Genuine Draft

If a case hinges on a document's authenticity, expert testimony is crucial

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Questioned-document examiners, commonly referred to as handwriting experts, often receive frantic phone calls from attorneys making last-minute attempts to save their cases. For example, suppose a questioned document suddenly surfaces during trial. The judge allows opposing counsel to admit the document into evidence over your objections. Or, even worse, the judge allows opposing counsel submit the questioned document during rebuttal arguments, just minutes before the case goes to the jury. If the jury believes these documents are legitimate, your client loses the case.

The outcome may hinge on counsel's ability to locate an experienced document examiner who can determine whether or not the signature was actually written by the party in question. Ideally, most document cases headed for jury trials don't involve last-minute work or testimony. Frequently, however, questioned documents do not surface until close to trial, or even during trial. Often the attorney, already buried under paperwork, does not realize there will be a questioned document until late in the case or until experts are disclosed.

An attorney confronted with a surprise document at trial will have to depend more on luck and successful objections to keep the document out. On the other hand, if the issue of questioned documents is anticipated, then the matter becomes one of good trial preparation.

For counsel in such cases, the first step is to select a questioned or forensic document examiner who can testify effectively before a jury. No matter how many credentials the examiner may have, they will be of little use if the person can't express opinions in a convincing manner.

In a face-to-face meeting, the attorney can evaluate the examiner's experience, qualifications, demeanor, verbal skills and ability to educate the attorney about the field. If the examiner can answer the attorney's question clearly and convincingly, then that person is likely to do the same before a jury. Ask for references and contact them to discuss the strengths and weaknesses of the examiner's testimony, as well as to learn how the examiner handled questions under cross-examination.

If the attorney doesn't already have an expert-retention contract, he or she should write a brief retention letter which outlines the questioned and known documents, the assignment, court dates and fee agreements. At deposition or trial there is little difficulty answering questions about the specific assignment. Avoid long explanations outlining the facts and theories in the case. Opposing counsel will want to show that the attorney is trying to bias the examiner.

Before the first conference, the attorney must decide how much background information to provide. One approach is to wait until the assignment is completed before providing specific details about the case. In other instances, it may be important to provide the legal issues and specific details about the case and the questioned documents

at the start and to explain whether the questioned documents are a central or peripheral issue. Avoid making off-the-record comments and discussing details that are not related to the assignment.

The examiner will educate the attorney about the methods used to examine the documents in the case and conduct tests using a stereo microscope, infrared and ultraviolet light sources and indented writing equipment. Photographs may also be taken. The case may not require the use of all this equipment, but the examiner needs to be prepared to explain why tests were or were not performed.

The examiner should explain the strengths and limitations of the documents in the case. For example, how is the absence of an original document going to affect the certainty of an opinion? The attorney should let the examiner know if there will be an opposing examiner. Don't get sidetracked by examiners who want to use the case for a platform to attack the opposing examiner. This approach can easily backfire; most juries want to learn about the evidence.

Once the attorney knows the strengths and limitations of the documents in the case, the next important step before trial is to decide whether to disclose the examiner. If the findings will not help the client's case, the examiner will not be asked to testify at trial. Still, the attorney will be in a position to handle the questioned document issues when they come up. If the examiner's testimony will assist the client's case or the document issues are critical, it is important to disclose the expert and prepare for depositions to avoid any surprises.

Perhaps the single most important form of pretrial preparation is taking the opposing examiner's deposition. Depositions are critical to make certain that both sides are working with the same documents, to protect against new documents surfacing at trial and to see what areas need more work. During this deposition, counsel should pin down the opposing examiner to his or her opinions and to the basis for these opinions.

Almost nothing gives the expert more pleasure at trial than to explain in great detail whether or not the questioned document is a fabrication or the signature is genuine. As a rule, juries like testimony about questioned documents and signatures. A cross-examining attorney who has not taken depositions commits a cardinal blunder by not knowing what an opposing expert will say.

By the pretrial conference, tests should have been completed, and original documents and the best evidence should have been either located or subpoenaed, then examined and photographed for the record and for court exhibits (if the case is not settled). The essence of effectively presenting a questioned-document case to the jury is in the visual presentations. Photographic exhibits may not always be feasible, but some type of visual presentation is usually essential.

During the pretrial conference, the attorney and examiner should go over questions for voir dire, review exhibits, ensure that key points are clear and prepare questions for cross-examination of an opposing expert. The amount of time to devote to this meeting will depend on the experience of the examiner and the attorney's confidence in how that person will handle both direct examination and cross-examination.

With thorough preparation, both attorney and expert should be at ease, prepared to explain and to illustrate the basis for the expert's opinion. Knowing how to make the best use of the expert's testimony assures the attorney that he or she did everything possible to properly represent the client and the questioned-document issues in the case.