Subj: WULQ article on graphology
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From: MMatley
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Dear Friends,

I said I would attempt to discuss the WULQ article more fully. Go to their web page and copy it out if you have not. Or copy it next time you are in a law library. Washington University Law Quarterly, Fall 1997, Vol. 75, No. 3. Pages in printed edition not given, but it prints out to 28 pages. *The Legal Implications of Graphology*, by Julie A. Spohn. It is a typical topsy-turvy legal journal paper. Ten pages make up the article and the other 17 pages the footnotes. Page 28 is only web page data. The multiplication of references to mostly biased and unreliable opinion sources makes it look like a scholarly work. It is called padding the bibliographical references so that the professor will give you a better grade for what is at best a "D" grade term paper. If logic is not a requirement for scholarship, the author is very scholarly for she is very illogical. My message is not a finely wrought piece, just put down as thoughts came to me on re-reading highlighted portions of the article. I only offer thoughts which others might be able to take and employ to advantage.

1. The first sentence reads: “Graphology, 'the alleged science of divining personality from handwriting,' is for many American employers a tool for making various employment decisions." The quote is from Joe Nickell's history of graphology in *The Write Stuff* edited by Beyerstein and Beyerstein. The "history" is so factually flawed that it does not even rate as a biased hatchet piece. Nickell attacks graphologists in the Beyerstein book but to help sell his own book he used an introduction written by one of America's best known graphoanalysts, Charles Hamilton. Would that rank as academic hypocrisy? But to the central point of the definition. No graphologists ever claimed to be able to "divine" anything from handwriting. To use "divination" or "divining" in defining graphology is a devilishly clever trick to elicit irrational feelings of revulsion from one's reader or listener against the discipline being defined. It is the lowest level of emotional gutter debate, especially since it entails an insult to God to make a term referencing Divinity into an emotionally crass insult. The use of such terminology in this way is worthy of both the author and the one she quotes, given the low scholarly and logical quality of their work products.

2. The first point is that she begins all her attacks on graphology with "may" and "possibly" statements. They are merely unsubstantiated hypothetical statements made in the subjunctive mood. She then switches over to categorical assertions without any evidence to support the switch. On page one she says "plaintiffs may pursue successful claims for harm resulting from employers' use of graphology in employment decisions." She later talks as if those pursuits were realities happening any minute now or presently in courts of law. Yet she never mentions a single case of such pursuit against any employer using graphological services. Reality has no impact on any of her opinions and assertions.

3. Her stated objective is to push a law banning graphology in employment decisions. On page one she says: "This note explores the possible claims that plaintiffs may file against employers that use graphology in employment decisions and proposes abolishing the use of graphology in employment decisions." She never mentions a single case in which an applicant or employee was unjustly harmed by a graphological analysis. She does explain how no suit for damages based on graphology in employment decisions will succeed. She never offers any basis whatsoever for her proposed law except the assertion that there is not scientific proof of the validity of graphology. She asserts even more than that, that there is no evidence whatever supporting it. I will return to both those assertions: One, that a new law ought to ban what cannot bring forth scientific proof of its validity and, two, that there is no evidence to support use of graphology in employment decisions.

4. On page 2 and elsewhere she says: "American courts have traditionally expressed hostility to graphology." She is wrong. True enough there are reported court cases wherein graphology as subject of expert testimony is rejected as not meeting rules for admissibility. But the reports do not show hostility, which means anger against, hatred for, attacks on the persons of those who hold a position, etc. They are for the most part impersonal rulings based on statutory and case law guidelines for admission of expert testimony. On the other hand, graphologists have been permitted in some courts to testify as Graphologists, giving opinions based on character handwriting analysis. Contact Sheila Lowe of Vanguard, Ellen Bowers and others for a list of such cases.

5. On page 3 she ends a discussion of the benefits of using graphology in employment with: "Therefore, graphology's costs exceed its benefits in light of negligent hiring claims." She was not paying attention to her own paper. She had already said no one had ever litigated the matter. So how can any costs of nonexistent negligent claims exceed any amount of money, even a penny? More importantly, she told how many businesses use graphology and keep using it. To assert that the costs of doing so outweigh the benefits to any degree is to assert that all those business managers and owners are very stupid indeed when it comes to figuring profit and loss from their activities. She offers no evidence whatsoever that any employer has ever suffered financial damage through use of graphology in employment decisions.

6. Remember that she said not one has ever litigated the use of graphology in employment decisions? Having embarked on a speculative discussion of how graphology might cause loss of revenue to businesses, she ends by saying: "Further, employers are often confronted with legal action resulting from using graphology in hiring decisions." She never names one single case, but that unreality is for her sufficient basis for saying such legal action "often" happens. Since she rightly stated it has never happened, did it not occur to her and the editors of the Quarterly that it is impossible for that which has never occurred to occur often? Thus she has made, as witnessed by her own statements, a plainly false statement as if it were fact, and it serves as a basis for causing others damage in their legitimate business activities. Is there cause for malicious defamation and restraint of trade here?

7. Interestingly, after the above quoted defamation (and that is not the only defamation she makes against graphologists engaged in employment analysis) she next discusses the nature of

defamation. Thus, she could never plead innocence or inadvertence in her falsely asserted statements of "fact." She, to my mind, is subject to legal action based on her own definition: "Defamation consists of any false written or spoken statement that is made to a third person and tends to expose a person to public hatred, contempt, or ridicule, or causes that person to be shunned or avoided or to be injured in her business or occupation." And her paper fits every requirement of that definition. She says the applicant has to have suffered injury to sue the employer. But if it is legal injury for graphological information to cause one applicant rather than another to be hired, then every means by which one among two or more applicants is hired is legally injurious. She forgets this idea: Does the applicant have a legal right to the job as versus any other applicant or has the applicant been unjustly treated relative to any other applicant?

8. She them embarks on a discussion of what happens in an actual suit on various grounds. Remember that no one has ever brought such suit, and she never cites any case at all. Thus her entire discussion is theoretical at best. It has no relation to any reality at all. However, for each supposed cause of action she brings up, she explains how it will not win against the employer.

9. She states that some graphologists claim to be able to determine factors which the law forbids the employer to consider, such as age, sex, race, disability which has no bearing on job requirements. She thus thinks graphology is illegal or ought to be made illegal on that claim. Is she really too dense to figure out that the graphologist who might arguably be able to determine all those things merely needs to omit any reference at all to them in any report to the employer? After all, all those things are discernible in a person-to-person interview. At least any business person I ever met is smart enough to tell male from female, one race from another, notice if the person is in a wheelchair or blind or limping and so on. So if graphology is illegal because it might be able to discern information which the law forbids be considered in hiring decisions, then all face-to-face interviews must be banned on the same basis. It is hard to decide whether the author is merely very clever or very stupid.

9. She talks of invasion of privacy on page 6. Based on the graphological theory that it works off of expressive gesture, we all employ expressive gesture to "get into other people's heads." If the graphologist can discern something which is private and which is not job related, the matter merely need be kept secret in the graphologist's own brain. We all retain some information to ourselves when telling another about a third person.

10. Continuing the same discussion, on the next page she does another of her "may" to categorical reality arguments. "Because Graphologists may use graphological analyses to reveal characteristics that are not specifically job-related, graphology allows government and business interests to collect unnecessary personal information." And in the next sentence graphology allows this information to be retained. "Therefore, one could tenably argue that using graphology in employment decisions violates California's privacy law." That is like saying that, since authors of legal articles "may" kill their parents, therefor one can tenably argue that such authors are in violation of the laws against murder. If every one of us who "may" be able to violate a law is subject to a "tenable" argument of having so violated it, we are all subject to indictment for every crime in the book. The entire tenor of her argument is the rankest nonsense and utterly

silly. Unfortunately, demagogues have succeeded through history in destroying those they disagree with by using just such arguments. This author's thesis is McCarthyism reincarnate, because Joe argued that such tenuous arguments, as long as they were "tenably" arguable, sufficed to destroy the lives and livelihoods of many Americans.

11. Having argued how various and sundry laws will expose the employer to law suits for use of graphology in employment decisions, she ends: "However, no cases have interpreted these acts to include employment testing." She assures us that clients of employment graphology are as legally safe as they can hope to be! No court has formulated the legal theories which are proposed in this paper. Let us hear it for the wisdom of American courts!

12. Having offered no evidence whatsoever, having assured the reader that no law suit, as far as she can figure it, would succeed against graphology's use by employers, she proposes a new law to do what reality says has not been done and ought not be done and would not succeed if it were. Why does she say such law should be passed? That brings us back to the two points which at the top of this message I said I would discuss: One, that a new law ought to ban what cannot bring forth scientific proof of its validity and, two, that there is no evidence to support use of graphology in employment decisions. Let us look at each of these.

13. If not being able to bring forth scientific evidence of validity means the law ought to ban something, then almost everything in life ought to be banned: marriage, love making, strolling in the park, writing poetry, reading poetry, publishing law quarterlies (given the nonsense of Julie's paper, maybe a very good idea). But let us limit it only to employment decisions. Personal interviews must be banned, as no employer has demonstrated the scientific validity of his particular interview style. Hiring anyone at all should be banned, as there is no "scientific" study on the scientific validity of hiring anyone at all. Money must be banned, since there are no scientific studies for a valid method of setting wages and benefits, or even proving money has value. And an employer should be banned from even asking an employee's name, since there are no scientific studies to prove the validity of the answers employers receive. The only evidence of anyone's name is anecdotal: "I was born and gurgled so nicely my mom called me Gertrude, after grandma who gurgled her beer so charmingly." In fact, passing laws about hiring practices ought to be banned by law, since there are no "scientific" studies proving hiring laws do any good. Other than the inherent absurdity of this reason for passing a law, there is the absolutely silly idea of what constitutes scientific proof. But aside from that potential debate, most things in life need only evidence, not scientific evidence. It is very rarely that decisions are made on scientific grounds, and that goes for both courts of law and scientists in all their scientific activities and organizations.

14. But, pretending that there is no scientific evidence (however one might define scientific evidence) to support graphology's validity, is there any evidence that graphology is a good and profitable tool for making employment decisions? Yes, there is, and the evidence is right in Julie's own paper, staring her in the face, while she turns her back on the very evidence she presents, and goes with her phantasmagorical and prejudicial preferences. What is that evidence?

(a) Employers, in large numbers, use graphology and keep using it. They are in the business of making money, and what makes for a loss rather than a gain of profit, they

empirically learn to drop. Their empirical experience is that graphology makes for a more profitable operation.

(b) No employer has ever been legally hurt by the use of graphology in employment decisions, and therefore every employer has objectively verifiable and empirically based evidence that one of the biggest worries of business today, law suits which cost both money and bad publicity, are not reasonable things to worry about. It is like worrying about being killed by a hurricane in San Francisco. No hurricane ever hit here. Earthquakes, yes. Hurricanes, never. And Julie assures us that no employer has ever been hit by the hurricane of law suits over employment graphology.

(c) Whatever could conceivably be a cause of legal trouble in the use of graphology need only be kept by the graphologist to herself. Just don't tell the employer anything which could violate any law. Julie has nicely listed those things so that the graphologist can assure the employer that none of them would ever be included in any graphological report, except as the employer assures the graphologist that legal counsel has said it is lawfully a thing touching on a job requirement.

15. One last suggestion to those who engage in employment graphology. There are probably fast buck artists in any endeavor. I suggest the finest graphologists of the greatest success get together and draw up a code of ethics. Join together to pursue any person who does this work in an unethical or illegal way. Even provide the expertise needed to bring legal action against fraudulent practitioners. Publicize the stringent code of professional behavior which you have formulated. Make joint ads even publicizing the honor and integrity of the work and advising the public on how to avoid being burned by employment counselors of any kind of method who are less than competent and ethical. Most of all, I suggest having your attorneys study this article to determine whether or not it is actionable. I think it contains knowingly false statements (evidenced as false by the author's own statements otherwise) and intended not just to propose a new law, something which is legitimate for any citizen to do, but tailored to ridicule publicly and to damage legitimate business expectations. Why not take legal action against the author and the Law Quarterly?

Regards,

Marcel