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The Examination of Questioned Documents

Ordway Hilton

AN ATTORNEY usually consults an examiner of questioned documents with the primary thought of calling him as a witness. However, the first function of the examiner in any legal problem is to discover facts concerning the document — its genuineness, the existence of alteration, and by whom it was prepared. In many cases simply by revealing these hidden facts he can render invaluable assistance to the trial attorney even though he may never be called to the witness stand.

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More and more attorneys are submitting documents for technical study because they realize the distinct value of knowing as much about such

documents as possible. These examinations may disclose very favorable information, items of slight value, or even facts adverse to his contentions. (The latter conclusion is reached in about 40% of the problems submitted to the scientific examiner) With a reliable opinion at hand, however, the attorney can better prepare for the presentation of his case, advise and work out settlements before trial, test the truthfulness of his own witness concerning the document's preparation, or cross-examine an opposing witness on testimony pertaining to it.

Here are a few examples of how such a procedure can work.

DENIED SIGNATURES

It is extremely encouraging when one's client who is confronted with an adverse document says clearly and convincingly: "But I didn't sign it." It is more encouraging when this statement can be established as a fact. If it is actually so, a document examiner's opinion and testimony is a powerful weapon. If it is not, he can discover the flaw before trial, discouraging as it may seem, without the mistaken client discrediting his entire testimony and adversely affecting his whole case.

Some denied signatures are forgeries; many are not. Certain individuals are foolish enough to believe that disclaiming an authentic signature will help their case and that no one will refute them. Today an alert opponent is almost sure to submit the signature to a document examiner for an opinion. He will thus be prepared to refute a mistaken or dishonest denial.

It may be that the genuineness of the signature is the controlling element of the entire case. The busy trial attorney, especially one who has the case on a contingent basis, can profit from the unfavorable news for then he can abandon what would be a hopeless proposition and devote his time to more promising business. On the other hand, the signature may not be the controlling factor. Advised in advance of its genuineness, the attorney may be able to confront his witness with the facts and get from him the truth concerning the controversy.

VERIFICATION OF OWN WITNESS'S TESTIMONY

Despite a lapse of years a witness may remember many significant details regarding the preparation or execution of a document. His attorney, feeling such memory is too good to be true, may decide to verify these statements through technical examination. Or this step may seem prudent because of a ringing challenge by his opponent. The latter situation generally arises after the witness has sworn to his story in an examination before trial or in the court room.

The ideal procedure would be to have the papers examined before the witness makes his statements under oath, but this is not always done. But where the witness has sworn to his claims, technical investigation serves a two-fold purpose. It reveals the true facts concerning the document, even if only to give advance warning of opposing expert testimony, and it provides for possible supplementary presentation of the facts should cross-examination tend to weaken the position of a truthful and accurate witness.

This sort of situation arose once in the course of an extended patent litigation. Certain modifications in a basic drawing figured prominently in the case. They had been made some twelve years before as an improvement in the regular course of manufacturing, and when it was done and by whom it was done became an important issue. A draftsman testified that he had made the changes at a date when there was a record that he had worked on a drawing, and he then proceeded to identify his lettering.

These statements were challenged on cross-examination, and the draftsman was required to prepare lettering for comparison with the disputed entries. Upon the completion he pointed to differences in the form of the letter "G." He had modified this letter when he changed employment several years after the date in question. The modification, he explained, was to improve the legibility of the letter. Neither side attempted to verify or disprove the assertions.

The attorney who called this draftsman had the courtroom writing and drawing studied and compared. He wished to learn just how his opponent might attack the testimony through an expert witness. Basically, he sought to know what the facts actually were. Examination of the lettering disclosed consistent similarities between the two documents, except, of course,

for the "G." Thus, with this information and after an extensive fact-seeking conference with his document examiner, the attorney was thoroughly prepared to cross-examine any opposing expert. Despite the counsel's worst fears no testimony on this point was offered. Nevertheless, through his consultation he knew the facts and their correct interpretation and could have handled the situation adequately had the issue been pursued.

EXAMINATION OF AN OPPOSING WITNESS

Had the situation just referred to been reversed, there would have been a foundation for a thorough and searching cross-examination. Whenever a key witness testifies about a document, or attempts to reinforce controversial testimony with one, it is always worth while to have the document examined.

This was effectively done during a long weekend recess of a trial involving a dispute over construction fees. A witness who had prepared estimates for one phase of the construction testified regarding the factors in the estimates and his handwritten work sheets were offered in evidence in this connection. These sheets were specially printed forms with pencil entries which contained many obvious changes and alterations. Certain of these changes seemed to have particular significance.

The sheets were submitted for technical examination. Very careful study and controlled-light photographs were made to determine exactly where the changes occurred. In this way it was verified that a key item which had been written in among the printed entries had been inserted at two points and partially erased before it was finally placed on the work sheet. The witness's direct testimony indicated that this would be contrary to his normal procedure.

The cross-examiner spent several hours with his document examiner going over the photographs and the original sheets and learning just what changes had been made and what the original entries had been. With this data he launched upon a searching cross-examination. In fact it was so effective that he was able to draw out of the witness admissions that each change had been made. When the cross-examination was completed the original testimony had been discredited and the true facts had been put before the court. It was not even necessary to call the document examiner to demonstrate these conclusions.

PREPARATION FOR AN UNCOOPERATIVE WITNESS

An adverse or uncooperative witness may be essential to the case, but his testimony generally is used with reluctance. The recent New York State Crime Commission's Investigation of Water Front Activities was often hampered by principals who had little desire to cooperate. One group however, reversed its attitude when confronted with the findings of a document examiner.

The records of a stevedoring company had been under scrutiny. The management's relationship with union officials was of particular concern. The Commission's accountants became suspicious that certain changes and alterations had been made in the account books, but at a closed hearing a company official, who had charge of these books, flatly denied that there were any changes. The books were then submitted to ultraviolet examination and chemical tests which revealed a series of erasures and the deleted names of labor representatives to whom periodic payments had been made. Confronted with a detailed report and photographic decipherments, the reluctant witness changed his story and at a public hearing admitted that the books had been tampered with. Expert testimony was then produced to demonstrate exactly what changes had been made.

By disclosing the true facts a document examiner can assist the trial attorney in planning the strategy for his entire case. When the hidden facts in a document are favorable he can enable the attorney to proceed with assurance. When the hidden facts are unfavorable he can help the attorney avoid useless litigation. Although it might be unnecessary to call the examiner as a witness his contribution to the successful presentation of a lawsuit cannot be overestimated.