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Questioned Documents and the Law: Handwriting Evidence in the Federal Court System

It is probably wise to define at the outset exactly what material this paper intends to discuss and, perhaps more importantly, what it will *not* discuss. At the very least, this practice should save the time of readers who already know (or don't care about) what is offered, and of those who search for information which is absent here. This paper does cover the origins, development, and present status of handwriting evidence in courts of the United States. What is not discussed includes the historical English precedents (except insofar as the English common law doctrines were adopted and explicated in U.S. court decisions), nor is there any discussion of developments in courts of the various states, nor is there any specific discussion of questioned document problems other than handwriting. These are all deserving topics, and let us hope they will be subjects of future research, but for now the topic will be limited strictly to the law of handwriting evidence applicable in the federal court system. Historical discussions, collections of citations, and surveys can be found in Refs 1 through 5.

The handwriting expert of today, used to testifying in federal courts as a matter of course, would have found matters different indeed during the last century. At first, expert testimony was simply not permitted at all since the courts preferred to rely on the testimony of persons familiar with the disputed handwriting and the writing of those responsible for it, however meager and unanalytical the basis for the familiarity. The leading federal case of *Strothers v. Lucas* [6], decided in 1832, clearly enunciated the then prevailing rule:

It is a general rule that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.

As with most general rules in the law, several exceptions were developed or adopted [7-11]. The basic principle remained unchanged, however, and a complete statement of the rule in 1903 read as follows [12]:

... the common-law rule is as follows: (1) It is the general rule that evidence by comparison of hands is not admissible where the witness has no previous knowledge of the handwriting, but is called to testify merely from a comparison of hands. (2) The general rule has exceptions equally as well settled as the rule itself, one of which is that if a paper is in evidence in the case for some other purpose, and is admitted or satisfactorily proven to be in the handwriting of the party, or to bear his signature, the disputed writing may be compared therewith, and its genuineness inferred, or otherwise, from such comparison. (3) A paper, such as a pleading, recognizance, or the like, filed by a party to the case, bearing his signature, and forming part of the record or proceedings in the case of which the court takes judicial notice, may likewise be made the basis

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of comparison in determining the genuineness, or otherwise, of a writing attributed to that party. (4) Where the disputed writing is not of such antiquity that witnesses acquainted with the person's handwriting cannot be had, papers otherwise irrelevant to the issues, and not in the case as part of its records or proceedings, cannot be introduced in evidence merely for the purpose of instituting a comparison of handwriting. (5) Where a comparison is permissible, it may be made by the court and jury, with or without the aid of expert witnesses. The danger of fraud or surprise, and the multiplication of collateral issues, are the principal reasons for confining the rule within these limits.

Two major points emerge from a careful reading of the above statement. First, the identification of handwriting by comparison with known standards was still in strong disfavor, and even when it was permitted no expert testimony was required. That the handwriting expert was not highly regarded is made clear from the following statement from a case decided in 1907 [13]:

Whether or not an expert in handwriting may be asked to give an opinion, from a mere inspection of the disputed writing, whether it is in a genuine or a disguised hand, was at one time the subject of much difference of opinion; but it seems to be now reasonably well settled that this species of evidence, though generally of slight weight, and often immaterial, is competent.

As we shall see, the standing of the professional handwriting expert's opinion has risen considerably over the years and is generally given more than "slight weight" today in court decisions, although judges and juries are by no means completely free from scepticism or suspicion on the subject of handwriting identification.

The second major point embodied in the general rule above is startling to those accustomed to modern practice and was certainly burdensome to the practitioners of the time. At that time exemplar materials had to be in the case for some other purpose and were not admissible for comparison purposes only, with the small exception that permitted comparison standards when the disputed writings were so old that no living person could be familiar with the handwriting of possible authors.

Consider the difficulties such a rule would create in the routine forgery case of today. The only documents that could be admitted into evidence would be those having some relevance in themselves to the matter at hand apart from being handwriting exemplars (essentially all "request standards" would be inadmissible, except possibly signatures on warning and waiver forms and the like). Even if adroit trial tactics could succeed in getting a few scraps of writing into evidence, it would not be very likely that there would be sufficient comparable material for an opinion in the average case. Probably handwriting evidence would just not be possible in most federal trials, particularly in criminal cases.

Clearly some major change was needed if handwriting evidence was to become a factor in federal court cases. Changes had been made in the English court system, and in a significant number of the state court systems, to permit the introduction of exemplars, as such, which had no other relevance. However, the rule against such admissibility was firmly entrenched in the federal system and there seemed no immediate hope of change by judicial fiat. But where courts cannot or will not act, Congress can. Congress did, and in 1913 passed what is probably the single most important law affecting the handwriting expert in the federal system. The law (28 U.S.C. 638) turned the prevailing rule about comparison exemplars completely about:

In any proceeding before a court or judicial officer of the United States, where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness.

A case involving this statute is reported in Ref 14. A few minor changes were made in the text of the law in 1948, and the current language, found at 28 U.S.C. 1731, reads:

The admitted or proved handwriting of any person shall be admissible for purposes of comparison, to determine the genuineness of other handwriting attributed to such person.

This law made it possible to admit exemplar writing that had no other relevance to the case other than as a comparison standard, and it still provides the basic legal foundation for the admission of exemplar material in the federal court system.

The law requires that exemplar material to be used for comparison purposes be "admitted or proved." If the writings are admitted there is usually no further difficulty, but in practice such admissions are not generally forthcoming. Therefore, in the usual case, exemplar writings must be proved. In *United States v. White* [15], it was ruled, "There is no precise method by which a specimen must be proved to be genuine and the proof may be either direct or circumstantial."

Federal appellate courts have found circumstantial proof satisfactory in the following cases: a personal notebook of the defendant [16]; personal letters written by the defendant in a fraud scheme at a time when there was no reason to disguise the handwriting [17]; a signature on jury trial waiver [18]; student records at a university [19]; business records authenticated by a secretary [20]; hotel registration cards containing an alias used by the defendant and other identifying information used by the defendant on other occasions [21]; and employment applications [22].

A particular problem frequently arises when the offered exemplar material is prejudicial to a criminal defendant in that it indicates a prior arrest or confinement. It is well settled that such exemplars are not inadmissible. A clear statement of this proposition is found in *Hilliard v. United States* [23], decided in 1941:

While evidence of arrest for a crime not covered by the indictment is not ordinarily admissible against the defendant, it may be admissible if it tends to prove a fact that is relevant to the crime charged in the indictment; and there is no error in admitting testimony, unless it manifestly appears that it has no legitimate bearing upon the question and is calculated to prejudice the accused in the minds of the jurors.

Hilliard permitted the introduction of a fingerprint card from a prior arrest as a handwriting exemplar. Other cases have permitted the use of penitentiary records [24] and probation department records [15]. Special care should be taken in such cases to minimize the prejudicial impact, either by disguising, to the extent possible, the exact nature of the documents to be admitted [24], or by cautionary instructions from the court [15].

At least one case has specifically permitted the use of one questioned document which was proved to be by the defendant to be used as a basis for a handwriting examination on other questioned documents [14]. Such a procedure might prove especially useful in credit card or fraud schemes where the same name or names are used throughout and the defendant can be identified as the writer of one or more questioned documents by other than handwriting evidence.

However, if the standard writing is to be proved, it seems clear that the proof must be presented first to the judge before the exemplar can be admitted as such and then to the jury for its consideration. "The great weight of authority places on the trial judge the burden of determining the genuineness of the handwriting on the documents to be used as a standard" [22]. While the required standard of proof has not been widely discussed, there is authority that the standard for criminal cases is "reasonable doubt" [16] and that at least a prima facie showing is required in a civil case [20].

While 28 U.S.C. 1731 provides a firm and unequivocal legal basis for the admission of handwriting exemplars for comparison purposes, the attack on the admissibility of handwriting exemplars, particularly "request exemplars" prepared by criminal defendants, was not abandoned. Ingenious defense counsel changed tactics and began to raise serious constitutional issues bearing on the process of taking exemplar writing, based on Fourth, Fifth, and Sixth Amendment arguments. If these arguments had prevailed, if the taking of handwriting exemplars had been adjudged an interest protected under the Fourth, Fifth, and Sixth Amendments of the Constitution, it would have been necessary to consider the taking of handwriting exemplars as (1) a "search and seizure" under the Fourth

Amendment (perhaps requiring a search warrant and certainly requiring a showing of probable cause); (2) "testimonial" evidence under the Fifth Amendment requiring, at the least, *Miranda*-type warnings in a custodial situation; and (3) a procedure giving rise to the right under the Sixth Amendment to presence of counsel while the exemplars are being taken (similar to a lineup situation). While such holdings would not have made the taking of handwriting exemplars impossible, they would certainly have complicated the process.

The United States Supreme Court first considered the arguments under the Fifth and Sixth Amendments in the landmark case of *Gilbert v. California* [25]. In *Gilbert*, the defendant was convicted of an armed robbery of a bank in Alhambra, California, where a police officer was killed. While in custody, the defendant refused to discuss the Alhambra robbery, but did provide some handwriting exemplars in connection with other robberies. These exemplars were admitted in the Alhambra robbery trial over objections that the defendant's Fifth and Sixth Amendment rights were being violated. In disposing of the Fifth Amendment argument, the Court squarely held that handwriting exemplars are not "testimonial" evidence under the protection of the Amendment, saying:

A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying characteristic outside its [Fifth Amendment] protection.

The Court also refused to accept the Sixth Amendment argument, stating that the taking of exemplars was not a "critical" stage requiring the assistance of counsel.

Accordingly, after *Gilbert*, it is clearly the law that handwriting exemplars may be taken without any sort of Fifth Amendment warnings, that they may be compelled without violation of Fifth Amendment rights, and that there is no right to the presence of counsel. Following *Gilbert*, lower federal courts have upheld the taking of exemplars from defendants in jail (as long as the detention is legal) [26] and have held proper requests for *literatim* exemplars [27-29].

The Court next turned to the Fourth Amendment arguments, which had found a sympathetic ear in a few of the lower federal courts [30]. The Court specifically refused to extend Fourth Amendment protection to handwriting exemplars in another landmark case, *United States v. Mara* [31] (see also *United States v. Dionisio* [32], a companion case to *Mara*, involving voiceprint exemplars). *Mara* was subpoenaed by the grand jury, Northern District of Illinois, and was ordered to produce handwriting exemplars. He refused, was held in contempt, and was committed to custody, in spite of his claim that the order was an "illegal search" under Fourth Amendment protection. The Supreme Court rejected the argument on the basis that there is no legitimate expectation of privacy in a person's handwriting [31]:

Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice. . . . The specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest.

It should be noted, however, that *Mara* arose in a grand jury setting and the Supreme Court has not explicitly ruled on the Fourth Amendment question in other contexts. For example, the case of *United States v. Harris* [30], decided before *Mara*, held that the taking of handwriting exemplars from a subject who was in custody was unreasonable under the Fourth Amendment. *Harris* was not explicitly overruled by *Mara*, but its continued vitality is subject to serious question. For example, the same Circuit Court of Appeals which decided *Harris*, in a case arising after the *Mara* decision, upheld an Internal Revenue Service summons to produce handwriting, relying on *Mara*, but again not specifically overruling *Harris* [33]. Other courts and commentators also have expressed the belief that *Harris* has no continued effect [34,35].

There is one further caveat regarding grand jury orders to produce handwriting. While *Mara* makes it clear that there is no requirement for a showing of probable cause prior to an order for handwriting exemplars, it may be necessary to at least show that the exemplars are relevant to proper grand jury proceedings [36]. However, a brief affidavit from the prosecuting attorney may suffice if the affidavit states "that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose" [37].

Under the cases discussed above, it is well established that courts and grand juries have the power to order production of handwriting exemplars and that the power may be enforced by contempt proceedings. While the contempt power has been long recognized, it also has a firm statutory basis in federal courts and grand juries under the provisions of the "recalcitrant witness statute," 28 U.S.C. 1826 [38], which provides that any witness who refuses to testify, or provide other information, to any court or grand jury of the United States may be confined for the duration of the court proceeding, or the term of the grand jury, up to a maximum of eighteen months. One recent case has held that the production of handwriting exemplars comes within the provisions of 28 U.S.C. 1826 [39].

In addition to contempt proceedings, other sanctions may be available against the defendant reluctant to provide handwriting exemplars. The government is normally required to turn over results of expert examinations on motion of the defendant [40], but the court may refuse to make such an order where the defendant has refused to provide handwriting exemplars [41]. Further, several cases have held that it is proper for the prosecution to comment on the failure to provide comparison writings [42-44].

Most of the preceding remarks have concerned the development of the legal foundation for the admission of comparison standards. The remainder of this discussion will consider the comparison process itself and in particular, the development of the legal foundation for expert handwriting testimony. As we have already seen, the common law rule permitted no handwriting testimony based on comparison by experts or otherwise, but required that handwriting identifications be made by a witness familiar with the disputed writing. It is still the rule that expert testimony is not required and that nonexperts may testify as to the identification of handwriting if they are sufficiently familiar with the alleged author's writing [45, 46]. It is also true that the comparison between questioned and known writing may be made by the court or jury [47], and that a jury might conclude that two writings are by the same hand even when an expert opinion was inconclusive [48, 49]. However, in the usual case today, expert testimony is routinely offered based on the comparison of disputed documents with standard writings and, as with the admission of comparison standards, considerable change was required from the old common law rules to permit this current general practice.

In the federal court system, there is no landmark turning point in changing the old rule that no testimony by comparison was permitted to the current rule permitting comparison testimony by experts as a matter of course. The process was a gradual one. In 1832 no expert testimony was admissible [6]; by 1907 such testimony was admissible "though generally of slight weight" [13]; but by 1960 it was possible for a court to say [50]:

It is well settled that "... an expert in handwriting may testify and state his opinion as to whether different documents or signatures were written by the same person or are similar in respect of handwriting ... or whether a particular handwriting is genuine or disguised ..."

Similar rulings are reported in Refs 51 and 52. It is not required that an expert opinion be conclusive, and testimony expressing some degree of probability is permissible [53]:

Admissibility under F. R. Crim. P. 26 is governed by "the principles of common law." The common law makes no distinction as to admissibility of qualified expert opinion on handwriting in criminal, as opposed to civil, cases. ... In addition, the opinion of the handwriting expert, once admitted, can be used for the same purposes and to the same effect as the opinion of other

experts, . . . and is not inadmissible under the Opinion Rule or otherwise because it expresses a probability. . . . Any reservations in the expressed opinion, as with shortcomings in an expert's qualifications, to the weight of the evidence and are a determination for the jury or fact-finder to make.

It is certainly true that there has been a vast increase in the respect accorded the opinion of a handwriting expert, permitting appellate courts to uphold the conviction of a criminal defendant on the basis of expert testimony alone [54]:

Handwriting identifications can be as certain and dependable as any other identification. While handwriting analysis may not be as scientifically accurate as fingerprint identification, it is, on the whole, probably no less reliable than eye witness identification which is often made after a quick glance at a human face. Naturally, when the record fails to furnish independent corroboration of guilt, the fact finder should receive the evidence with heightened caution, but it cannot be said as a matter of law that such testimony, coupled with the trial judge's own observation of the exhibits, may in *no* event be found sufficiently persuasive.

One may harbor some skepticism about the government witness' self-assured statement on cross-examination that in thirty-five years he had never made a mistake in such a case, qualifying this statement only by the phrase "so far as I know." This recalls Justice Holmes' famous observation, made in another context, that certitude is not the test of certainty. But though we attribute human fallibility to handwriting experts as to other witnesses, the judge or jury hears them out and makes an independent judgment upon the reliability of their testimony. To qualify as a witness, the expert is not required to prove that he has achieved a record of perfection.

Thus, whatever reservations courts had about handwriting evidence at one time, it is now firmly established that such evidence is well regarded in the federal court system.

Of course, before the expert may testify at all, he or she must be qualified as an expert witness, and the determination of whether the witness is sufficiently qualified to offer expert testimony is for the court, and the weight to be given the testimony (if permitted) is for the jury, to decide [55]. Handwriting experts are qualified in court on the same basis as other experts [56]. The courts have only rarely discussed precise details of expert qualifications for handwriting experts, but let us hope that standards are higher than those found acceptable for the "expert" in the old case of *Miller v. United States* [57], decided in 1921:

The witness John T. Roddey testified that he had had some occasion to examine handwritings; that he had not had a great deal of experience, and had not given much attention to the matter, and had had no experience of examining handwritings, except for his own satisfaction; that for his own satisfaction he had studied books on the subject and read two or three articles; that he looked into the subject enough to enable him to identify different handwritings; that he did not consider himself an expert, but might be called an expert, but not of the first class, that he could identify handwritings as well as the ordinary man, and probably a little better; and that sometimes, when he happened to be around the bank he would be called on to make comparisons of different handwritings.

It would be comforting, but perhaps unrealistic, to believe that Mr. John T. Roddey lives only in an old law book, and cannot be found in modern courtrooms. While it is undoubtedly true that not all lawyers and judges understand (or care) what a handwriting expert ought to be, at least one widely respected and consulted legal authority provides excellent discussions of handwriting evidence and the qualification of handwriting experts [58].

This paper, in essence, has developed the not very startling proposition that expert handwriting evidence is admissible in federal courts. While the conclusion itself is not surprising, it is perhaps useful to understand the legal basis for the conclusion. It may be useful to know why handwriting exemplars may be admissible for comparison and no other purpose; why the production of handwriting exemplars may be compelled from defendants without violation of any Fourth, Fifth, or Sixth Amendment rights; and why the conclusions of a properly qualified handwriting expert are admissible in evidence. These topics, among others, have been discussed with a sincere attempt to make the

discussion as accurate as possible. The treatment is not exhaustive but should serve as a guide to the federal law concerning handwriting evidence.

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