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## Expert Handwriting Testimony: Is the Writing Really on the Wall

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# EXPERT HANDWRITING TESTIMONY: IS THE WRITING REALLY ON THE WALL?

## I. INTRODUCTION

On April 3, 1936, the state of New Jersey executed Bruno Richard Hauptmann for the kidnapping and murder of Charles A. Lindbergh, Jr., son of aviator Charles Lindbergh.<sup>1</sup> Four years prior to his execution, Bruno Hauptmann found himself defending his very life in the “trial of the century.”<sup>2</sup> A ransom note left on the windowsill of Baby Lindbergh’s room and another note that followed the kidnapping sparked huge controversy over the author of the notes.<sup>3</sup> Among the evidence centering the prosecution’s case, lay the testimony of the handwriting expert, Albert S. Osborn, who asserted that Bruno Richard Hauptmann wrote the notes as part of his kidnapping scheme.<sup>4</sup> A handwriting expert for the defense testified and contended that Mr. Hauptmann did not write the ransom notes.<sup>5</sup> Whether Bruno Richard Hauptmann wrote the ransom notes remains a controversy today.<sup>6</sup>

Some authors and advocates argue that our legal system victimized Bruno Hauptmann because of the admission of questionable evidence: expert handwriting testimony.<sup>7</sup> This controversy extends far beyond this infamous case, reaching the academic and judicial forum.<sup>8</sup> Critics of

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<sup>1</sup> Laurence M. Nolan & Peter M. Tiersma, *Hearing Voices: Speaker Identification in Court*, 54 HASTINGS L.J. 373 (2003).

<sup>2</sup> See Anthony R. Tempesta, *The Lindbergh Case*, 147 Mil. L. Rev. 293 (Winter 1995).

<sup>3</sup> See Tempesta *supra* note 2, at 293.

<sup>4</sup> *Id.* See David L. Faigman et al., SCIENCE IN THE LAW FORENSIC SCIENCE ISSUES, 115, 119 (West Group 2002) (discussing *State v. Hauptman* where Osborn testified as the expert witness for the prosecution).

<sup>5</sup> See *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

<sup>6</sup> See Tempesta, *supra* note 2, at 296 (discussing some of the attacks on Hauptmann’s conviction.); D. Michael Risinger et al., *The Daubert / Kumho Implications of Observer Effects In Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 38-39 (2002) (commenting on Osborn’s initial doubts as to the whether Hauptmann wrote ransom notes); Laurie L. Levenson, *Cases of the Century*, 33 LOY. L.A. L. REV. 585, 612 n.20 (2000) (commenting on Mrs. Hauptmann’s continued fight for her husband’s innocence).

<sup>7</sup> *Id.* See also *infra* note 47 and accompanying text (explaining defendant’s assertions that jury charge was prejudicial).

<sup>8</sup> See *infra* note 78 and accompanying text (listing United State Appeals Court decisions that admit expert handwriting testimony); *infra* note 81 and accompanying text (list-

handwriting expertise, mainly argue against the field's reliability and credibility as a science.<sup>9</sup>

Furthermore, contention between the United States Courts of Appeals and the Federal District Courts evinces inconsistent application of the governing standards for the admission of scientific evidence.<sup>10</sup> With some of the lower federal courts questioning the reliability of expert handwriting testimony, and, therefore, its appropriate admissibility as expert testimony, some of these district courts bar the evidence completely.<sup>11</sup>

Other districts courts approach the issue of expert handwriting testimony admissibility by separating the testimony into two categories, limiting the expert testimony by denying testimony on authorship.<sup>12</sup> Specifically, these district courts that express concerns over the reliability of any form expert handwriting testimony, are primarily troubled by the lack of evidence supporting the field's validity outside its own community.<sup>13</sup>

This note will focus on the failure of the United States Court of Appeals to adhere to the admissibility standards set forth by the United States Supreme Court. After detailing the criticisms of expert handwriting testimony in both the academic legal field and the judicial forum, this note advocates for a strict adherence to the Supreme Court standards, which ultimately would bar all forms of expert handwriting testimony until the scientific reliability of this field is adequately established. Additionally, this note addresses the compromised approach of some districts courts as an alternative to a complete bar of expert handwriting testimony.

Specifically, Part II chronicles the early history of handwriting identification expertise, from its early origins in the French legal system through its development in Anglo-American jurisprudence.<sup>14</sup> This section also explores the admission of expert handwriting evidence under previous standards and the application of the current test as promulgated by the Su-

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ing district courts that bar expert handwriting testimony); *infra* note 93 and accompanying text (citing critics of handwriting expertise as a reliable science).

<sup>9</sup> See *infra* note 93 and accompanying text (detailing criticisms of expert handwriting evidence).

<sup>10</sup> See *infra* notes 78 and 81 and accompanying text (comparing federal district courts and federal appeal courts approach to expert handwriting testimony).

<sup>11</sup> See *infra* note 82 and accompanying text (listing federal district courts that bar expert handwriting testimony).

<sup>12</sup> *United States v. Hines*, 55 F. Supp. 2d 62, 67 (D. Mass. 1999) (separating expert testimony into two categories and barring testimony regarding authorship); *United States v. Santillan*, No. CR-96-40169DLJ, 1999 WL 1201765 (N.D. Cal. 1999) (allowing testimony only as to similarities and differences between known exemplar and questioned document).

<sup>13</sup> See *supra* note 81 and accompanying text (highlighting districts courts' skepticism as to the validity of handwriting expertise).

<sup>14</sup> See *infra* notes 22-33 and accompanying text (detailing history of handwriting testimony in foreign and American court systems).

preme Court.<sup>15</sup> Part III reviews the current state of the law in the federal courts, highlighting the contention over the reliability of expert handwriting testimony between the United States Court of Appeals and the United State District Courts.<sup>16</sup> Additionally, Part III analyzes the current test by specifically tracing the inconsistencies of its application throughout the circuits of the United States Court of Appeals.<sup>17</sup> These inconsistencies sparked additional criticism from those who oppose admitting expert handwriting testimony.<sup>18</sup> Finally, Part IV advocates for a strict adherence to the current Supreme Court test, contending that expert handwriting evidence on authorship should not fall under the purview of the Federal Rules of Evidence as expert testimony. Rather, this type of evidence should be considered lay testimony until the establishment of the field's reliability.<sup>19</sup>

## II. HISTORY OF EXPERT HANDWRITING TESTIMONY

### A. Early Legal Roots of the First Forensic Evidence

Just as all men do not have the same speech sounds; neither do they have the same handwriting.<sup>20</sup>

Forgery detection dates back centuries to the reign of the great Greek and Roman philosophers.<sup>21</sup> As far back as Aristotle, scholars have

<sup>15</sup> See *infra* notes 52-57 and accompanying text (chronicling evolving standards of admitting scientific evidence from *Frye*'s general acceptance test to enactment of Federal Rule of Evidence 702); see *infra* notes 65-68 and accompanying text (explaining resolution of conflict between *Frye*'s general acceptance test and Federal Rule of Evidence 702 in *Daubert*).

<sup>16</sup> See *infra* notes 87-88 and accompanying text (highlighting concerns over reliability of expert handwriting evidence and forensic document examination as scientific or technical field).

<sup>17</sup> See *infra* note 78 and accompanying text (evidencing circuit court's inconsistent application of *Daubert* factors).

<sup>18</sup> See *infra* notes 97-98 and accompanying text (criticizing failure of courts to adhere to *Daubert*).

<sup>19</sup> See *infra* notes 134-136 and accompanying text (advocating for stricter adherence to *Daubert*, requiring handwriting experts to establish reliability). See also *infra* notes 123-124, 128 and accompanying text (explaining need to balance benefits of expert handwriting testimony with concerns of field's reliability).

<sup>20</sup> HARTFORD HUNTINGTON, *YOU ARE WHAT YOU WRITE: COMPREHENSIVE GUIDE TO HANDWRITING ANALYSIS* 43 (1973). This book explains graphology, the notion that one's personality or identity can be deduced from one's handwriting. *Id.* This note does not address graphology and only focuses on handwriting experts who compare known and unknown documents to identify the author.

<sup>21</sup> E.g., J. NEWTON BAKER, *LAW OF DISPUTED AND FORGED DOCUMENTS* 3-12 (Michie Co. 1955) (delineating history of handwriting analysis and forgery detection as far back as Roman era), Faigman, *supra* note 4, at 115 (recognizing long history of handwriting expertise), Andre A. Moenssens, *Handwriting Identification Evidence in the Post-Daubert World*, 66 UMKC L. REV. 251, 256 (1997) (commenting on centuries old practice of for-

maintained that an individual's unique handwriting could lead to his or her identification.<sup>22</sup> The earliest systems of handwriting analysis date back to seventeenth century France and Italy.<sup>23</sup> By 1737, France incorporated a system of forgery detection into the law through the enactment of the Code de Faux (translated as the Code Concerning Forgeries).<sup>24</sup> Such a formality, however, did not exist in the Anglo-American courts until a century later, when English barristers successfully persuaded the courts to accept the credibility of handwriting expertise.<sup>25</sup> Moreover, handwriting identification expertise became the first type of "forensic expertise"<sup>26</sup> permitted in the Anglo-American courtroom.<sup>27</sup>

Most American jurisdictions followed the old English practice of barring expert handwriting testimony until the enactment of the Common Law Procedure Act of 1854.<sup>28</sup> In 1836, Massachusetts became the first jurisdiction to recognize and admit the testimony of a handwriting expert in *Moody v. Rowell*,<sup>29</sup> however, not without doubts as to its reliability.<sup>30</sup> As an interesting caveat, the Supreme Judicial Court in *Moody* reasoned

gery detection), D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 734 (1988-89) (citing Huntington Hartford's Aristotle quote).

<sup>22</sup> See Faigman, *supra* note 4, at 115 (explaining idea that a person's unique handwriting could lead to his identification as a very old concept).

<sup>23</sup> *Id.* (indicating that these early European systems focused more on characteristics of author, known today as graphology).

<sup>24</sup> *Id.* According to Faigman, the Code de Faux regulated the collection of exemplars and the manner in which they were presented to the "experts." *Id.*

<sup>25</sup> *Id.* at 116 (citing Common Law Procedure Act, 1854, construed to allow use of handwriting expertise in English courts). Prior to this, authorship had been authenticated through the use of lay witnesses who were familiar with the putative author's handwriting. *Id.* at 117.

<sup>26</sup> Handwriting experts are also known as "forensic document examiners." For the purposes of consistency in terminology in this note, the term handwriting expert will be used.

<sup>27</sup> See *United States v. Rutland*, 372 F.3d 543 (3d Cir. 2004) (noting expert handwriting testimony's historical use in American jurisprudence); *United States v. Mooney*, 315 F.3d 54 (1st Cir. 2002) (acknowledging long history of acceptance of evidence from handwriting expertise in courtrooms). See also Faigman, *supra* note 21, at 116 (identifying Anglo-American handwriting expertise as "oldest 'forensic science'" despite lagging behind French by a century); Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1747 (2001) (chronicling handwriting evidence doctrines and early experts).

<sup>28</sup> See Faigman, *supra* note 21, at 117 (noting that American practice excluded expert handwriting testimony until English construed statute otherwise).

<sup>29</sup> 34 Mass. (17 Pick.) 490 (1835).

<sup>30</sup> *Id.* (allowing use of expert handwriting testimony); see also Faigman, *supra* note 4, at 117 (chronicling complex rise of handwriting expertise in the United States). With the exception of Massachusetts, most American jurisdictions followed the English practice of barring such evidence. *Id.* After the passage of the Common Law Procedure Act of 1854, an English statute, American courts began to admit handwriting expertise into evidence. *Id.* at 116.

that admitting such evidence would not be any more harmful than the previous methods employed to determine authorship of questioned documents.<sup>31</sup> These previous methods included using lay witnesses who were familiar with the alleged author's handwriting to authenticate the handwriting in the questioned document.<sup>32</sup> Today, the use of lay testimony is governed by Federal Rules of Evidence 701.<sup>33</sup>

Eventually, many American jurisdictions followed Massachusetts and started to admit expert handwriting testimony, yet based on the same tenuous explanation articulated in *Moody*.<sup>34</sup> This set the stage for the controversy surrounding the "science" of handwriting analysis as a reliable tool and its appropriate place in American jurisprudence.<sup>35</sup> Given that the only explanation for the admission of expert handwriting testimony rested on the notion that it was better than using lay witnesses, critics contend that this justification has no place in the courtroom because there is no proof of such an assertion.<sup>36</sup>

The Court of Appeals of New York in *Hoag v. Wright*<sup>37</sup> summarized the very crux of the dispute surrounding the admission of handwriting expertise by questioning the reliability of the expert's technique.<sup>38</sup> Acknowledging the dubious value of handwriting expertise, the court explained that "in so many cases where such evidence is received witnesses of equal honesty, intelligence and experience reach conclusions not only

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<sup>31</sup> *Moody*, 34 Mass. (17 Pick.) at 498 (affirming the admission of the opinions of the writing master as competent evidence). See generally Faigman et al., *supra* note 4 at 115 (detailing origins of handwriting evidence and forgery detection and its development into area of expertise in Anglo-American jurisprudence).

<sup>32</sup> See Faigman, *supra* note 4, at 117 (adding that in particular situations jury was permitted to directly compare challenged documents with known exemplars).

<sup>33</sup> FED. R. EVID. 701. Opinion Testimony by Lay Witnesses: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." See also MASS. GEN. LAWS. 191, § 1 (2004) (allowing use of lay witness to authenticate testator's signature).

<sup>34</sup> See Faigman, *supra* note 4, at 117 (asserting this rationale remained dominant explanation for use of handwriting experts in courtroom).

<sup>35</sup> Compare Faigman, *supra* note 4 at 115 (criticizing field of handwriting analysis), D. Michael Risinger et al., *Brave New "Post-Daubert World"—A Reply to Professor Moenssens*, 29 SETON HALL L. REV. 405, 406-18 (1998) (labeling field of questioned document examination as "not science"), and Risinger et al., *supra* note 21, at 772 (arguing that no case has "ever examined, much less determined, whether these 'experts' can do what they claim") with Moenssens, *supra* note 21, at 251 (defending the field of handwriting expertise).

<sup>36</sup> See Risinger et al., *supra* note 21, at 772 (censuring admission of evidence with no proven reliability, that results in denial of rational trial to opponent).

<sup>37</sup> 66 N.E. 579 (N.Y. 1903).

<sup>38</sup> See Faigman, *supra* note 41, at 117 (declaring *Hoag* as typical of prevailing attitude at that time regarding handwriting expertise).

diametrically opposite, but always in favor of the party who called them.”<sup>39</sup> After *Hoag*, some courts continued to reject handwriting expertise while others that admitted this evidence remained skeptical.<sup>40</sup>

Eventually, expert handwriting testimony gained widespread acceptance in courtrooms, and demands for handwriting experts increased.<sup>41</sup> During the early part of the twentieth century, handwriting analysis manuals emerged, training others in this field while continuing to battle skepticism.<sup>42</sup>

Handwriting expertise gained great momentum into the field of “science” after the publication of *QUESTIONED DOCUMENTS*, a collaboration between Albert S. Osborn, known for his expert testimony in the Lindbergh Baby Kidnapping case and John Henry Wigmore, known for his treatise on evidence.<sup>43</sup> Heralded as the quintessential book on handwriting analysis, Osborn and Wigmore effectively launched the field of handwriting expertise out of the realm of “quack science” for the time being.<sup>44</sup> The infamous “Lindbergh baby kidnapping” case, *State v. Hauptmann*,<sup>45</sup> evidenced Osborn’s culminating triumph in the field.<sup>46</sup>

In *Hauptmann*, Osborn, an expert witness for the prosecution, testified that Bruno Richard Hauptmann wrote the ransom notes found in connection with the kidnapping of Charles A. Lindbergh, Jr.<sup>47</sup> Subsequently, a jury convicted Hauptmann of kidnapping and murder, arguably due to the testimony of the handwriting expert as asserted by the defense.<sup>48</sup> Pro-

<sup>39</sup> *Hoag*, 66 N.E. at 581 (classifying opinions of handwriting experts “as of uncertain value”).

<sup>40</sup> See Faigman, *supra* note 4, at 117. Despite the skepticism, experts started to gain greater respect, growing into a larger community. *Id.*

<sup>41</sup> See Faigman, *supra* note 4, at 118 (highlighting some literature on handwriting analysis published in the 1890’s). Faigman cited to *The Manual of the Study of Documents* by Persifor Frazer, *Disputed Handwriting* by William E. Hagan and *Ames on Forgery* by Daniel T. Ames. *Id.*

<sup>42</sup> See *supra* note 41 and accompanying text (listing some popular literature and training manuals on handwriting analysis and forgery detection).

<sup>43</sup> See Faigman, *supra* note 4, at 118 (identifying *Questioned Documents* as point where expert handwriting analysts gained credibility).

<sup>44</sup> *Id.* at 119 (criticizing current literature on subject of handwriting analysis as merely “rearrangements or expansions of Osborn’s 1910 book”).

<sup>45</sup> 180 A. 809 (N.J. 1935).

<sup>46</sup> See Faigman, *supra* note 4, at 119 (discussing *State v. Hauptman* where Osborn testified as the expert witness for the prosecution).

<sup>47</sup> See *Hauptmann*, 180 A. at 822-23 (explaining defendant’s contention that jury charge was unduly prejudicial due to specific references to Mr. Osborn’s testimony). The jury charge specifically recounted Osborn’s testimony and conclusion that the evidence was “irresistible, unanswerable and overwhelming.” *Id.* at 821. The jury charge simply remarked that the expert for the defense rebuts the testimony of the expert for the prosecution. *Id.*

<sup>48</sup> See *supra* note 47 and accompanying text (detailing defendant’s objections to evidence); see also Risinger et al., *supra* note 21, at 771 (describing public need for closure

claimed as an expert in the field of handwriting identification and forgery detection after the *Hauptman* case, Osborn increased acceptance for the field, while temporarily eradicating some of the skepticism aforementioned in *Hoag*.<sup>49</sup>

### *B. Admitting Handwriting Evidence: Gatekeepers Beware*

As previously discussed, testimony from handwriting experts has a long history in the courtroom, receiving widespread acceptance in both the federal and state court systems.<sup>50</sup> For many years, courts admitted testimony from both lay witnesses and “experts” to identify authors of questioned documents.<sup>51</sup> In *Frye v. United States*,<sup>52</sup> the Court of Appeals for the District of Columbia stated that expert opinion based on scientific technique is inadmissible unless the technique is “generally accepted” as reliable in the “relevant” scientific community.<sup>53</sup> With regards to handwriting expertise, the particular technique employed by the handwriting expert need only be accepted within the field of handwriting analysis.<sup>54</sup>

The *Frye* “general acceptance” standard remained the test for admitting forensic or scientific evidence until the enactment of Federal Rule of Evidence 702, which conflicted with the *Frye* test.<sup>55</sup> Federal Rule of Evidence 702 allows a qualified witness to testify if it will assist the trier of

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and belief that Hauptmann was guilty); Faigman, *supra* note 4, at 119 (characterizing public’s need to believe that Hauptmann was guilty).

<sup>49</sup> See *In re State of Sylvestri*, 55 A.D. 2d 916, 918 (App. Div. 1977) (declaring that expert handwriting analysts have achieved respectable standing in the courtroom). See Faigman, *supra* note 4, at 119 (claiming that in years following *Hauptmann*, no reported opinion barred expert handwriting testimony). See also *Moody*, 315 F.3d at 62 (listing factors that trial judge used to determine admissibility of handwriting expert’s testimony including persuasiveness of historical acceptance); *Crisp*, 324 F.3d at 265 (observing on court’s long recognition of handwriting analysis as sound method for making reliable identifications).

<sup>50</sup> See *supra* note 49 and accompanying text (chronicling the eradication of court skepticism after Osborn’s testimony in *Hauptmann*).

<sup>51</sup> See *United States v. Brown Okolo*, 82 F. App’x. 131, 137 (5th Cir. 2003) (admitting lay testimony on handwriting under Fed. Rule of Evidence 701); see *supra* note 32 and accompanying text (detailing use of lay witnesses for authentication of unknown document).

<sup>52</sup> 293 F. 1013 (D.C. Cir. 1923) *overruled by* *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>53</sup> *Id.* at 1014 (reasoning that methodologies employed by experts “must be sufficiently established to have gained general acceptance in the particular field in which it belongs”).

<sup>54</sup> See *supra* note 53 and accompanying text (explaining the parameters of “general acceptance”).

<sup>55</sup> See *infra* note 57 and accompanying text (explaining conflict with *Frye* test and Federal Rule of Evidence 702). The Supreme Court eventually dealt with the inconsistency in *Daubert*. *Daubert*, 509 U.S. 579. See *infra* note 66 and accompanying text (explaining court’s reasoning in *Daubert*).



fact.<sup>56</sup> The key language in the rule "assist the trier of fact" and "qualified as an expert" suggests the need for further exploration into the reliability of particular testimony before admitting scientific evidence based solely on "general acceptance."<sup>57</sup>

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>58</sup> the United States Supreme Court finally addressed the conflict surrounding the appropriate standard for admitting scientific evidence.<sup>59</sup> The plaintiffs, individuals born with serious birth defects and their parents who took Bendectin during their pregnancies, filed a lawsuit against Dow Pharmaceuticals asserting that the drug caused their defects.<sup>60</sup> The defendants, manufacturers of the drug Bendectin, marketed the prescription drug as a means to reduce morning sickness in pregnant women.<sup>61</sup> The plaintiffs brought forth eight expert witnesses with various credentials, each of whom concluded that Bendectin could cause birth defects.<sup>62</sup>

The district court granted the defendants petition for summary judgment, reasoning that scientific evidence is admissible only if the principle upon which it is based is "sufficiently established to have general acceptance in the field to which it belongs."<sup>63</sup> The United States Court of Appeals for the Ninth Circuit affirmed, holding that under *Frye* expert knowledge must be premised on generally accepted methodologies in the particular field to which it belongs.<sup>64</sup> Reversing the lower courts, the Supreme Court concluded that the language of Federal Rule of Evidence 702 did not

<sup>56</sup> FED. R. EVID. 702. Testimony by Experts: "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." *Id.*

<sup>57</sup> See *Daubert*, 509 U.S. at 589 (clarifying that displacement of *Frye* test by Fed. Rule of Evidence 702 did not remove any "limits on the admissibility of purportedly scientific evidence"). The court stressed that the rules require not only established relevancy but reliability. *Id.*

<sup>58</sup> 509 U.S. 579 (1993).

<sup>59</sup> *Id.* at 587-89 (squaring "*Frye*" test with enactment of Federal Rule of Evidence 702).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 582.

<sup>62</sup> *Daubert*, 509 U.S. at 583. The experts based their conclusions on "in vitro" and "in vivo" animal studies that discovered a link between Bendectin and malformations. *Id.* These studies supported the theory that similar malformations could be found in humans. *Id.* Specifically, pharmacological studies of Bendectin's chemical structure evidenced similarities with other drugs that caused birth defects. *Id.*

<sup>63</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 575 (S.D. Cal. 1989), *rev'd*, 509 U.S. at 579 (quoting *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978)) (reasoning that because opinion of petitioner's expert did not rely on enormous body of epidemiological data regarding Bendectin, it conflicted with *Frye*).

<sup>64</sup> *Daubert*, 951 F.2d at 1130. The court stated that "expert opinion based on a methodology that diverges significantly from the procedures accepted by recognized authorities in the field cannot be shown to be 'generally accepted' as a reliable technique." *Id.* (quoting *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir. 1985)).

establish “general acceptance” as the absolute prerequisite to admissibility.<sup>65</sup> Furthermore, the Court reasoned that the defendant did not present any clear evidence that the drafters of the rule intended to incorporate the “general acceptance” standard into the rule, which would essentially codify *Frye*.<sup>66</sup>

Rather, the Court in *Daubert* set forth the following four-prong test for assessing the relevancy and reliability of expert handwriting testimony: 1) whether the particular scientific theory can be and has been tested, 2) whether the theory has been subjected to peer review and publication, 3) what the known or potential rate of error is, and 4) whether the technique has achieved general acceptance in the relevant scientific community.<sup>67</sup> The Court cautioned, however, that other factors may be used to assess whether certain scientific evidence is reliable.<sup>68</sup> The new standard opened the door to more controversy over expert testimony as inconsistent application of the *Daubert* factors emerged in subsequent federal court cases regarding the admissibility of such testimony.<sup>69</sup>

Additionally, the *Daubert* opinion created some confusion over its application to the “technical or otherwise specialized knowledge” segment of Federal Rule of Evidence 702 because the Court in *Daubert* limited its discussion to the scientific context.<sup>70</sup> Specifically, with respect to evidence from handwriting experts, some courts argued that handwriting analysis is actually a “technical” field rather than “scientific,” thus falling outside the purview of Federal Rule of Evidence 702.<sup>71</sup> In *Kumho Tire Co., Ltd. v. Carmichael*,<sup>72</sup> the United States Supreme Court resolved this issue, holding that the trial court’s gate keeping function extended to expertise in technical evidence.<sup>73</sup> Additionally, the Court reaffirmed the importance of the

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<sup>65</sup> *Daubert*, 509 U.S. at 597 (reasoning that Fed. Rule of Evidence 702 assigns “to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand”).

<sup>66</sup> *Id.* at 588 (stating that drafting history does not mention *Frye*). The Court notes that adhering to the rigid “general acceptance” standards “would be at odds with the liberal thrust of the Federal rules and their general approach of relaxing the traditional barriers to opinion testimony.” *Id.* (internal quotes omitted).

<sup>67</sup> *Daubert*, 509 U.S. at 593-94 (stressing that the inquiry is flexible).

<sup>68</sup> *Id.* at 595 (noting that the focus “must be solely on principles and methodology, not on the conclusions that they generate”).

<sup>69</sup> See *infra* notes 78-82 and accompanying text (evidencing inconsistent application and contention between circuit and district courts over admissibility of expert handwriting testimony).

<sup>70</sup> See *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1040 (S.D.N.Y. 1995) (explaining that issue before the court is whether *Daubert* applies to technical or other specialized knowledge testimony).

<sup>71</sup> See *Starzecpyzel*, 880 F. Supp. at 1041 (holding handwriting expertise as technical).

<sup>72</sup> 526 U.S. 137 (1999).

<sup>73</sup> See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-48 (1999) (concluding that it would prove difficult to administer different evidentiary standards based on distinc-

gatekeeping function, stressing that the purpose of the rule is to assure reliability and relevancy of expert testimony.<sup>74</sup> Furthermore, the Court clarified that “[i]t is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>75</sup> Thus, based on *Kumho Tire*, it is clear that courts should apply the *Daubert* factors to both scientific and technical fields when determining admissibility of expert evidence under Federal Rule of Evidence 702.<sup>76</sup> Therefore, handwriting analysis falls clearly within the purview of *Daubert*, regardless of its status as technical or scientific.<sup>77</sup>

### III. THE CURRENT LAW

Most United States Court of Appeals have considered the issue of the admissibility of expert handwriting testimony and all, with one exception, hold that it is admissible under the *Daubert* standard.<sup>78</sup> The United States Court of Appeals for the Tenth Circuit, the one exception, affirmed the lower federal district court’s approach of separating the expert testimony into two categories, allowing the expert to testify only on the simi-

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tion between “scientific” knowledge versus “technical or otherwise specialized” knowledge).

<sup>74</sup> *Id.* at 152.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 141 (concluding that trial court may consider one or more of *Daubert*’s factors to determine reliability of scientific or technical testimony). The court also emphasized that the list posted in *Daubert* was not exhaustive. *Id.*

<sup>77</sup> *Kumho Tire*, 526 U.S. at 141 (concluding that gatekeeping function of *Daubert* applies to testimony based on technical and other specialized knowledge).

<sup>78</sup> Compare *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002) (affirming lower court’s admission of expert handwriting testimony), *United States v. Rutland*, 372 F.3d 543, 545-46 (3d Cir. 2004) (rejecting notion that revealing expert’s credentials would influence jury to accept expert’s opinion rather than underlying analysis), *United States v. Crisp*, 324 F.3d 261, 270-71 (4th Cir. 2003) (illuminating long history of acceptance of expert handwriting testimony in courtroom as assurance of reliability required by *Daubert*), *United States v. Sanders*, 59 F. App’x. 765, 767 (6th Cir. 2003) (holding district court’s admission of handwriting examiner’s testimony as proper), *United States v. Kehoe*, 310 F.3d 579, 593 (8th Cir. 2002) (labeling expert’s testimony as reliable and helpful to jury), *United States v. Prime*, 363 F.3d 1028, 1034 (9th Cir. 2004) *vacated by* 125 S. Ct. 1005 (2005) *and opinion amended by* 431 F.3d 1147 (9th Cir. 2005) (concluding that district court carefully applied *Daubert* factors), *United States v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000) (reasoning that expert’s testimony enhanced jury’s understanding of evidence before them), *United States v. Paul*, 175 F.3d 906, 911 (11th Cir. 1999) (admitting expert handwriting testimony), *United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997) (holding handwriting testimony about defendant’s signature admissible), *United States v. Velasquez*, 64 F.3d 844, 848-49 (3d Cir. 1995) (recognizing expert handwriting analysis as a field of expertise) *with United States v. Hernandez*, 42 F. App’x. 173, 176 (10th Cir. 2002) (affirming lower court’s decision to bar expert testimony on authorship).

larities and differences between the known exemplar (known document or sample) and the questioned document, but barring testimony on authorship.<sup>79</sup>

The major contention over the admissibility of expert handwriting testimony rests between the United States Court of Appeals and the federal district courts.<sup>80</sup> Primarily, some federal district courts are very reluctant to accept handwriting expertise as reliable scientific or technical evidence.<sup>81</sup> Some of these federal districts courts completely bar expert handwriting testimony for failing to satisfy the *Daubert* factors.<sup>82</sup> In *United States v. Saelee*,<sup>83</sup> the United States District Court for the District of Alaska considered testimony from handwriting experts to be unreliable.<sup>84</sup> Additionally, the court determined that handwriting expertise potentially misleads the trier(s) of fact because of the “expert” status of the witness and his or her long list of “credentials.”<sup>85</sup>

In *United States v. Hines*,<sup>86</sup> decided prior to the *Hernandez* case, the United States District Court for the District of Massachusetts discussed at length its concerns regarding the possible prejudicial effect of an “expert” testifying as to his or her opinion on authorship.<sup>87</sup> The court reasoned that

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<sup>79</sup> See *Hernandez*, 42 F. App’x. at 176-77 (affirming lower court’s decision to separate expert testimony into two categories, allowing testimony on similarities and differences).

<sup>80</sup> See *Deputy v. Lehman Brothers, Inc.*, 345 F.3d 494, 509 (7th Cir. 2003) (acknowledging diverging opinions between circuit and district courts without officially weighing in on issue of admissibility).

<sup>81</sup> See *United States v. Lewis*, 220 F. Supp. 2d 548, 554 (S.D.W. Va. 2002) *criticized* by *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (barring expert testimony for failure to pass muster under *Daubert*); *United States v. Brewer*, No. 01CR892, 2002 WL 596365, at \*8 (N.D. Ill. 2002) (doubting whether expert handwriting analysis could proffer any new evidence of its reliability); *United States v. Saelee*, 162 F. Supp. 2d 1097, 1102-03 (D. Alaska 2001) (determining that handwriting expert lacked reliability under *Daubert* analysis). The court stressed the lack of peer review by an unbiased community of practitioners in addition to narrowing in on the lack of statistics for potential error rate, ultimately concluding that the methodology was unreliable. *Id.* at 1102-05.

<sup>82</sup> See *Lewis*, 220 F. Supp. 2d at, 554 (holding expert handwriting testimony inadmissible for failure to satisfy *Daubert* test); *Saelee*, 162 F. Supp. 2d 1097 at 1102-03 (holding expert handwriting testimony inadmissible based on failure to establish reliability).

<sup>83</sup> 162 F. Supp. 2d 1097 (D. Alaska 2001).

<sup>84</sup> *Id.* at 1102 (finding that theories and methodologies could be tested but concluding that overall there was a lack of testing sufficient to satisfy Federal Rule of Evidence 702 admission).

<sup>85</sup> *Id.* at 1105 (characterizing government’s witness as testifying with apparent authority on a subject of seemingly specialized knowledge whose validity court is unable to evaluate). The court further cautioned that the government’s expert witness “is likely to mislead the jury as to assist it in determining the facts of this case. *Id.*”

<sup>86</sup> 55 F. Supp. 2d 62 (D. Mass. 1999).

<sup>87</sup> *Id.* at 68 (reasoning that handwriting expertise has not been sufficiently tested to ensure reliability); see also *Saelee*, 162 F. Supp. 2d at 1103 (declaring that minimal testing done in the field of handwriting analysis raises grave concerns about reliability of methods employed).

such an issue lies within the competence of the average juror and ultimately should be left to the jury without the influence of the expert's credentials.<sup>88</sup> The court recognized the value of the expert's testimony as to similarities and differences between the questioned document and known exemplar, allowing such testimony as a means to assist the jury with making the final decision and as a time saving measure.<sup>89</sup> The court reasoned that such a compromise would effectively balance the interests of both parties.<sup>90</sup>

The risk of unduly prejudicing the jury with expert testimony always exists, especially when the field is so complex that the concepts are beyond the competence of the trier(s) of fact.<sup>91</sup> In particular, the concern with expert testimony in handwriting is that the field of handwriting analysis lacks any evidence that an "expert" is more competent than a lay person to compare handwriting samples, and furthermore, that the field is so complex that it requires the services of an expert.<sup>92</sup> Generally, critics attack the entire field of handwriting expertise and not just a particular methodology.<sup>93</sup> Serious questions remain as to whether testimony on authorship can truly pass muster under *Daubert*.<sup>94</sup>

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<sup>88</sup> See *Hines*, 55 F. Supp. 2d at 70 (reasoning that opinion on authorship would exceed expertise).

<sup>89</sup> *Id.* at 69 (concluding that "experts" can be used in absence of lay witnesses to compare handwriting). The court noted that "experts" have studied handwriting for years and are essentially "observational experts." *Id.*

<sup>90</sup> See *supra* note 88-89 (explaining concerns with expert testimony's reliability and how a compromise could serve interests of justice).

<sup>91</sup> See *Daubert*, 509 U.S. at 595 (discussing power of expert evidence and its potentially misleading results).

<sup>92</sup> See *Saelee*, 162 F. Supp. 2d at 1102-03 (discussing Kam studies on handwriting abilities between lay persons and experts). The court in *Saelee* noted that lay persons and experts possessed similar skills in detecting forgeries. *Id.* at 1102. Specifically, experts distinguished authentic signatures somewhat better than lay witnesses; lay witness incorrectly found forgeries to be authentic signatures and vice versa slightly more than experts. *Id.* The court considered this evidence inconclusive of the field's reliability. *Id.*

<sup>93</sup> See generally Faigman et al., *supra* note 4 at 115 (chronicling judicial response to handwriting expertise and summarizing statistical data on handwriting expert's proficiency); Risinger et al., *supra* note 21, at 772 (advocating for complete exclusion of expert handwriting testimony); Risinger et al., *supra* note 34, at 406-18 (defending criticisms of previous article and labeling field of questioned document examination as "not science"). In *Daubert*, the respondents argued that the specific methodology lacked credibility within the field. *Daubert*, 509 U.S. at 582.

<sup>94</sup> See *supra* note 87 and accompanying text (expressing concerns over the lack of testing in this field). In *Saelee*, the court conveyed reservations about the field's lack of controlling standards and the lack of peer review by practitioners outside "the closed universe of forensic document examiners." *Saelee*, 162 F. Supp. 2d at 1104-05.

## IV. CLEARING THE SLATE

The majority of the United States Court of Appeals has concluded that handwriting expertise is reliable, however, the basis for this conclusion rests on the notion that the field has enjoyed a long history of acceptance in the courtroom.<sup>95</sup> Moreover, the application of the *Daubert* standard to expert handwriting testimony remains inconsistent among the federal circuits, leaving case law in conflict.<sup>96</sup> Specifically, the reliability of such expertise and the status of handwriting expertise as “scientific” or “technical” within the meaning of Federal Rule of Evidence 702 are seriously questioned.<sup>97</sup> The lengthy history of admitting expert handwriting testimony suggests that the majority of courts approach the question of admissibility under the antiquated *Frye* “general acceptance” standard, while using *Daubert* terminology.<sup>98</sup> It appears to be simply a question of judicial tradition: expertise in handwriting identification and forgery detection is reliable because the techniques have been accepted and tested in the court system over time.<sup>99</sup> The dissenting opinion in *Leroy v. Crisp*,<sup>100</sup> criticized the majority’s excusal of handwriting expertise from any comprehensive *Daubert* analysis simply “because these techniques are generally accepted

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<sup>95</sup> See *Paul*, 175 F.3d at 910 n.2 (stating that courts have accepted expert handwriting testimony). See *infra* note 98 and accompanying text (discussing current use of the antiquated *Frye* general acceptance test).

<sup>96</sup> See *infra* note 98 and accompanying text (highlighting circuit courts that admit expert handwriting testimony without discussing *Daubert* factors).

<sup>97</sup> See *Starzecpyzel*, 880 F. Supp at 1029, 1047 (holding forensic document examination expertise as nonscientific within meaning of Fed. Rule of Evidence 702 and outside scope of *Daubert* analysis). This case, decided before *Kumho Tire*, resolved the issue of whether “technical or other specialized knowledge” came under the purview of *Daubert*, did explain in dicta, that if handwriting expertise were subjected to *Daubert* analysis, it would have to be excluded. *Id* at 1036. See *supra* note 35 and accompanying text (listing academic critics of forensic document examination as “science”); *Crisp*, 324 F.3d at 280 (Michael, J., dissenting) (asserting that lack of critical review has stunted advancement of methodology).

<sup>98</sup> See *Saelee*, 162 F. Supp. 2d at 1105 (clarifying that evidence previously accepted in past by courts does not translate into automatic acceptance under *Daubert* and *Kumho Tire*); *Crisp*, 324 F.3d at 272 (Michael, J., dissenting) (discussing historical acceptance of expert handwriting testimony but highlighting recent criticisms of reliability). But see *Rutland*, 372 F.3d at 545-46 (admitting expert handwriting testimony without any discussion of satisfying *Daubert* factors); *Prime*, 363 F.3d at 1033-35 (admitting expert handwriting testimony based on a *Daubert* analysis with a discussion of each prong); *Crisp*, 324 F.3d at 270-71 (admitting expert handwriting testimony after listing *Daubert* factors but without any analysis); *Brown Okolo*, 82 F. App’x. at 137 (admitting lay testimony on handwriting under Fed. Rule of Evidence 701); *Mooney*, 315 F.3d at 61-62 (admitting expert handwriting testimony without any discussion of satisfying *Daubert* factors); *Kehoe*, 310 F.3d at 593 (admitting expert handwriting testimony based on *Daubert* but without any discussion of *Daubert* factors).

<sup>99</sup> See *Crisp*, 324 F.3d at 272 (Michael, J., dissenting) (stating majority’s belief leads to excusing handwriting analysis from careful scrutiny under *Daubert*).

<sup>100</sup> 324 F.3d 261.

and have been examined for nearly one hundred years in our adversarial system of litigation.”<sup>101</sup> The dissent cautions that reliance on judicial traditions is not sufficient to establish reliability under *Daubert*.<sup>102</sup> Moreover, many criticize this judicial tradition, contesting that the techniques have not been truly tested in the court system much less scientifically proven as required by *Daubert*.<sup>103</sup>

A less confusing approach may reconcile the inconsistent applications of *Daubert* by separating the analysis from opinion on authorship from testimony on similarities and differences between the known exemplar and questioned document.<sup>104</sup> By recognizing two distinct categories of expert handwriting testimony, courts can balance the need for such expertise to assist the trier(s) of fact with the need to insulate the trier(s) of fact from potentially prejudicial “expertise” on authorship that fails a strict scrutiny under the *Daubert*.<sup>105</sup> Courts, however, should strictly adhere to *Daubert* when analyzing both categories of testimony, ultimately barring any expert testimony for unproven reliability.<sup>106</sup>

#### A. Only the Experts Can See the Writing on the Wall

Every circuit that considered the issue of expert handwriting testimony admitted some form of expert testimony.<sup>107</sup> Yet, very few decisions offer any explanation, much less analysis, of how expert handwriting testimony comports with the more careful scrutiny set forth in *Daubert*.<sup>108</sup>

<sup>101</sup> *Id.* at 272.

<sup>102</sup> See *infra* note 112 (explaining that courtroom is no substitute for scientific testing); see also *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir. 2002) (stating that “[r]ulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert’s methodology”).

<sup>103</sup> See *Starzecpyzel*, 880 F. Supp at 1038 (highlighting that more recent texts and training material in field of handwriting expertise still cite to publications from 1910 and 1929). The court concluded that “despite the existence of a certification program, professional journals and other trappings of science, cannot, after *Daubert* be regarded as scientific...knowledge.” *Id.* See also *Risinger et al.*, *supra* note 4, at 772 (claiming that no case has ever examined reliability of handwriting experts as to ability to detect authorship).

<sup>104</sup> See *Hernandez*, 42 Fed. App’x. at 173 (affirming the trial court’s decision to bar expert testimony on authorship). See *infra* note 123 and accompanying text (discussing other courts that have severed testimony into two categories, allowing only expert testimony on similarities and differences).

<sup>105</sup> See *supra* note 89 and accompanying text (outlining potential benefits of some form of expert handwriting testimony).

<sup>106</sup> See *Saelee*, 162 F. Supp. 2d at 1100 (explaining that purpose of *Daubert* and Fed. Rule of Evidence 702 is to exclude unreliable scientific expert testimony).

<sup>107</sup> See *supra* note 78 and accompanying text (evidencing various circuits that have held handwriting expertise admissible).

<sup>108</sup> See *supra* note 98 and accompanying text (discussing current use of the antiquated *Frye* general acceptance test and listing court that admit expert handwriting testimony without any *Daubert* analysis).

Critics that question the reliability of handwriting expertise, claim that the field's validity has only been *assumed* since Wigmore's treatises.<sup>109</sup> Furthermore, critics contend that the techniques employed in expert handwriting testimony remain undeveloped since the first handbook.<sup>110</sup>

Additionally, *Daubert* does not suggest that acceptance by the legal rather than the scientific community suffices for reliability.<sup>111</sup> The courtroom is not the place to test scientific theory.<sup>112</sup> Cross examination of a handwriting expert does not equate to subjecting the field to the rigorous standards of the scientific community as required by *Daubert*.<sup>113</sup> The purpose of Federal Rule of Evidence 702 as postulated by the Supreme Court in *Daubert*, cautions courts against admitting scientific evidence without any scrutiny.<sup>114</sup> Trial judges, functioning as gatekeepers, must maintain security and balance; they should not permit passage through the gates simply because an expert asserts his techniques are reliable.<sup>115</sup>

Moreover, the mere historical acceptance of handwriting expertise in the legal forum does not translate into a free pass under *Daubert* because Federal Rule of Evidence 702 replaced the "general acceptance" test of *Frye*.<sup>116</sup> Nothing in the *Daubert* opinion proposes that scientific evidence admissible under *Frye* "is grandfathered in or is free of the more exacting analysis now required."<sup>117</sup> Under *Daubert*, general acceptance is only one prong of the analysis, yet many courts have continued to admit expert handwriting testimony solely on this basis, clearly following the obsolete rule of *Frye*.<sup>118</sup>

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<sup>109</sup> See *supra* note 103 and accompanying text (discussing lack of improvements in methodology in the field of handwriting expertise).

<sup>110</sup> See *supra* note 103 and accompanying text (discussing references to methodologies dating back to 1910).

<sup>111</sup> *Crisp*, 324 F.3d at 273 (Michael, J., dissenting) (cautioning that our adversarial system is not a substitute for *Daubert* analysis).

<sup>112</sup> *Id.* (conceding that adversarial testing is important but as only a tool of the legal system and cannot be substituted for empirical testing of reliability).

<sup>113</sup> *Id.* (underscoring that many criminal defendants are indigent and do not have independent access to rebuttal expert).

<sup>114</sup> See *Saelee*, 162 F. Supp. 2d at 1100 (affirming importance of court's gate keeping function).

<sup>115</sup> See *Crisp* 324 F.3d at 273 (Michael, J., dissenting) (asserting that expert handwriting evidence passed through courts with little judicial scrutiny). Judge Michael comments that it appears as though the only practitioners that have assessed the field's validity are other handwriting experts. *Id.* at 279.

<sup>116</sup> *Id.* at 272 (agreeing with contention in *Saelee* that only new scientific evidence fell under the purview of *Daubert*).

<sup>117</sup> *Crisp*, 324 F.3d at 273 (Michael, J., dissenting) (contending that previous exposure to the adversarial process does not relieve previously accepted evidence of the "more exacting analysis now required"); see *Saelee*, 162 F. Supp.2d at 1105 (concluding that expert testimony that has been previously accepted does not equate to a general acceptance after *Daubert* and *Kumho*).

<sup>118</sup> *Crisp*, 324 F.3d at 272 (Michael, J., dissenting) (criticizing majority for accepting techniques because they had been accepted for over one hundred years); *supra* note 78 and



Furthermore, critics from both the judicial and academic forums contend that no meaningful evidence of reliable testing exists to prove the validity of handwriting analysis.<sup>119</sup> The United States District Court for the Southern District of New York observed in *United States v. Starzecpyzel*, that a half century after Wigmore's and other texts, the field of handwriting expertise failed to advance any improved methods of comparing handwriting samples for identification.<sup>120</sup> Those who weighed in are only other handwriting experts, suggesting that the field has not endured any peer review from a "competitive, unbiased community of practitioners and academics."<sup>121</sup> Additionally, critics question what incentives remain to advance the field handwriting analysis examination if courts do not force the experts to defend their methodologies.<sup>122</sup>

### *B. Let Us All See the Writing on the Wall*

Some federal district courts divide the expert testimony into two main categories: (1) similarities and differences between the known exemplar and the questioned document and (2) opinion as to authorship of the questioned document.<sup>123</sup> In *Hines*, the court expressed concerns about the

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accompanying text (evidencing various circuits that admit expert handwriting testimony without any discussion of *Daubert*).

<sup>119</sup> See *Saelee*, 162 F. Supp. 2d at 1102 (holding expert handwriting testimony inadmissible for failure to establish reliability); *Hines*, 55 F. Supp.2d at 68 (concluding that handwriting expertise has never been "subject to meaningful reliability or validity testing"); *Starzecpyzel*, 880 F. Supp. at 1034 (noting lack of evidence to support that everyone's handwriting is unique); see also Risinger et al., *supra* note 21, at 772 (asserting that tests do not support the claim that handwriting analysts are "experts").

<sup>120</sup> *Starzecpyzel*, 880 F. Supp. at 1038 (positing that one would expect improvements in the methodology and techniques since the early treatises). Defendants attributed the lack of improvement in the field of handwriting analysis to the fact that the "discipline has no counterpart in industry or academics with an economic incentive to study and refine its scientific basis." *Id.*

<sup>121</sup> *Starzecpyzel*, 880 F. Supp. at 1038 (suggesting that "a logical choice for a relevant scientific community would seem to be a collection of such mainstream sciences as pattern recognition and motor control"); *Crisp*, 324 F.3d at 280 (Michael, J., dissenting) (asserting that lack of critical review has stunted advancement of methodology); see *Saelee*, 162 F. Supp. 2d at 1104 (declaring that minimal empirical testing raises grave concerns regarding reliability of methods currently used).

<sup>122</sup> See *United States v. Lewis*, 220 F. Supp.2d 548, 554 (S.D.W. Va. 2002) (observing that proficiency tests ineffectively assess proficiency if everyone passes); see also D. Michael Risinger et al., *Science and Non-science in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 IOWA L. REV. 21, 42 (1996) (contending that "expertise" exists only if there is a significant accuracy advantage over average jurors).

<sup>123</sup> See *Hines*, 55 F. Supp.2d at 68 (admitting expert handwriting testimony only on similarities and differences between disputed document and known exemplar). See also *Wolf v. Ramsey*, 253 F. Supp. 2d 1323, 1347-48 (N.D. Ga. 2003) (reasoning that expert handwriting testimony may assist trier of fact by testifying as to similarities and differences but barring testimony on authorship); *United States v. Hidalgo*, 229 F. Supp. 2d 961, 968 (D. Ari. 2002) (barring testimony on authorship); *United States v. Van Wyc*, 83 F. Supp. 2d

reliability of expert testimony from handwriting analysts, because “it has never been shown to be more reliable than the results obtained by lay people.”<sup>124</sup> The court, however, also recognized the usefulness of such testimony, choosing to balance these concerns without barring the evidence completely.<sup>125</sup> Remedying these concerns, the court labeled an expert’s testimony about the similarities and differences between two documents as observational and potentially helpful in the conservation of time.<sup>126</sup> More specifically, a lay person could make the same observations in the courtroom as an expert but it would take more time.<sup>127</sup> Therefore, allowing an “expert” to make these observations outside of the courtroom and then present them to the jury in a concise manner seemed sensible.<sup>128</sup>

In contrast, expert testimony as to authorship presents a more troubling issue of reliability because of the lack of evidence to support any consistent methodology, rate of error or outside peer review, as discussed above.<sup>129</sup> Moreover, the proposition that handwriting uniqueness is testable within *Daubert*’s meaning, does not translate into the conclusion that it has actually been tested.<sup>130</sup> Finally, acceptance of the uniqueness principle within the field does not satisfy *Daubert*.<sup>131</sup>

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515, 523 (D.N.J. 2000) (barring expert testimony as to authorship of unknown writing); *United States v. Rutherford*, 104 F. Supp.2d 1190, 1193-94 (D. Neb. 2000) (holding handwriting analyst not entitled to offer opinions on the ultimate issue of authorship); *United States v. Santillan*, 1999 WL 1201765, at \*4 (N.D. Cal. 1999) (barring expert handwriting testimony on authorship).

<sup>124</sup> *Hines*, 55 F.Supp.2d at 68-69 (recognizing government’s expert, Kam and his studies as interesting and important but not without severe criticism). Judge Gertner further commented that such studies cannot purport to have established the reliability of the field to any “meaningful degree.” *Id.* at 69.

<sup>125</sup> See *supra* note 89 and accompanying text (commenting on potential benefits of testimony from handwriting experts).

<sup>126</sup> *Hines*, 55 F.Supp. 2d at 68 (reasoning that without any lay witnesses, government must use testimony from “experts” those who study handwriting).

<sup>127</sup> See *Hines*, 55 F.Supp.2d at 69 (comparing lay witness’s conclusions due to time and exposure to that of an expert, labeling latter as “observational experts, taxonomist—arguably qualified because they have seen so many examples over so long”).

<sup>128</sup> See *supra* note 127 and accompanying text (explaining observations between lay and expert witnesses). See also *Van Wyc*, 83 F. Supp. 2d at 523 (concluding that testimony on similarities and differences can be helpful to jury); *Rutherford*, 104 F. Supp. 2d at 1190 (concluding that limits should be placed on expert handwriting testimony by barring opinions on authorship); *Santillan*, 1999 WL 1201765, at \*4 (finding it helpful to separate the proffered expert handwriting testimony into two categories).

<sup>129</sup> See *supra* notes 82-85, 119, 122 and accompanying text (commenting on the overall skepticism about handwriting’s testability).

<sup>130</sup> See *Hidalgo*, 229 F. Supp. 2d at 967 (holding that nothing supports the proposition that uniqueness of handwriting can be proven). The court acknowledged that while the Kam studies support the notion that expert handwriting analysts are better than lay persons in excluding false positives, it does not support the uniqueness principle upon which authorship testimony is based. *Id.*

<sup>131</sup> See *Saelee*, 162 F. Supp. 2d at 1102-05 (stressing lack of peer review by unbiased community of practitioners fails to support proposition of reliability); *Rutherford*, 104 F.

*C. A Strict Adherence to Daubert No Matter What Wall You Look At*

Every court must strictly adhere to the *Daubert* standard.<sup>132</sup> The notion that handwriting expertise passed muster under *Frye*, cannot continue under *Daubert*.<sup>133</sup> Though general acceptance is one prong of the *Daubert* analysis, the court must balance the other factors.<sup>134</sup> Moreover, it is essential to distinguish between acceptance within the courtroom and acceptance within the scientific or technical community, the former of which is not sufficient under *Daubert*.<sup>135</sup> As gatekeepers, courts must force handwriting experts to defend and prove their methodologies; otherwise, they must not be given expert status.<sup>136</sup>

On the other hand, courts who admit this testimony may be reluctant to bar the evidence entirely and as a result a compromise may be in order.<sup>137</sup> Recognizing two categories of expert handwriting testimony may relieve skepticism and offer critics an opportunity to use its potential benefits to assist the trier(s) of fact in an efficient manner.<sup>138</sup> Though some district courts have barred expert handwriting testimony completely, a

Supp. 2d at 1193 (maintaining that there was “no blind external proficiency testing involved which could demonstrate any scientific reliability”).

<sup>132</sup> See *supra* note 78 and accompanying text (highlighting circuits that admit expert handwriting testimony based on long history of acceptance and reliability).

<sup>133</sup> See *Crisp*, 324 F.3d at 273 (Michael, J., dissenting) (contending that previous exposure to the adversarial process does not relieve previously accepted evidence of the “more exacting analysis now required”); *Saelee*, 162 F. Supp.2d at 1105 (concluding that expert testimony that has been previously accepted does not equate to a general acceptance after *Daubert* and *Kumho*). See also *supra* note 57 and accompanying text (resolving conflict between FRE 702 and general acceptance test).

<sup>134</sup> See *Saelee* 162 F. Supp. 2d at 1101 (listing five factors that courts should balance when determining admissibility of scientific testimony).

<sup>135</sup> See *Hidalgo*, 229 F. Supp.2d at 967 (holding that the principle of uniqueness fails to satisfy the *Daubert/Kumho* test).

<sup>136</sup> See *Lewis*, 220 F. Supp. 2d at 554 (barring expert handwriting testimony for failure to pass muster under *Daubert*); *Saelee*, 162 F. Supp. 2d at 1102-03 (concluding that handwriting expert lacked reliability under *Daubert* analysis). See also *Brewer*, No. 01CR892, 2002 WL 596365, at \*7 (doubting whether expert handwriting analysis could proffer any new evidence of its reliability). The court conceded that expert handwriting testimony has often been permitted by courts in the past, however, the government failed to proffer evidence to prove the reliability of the handwriting comparison testimony). *Id.* See *Crisp*, 324 F.3d at 273 (Michael, J., dissenting) (contending that previous exposure to the adversarial process does not relieve previously accepted evidence of the “more exacting analysis now required”); *Saelee*, 162 F. Supp.2d at 1105 (concluding that expert testimony that has been previously accepted does not equate to a general acceptance after *Daubert* and *Kumho*). See also *supra* note 119 and accompanying text (highlighting lack of advancement in the field of forensic document examination).

<sup>137</sup> See *supra* note 123 and accompanying text (discussing courts that admit expert handwriting testimony on similarities and differences between known and questioned exemplars).

<sup>138</sup> *Supra* note 89 and accompanying text (explaining potential benefits of expert handwriting testimony).

logical argument can be made that testimony as to similarities and differences can be helpful to the trier of fact in both conserving time and highlighting key points in the compared documents.<sup>139</sup>

As to testimony on authorship, there is no conclusive support for its reliability and thus fails under a strict *Daubert* analysis.<sup>140</sup> Failure to apply a strict *Daubert* analysis poses serious risks that the trier of fact will rely too heavily on the “credentials” and opinion of an expert from a field that lacks scientific reliability.<sup>141</sup>

## V. CONCLUSION

A strict adherence to the *Daubert* analysis must be applied consistently. There is a potential compromise, however, that acknowledges the difficulties in establishing reliability in a field that has not been tested outside of its own realm, while recognizing that the field has something to contribute to the legal process. The basic tenet of Federal Rule of Evidence 702, “to assist the trier of fact,” welcomes helpful and relevant expertise. Helpful, however, does not suggest that experts do not have to prove the reliability of their testimony. Testimony *only* as to the similarities and differences between a questioned document and a known exemplar can assist the judge or jury to determine the issue of authorship while removing potentially prejudicial effects. Arguably, barring testimony on authorship achieves a necessary balance between using helpful information to analyze evidence and preventing prejudicial and harmful effects. Courts may no longer rely on historical acceptance alone in deciding whether to admit scientific expert opinion testimony but must balance the factors set

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<sup>139</sup> Compare *Lewis*, 220 F. Supp. 2d at 554 (holding expert handwriting testimony inadmissible for failure to satisfy *Daubert* test), and *Saelee*, 162 F. Supp. 2d at 1102-03 (holding expert handwriting testimony inadmissible based on failure to establish reliability) with *Ramsey*, 253 F. Supp. 2d at 1347-48 (reasoning that expert handwriting testimony may assist trier of fact by testifying as to similarities and differences but barring testimony on authorship), *Hidalgo*, 229 F. Supp. 2d at 968 (barring testimony on authorship), *Van Wyc*, 83 F. Supp. 2d at 523 (barring expert testimony as to authorship of unknown writing), *Rutherford*, 104 F. Supp. 2d at 1193-94 (holding handwriting analyst not entitled to offer opinions on the ultimate issue of authorship), *Hines*, 55 F. Supp. 2d at 68 (admitting expert handwriting testimony only on similarities and differences between disputed document and known exemplar), *Santillan*, 1999 WL 1201765, at \*4 (barring expert handwriting testimony on authorship).

<sup>140</sup> See *Hidalgo*, 229 F. Supp. 2d at 967 (holding that nothing supports the proposition that uniqueness of handwriting can be proven). The court acknowledged that while the Kam studies support the notion that handwriting experts are better than lay persons in excluding false positives, it does not support the uniqueness principle upon which authorship testimony is based. *Id.*

<sup>141</sup> See *Crisp*, 324 F.3d at 273 (underscoring that many criminal defendants are indigent and do not have independent access to rebuttal expert). See also Risinger et al., *supra* note 21 at 772 (censuring admission of evidence with no proven reliability because it results in denial of rational trial to opponent).

forth in *Daubert*. We must always question the reliability of any piece of evidence and always understand the process by which it is obtained.

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