sciences.

Considering the courtroom situation as a game will help preserve the sanity of the expert witness, particularly in view of the gravity of the proceedings to the defendant.

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