

---

---

## History and the Law: The Forensic Historian in Court

BY DOUGLAS R. LITTLEFIELD

---

---

The practice of history in the legal arena is guided by rules and assumptions different from those characteristic of history in an academic environment. The following observations—drawn from personal background as an academic historian who has taught California history, environmental history, and the history of the American West, as well as from courtroom experience as a historian involved in litigation support—attempt to illustrate how history is discerned by many judges and lawyers, and how that perception shapes historical research and writing in a legal context.



Douglas R. Littlefield

The judicial process and its governing canons regarding evidence and testimony tend to be precise in order to protect the rights of opposing parties in litigation—at least more precise than the rules applicable to historical research and writing in academia. It is this exactness that shapes the utility of history to the legal system and determines the manner in which historical research must be done when undertaken for litigation support. It is also the relative precision of the law that mandates that historical research and writing for the courtroom must be more rigorous than historical research done for traditional scholarly purposes. An attention to detail in the extreme and a tendency toward redundancy in historical research undertaken for the judicial process, in turn, make that research appear more “objective” than history done for academia—a view that squares with one of the legal system’s fundamental premises: that objective sets of facts underlie any courtroom judgment.

Thoroughness and the perception of objectivity have important implications for the utility of secondary sources in historical research done for litigation support. Judges and lawyers—indeed, many non-historians—generally think of history as an undisputed chain of events that happened sometime in the past, although they readily will concede that some elements of antiquity may not be known due to gaps in the documentary record. Nevertheless, the prevailing lay view is that history is factual, linear, and not interpretive.

Such an attitude renders secondary sources less useful in the judicial process, since most scholarly historical studies offer interpretation in varying degrees. Interpretation as it is typically found in many published historical works, either as synthesis or to fill in blanks in the chronological record, appears little better than guessing or waffling to judges, lawyers, and many other non-academics. Therefore, because interpretation as practiced by scholarly historians can be seen as obfuscation in a legal setting, secondary sources have limited value in a system designed to determine fault, assess guilt, resolve questions of equity, or provide accurate meanings of contracts.

As a practical matter to a historian working in the legal arena, this means that secondary sources are used only as a last resort in testimony or as exhibits presented in court. Yet secondary sources are not ignored in research for litigation. Like research for academia, work on a project for courtroom use begins with what has been published, but only to establish the state of the literature and to critique its validity. Relying on secondary sources for some factual matter—while common practice for academic historians—is fraught with perils from the legal point of view: The author of a particular scholarly study may have missed contradicting documentary evidence, or, worse still, the broader interpretation of the events under study may be adverse to, or may modify, other historians’ views. Both of these problems can thoroughly undermine an expert-witness historian’s testimony in court if asked on cross-examination to explain the missing facts or to take a side in the scholarly debate.

This is not to say that consulting historians do not interpret the past; rather, the interpretation of a historian who writes for litigation emerges directly from the primary sources upon which the historian relies. Unlike the legal system’s bias against secondary materials, the nature of judicial proceedings leans strongly in favor of an over-reliance on primary sources—at least from the perspective of an academic historian. This prejudice creates a piece-by-piece microscopic approach to history that grows gradually from the ground up instead of a historical account that is portrayed in broad, bold strokes. The ground-up approach allows the documents to speak for themselves by permitting the historical actors to “testify,” and with enough historical figures explaining their recollections of an event, the past unfolds along a line at which those views coin-

cide. It is in this manner that the consulting historian's own interpretation of the past materializes—an interpretation that conforms with the lay view that history is objective.

Legal rules reinforce the need for letting a large number of primary source documents tell the story. While a historian in the courtroom may have been called there as an expert in the history of a particular subject, what the historian can say and which documents can be discussed are determined by the lawyers and the judicial process. To be sure, by the time an expert-witness historian takes the stand to testify, he or she has already explained the complete history of the topic under study as exposed in primary sources—warts and all—to the attorney on his or her side. Yet, since an attorney is a participant in an adversarial system, he or she has no obligation to reveal documents that may be potentially damaging to his or her client unless required to do so under the rules of discovery. The historian as an expert witness, on the other hand, has a fundamental responsibility to be as truthful and objective as possible when questioned in court—indeed, the give and take of direct testimony and cross-examination fosters candid and impartial answers and ensures an extremely unpleasant experience for any witness who even seems to be biased. Unlike an expert witness, however, an attorney is an advocate, and it is his or her responsibility to ask all witnesses—including the historian—questions that will paint his or her client's picture as favorably as possible. For this reason, if several documents establish the same important fact in the historical record, the historian's attorney will choose the one least harmful in other areas because once admitted as evidence, everything in that exhibit is fair game for use by opposing counsel. Replication of key facts in the historical record, therefore, is essential to the work of a consulting historian to provide one's own attorney with the largest number of choices to develop a legal strategy, while still creating an accurate rendition of the past's occurrences.

The opposing lawyer has the duty to locate documents detrimental to the historian's side or to elicit information about such records by questioning the historian on cross-examination. But even without knowing which unrevealed records may be pernicious, opposing counsel must also try to block admission of documents that may be offered as exhibits during the historian's direct testimony, particularly when it becomes apparent to that lawyer how damning those records may be to his or her case. It is this reality of the legal process that reinforces the need for an overabundance of primary sources to prove any given historical point. Since opposing counsel may use different legal rules to obstruct the admissibility of key documents in court, large holes may be constructed in the overall historical record without a certain amount of redundancy in the research done by the historian. If opposing counsel is more competent or canny than the historian's attorney, and if the judge is cooperative, the lawyer on the opposite side eventually may be successful in excluding so many relevant documents that historical testimony may become almost meaningless. A few illustrations will demonstrate how a historian's testimony can be circumscribed on the stand without the insurance of a surfeit of records leading to the same historical conclusion.

A common technique to eliminate an offending document is to argue that it is, in legalese, "hearsay." In essence, this means that since opposing counsel cannot cross-examine the person or persons who wrote the document, it should not be admitted as evidence. For example, in one lawsuit in which twelve days of historical testimony was taken concerning a near-century-long dispute between two western states over the allocation of water from a river they share, the opposing lawyer asked the special master (judge) to preclude the use of any historical documents on the grounds they were *all* hearsay. With over two hundred historical exhibits planned, the attorneys who had retained the expert-witness historian countered that judicial rules



ELEPHANT BUTTE RESERVOIR —

*the site at which New Mexico's deliveries of water to Texas under the Rio Grande Compact of 1938 are measured. The Compact is discussed in Littlefield's forthcoming book, Conflict on the Rio Grande: Water and the Law, 1879-1939.*

*Photo by James Hogan, courtesy of Southwest Hydrology.*

allowing the use of “antiquities” overcame the hearsay objection. The presiding special master supported that argument, and opposing counsel was forced to use other tactics to try to bar each document individually.

Another means a lawyer may use to exclude a damaging historical document is to maintain that it is not the “best evidence.” Such a legal argument could be made, for instance, if an expert-witness historian relied upon an unsigned carbon copy of an old letter to establish an important historical point—something commonly done by academic historians. The legal rationale for resisting the use of the carbon copy as an exhibit is that the original letter itself might be better proof since it will be signed and might have additional annotations not apparent on the carbon. The “best evidence” argument can be overcome, however, by having the historian testify that relying on carbon copies is “accepted practice” among scholarly historians because accepted practice is the standard used in court to establish the validity of methods used by any expert witness’s profession.

“Relevance” can also be used to obstruct certain documents. A good example of how this tactic can be utilized can be seen in the case mentioned above involving the interstate river dispute. In that particular instance, the interpretation of a provision of an interstate compact governing the river’s allocation was central to the conflict. The state authorities who originally had negotiated the compact in the 1940s had written an “official” record of their deliberations, which they jointly had approved.

Naturally, they also had created other records revealing their points of view, but these were not part of the “official” record. The other documents included a verbatim transcript of the proceedings (which had been used to create the “official” record), memoranda, notes, reports, and other working papers. Opposing counsel contended that since the compact’s negotiators had drafted an “official” record, all other historical evidence should be dismissed as irrelevant. While the legal basis for this argument is that a contract (such as an interstate

compact) should be construed foremost from its own wording and any related “official” records, this logic appears absurd to an academic historian. To overcome this objection, the historian’s attorney had to establish that the historian’s use of the “unofficial” documents was consistent with standard practice by scholarly historians.

Yet another way to eliminate a bothersome historical exhibit is to assert that it is not a “certified” copy—meaning that it is not verified to be an exact replica (by an authoritative stamp or other notation) by the archive or agency where the original record is held. Without certification, a lawyer can argue that the document may have been altered or that it may be incomplete. The need to certify depends upon the degree to which both sides’ attorneys are willing to accept ordinary copies and the judge’s acquiescence in such mutual accommodation. From an academic point of view, certification of copies is unimportant since scholarly historians generally accept the integrity of documents used by their colleagues. Yet in the judicial arena, when certification is required, it can have major consequences for how many of the historical exhibits will be accepted by the court. This will have an impact on the effectiveness of the historical testimony. Nevertheless, an objection based on a lack of certification can be defeated by having the expert-witness historian testify as to the accuracy of the exhibit—assuming the judge agrees.

These illustrations of how opposing counsel may object to historical exhibits and testimony and how those protests can be overcome demonstrate why having a historian as an expert witness can be a particularly powerful weapon in litigation—a reality that growing numbers of lawyers are now beginning to understand. Simply put, the very fact that historians deal with the past and many of the past’s actors are dead can persuade a court to allow a historian greater leeway in some areas of testimony and in the use of historical exhibits than another expert witness whose specialty is in a different discipline. This is because



**ROOSEVELT DAM,**  
*located on the Salt River, currently supplies much of metropolitan Phoenix, Arizona, with both water and hydroelectric power, and is often involved in litigation and negotiations with competing water interests.*  
*Inset photo, bottom: Theodore Roosevelt speaking in 1911 at the dedication of Roosevelt Dam, the first major project to be completed under the U.S. Reclamation Act of 1902.*

historians are trained specialists in their field of knowledge—mastery that gives them the ability to reconstruct and analyze the past so that others without similar background can understand and learn from it.

The expertise of a historian can be especially useful to an attorney when the issue at trial involves matters of intent. In litigation, determining the meaning behind certain provisions of legislation or an agreement (such as

a contract or interstate compact) is generally considered the prerogative of the judge. The two opposing sides present facts through adversarial confrontation defined by legal rules; the truth emerges from this showdown; and the judge ascertains intent. Historians, however, routinely examine motivation in analyzing the historical record. So to the degree that the judge will allow, an expert-witness historian can offer his or her opinion on the intentions of contracting parties because *this is part of what historians are trained to do*. Most other types of expert witnesses might not be able to express an opinion on intent, since relatively few professions examine human motivation as part of their scholarly activity. It is because historians are taught to study the past that allows them to voice opinions on the motivations of historical



DELTA-MENDOTA CANAL,  
*completed in 1951, transfers water from the Sacramento River to the San Joaquin Valley as part of the U.S. Bureau of Reclamation Central Valley Project in California, and has been the subject of recent court rulings involving endangered species.*

actors and to move more freely through antiquity's sources—at least more so than non-historian expert-witnesses. Historians, therefore, can bring to the court information that might not be admissible under other circumstances, and this may have a significant impact on the outcome of the litigation.

In short, academic historians who appear in court as consultants are not hired guns who defend the party line of those who are pay-

ing them; the legal process itself militates against such debasement. The legal system does have an impact on how historical research and writing is conducted for use in court, but if anything, it tends to make such historical work more detailed and thorough than it might be under other circumstances. Scholarly historians who work in litigation support, therefore, provide a valuable service to the judicial system by acting as what they are: experts in arbitrating the past.

---

*A longer version of this article was originally written for non-lawyer historians. Copyright by the Western History Association. Reprinted by permission. The article first appeared as a Field Note, "The Forensic Historian: Clio in Court," Western Historical Quarterly 25 (Winter 1994): 507-512.*

---

---

## BECOME A CSCHS MEMBER



# TODAY



Your membership supports the mission of the society to recover, preserve, and promote the legal and judicial history of the state of California. This income provides for publications, programs, projects and grants.

All members receive the CSCHS Newsletter and invitations to society-sponsored receptions and events. Judicial level or higher additionally receive as a membership benefit *California Legal History*—the Society's scholarly journal (formerly the *CSCHS Yearbook*)—and other publications offered by the Society.

EMAIL US AT [DIRECTOR@CSCHS.ORG](mailto:DIRECTOR@CSCHS.ORG) OR CALL US AT (800)353-7537