THRESHOLD OF ADMISSIBILITY: QUALIFICATIONS OF THE FORENSIC DOCUMENT EXAMINER

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INTRODUCTION

The admission of expert testimony, especially that of Forensic Document Examiners, often seems ambiguous and arbitrary. This paper examines when and how expert testimony is admitted in courts of law. The paper consists of the following:

I. The THRESHOLD OF ADMISSIBILITY FOR EXPERT TESTIMONY.

II. QUALIFICATIONS NECESSARY FOR THOSE TESTIFYING AS FORENSIC DOCUMENT EXAMINERS. (The Impact of recent attempts at standardizing and assuring the professional qualifications for Forensic Document Examiners (i.e., ABFDE certification) on the legal system.)

III. EXCLUDING the TESTIMONY OF UNQUALIFIED EXAMINERS - CONCLUSION.

I. THRESHOLD OF ADMISSIBILITY FOR EXPERT TESTIMONY

The qualification of an expert to testify is committed to the sound discretion of the trial court. This authority is granted the trial court under Rl. 104(a) of the Federal Rules of Evidence. (The Federal Rules, with minor variations have been adopted in most states.) Rule 104(a) states in relevant part that "Preliminary questions concerning the qualification of a person to be a witness...or the admissibility of evidence shall be determined by the court."

It follows then that all preliminary challenges to a proposed expert's competency are made under Fed. Rl. 104(a). Since there is no general presumption a witness is competent to testify as an expert, the burden of demonstrating the proposed expert possesses the necessary learning, knowledge, or experience falls on the party offering the witness. All challenges to the witness's qualifications should be made prior to the admission of their testimony. Following such challenges, it is preferable for the court to expressly find the witness is qualified. However, some courts are reluctant to do this; the jury may see it as an approval by the court of the expert's opinion. Therefore, the opinion is given more weight than it might otherwise have received from the jury. By permitting the witness to testify as an expert, the judge, by inference, rules that the expert is qualified.

Rl. 702 of the Federal Rules of Evidence outlines when expert testimony may be admitted:

> "If Scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Thus, per Rl. 702, the preliminary question of admissibility is whether the jury can receive appreciable help from the expert in the particular subject in issue. It is a relatively liberal standard dependent in each case upon the subject in issue and the witness.

Substantive areas of expertise are not limited to those recognized formally in academia and experts need not be persons with academic backgrounds. For example in Circle J. Dairy, Inc. v. A. O. Smith Harvestore Products, Inc., 790 F.2d 694 (8th Cir. 1986) the Court upheld the trial court's decision to permit the owner of a soil and feed testing service to testify as an expert regarding permanent injury suffered by cattle even though the witness was not a veterinarian and was without an advanced degree. In reaching its decision the court reasoned that Rule 702 does not rank academic training over demonstrated practical experience.

Unfortunately, there are no rigid rules for determining who is qualified as an expert in a particular field. As stated earlier, this determination is left largely to the trial court's discretion. As a result, the admission of expert testimony does appear at times to be ambiguous and arbitrary.

Yet, there are certain recognizable standards against which the qualifications of an expert may be judged. Some courts have said that the true criterion is not whether the proffered expert employs their trade commercially or even professionally, but rather can they be of help to the jury in resolving the particular subject in issue? (Bliss v. Treece, 658 P.2d 169 (1983)) Other courts make their decision based on the witness's ability to exhibit sufficient knowledge on the subject matter in issue. (Gnrud v. Smith, 206 N.W.2d 311 (1973)) In measuring the qualifications of an expert, it is commonly stated that the witness must demonstrate some knowledge of the subject beyond that of the average person. (Consolidated Mechanical Contractors Inc. v. Ball, 283 A.2d 154 (1971)) Thus, the threshold for admissibility seems to be quite low and quite liberal. Stated most succinctly: Can the jury receive appreciable help on this subject from this witness?

An expert witness is not required to be the best witness on a particular subject; the test is merely whether the witness offered as an expert will aid the trier of fact. Further, the witness does not necessarily have to possess all of the knowledge within his or her special field of endeavor. As set forth in Ellis v. K-Lan Co., 695 F.2d 157 (1983), even though a proffered expert may be unfamiliar with pertinent standards or definitions within his field, that alone is not grounds for disqualification. Witnesses may be qualified to testify even though they are not at the top of their field. It is widely held that the degree of the expert's knowledge goes more to the weight of the evidence than to its admissibility.

Despite the relatively liberal standard of Rule 702, a witness must still satisfy the degree of "certainty" required of expert testimony in that jurisdiction. In general an expert must testify to a "reasonable certainty" which is often interpreted as "more likely than not."

Expert testimony must also satisfy criteria under Rule 703, setting forth the acceptable basis for expert opinions. In formulating an opinion for Federal Court, an expert may rely on facts or data observed firsthand, or made known to them at trial, or upon inadmissible evidence. In this last respect, the Federal Rules sought to broaden the basis for expert opinions beyond that which is current in many jurisdictions. This was to bring judicial practice into line with the practice of the experts themselves when not in court. For example, a physician in his own practice may base his diagnosis on numerous sources including statements from patients, hospital records, opinions from nurses and other doctors' reports.

As stated previously, the primary responsibility for determining whether or not a witness is qualified as an expert rests with the trial court. This determination is reviewable on appeal only when an abuse of discretion is demonstrated or the error is clear. The decision of the trial judge will be upheld as long as the correct principles of law were applied to the facts involved. It is not a question of whether the higher courts would have ruled contrary to the trial judge or found his decision "right" or "wrong", but rather simply did the trial judge abuse his discretion.

II. QUALIFICATIONS FOR FORENSIC DOCUMENT EXAMINERS

The general rule for admitting forensic document testimony is the same as for admitting expert testimony in general. A prospective document expert must satisfy the rather liberal requirements of Rl. 702. The witness must be able to demonstrate some knowledge of the subject beyond that of the average person and, further, must be likely to assist the trier of fact in resolving a subject in issue. The specific guidelines for one attempting to testify as a forensic document expert are quite ambiguous and the standard remains quite liberal.

This liberal standard is illustrated in the early case of Miller v. United States, 277 F. 721 (1921). In Miller, a witness was permitted to testify as an expert in handwriting even though he admitted that "he had not given much attention to the matter and had had no experience in examining handwriting, except for his own satisfaction." The admission of his testimony was later upheld and he was permitted to express an opinion regarding a handwriting comparison he had conducted.

Some years later in Heller v. Murray, 112 Misc.2d 745 (1981) this liberal standard was once again used to admit a graphologist to testify concerning a disputed signature. The court later stated that although the witness had been duly qualified, the weight given his testimony was severely affected by his mail order degree and the fact that he had never testified before. It held that attacks on an expert's qualifications are better directed toward the weight of the testimony, rather than toward its admissibility. A significant number of other courts share this view. These courts believe, as does the Heller court, that qualifications are truly a matter of credibility, a determination better left to the jury. (State v. Berg, 697 P.2d 1365 (1985))

A decision similar to Heller was handed down by the Supreme Court of Mississippi in Hooten v. State, 492 So.2d 948 (1986). It admitted the testimony of a graphologists, who fifteen years earlier had completed a correspondence course through the International Grapho Analysis Society Institute. On cross-examination, the witness admitted that the only references she used when examining documents were her dictionary and "some books" published through her alma mater. When asked if in the last fifteen years she had

attempted to learn anything new about the field of handwriting examination, she replied "I don't intend to. I feel like what I know is sufficient for the amount I intend to do."

In admitting her testimony, the Supreme Court reasoned that her "practical experience" fell within the ambit of Rl. 702. Further, she had testified over 300 times in various courts of law. The Hooten court emphasized that because the trial court had excluded her testimony, the testimony of an F.B.I. examiner, who had established the defendant's presence at the crime scene, was uncontradicted. This last reason appeared to be the most compelling for the court. Defendants' rights in criminal prosecutions are very hallowed. It seemed the court believed the defendant's right to a fair trial and his right to present witnesses on his own behalf, had been deprived by the trial court in its refusal to permit the graphologist's testimony. As seen here, there are times when other issues, besides qualifications, dictate when a prospective witness will be permitted to give expert testimony.

In reaching its decision that the graphologist was qualified, the court emphasized the established rule that is it not necessary for one offering testimony to possess the highest degree of skill or knowledge on that subject. Rather, it is sufficient that the person possess information on the subject not likely to be held by the average lay person. In its conclusion, the court reiterated the Heller court's view that attacks on the credibility of an expert's qualifications go to the weight of the testimony, rather than to its admissibility.

There was a nine page dissent written in Hooten. Justice Hawkins, who obviously was well informed on the subject of forensic document examination, noted that the prospective witness was not familiar with books by Hilton, Conway, Harrison, or Osborn. He also went into a rather satirical discussion on the validity and relevancy of "Grapho Analysis" to handwriting examinations. Certain qualifications for forensic document examiners were set forth. Hawkins stated "the qualified examiner will invariably have several years working...for others in his special field...is almost certain to be a member of the American Society of Questioned Document Examiners and will probably belong to other related professional groups, such as the American Academy of Forensic Sciences." He concluded by answering the claim that she had testified over 300 times by responding that "it is an astonishing indictment on the gullibility of lawyers and judges."

As can be seen by this dissent, there are judges who are skilled at discriminating between the qualified and unqualified examiner. The power to effectively discriminate comes from being well informed. It is important to note the criterion used by Judge Hawkins: He understood the apprenticeship involved in forensic document training, the importance of reading the recognized texts, and the value of professional memberships. Some recent cases suggest that other courts are also beginning to adopt a more critical attitude when admitting prospective forensic document experts. The following cases illustrate this trend.

A leading case in which a prospective document expert was not permitted to testify is Carroll v. State, 634 S.W.2d 99 (1982). The court found that "the practical training and experience of the witness in the field of forensic document work did not clearly qualify him as an expert to testify about the authenticity of questioned documents." The proffered witness's training in this case consisted of a correspondence course through the International Graphoanalysis Society of Chicago.

The court in Carroll discussed at length the scientific value of graphoanalysis. It noted that the term "graphoanalysis" was not found in any of the leading dictionaries and concluded that the term must have been coined by the international society. It went on to consider that graphoanalysis is merely an aspect of graphology. Based on an article from the Encyclopedia Britannica (1965), the court found that graphology was the study of handwriting as it relates to personality and character traits. Quoting from the article the court reasoned that "the question of the ultimate scientific value of graphology is unanswered" and that the encyclopedia listed graphology under Fortune Telling. The court concluded that there is no apparent connection between either graphology or graphoanalysis and the comparison of handwritings to determine authenticity.

The court further noted that even though the proffered witness claimed to have twelve years experience in the field of questioned document work, he only testified once in a court of law. In an interesting comment, the court also indicated the witness was not a member of the American Academy of Forensic Sciences. The court concluded that the presented witness lacked the necessary qualifications to give expert testimony. In reaching its decision, the Arkansas Supreme Court quoted from a previous case in which it also sustained the trial court's rejection of a proffered expert who "was unable to cite any training or experience that clearly qualified him as an expert with respect to the question at issue." United States v. Fidelity & Guaranty Co. v. Smith, 480 S.W.2d 129 (1972).

There is one small caveat to this case. In concluding that the witness was not qualified, the court noted that the forensic document question regarding who had signed a particular bill of lading was not of any real consequence to the case. In fact, one of the defendant's freely admitted that the bill was spurious. Thus, there are intimations that the outcome may have been different had the document issue been central to the case.

Nonetheless, several important points in this case are encouraging. First, the court, in a well reasoned discourse, successfully distinguished between graphology and forensic document examination. Second, they pointed to membership in the American Academy of Forensic Sciences as a means to distinguish the qualified from the unqualified.

A similar case arose from the Middle District of Georgia, United States Court of Appeals, Fifth Circuit. In United States v. King, 532 F.2d 505 (1976) the court held that a prospective witness, whose only training consisted of a correspondence course in graphology, was not qualified as a "handwriting expert." The court pointed out that the witness had not trained under a qualified examiner and had no laboratory experience. The court further noted that the proffered witness was employed full time in a job unrelated to forensic document work.

The impact on the court of recent attempts at standardizing professional qualifications for forensic document examiners, namely American Board of Forensic Document Examiners (ABFDE) certification, can be seen in this trend as well. In People v. Tidwell, 706 P.2d 438 (1985), the court refused to admit the testimony of a proposed expert who was regularly employed as a court clerk. The proposed witness could give only a vague explanation as to her qualifications and no identifiable standards for membership in organizations to which she belonged. In concluding that the witness was not properly qualified, the court pointed out she was not certified by the ABFDE.

In relying in part on Tidwell and Carroll, a proffered witness's testimony was rejected, in part, because he was not certified by the ABFDE and because he was not a member of the American Academy of Forensic Sciences. State v Livanos, 725 P.2d 505 (1986). As the other courts had done, Livanos reasoned that the witness's background was in graphology and as such was not qualified to testify on forensic document issues. The prospective witness in Livanos pointed to his professional membership in World Association of Document Examiners (W.A.D.E.), which the court concluded was of little influence, since the admission procedures were so informal. The court also considered that the witness had never testified in a court of comparable jurisdiction.

In reaching its decision, the Livanos court also relied, in part on a previous Arizona decision that had somewhat modified the threshold of an expert: someone who possesses more knowledge on a particular subject than the average lay person. "The fact that a person may deal with a subject in such a manner that it makes him more knowledgeable than the average citizen does not necessarily make him such an expert that it is an abuse of discretion to refuse to allow him to testify." State v. Seebold, 531 P.2d 1130 (1975).

A subsequent decision also noted the existence of the ABFDE as a certifying body for forensic document examiners. In United States v. Buck, 1987 U.S. District Court for the Southern District of New York, a defendant's motion challenging the validity of handwriting comparisons was denied in part based on the existence of the ABFDE. The court held that it was satisfied "that professional scientific knowledge in the subject area exists and is sufficiently reliable to be of assistance to the jury."

Another recent case, illustrating the courts desire to adopt a more critical attitude when admitting prospective forensic document experts, is Graves v. State, 547 N.E.2d 881 (1989). The court refused to qualify a proffered witness as a handwriting expert, essentially because her training was in graphology. It further reasoned there were no identifiable standards for membership in the organization to which the witness belonged, namely the International Graphoanalysis Society, whose qualification for membership are a "good track record in document examination" or having graduated from the Chicago institute.

Although the precise impact of the ABFDE on the legal system is not yet fully known, it is encouraging that several important cases have emerged where the ABFDE was used to discriminate the qualified from the unqualified. In that the Board's purpose is to establish and enhance standards for the science of forensic document examination, it seems fitting that these standards should be recognized and applied by the legal system. The actual naming of several of the professional organizations, such as ASQDE and AAFS, in certain decisions is also encouraging. It provides a means for courts to distinguish between legitimate forensic document associations and those that are less than legitimate. Finally, the decisions that successfully distinguished between graphology and forensic document examination offer hope that courts may stop permitting graphologists to overstep the bounds of their training to testify as forensic document examiners.

III. EXCLUDING THE TESTIMONY OF UNQUALIFIED EXAMINER CONCLUSION

The threshold of admissibility for forensic document testimony remains low and quite liberal. As a result, unqualified examiners continue to be admitted in courts throughout the country. Many of these courts justify admission by holding that an expert's qualifications goes to credibility rather than to admissibility. These courts are often very liberal in admitting all types of evidence, so as not to run the risk of being overturned on appeal. They truly believe that the jury is better suited to render experts admissible.

In essence, the courts "passing the buck." Jurors are indeed best suited to determine if a witness is believable, but they are not best suited to determine if a witness is admissible. The admissibility of a witness as an expert is a question of law and the sole power to make that determination is clearly vested in the trial judge per Rl. 104(a).

Jurors do not have the legal sophistication to interpret the rules of evidence; apply those rules to the facts in that particular case and then render a legal determination as to who indeed is qualified as an expert. In reading Rl. 702 "...a witness qualified as an expert by knowledge, skill, experience, training, or

education may testify in the form of opinion." Jurors can not be expected to be versed in all possible areas of expertise and know in each instance what skill, training, etc. is sufficient. Articulate pretenders can blur complex issues and distort scientific data far beyond the comprehension of the average juror. This can lead to erroneous verdicts and the miscarriage of justice.

In spite of this, a significant number of courts will continue to view qualifications as a credibility issue rather than an admissibility issue. Coupled with the relatively low threshold of admissibility for experts in general, unqualified examiners will undoubtedly continue to be admitted as forensic document examiners.

In the past, several suggestions have been made on how to eliminate the unqualified examiner in court. Hilton in his article "A New Look at Qualifying Expert Witnesses and the Doctrine of Privilege for Forensic Scientists", Journal of Forensic Sciences,Vol. 17, No. 4, Oct. 1972, suggests that courts maintain a list of qualified experts in the various fields. Miller proposes in "Professionalization of Document Examiners: Problems of Certification and Training", Journal of Forensic Sciences, Vol. 18, No. 4, Oct. 1973, a certified status, or a set of realistic standards recognized by all legitimate examiners, would provide guidance to courts. Most recently Caywood in "Questioned Document Examiners Assistance to the Judiciary", a paper presented at the 1991 AAFS meeting, proposes that a check list, based upon prior judicial decisions, be attempted.

Even though all of these suggestions have merit, the problem remains that most judges do not enthusiastically embrace such proposals or suggestions. They are vested with broad discretionary powers and seem hesitant to take too much outside guidance. The guidance most courts do seem willing to consider is that which comes from other courts. Under the doctrine of "stare decisis" courts are bound by precedent. They are bound, though, only by precedent in the same court, or in other courts of equal or lower rank, in subsequent cases where the very point is again in controversy. Caywood's check list suggestion appears based on this doctrine.

Perhaps the most effective means by which to offer guidelines to the courts in these matters is to direct them to the cases which set forth the criterion used to exclude unqualified examiners. Many of these cases were discussed in sections I and II of this paper. (Appendix "A" lists the relevant cases and gives a brief statement of their finding.)

Even though most courts do not readily accept outside guidance, that is not to say that courts do not look to the qualifications imposed within a profession itself. In other words, each profession ultimately bears the responsibility of setting minimum standards for education and training that courts can look to for guidance when determining the degree of expertise required in a given profession.

This is consistent with Miller's suggestion that a set of realistic standards recognized by all legitimate examiners should be set within the forensic document profession. The ABFDE was established for that very purpose. It has been recognized by several courts as a way to distinguish between the qualified and unqualified examiners. Courts should be able to point to the minimum requirements of the ABFDE and such organizations as ASQDE and AAFS, for guidance in determining who is qualified as a forensic document expert.

Ultimately, the responsibility of educating and guiding the courts as to a prospective expert witness's qualification rests with the lawyer. Skilled attorneys who do their homework are usually the most effective means by which unqualified examiners are excluded. An informed, educated attorney can expose the charlatan.

There are weaknesses in our judicial system relating to the effective and fair use of expert witnesses. Yet, despite these weaknesses, some recent cases offer encouragement. Certain courts are becoming more critical in their scrutiny of prospective witnesses. These courts appear more willing to look to the standards set by and for each profession. In all likelihood, the unqualified examiner's testimony will continue to be admitted; but with stricter scrutiny and the recognition of professional standards set by the ABFDE, ASQDE and AAFS, the future use of unqualified examiners may be deterred.

Appendix "A"

Circle J. Dairy, Inc. v. A. O. Smith Harvestore Products, Inc., 790 F.2d 694 (8th Cir. 1986).
Substantive areas of expertise are not limited to those recognized formally in academia and experts need not be persons with academic backgrounds.

Bliss v. Treece, 658 P2d 169 (1983).
The true criterion for qualifying as an expert is not whether the proffered witness employs their trade commercially or even professionally, but rather can they be of help to the jury in resolving the particular subject in issue.

Gnrud v. Smith, 206 NW2d 311 (1973).
The witness's ability to exhibit sufficient knowledge on the subject matter in issue is what qualifies him as an expert.

Consolidated Mechanical Contractors Inc. v. Ball, 283 A2d 154 (1971).
In measuring the qualifications of an expert, it is commonly stated that the witness must demonstrate some knowledge of the subject beyond that of the average person.

Ellis v. K-Lan Co., 695 F2d 157 (1983).
Even though a proffered expert may be unfamiliar with pertinent standards or definitions within his field, that alone is not grounds for disqualification.

Miller v. United States, 277 F. 721 (1921).
Illustrates liberal standard of admitting expert testimony, where witness admitted "he had not given much attention to the matter and had had no experience in examining handwriting, except for his own satisfaction."

Heller v. Murray, 112 Misc.2d 745 (1981).
The court applied a liberal standard to admit testimony of a graphologist, but later stated that although the witness had been duly qualified, the weight given his testimony was severely affected by his mail order degree and the fact that he had never testified before.

State v. Berg, 697 P.2d 1365 (1985).
Expert qualifications are truly a matter of credibility, rather than admissibility.

Hooten v. State, 492 So.2d 948 (1986).
The court applied a liberal standard and admitted the testimony of a graphologist, who fifteen years earlier had completed a correspondence course through the International Grapho Analysis Society Institute.

Appendix "A" Cont.

Carroll v. State, 634 S.W.2d 99 (1982).
A leading case in which a prospective document expert was not permitted to testify. The court found that the practical training and experience of the witness in the field of forensic document work did not clearly qualify him as an expert to testify about the authenticity of questioned documents.

United States v. Fidelity & Guaranty Co. v. Smith, 480 S.W.2d 129 (1972).
The trial court rejected a proffered expert who was unable to cite any training or experience that clearly qualified him as an expert with respect to the question at issue.

United States v. King, 532 F.2d 505 (1976).
The court held that a prospective witness, whose only training consisted of a correspondence course in graphology, was not qualified as a "handwriting expert".

People v. Tidwell, 706 P.2d 438 (1985).
The court refused to admit the testimony of a proposed expert, who gave only a vague explanation of her qualifications and no identifiable standards for membership in organizations to which she belonged. In concluding that the witness was not properly qualified, the court pointed out she was not certified by the ABFDE.

State v Livanos, 725 P.2d 505 (1986).
The court rejected the testimony of a graphologist, in part, because he was not certified by the ABFDE and because he was not a member of the AAFS.

State v. Seebold, 531 P.2d 1130 (1975).
The fact that a person may deal with a subject in such a manner that it makes him more knowledgeable than the average citizen does not necessarily make him such an expert that it is an abuse of discretion to refuse to allow him to testify.

United States v. Buck, 1987 U.S. District Court for the Southern District of New York.
This court recognized the existence of the ABFDE, as a certifying body for forensic document examiners, in denying a motion which claimed handwriting comparison were unreliable. By referring to the ABFDE it was satisfied "that professional scientific knowledge in the subject area exists and is sufficiently reliable to be of assistance to the jury."

Graves v. State, 547 N.E.2d 881 (1989).
The court refused to qualify a proffered witness as a handwriting expert, essentially because her training was in graphology. It further reasoned that were no identifiable standards for membership in the organization to which the witness belonged.