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## Opinion Evidence or Facts

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## OPINION EVIDENCE OR FACTS?

MRS. LUCILE P. LACY\*

The primary resource of an attorney is his special knowledge of the law, but equally important to him are WORDS, both written and spoken. Written words by which law is established are not necessarily the most important; many important words are those that are type-written or handwritten or even printed, and most attorneys realize that papers or documents are actually the "tools" of their profession.

This is an age of specialization and most practicing attorneys find that they are more and more using the services of specialists or expert witnesses. One type of expert whom we hear in the courts today, and probably one of the most specialized of the experts, is the questioned document examiner. The people engaged in this relatively new profession devote their entire time to the examination of written words or documents, which are such an important part of the practice of law. The documents they examine are wills, deeds, contracts, notes, checks, agreements, or any instrument which for some reason or another has had its validity questioned. These specialists are often able to discover some bit of hidden evidence which proves that a particular document is in fact not that which it purports to be.

The profession of questioned document examiner (usually called a handwriting expert) only began in the early part of this century. The testimony of these specialists is of course "opinion evidence," and yet in a decision more than forty years ago a learned court held:

[B]ut the error in the conclusion arrived at upon the first hearing consisted in treating the testimony of the... expert on handwriting [the late William J. Kinsley, of New York], as merely opinion evidence.

It was something more than the mere opinion of the witness. It was a detailed statement of facts...; facts which were revealed by the use of mechanical instruments and scientifically established to the degree of demonstration... So the decree is reversed.<sup>1</sup>

Although the profession was in its infancy at that time, this court acknowledged something which is recognized by most courts today. That is, that the work of a well qualified questioned document examiner is an orderly scientific procedure, resulting in opinions based

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<sup>1</sup>*Boyd v. Gosser*, 78 Fla. 64, 82 So. 758, 759-61 (1919).

on sound reasoning, which can be demonstrated with photographic exhibits.

Because of the countless number of papers involved in every lawsuit, no doubt thousands of fraudulent documents are passed each year, simply because the tell-tale signs of forgery are not recognized. For this reason, it would seem important that every lawyer be familiar with some of the physical factors found on documents, which might prove that they are not really the instruments they purport to be. Some of the physical components of a document which are studied by the examiner of questioned documents are: handwriting, typewriting, paper, ink, staple holes, indentations in paper, and numerous other physical facts which are not usually noticed by the average observer. Discrepancies discovered during a thorough examination of a suspicious document may completely change the course of a lawsuit.

### HANDWRITING

Handwriting is identified in the same manner that a person or an object is identified; that is, by a combination of similar characteristics. However, the best qualified questioned document examiner cannot simply look at two writings and know whether or not they were written by the same person. It sometimes takes hours of study with a microscope before definite opinions can be rendered.

The most important factor in identifying any writing is that the document examiner be furnished with a sufficient amount of proper standards of comparison or known genuine writings. If the writing in question is a narrative writing, it should be compared with narrative writings of known origin which were written on a date contemporary with the date of the questioned writing. The same is true of signature comparisons. The standards or known signatures should be of a similar date and written under somewhat similar conditions. The "ideal" situation is to have some known writing written before the date of the questioned writing, to have some written about the same date as the questioned writing, and to have some written subsequent to the date. However, in document work as well as in the practice of law it is not always possible to attain the "ideal" situation.

The document examiner should be furnished only those writings which can be proved to the satisfaction of the court to be genuine writings. Generally speaking, standards of comparison or known writings accepted by the court are writings that have been written in the normal course of business or personal affairs. Proof accepted by most courts may be made in one of the following ways:

1. Admission of the person who made the writing.
2. By witnesses who saw the standards written or heard the person acknowledge the writing.
3. Evidence showing that the writer recognized or acquiesced in the writing by his actions in his business transactions.<sup>1a</sup>
4. Testimony of a witness who has good reason to be familiar with the writing.
5. The "ancient document" ruling. This ruling holds that writings thirty years old or older that have never had their validity questioned, may be admitted as genuine writings or standards of comparison.

Request writings are not considered by most questioned document examiners to be the best standards of comparison. However, it is occasionally necessary to use writings obtained in this manner, particularly in criminal cases. Most courts agree that a defendant testifying in his own behalf can be compelled to write for the court or opposing counsel.<sup>2</sup>

Forged handwriting or signatures often *looks* very much like genuine writing; however, when examined carefully, it will be found to contain certain attributes of forgery. The most outstanding characteristic of a forged writing is the evidence that it has been slowly written or drawn. This is indicated by jerky movements, abrupt changes in pen direction and differences (or even sameness) of pressure on the writing instrument. (See Fig. 1.)

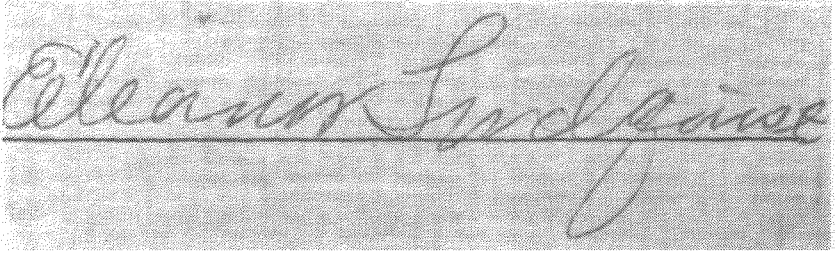
It is well known that no one ever writes in exactly the same way twice. In normal writings, there is always some natural variation in the formation and spacing of letters. Sometimes forged signatures look *too* much like a particular genuine signature, in fact they may be identical. The questioned document examiner can easily detect this identity. With the aid of a glass test plate containing ruled numbered horizontal and vertical lines, he can prepare photographs by which the jury can see for themselves that the two are identical. If a questioned writing and a genuine writing contain the same spacing in every part of every letter, the questioned writing must be a tracing. (See Fig. 2.)

From the time a person first learns to write, even though he may be taught the same system of writing that is taught thousands of other persons, he adopts his own personal set of characteristics and variations in habit. It is by these characteristics and variations in habit that

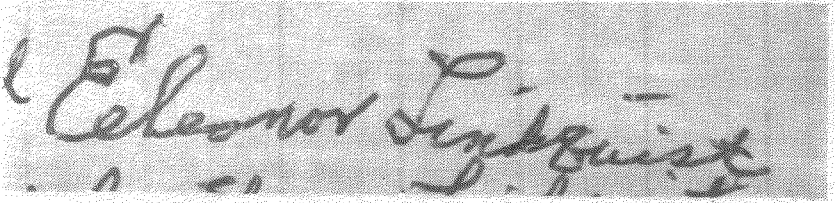
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<sup>1a</sup>State v. Stephens, 168 Kan. 5, 209 P.2d 924 (1949): Where it is important to de-

<sup>2</sup>State v. Stephens, 168 Kan. 5, 209 P.2d 924 (1949): Where it is important to determine whether or not a certain signature was written by the witness, it is error to sustain an objection to the witness writing his name while being cross-examined.



Eleanor Lindquist



Eleanor Lindquist

Fig. 1. Genuine signature above, forged signature below. Note the freedom of motion in the genuine. The simulated forgery looks something like the genuine signature, but note the difference in quality as well as size.

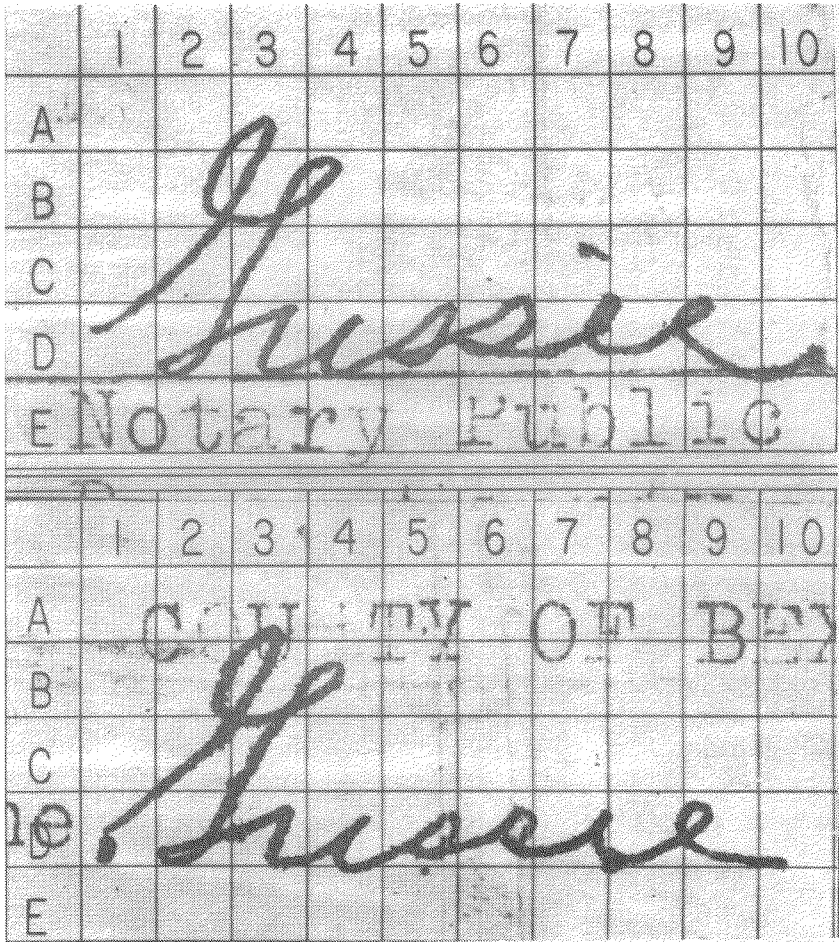


Fig. 2. Traced signature and the model used, photographed through a glass test plate. Note same horizontal and lateral spacing.

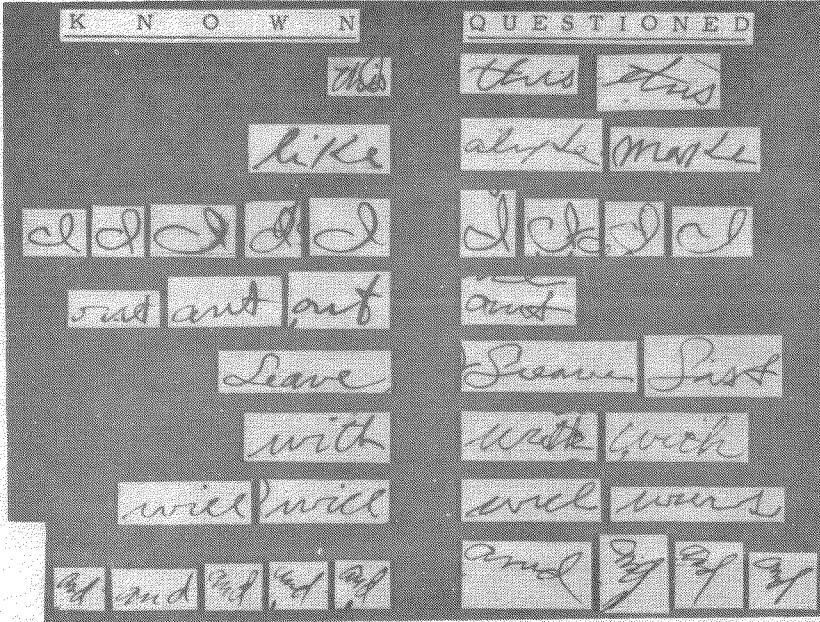
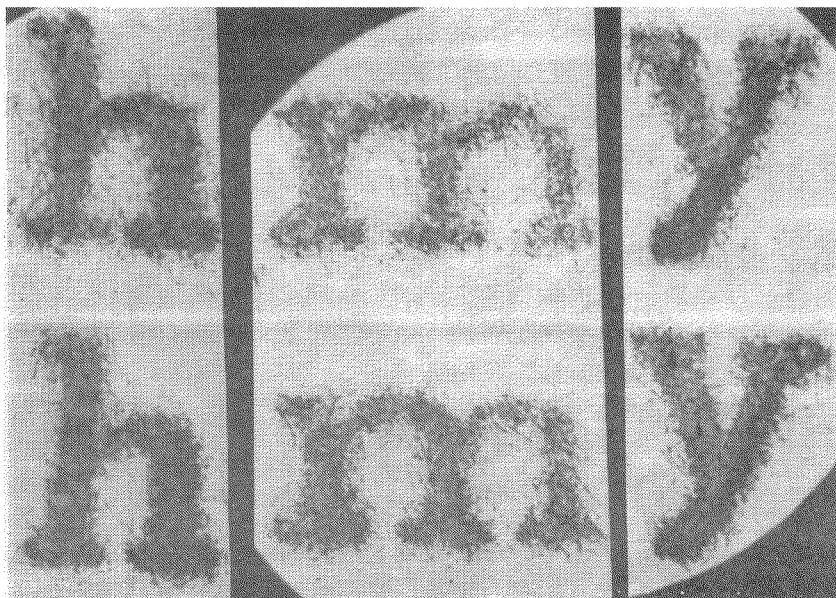


Fig 3. Handwriting of same person fifty-four years apart. Note such similarities as the absence of a lead stroke in the word "this"; lifting of the pen after "i" in "like"; general formation and slant of "l"; crossing of ending "t" in "out" and "Last"; formation of "L"; leading stroke to "w"; formation and down-hill slant of "and".



*Fig. 4. Photomicrograph illustrating two typewritten carbon copies written on same typewriter. Note heavy inking of right side of "h", left side of "m", and right leg of "y" caused by heavy pressure of typewriter keys in these areas.*



PRE-TEST: Drove in while wife Jane was there. Examined garage  
 as to see. The Cuckoo gave some, but one  
 blanket out side.  
 Jane had a few overages & shortages.  
 I was supposed to get a raise before Jane left, but  
 haven't got it yet. was supposed to be raised to 2500.

FIRST CHART:  
 There are specific reactions to alcohol whiskey  
 from bottle being. No explanation.

SECOND CHART:  
 Continued reactions on taking whiskey and  
 drinking w/o permission.

EXAMINER'S OPINION:  
 Due to continued responses in the area of  
 taking whiskey w/o permission and drinking  
 out of the job, we are unable to verify  
 that subject has been completely truthful.

Fig. 5. Ordinary photograph of material in question.

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Fig. 6. Infrared photograph of same material illustrated in figure 5. Note that infrared photography completely eliminated ink in paragraph one—indicating that it was written with ink of a different composition.



*Fig. 7. Photomicrograph of letters purportedly typed on same date. Note difference in amount of ink in typewriter ribbon, indicated by degree of blackness and the fact that open portions of bottom "a" is filled with ink. (See text.)*

FORM DATED BEFORE JUNE 30

This order is subject to acceptance by  
are payable at the office of Leff Bros. Dr  
equivalent in interest in any charges, or t

Code	Lot No.	Quan.	Pc. Doz. Gro.	Description
	5115			

FORM DATED AFTER JUNE 30,

This order is subject to acceptance by  
are payable at the office of Leff Bros. Dr  
equivalent in interest in any charges, or t

Code	Lot No.	Quan.	Pc. Doz. Gro.	Description
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Q U E S T I O N E D

This order is subject to acceptance b  
are payable at the office of Leff Bros. Dr  
equivalent in interest in any charges, or t

Code	Lot No.	Quan.	Pc. Doz. Gro.	Description
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Fig. 8. Photograph illustrating different "runs" of printing. Note similar "bulges" in vertical lines of middle and bottom illustration; also malformation of second "a" in "acceptance"; bottom of "p" and connection of "a" and "y" in "payable"; missing portion of top of "u" in "equivalent" etc.

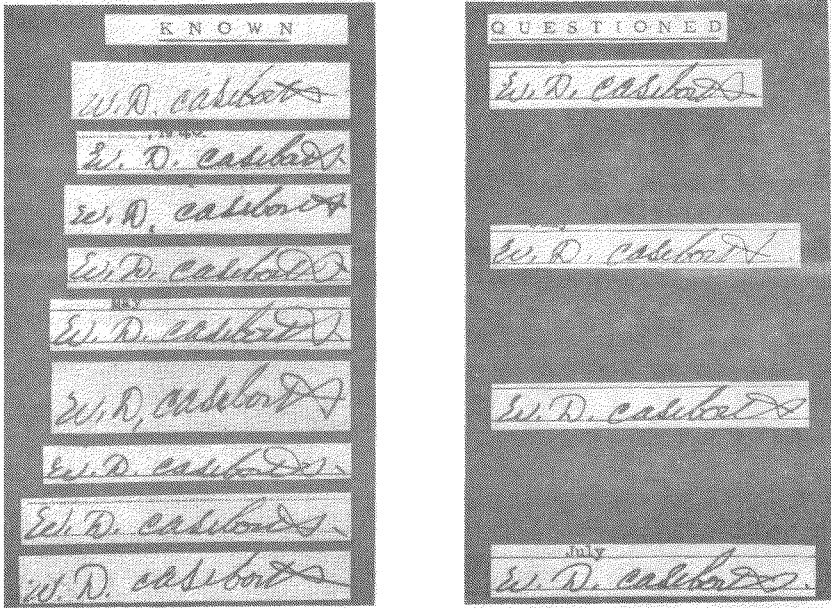


Fig. 9. Four genuine signatures that were questioned. Note same natural variations in KNOWN and QUESTIONED writing, and similar formation and relative height of letters.

the handwriting of a particular person is identified. Some persons alter or change to some extent their habit of writing as the years go by. For this reason it is necessary to compare a questioned writing with known writings of a similar date. Usually, however, a person retains some of the same characteristics or habits in his writing throughout his lifetime.

In handwriting, as in the individuals themselves, the extent of change varies with different persons. In an important holographic will matter, the testator had not done any writing other than his signature for many years. At the age of 85 while confined to a hospital, he decided to rewrite his will in his own handwriting. It was impossible to obtain specimens of genuine narrative writing of proper date, because none was available. Finally a number of handwritten letters were found which the deceased had written to his wife 54 years before the date of the questioned will. A study and comparison of the handwriting characteristics revealed that the writing in the body portion of the will contained many of the same characteristics that were found in the old handwritten letters, and the signature was similar to genuine signatures of a date near the date of the questioned will. There was some difference in the *quality* of the writing in the old letters, but the similarity of the individual handwriting characteristics was illustrative enough to convince the court that the questioned will was written by the same person who had written the letters. (See Fig. 3.)

Languages written in letters, with the same formation as those used in the English language, are not the only writings that can be identified. Visits by the author to document examiners in other parts of the world revealed that the native writing of Japan, China, Thailand, Yugoslavia, and other writings with which we are not familiar, is identified in the same scientific manner that is used to identify writings in English. Handwritten characters which seem to be only a number of straight lines put together and arranged in longitudinal rows instead of horizontal lines, contain the individual habits of the writer, much the same as our a, b, c's.

Handprinting can also be identified; because here again, it contains definite individual characteristics. Even though handprinted block letters are composed only of a series of short straight or curved lines, the length and slant of the straight lines and the degree of curvature of the curved lines produce definite identifying individual characteristics. The courts generally attach the same weight to expert testimony regarding handlettering as to cursive writing.<sup>3</sup>

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<sup>3</sup>Alexander's Estate v. Hatcher, 193 Miss. 369, 9 So. 2d 791 (1942). In a probate

## TYPEWRITING

Up until the last few years, all typewriting looked very much alike to the casual observer; it was either pica type (with 10 characters to the inch) or elite type (with 12 characters to the inch). The relatively few typewriter manufacturers had their own particular design of letters, and they seldom changed this design. Today there are literally dozens of various styles of type design and spacing. But in spite of this, it is possible to establish that two samples of typewriting were, or were not, written on the same typewriter.

After the spacing or size of the type is established, first to be considered by the document examiner is the design or formation of each of the typewritten letters. The letters usually studied first as to formation are: "w", "t", "g", and "r". One identifying characteristic of the "w" is whether or not the middle leg is shorter or the same length as the other two legs. A "t" may have a cross bar or top which is of equal length on both sides of the staff, or it may be shorter on one side; the bottom of the "t" may be a sharp curve or a rather long wide curve. The curved stroke which connects the top of a typewritten "g" with the bottom may be a simple slightly curved line, or it may look almost like a corkscrew. The length and degree of curvature of the top or "pump handle" portion of the typewritten "r" is also an important factor in the identification of typewriting.

After it has been established that the samples of typing have been written on the same *kind* of typewriter, there are numerous factors which aid in establishing whether or not they were written on the same typewriter. Even when typewriters leave the factory, they have their own particular set of writing characteristics, much the same as the writing of individuals. Each character on the typewriter is supposed to strike the paper with the same amount of pressure on every portion of the character and in the center of the space allotted to that particular character. Even with new typewriters, this practically never happens with every key on the typewriter. There will be variations in some of the letters. These variations are not easily seen with the naked eye but are definitely visible when examined through the microscope and easily illustrated with photographs made through the microscope. (See Fig. 4.)

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proceeding regarding a handprinted will the court stated: "[U]nder the law 'hand-writing includes, generally, whatever the person has written with his hand, and not merely his common and usual style of chirography.'" 9 So. 2d at 792.

## DOCUMENT MATERIALS

Someone once said, "The material always comes before the work." Before we can have written words, we must have the materials necessary to produce them. The various ingredients or materials of documents may furnish evidence so convincing that it cannot be contradicted.

The paper on which a writing is made may be extremely important in establishing the genuineness of fraudulency of a document. One important attribute found in some writing papers is the presence of a watermark. Most paper manufacturers have definite records as to the time when a particular watermark was first used in their writing papers. In addition to this, today some paper manufacturers place small coding marks in the watermarks of their papers. The location of these marks is changed from time to time, thereby providing a more definite date of manufacture. A few years ago a will involving property worth several million dollars was denied probate, principally because evidence presented by a document examiner established beyond reasonable doubt that the paper was not even manufactured until two years after the date of the will in question.

There are still other features of paper that are important in the documents with which a lawyer works. Careful examination of the various pages of a multi-paged document may reveal that one or more pages has been substituted. The substituted pages may be of a different thickness (measured in thousandth parts of an inch with a thickness gauge), or the paper may be of a different composition. Examination of paper under ultraviolet light often reveals a difference in composition of papers, by a difference in color or degree of fluorescence.

Writing, especially signatures, which appears on paper of an unusual size should always be carefully scrutinized. Examination of the edges may reveal that one or more of the edges has been cut by hand, rather than machine cut. In documents of unusual size, it is not at all unusual to find that the signature is genuine, but the document is a forgery. In a Louisiana case many years ago, a typewritten Demand Note for \$100,000 was presented for payment to the estate of a well known businessman. Examination of the signature revealed that it was in an unusual position on the page, but it was a genuine signature. Examination of the paper revealed that it was of an unusual size and had two edges which were not machine cut. Extensive investigation of the files of the deceased brought forth a signed duplicate original of an earlier transaction with the person who presented the note. When the typewritten note in question was superimposed on the

duplicate copy, it was found that the signature was in fact in the same position that it would have been if the document in question had been cut from the original document containing the genuine signature which had been sent to the payee in the previous transactions. In addition to this, examination of the typewriting in the note in question revealed that it was typed on a typewriter that was owned by the payee. Suspicious circumstances to say the least. Circumstances, or shall we say "opinion evidence," which finally resulted in the withdrawal of the demand for payment on the note, as well as charges of forgery.

The ink used to write a document may be silent but convincing evidence that a document is spurious. This ink may be that used to write a handwritten document, a typewritten document, or even a printed document.

Changes or alterations made on a handwritten document with ink of the same color but different composition is sometimes differentiated in one or more of several ways. Chemical tests of ink made with very small portions of chemicals and studied through the microscope may reveal that two samples of ink of the same color react differently to the same reagent, indicating a difference in composition. Sometimes inks of the same color react differently to infrared photography. Some inks which to the naked eye seem to be the same color may be found to be of a different hue when examined with the specially made color comparison microscope found in most document laboratories.

In a recent case, testimony during three weeks of trial had been to the effect that every paragraph on a page of writing had been written at one time, by the same person, and with the same pen and ink. Examination by the document examiner revealed that the ink in all four paragraphs was essentially the same color. Micro-chemical tests revealed that the ink used to write paragraph one reacted differently to reagents than the other three paragraphs. An infrared photograph completely eliminated the ink in paragraph one. Here again is an illustration of "opinion evidence" that could actually be seen by the jury. (See Figs. 5 and 6.)

The ink in the typewriter ribbon of typewritten documents is sometimes a deciding factor in a lawsuit. Examination with the color comparison microscope may reveal differences in color or hue of two samples of typing purportedly written at the same time. Even the amount of ink in the typewriter ribbon may be added weight to other findings on a document. A recent case involved, in part, the date on which a particular typewritten document was typed. The contention



was that it had been typed on a particular typewriter on a particular date in November (the date appearing on the questioned document). Examination of several hundred documents written on this typewriter revealed that the typing on documents dated in the early part of September contained a large amount of ink. The amount of ink in the typing of documents of successive dates over a period of several months showed a gradual decrease in the amount of ink, so that typing impressions made on documents dated early in January were quite light, indicating that the typewriter ribbon contained very little ink. Documents dated after the middle of January again revealed that the typing contained a large amount of ink, indicating that no doubt a new typewriter ribbon was being used. The typing on documents dated in November near the date of the document in question were fairly light in color and contained a small amount of ink; the typing in question contained a large amount of ink. It would not be reasonable to believe that a typist doing an extensive amount of typing over a period of months, would change a typewriter ribbon just to write one document containing five lines of writing and then put the old ribbon back on the typewriter to write other documents on the same date. (See Fig. 7.)

Printed documents can sometimes contain that small bit of hidden evidence which makes the difference between winning or losing a lawsuit. The approximate date of printing of legal forms can sometimes be established by investigation through the records of the printer. It is not unusual to find documents in question that are dated years prior to the date the form was printed.

The various kinds of printing processes can often be distinguished by microscopic examination. A case some time ago involved two printed forms which were purported to have been used by a certain company at about the same date. Microscopic examination revealed that one form was produced by the letterpress printing process, the other by the offset process. Investigation revealed that the company had changed printers on a specific date. The style of the printed form was the same over a long period of time, but the new printer used the offset process, whereas the forms printed on earlier dates were printed with the letterpress process. Here again was "hidden evidence," but definitely important evidence.

In addition to the identification of various printing processes, the experienced and qualified document examiner may sometimes find that printed forms of a different "run" or series may be important. In offset printing, certain malformation of letters or lines may ap-

pear in every sheet of a particular run, but not in other runs. In a recent holographic will matter, the three short lines of handwriting in the will were a very clever forgery. Investigation of the printed invoice form on which the will was written revealed that the invoice was not even printed until after the death of the testator. After the jury rendered a verdict that the will was a forgery, a poll of them revealed that they were fairly well convinced that the handwriting was a forgery, but the evidence regarding the printing was the thing which cinched their conclusions. (See Fig. 8.)

### THE DOCUMENT ITSELF TESTIFIES

A well qualified questioned document examiner can make the documents themselves talk by his preparation of proper illustrative photographic exhibits; photographic exhibits made up of parts of the documents introduced in evidence. These exhibits are usually enlargements. They vary in size from an 11" x 14" photograph which the juror can hold in his hand and study, to a giant bromide enlargement measuring 4 to 6 feet long, or even a 35 millimeter slide projected on a screen. Well prepared photographs which hold the interest of the juror and show a side-by-side comparison of known writing and questioned writing (See Fig. 9), when accompanied by clear and concise reasons for the opinion of the expert witness, do much to make this opinion evidence approach the realm of fact evidence. It is evidence which can be seen; it can be touched because it is on pieces of paper; and it can be heard if the testimony of the document examiner shows that he has sound reasoning as a basis for his conclusions.

Because of the fact that the physical composition of a document depends on the interpretation or reasoning of the questioned document examiner, the attorney who has a document problem should make certain that he retains the services of a well qualified expert of good reputation. When two equally well qualified document experts are presented the same problem and the same standards of comparison, their opinions seldom differ.

Many document examiners in the United States today are members of an organization known as the American Society of Questioned Document Examiners. Membership in this organization is by invitation only. The preface to the Constitution of this organization quotes the following from 4 Wigmore, Evidence § 1302 (3d ed. 1940), cited in *In re Young's Estate*, 347 Pa. 457, 32 A.2d 901, 903 (1943):

The unanimous testimony of the attestors may fail of credit even though the only opposing evidence is that of the alleged maker's handwriting as analyzed by expert witnesses. The cir-

cumstantial evidence afforded by the handwriting may in a given case be more convincing than the testimony of the attestors. This possibility is one of the results of the modern scientific study of handwriting.

#### A CHECK LIST FOR ATTORNEYS

The items discussed above are some of the details covered by the qualified examiner of questioned documents, but a practicing attorney has neither the time nor experience to make thorough investigations regarding the physical composition of all the papers involved in his daily practice. If he has reason to be suspicious of some document that is presented to him either by his client or his opposition, he should be able to make a quick survey of some of its characteristics. The following list of questions is designed to assist the lawyer in the discovery of any hidden evidence. Evidence, which when presented in court by a document expert, will be "Opinion Evidence", but it may approach "Fact Evidence":

1. Does the handwriting show suspicious tremor, over-writing, mending and pen lifts? It is placed on the paper in the usual, normal arrangement?
2. Is there evidence of a carbon outline or an indentation in portions of the signature, which might be guide lines of a tracing?
3. When two signatures are affixed to the same document or are concerned in the same transaction, are they suspiciously similar in size and general appearance?
4. If a document purports to have been handwritten all at one time, is it consistent throughout as to margins, slant of writing, space between lines and most important is the ink of the same color in all portions?
5. If the document purports to have been written on numerous occasions covering a period of time, is there an unnatural *similarity* in regard to letter forms and color of ink?
6. Is the ink of a document bearing an old date bright blue in color, suggesting a more recent production?
7. Does this document show suspicious erasures, interlineations or added words, figures or clauses? Are there differences in writing *quality* in various areas? Erasures of the abrasive type are detected by throwing a side light on the document and observing for disturbed paper fibers. Chemical erasures usually leave a yellow stain on the paper.
8. If a typewritten document purports to have been written at one time, are all of the lines and letters parallel both horizontally and vertically? By scanning the document from its

edge, as would a carpenter inspecting a board for straightness, it is sometimes possible to tell whether a line, word, or letter of typewriting was inserted.

9. Were all pages or parts of the document written on the same typewriter? Are the letters similar in formation or design? Is the spacing between the letters similar?
10. Do the various pages in a will or other document contain the same watermark? Are the pages the same size, color, and apparent thickness?
11. Do multiple holes in the binding of the document indicate the pages have been removed and re-inserted with possible substitution of pages?
12. Does the ink of a certain part of the document "feather out" at the fold, in contrast to unaffected strokes in other portions? This might indicate that the writing had been inserted, and at a time *after* the paper had been folded.