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Ordway Hilton,[1] *M.A.*

Is There Any Place in Criminal Prosecutions for Qualified Opinions by Document Examiners?

In the course of resolving submitted problems, document examiners may reach an opinion ranging from genuineness to forgery. In comparisons with standards, the opinion may range from "This person wrote the questioned material" to "This person cannot have written the questioned material." However, not all opinions are positively yes or no. For a number of reasons an opinion may be qualified to some degree. These opinions are expressed in reports of findings, but should any opinion other than a positive one be part of the testimony in a criminal case?

A further question undoubtedly should be considered: Why limit this inquiry to criminal trials? We have to recognize the difference in the degree of proof required for a guilty verdict in a criminal case compared to the findings for either plaintiff or defendant in a civil case. Civil cases' decisions are based on the preponderance of the evidence, but a criminal guilty verdict must be beyond a reasonable doubt. In other words, a significantly different degree of proof is needed in criminal trials, and this point must be a key consideration in the question at hand.

It should also be recognized at the outset of this discussion that the decision concerning the use of qualified opinions in criminal trials is not necessarily a decision of the document examiner alone. There are the problems of administrative superiors who require that the examiner appear in the case, or the decision may be solely that of the prosecutor. Not every examiner can take the position that he will decide whether or not he should testify, but in many instances his taking a strong stand one way or the other may influence the person who makes the final decision.

Document problems can be divided into two classifications: those in which a positive opinion is possible, or is commonplace, and those in which the state of the art permits only qualified findings or permits a positive finding only in very rare instances. Certainly with this latter class of problem we cannot arbitrarily say that no testimony should be given unless it is positive.

As far as federal courts (and many state courts) are concerned, *United States v. Galvin* [*1,2*] holds. In particular, it establishes that a qualified expert opinion on handwriting is admissible in criminal as well as civil cases. Thus, as far as the courts are concerned, there is no rule preventing qualified opinions, although experts may occasionally encounter judges in lower city courts and state courts who rule against such evidence. We are concerned not with the individual arbitrary lower court judge or magistrate but with the rule in general and with considerations, primarily from the document examiner's point of view, of the real effectiveness of qualified testimony in criminal prosecutions.

Let us first consider the cases in which a positive opinion should be possible—the identification of handwriting or typewriting, or the proof of the genuineness or forgery of a signature. With these problems it is known throughout the profession that a certain percentage of cases does not permit definite findings. Disguise, inadequate standards,

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[1]Examiner of questioned documents, New York, N.Y.

and the nature of the questioned writing when it cannot be duplicated in any known specimens are among the reasons for qualified opinions. If such a case leads to a qualified identification, should the examiner testify or should he be permitted to testify by the courts?

If the question concerning handwriting is the controlling element in the ultimate decision of the case, as it might well be when the document in question is the basis of the indictment, then the examiner is probably the main means of proving guilt. When guilt must be proven beyond a reasonable doubt, what real value is there in an opinion that can be no stronger than "very probable"? Why should a prosecutor proceed with such qualified identification? In view of the degree of proof necessary in criminal cases and the fact that an examiner should be able to express a definite opinion there seems to be good argument for his limiting his testimony to those cases in which he can be definite.

On the other hand, when an examiner is testifying in a case that requires an answer to the question of whether the defendant's pen was the one which placed certain notations on a paper, we all know that the answer can seldom be expressed in any way except in various degrees of probability or likelihood. Conceivably, a prosecutor might, as part of his proof, want this evidence before the jury. Since no one can say for sure that only this pen was used there seems to be some argument for producing this kind of qualified testimony. Obviously, in such a case there is a definite need to lay the proper groundwork for a qualified opinion. Those who must decide the case should know why such an opinion is given. They should know that there are, for example, certain common defects in ball-point pen strokes, some of which appear in the writing at hand. They should know that despite the apparent rarity of a particular color ball-point pen ink that thousands of other pens besides the defendant's have been manufactured with this ink. They should know that there are many pens with a small ball, which consequently produce a finer writing line, and if there are other qualities of the writing in question which tend to individualize it, they should know that these things can occur in other instances. Finally, it should be made clear that there are only limited qualities of the writing stroke which can be considered to result from the way the pen writes and that none of these, or no combination of them, is going to individualize one particular pen. Rather the fact must be stated that here is one of a group of pens which could have been used. This evidence alone will not result in conviction, but it may form one of a series of links to prove the case. The justification for presenting this qualified testimony is simply that it is as strong as the state of the art will permit.

Probably the crux of the whole situation is this: Must the defendant be proven guilty by the handwriting testimony alone or is there other evidence which in combination should establish guilt? In the former instance qualified opinions are insufficient, while in the latter there can be an argument for using a qualified opinion as one of the series of links.

Another element should be considered. There is a danger in some instances that a jury will be swayed by the presentation of an expert so that his testimony is given undue weight. Possibly an agressive prosecutor will insist on the examiner testifying in the hopes that he will get a conviction under such circumstances. The jury will take the attitude that the examiner has been very fair, maybe too fair, so that his testimony on a partial identification is interpreted by the jury as a very good identification because they do not completely understand the dangers of assuming that the opinion is convincing based on the evidence that has been developed. In other words, by the examiner's saying that there is strong probability (that is, some doubt remains) that the defendant wrote the document the jury will come to believe he did, whereas without such expert testimony there will be no guilty verdict. In such instances the use of expert testimony represents an attempt to sway the jury beyond the point that someone who is expert in the field is willing to go. Are we who are specialists in the evidence and who have some reservations

contributing to the proper administration of justice by participating in such a practice? We need also to recognize that defense counsel may hesitate to emphasis the lack of a positive opinion on cross examination for fear that the expert may then be pushed into strengthening his opinion.

Some qualified opinions on handwriting and typewriting identifications lead to opposing expert testimony. The conflict may simply be over the degree of qualifications, or it may lead to an expert for the defense who will maintain that there are not sufficient similarities to make any kind of identification. Actually, the conflict arises over how to interpret the differences—whether they are really basic differences or are simply unexplained differences not of a fundamental nature. Conflict in court by opposing experts erodes the acceptance of testimony in this field. While no statistics have been kept on this subject, conflicts appear to be becoming more numerous. Qualified opinions may be only a minor factor. Limited qualifications, emphasis on adversary attitudes, and the professional witness who finds no problem in adjusting his opinion to best fit his client's case all play a prominent role. However, the willingness of document examiners to present qualified testimony certainly invites rebuttal that is similar but expresses different likelihoods. Often an unbiased examiner might well conclude that neither witness should have been on the stand. As stated earlier in this paper, the decision as to whether an expert will present a qualified opinion in a criminal prosecution is not entirely the document examiner's decision, but we as a group could do well to discourage the use of this testimony in those situations in which only positive opinion should lead to a guilty verdict.

This question of testifying with qualified opinions in criminal prosecutions is a delicate one. There is no simple solution. Many courts will accept an expert opinion short of certainty. But what the document examiner needs to do is to carefully analyze his position in any case in which his examination leads to a qualified conclusion. He may do well to advise the prosecutor or his immediate superior, who decides whether he should or should not appear, of his lack of enthusiasm for testimony in a case with such opinions. We need to take a stand whenever there is an opportunity. We need to review what has been accomplished in cases in which similar evidence has been presented, and we need to consider, as a group, whether this type of testimony has any real place in the prosecution of criminal cases.

References

[1] *United States v. Galvin,* 394 F.2d 228,229 (3rd Cir. 1968).

[2] Costain, J. E., "Questioned Documents and the Law: Handwriting Evidence in the Federal Court System," *Journal of Forensic Sciences,* Vol. 22, No. 4, Oct. 1977, pp. 799–806.

Address requests for reprints or additional information to
Ordway Hilton
15 Park Row
New York, N.Y. 10038