CASES ADVOCATING HANDWRITING & DOCUMENT EXAMINATION IN COURTS OF LAW
BOTH SATISFY THE DAUBERT RULING!

Many case reports are officially designated "not for publication," and rules of court forbid or restrict their citation as precedents. The reader must take responsibility to ascertain the authoritative nature of any case cited in support of a legal position. Decisions may also have been overruled or modified by the same or higher court.

With two exceptions, these cases have all gone to the appeal level and were selected from approximately 300 federal and state cases that have considered expert handwriting evidence post-*Daubert*. In summary, no trial court that found the expertise itself to be reliable and admissible has been reversed. Individual handwriting expert witnesses were ruled inadmissible or restricted by the trial court, a ruling usually upheld upon appeal, or the specific qualifications of the witness relative to the expert fact at issue was found wanting. However, more recent cases do give support to trial courts that find critics of handwriting expertise to be inadmissible for some reason. Reading between the judicial lines, one can infer a judicious, though unstated, finding that they really did not know what they were talking about.

Cases from states on the *Frye* standard are included to show that all jurisdictions are in harmony as to the ultimate reliability and admissibility of expert handwriting evidence.

Estate of Acuff, et al., v O'Linger, 56 S.W.3d 527, 2001 Tenn. App. LEXIS 238 (Ct Ap TN 2001); subsequent appeal, 2003 Tenn. App. LEXIS 664 (TN Ap 2003); appeal denied, 2004 Tenn. LEXIS 190 (TN 2004)

The factual issue takes little space, but legal issues are extensive and detailed. After Acuff's death, O'Linger recorded two deeds purportedly signed by decedent in her favor and notarized. The factual issue was whether the deeds bore forged signatures. An advisory jury returned a unanimous verdict in favor of plaintiffs and against O'Linger. The judge had instructed the jury that the burden of proof was by a preponderance of the evidence, and the judge accepted the jury's advisory finding and ruled in favor of s that the deeds were forged. At *3 the Court of Appeals states: "It is easy enough in this case to identify the controlling issue. The two deeds are either forged or they are not forged. That having been said, the complications begin." In simplistic summary, the Court of Appeals found that the proper standard was proof by clear and convincing evidence, and thus it reversed the trial court and dismissed the suit.

The expert handwriting evidence, which was offered only by plaintiffs, is considered at *37 *et seq.*: "After a very extensive 'gate keeping' hearing under principles established by the Supreme Court in McDaniel v. CSX Transportation. Inc.. 955 S. W .2d 257 (Tenn. 1997), the trial judge allowed the testimony of Thomas Vastrick and Brian Carney, offered by the plaintiffs as handwriting analysis experts on the basis that their testimony could 'substantially assist the trier of fact' under Tennessee Rules of Evidence 702 and 703. While the Tennessee standard for admissibility set forth in *McDaniel* is more restrictive than the rule under its federal counterpart, we are still bound by the general rule that questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transportation, Inc., 955 S.W.2d 251, 263 (Tenn. 1997); State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993). We see no abuse of discretion in the admission of the testimony of Vastrick and Carney. Both of these handwriting analysts testify that the signatures on the two deeds in issue are in fact tracings made from a genuine

signature of John Acuff appearing on an exhibited document in the case called a ‘landlord waiver.’ This testimony subjected to vigorous cross-examination is to be weighed along with all other evidence by the trier of fact under the ‘clear, cogent and convincing’ evidence rule.”

The Court of Appeals considered this expert testimony to be no more than “preponderance of evidence” because of the judge’s instruction to the jury. Further, at *57, it is stated that the experts’ opinion would entail “an active conspiracy” among five people. “The evidence of the plaintiffs and particularly the expert handwriting analysis from the witnesses Vastrick and Carney casts troublesome shadows in the case but considered as a whole, the evidence in the opinion of this Court does not establish that it is ‘highly probable’ that the deeds of August 16, 1996 and September 30, 1996 are forgeries.”

COMMENTARY: First, the Court of Appeals upholds the trial court’s finding that the two experts were reliable under standards more restrictive than the corresponding Federal standards, and that makes the case well worth citing to support admissibility in future hearings. Second, as other Courts of Appeals have, a Court of Appeals equates our term “highly probable” with “clear and convincing.” Third, I find it hard to believe that these two experts in tandem did not provide evidence that was at least in itself “highly probable,” if not definite, of a tracing, particularly since they identified the source signature. The decision does not say why the case was dismissed by the Court of Appeals rather than remanded to permit plaintiffs to make their case by the higher standard, particularly since the Court of Appeals sets forth how very confusing and contradictory were Tennessee rulings on the issue of burden of proof in such cases.

Ajinomoto Co, Inc., v Archer-Daniels-Midland Co., 228 F.3d 1338, 2000 U.S. App. LEXIS 24767, 56 USPQ2 (BNA) 1332 (Fed Cir 2000); amended, rehearing denied, 2000 U.S. App. LEXIS 31898 (Fed Cir 2000); certiorari denied, 2001 US LEXIS 3599 (US 2001)

Plaintiff prevailed in suit of infringement of patent in use of genetically modified bacteria and Court of Appeals affirmed with modification of damages. ADM argued the patent invalid since the application was not properly signed. At page *12: “ADM's handwriting expert compared the fourteen signatures on the 1996 declaration with the fourteen signatures on the declaration filed in 1980 and gave the opinion that six or possibly seven of the signatures were not written by the same person. ADM's expert conceded that the signatures were difficult to compare since those on the 1996 Russian document were written in the Russian (Cyrillic) script, whereas those on the 1980 English document were written in English script.”

COMMENTARY: This case is an example of comparison between different scripts. Too often “difficult” is confused with “impossible.”

Alexander v State, 759 So.2d 411, 2000 Miss. LEXIS 104 (MS 2000)

Convicted of capital murder and sentenced to life without parole, among other errors Appellant argued that the State’s handwriting expert, A. Frank Hicks, had improperly used letters Alexander wrote to his wife as exemplars. However, The Supreme Court of Mississippi states in its ruling: “P34. While the admission of any information contained in Alexander's letters [*24] to his wife would have posed a privileged communication problem, the expert's mere reliance on the letters for handwriting purposes poses no such evidentiary bar. In the latter instance, the expert is not concerned with the

actual information contained in the letters; rather, he is concerned with the manner in which the letters and words are formed--the actual handwriting. The content of the privileged letters was not introduced into evidence; and therefore, there was no violation of M.R.E. 504(b). Though unnecessary, the essence of the problem was avoided when the handwriting expert altered his testimony to express opinions unrelated to the documents in question. Today's ruling is consistent with other jurisdictions. [Citations omitted.]”

COMMENTARY: This is a good example of adjustment to avoid a potential problem as well as authority for use of privileged material in a way to respect the privilege.

Angelini v Cowan, 18 Fed. Appx. 387, 2001 U.S. App. LEXIS 19101 (7 Cir 2001)

Having been convicted of sexual assault in Illinois state court and having exhausted all his appeals, brought *habeas corpus* in Federal District Court which denied him relief. The Seventh Circuit affirmed in part, vacated in part, and remanded for further proceedings.

Defendant had been identified by the victim by voice. Part of the investigation is described on page *3: “Police investigators learned that nearly four months earlier the victim's apartment had been burglarized while she was sleeping. The victim had reported the burglary to the police, and days later told police that she had received harassing phone calls from an anonymous caller with a deep, gravelly voice. The caller told her that he had her purse and pairs of her panties. The victim found her panties on the antennas of cars at her place of employment a few days later. The victim's name and telephone number were handwritten on the panties. The police still had the panties in its possession and arranged for a handwriting expert to compare the writing on the panties with samples of Angelini's handwriting obtained in connection with his 1982 conviction. The expert's comparison was inconclusive, but after obtaining more recent samples, he concluded that it was Angelini's handwriting on the panties.”

The handwriting expert was called at trial, and the appeal record does not indicate any challenge to his evidence.

COMMENTARY: It is not quite a case of routine admissibility, since the questioned writing was on a most unusual surface.

Barr v Commonwealth, 2002 Va. App. LEXIS 218 (VA Ct Ap 2002)

Amanda Loving Barr appealed her forgery conviction which was upheld. Forensic document examiner Richard Horton identified Barr as writer of forged time sheets on behalf of her husband. He used the term “indications” as a positive identification. At page *6: “Horton noted that while different inks were used for different documents, each individual form contained only one type of ink, which suggested that the same person and same instrument prepared all parts of the form.” After hearing a proffer of Barr’s husband’s testimony that she did not write the forged material, the trial court excluded it because it found that the expert fingerprint, handwriting and ink evidence was more than sufficient to convict. There was no error.

COMMENTARY: A routine case of admissibility with the added skill of ink analysis.

Bramblett v Commonwealth, 257 Va. 263, 513 SE2 400, 1999 Va. LEXIS 47 (1999); affirmed in part and dismissed in part, *Bramblett v True*, 59 Fed. Appx. 1, 2003 U.S. App. LEXIS 220 (4 Cir 2003); stay of execution of death sentence denied, certiorari to Court of Appeals denied, 155 L.Ed.2d 533, 123 S.Ct. 1780, 2003 U.S. LEXIS 2916 (2003)

2003 U.S. App. LEXIS 220:

At *7-8, Prosecution's document expert, Gordon Menzies, testified he "was unable to make a positive match. The prosecution argued, based on other testimony by Menzies, that Menzies was unable to positively identify Teresa's handwriting because she had been under some kind of duress or stress when she wrote the notes. In addition, Menzies found an indented writing on one of the notes and testified that the writing, which was addressed to Bramblett's sons, was very likely written by Bramblett."

COMMENTARY: Apparently Menzies made an ESDA study of the documents and also understood the effects of stress or duress on handwriting. The latter enjoys scientific support in the medical literature.

Brown v State, 1999 Tex. App. LEXIS 805 (Ap Dallas TX 1999)

The discussion of defense expert witness is at *22-23: "In his twelfth point of error, Brown contends that the trial court erred in overruling his objection to the prosecutor's argument during the guilt or innocence phase of the trial in which he called defense witness Curtis Baggett a 'charlatan.' Baggett testified that he was a psychologist, hypnotherapist, psychotherapist, and graphologist, and that he had been designated by the court as an expert witness in this case. The court noted that Baggett had not been properly qualified as an expert, and Baggett retracted his testimony that the court had designated him as an expert in this case. Baggett testified that he is not licensed as a psychologist or a psychotherapist and has not practiced therapy full-time for fifteen years, although he still conducts occasional weight loss and stress management seminars. Baggett works primarily in real estate and financial planning. A 'charlatan' is defined as 'a pretender to medical knowledge: a quack.' Webster's Third New International Dictionary 378 (1993). We conclude that the prosecutor's argument that Baggett was a charlatan was proper as a reasonable deduction from the evidence. *See* Broussard v. State. 910 S. W.2d 952, 959 (Tex. Crim. Ann. 1995), *cert. denied*, 519 U.S. 826.117 S. Ct. 87.136 L. Ed. 2d 44 1996)."

COMMENTARY: This writer would offer no defense of Mr. Baggett. Presumably the trial court permitted him to testify, so this would be a routine case of admissibility.

Commonwealth v Glyman and Parham, 17 Mass. L. Rep. 146; 2003 Mass. Super. LEXIS 431 (MA 2003)

Charged with falsification of a will, defendants moved for an *in limine* hearing to bar handwriting comparison testimony "on ground that its reliability is not sufficiently established to meet the test of *Commonwealth v. Lanigan*, 419 Mass. 15 (1994) based on *Daubert v. Merrell Dow Pharmaceutical*.... For the reasons that will be explained, the defendants' motion will be denied." The court reviews

cases pre- and post-*Daubert*. The decision is based on filings by the parties, since these stated all that would have been stated in a hearing. Saks was *in limine* motion expert for and Kam for Commonwealth; John Breslin of US Postal Inspection Service was proffered trial expert for the Commonwealth. The decision enumerates Saks's three theories and explains why they are incorrect or of no moment. Some footnotes give a precise critique, and so they are reproduced here verbatim:

"(l) In *United States* v *Mooney,* 315 F. 3d at 62-63, the First Circuit affirmed the ruling of another judge in the Circuit who had considered the reasoning of *Hines* and declined to apply the same limitation.

"(2) Professor Saks's affidavit refers to these two decisions [*Hines* and *Starzecpyzel*] by name, but does not give their citations, and does not acknowledge that their holdings are contrary to the position he advocates. Such omissions are surprising in a submission from a law professor.

"(3) Professor Saks himself is a professor of law and psychology at Arizona State University, with 'doctoral training in experimental social psychology,' with emphasis on 'research methodology and statistical analysis.' He has published articles in law journals, a legal treatise, and one article in the Journal of Forensic Science. It does not appear that he has published any empirical research of his own on any subject, or that he has published anything in the area of research design or methodology.

"(4) The Court has disregarded those portions of Professor Saks's affidavit that consist of argument and advocacy, as distinct from fact and opinions on matters of fact.

"(5) Professor Saks draws an analogy to the field of DNA typing, in which experts do not claim uniqueness, but refer to the probability of coincidental similarity. The analogy seems less than fully apt, in that DNA involves a finite number of physical components, thus lending itself to calculation of probability, while handwriting is more in the nature of behavior, subject to virtually infinite variation.

"(6) Professor Kam's affidavit points out that certain of the studies on which Professor Saks relies have not been published in any peer reviewed publication.

"(7) Professor Saks draws particular attention to variation in proficiency when the author is a teenager and when the sample is hand printed, and to bias arising from the examiner knowing the result desired or expected by investigators. This case does not involve teenagers. Although one of the entries on which Mr. Breslin opines is hand printed, the issue of ultimate significance in the case is the authorship of signatures. Although Professor Saks asserts that 'In the present case . . . it appears that the examiner had been informed who the suspect was,' nothing in the materials before the Court supports that assertion.

"(8) Professor Saks criticizes Professor Kam's research on the theory that the results may have been skewed by different financial incentives affecting lay participants and professional examiners. Professor Kam has tested and refuted that theory and has published the results of his test in a peer reviewed journal."

COMMENTARY: This is an excellent court decision giving the exact analysis that Saks and his like are wont to complain that courts do not give when disagreeing with them. I strongly recommend that you acquire this complete text for your reference and study.

Commonwealth v Harwood, 432 Mass. 290, 733 N.E.2d 547, 2000 Mass. LEXIS 425 (MA Supreme Jud. Ct. 2000)

"We consider whether it was abuse of discretion for a judge to suppress the testimony of a Commonwealth witness as a remedy for a missing file containing documents that the defendant asserts were exculpatory." Defendant claimed a key witness against him lied to the Grand Jury when denying he had signed a certain letter which was now lost. Defendant claimed a handwriting analysis would have proved the signature genuine. The trial judge suppressed the witness' testimony at trial. When the original file was reported missing, "the judge allowed a motion in limine permitting the Commonwealth to use copies in place of the missing originals. The defendant's document examiners reported, however, that '[b]ased upon the quality of the photocopied signature examined, authorship of the "[Leif] Mikkelsen" signature [on the February 5 letter] cannot be determined at this time. An examination of the original document would establish a more conclusive opinion.'" The Commonwealth's document examiner, Barbara Harding, also testified that the original was preferable. The Commonwealth had not submitted the February 5 letter to Harding for analysis. Suppression of the testimony was affirmed.

COMMENTARY: One can say by way of inference that, if the Supreme Judicial Court had not considered handwriting comparison reliable, its ruling would have been most unreasonable and badly founded. At the very least, the expertise is clearly admissible in Massachusetts in the post-*Daubert* era.

Commonwealth v Lambert, 2000 Pa.Super. 396, 765 A.2d 306, 2000 Pa. Super. LEXIS 4138 (PA 2000); *Lambert v Blackwell*, 205 FRD 180 (E.D. PA 2002); 2003 U.S. Dist. LEXIS 5125 (E.D. Pa., Apr. 1, 2003); 2004 U.S. App. LEXIS 21176 (3 Cir 2004); certiorari denied, 2005 U.S. LEXIS 4404 (U.S. 2005)

2000 Pa. Super. LEXIS 4138:

William J. Ries, Appellant Lambert's forensic document examiner before the Post Conviction Review Court, had several opinions about the validity of the statement that Detective Solt took from Appellant during the investigation. The court summarized them all at page *36: "Mr. Ries's tone of disapproval and his inconsequential criticism of [Detective] Solt's methods were of no help to this court and appeared to be little more than advocacy dressed in expert's clothing." Lt. Joseph Bonenberger, document examiner with the Pennsylvania State Police, came to other conclusions, such as Appellant's signature in red ink was above, not below, other writing in black ink on the statement as revealed by microscopic examination. Further, Appellant's own statements supported both Solt's testimony that his writing in black ink recorded Lambert's statements to him and Bonenberger's testimony as to the sequence of the writing.

2004 U.S. App. LEXIS 21176:

Denial of *habeas corpus* petition by district court is affirmed. At page *28: "Yunkin testified that in the document that passed between him and Lambert, Lambert had written the questions in pencil and he had written all his answers in pencil and then traced over every other word in ink so that they could not be changed. But Lambert's expert testified that there was no indication of any pencil writing on the 29 Questions and that the questions and answers were written with two different pens. After the Commonwealth had an expert from the Pennsylvania State Police crime lab examine the document, Lambert and the government entered into a stipulation that there were no erasures or graphite on the document. The Commonwealth conceded that if its expert were called to the stand, he would

essentially agree with Lambert's expert." Lambert's expert also testified that Yunkin indeed had handwritten the questions. Another district court judge had said Lambert was innocent and that the government's conduct was "the worst case of prosecutorial misconduct in English-speaking experience." The Court of Appeals said that these findings were insupportable.

COMMENTARY: No challenge to any of the skills employed is indicated, making this a routine case of admissibility. Several skills in questioned document were involved besides handwriting identification, which appears to be incidental and only supportive of the writer's own testimony.

Commonwealth v Murphy, 59 MA App Ct 571, 797 NE 2 394, 2003 MA App LEXIS 1096 (Ap Ct MA 2003); review denied, 440 Mass. 1109, 801 N.E.2d 802, 2003 Mass. LEXIS 927 (2003)

In an identity theft case, argued on appeal that trial judge erred in admitting testimony of handwriting expert, Nancy McCann. Objection and motion to strike were made the day following lengthy cross-examination, and so were not timely. There had been no motion for pretrial hearing on scientific reliability. Thus, the Court of Appeals defers to the judge's exercise of discretion. Nevertheless, at page 399 it is stated: "We conclude that, as the courts in Massachusetts have long accepted as reliable expert testimony about the authorship of handwriting, a *Lanigan* hearing was not necessary even had one properly been requested."

COMMENTARY: At least in Massachusetts rationality reigns as to the admissibility of the admissible.

Deputy v Lehman Brothers, Inc., D.C., Eastern District of Wisconsin, No. 02 C 718; reversed and remanded, Court of Appeals, Seventh Circuit, Nos. 02-4305 & 03-1155 (2003) [Printed from Internet]; 345 F.3d 494;2003 U.S. App. LEXIS 19952;62 Fed. R. Evid. Serv. (Callaghan) 965 (7 Cir 2003)

There is extensive review of what happened in the district court. In a hearing on a motion to dismiss, Lehman Brothers called Diane Marsh who was member of WADE, IAQDE and ABFE. Responding "no" to trial judge's question as to whether a court had refused to accept her as an expert witness, the judge then asked about *Malachinski*, which is discussed below. Eventually the judge said she lacked candor since that court had rejected her expert report.

In *Deputy* she had first seen copies and gave a qualified opinion, then saw originals and gave an unqualified opinion, describing what observations she had made. She said "yes" when the judge asked if her work was a science. Asked by the judge to give principles she relied on, she was less than clear and precise, except when saying at pages 11-12 "that there are no particular number of points of comparison [to make an identification]. Rather, as an expert, Marsh explained, she must determine if there is a fundamental difference because 'in order to determine that two signatures were not written by the same individual you only need one fundamental difference.'"

The trial judge rejected the testimony because she failed to say a previous court had rejected her, and he ruled that her testimony was not admissible; then he proceeded to render summary judgement. In the written opinion, the judge gave seven reasons for rejecting Marsh. The Court of Appeal rejects all seven since in that hearing the trial judge was only to rule on admissibility but instead ruled on credibility and made a finding of fact.

At page 20: “At the hearing, however, Marsh explained that the inconsistency was merely a typographical error.... A typographical error appearing in an expert report might lead a fact-finder to conclude that the expert is sloppy, but it does not render an expert’s opinion unreliable and thus inadmissible.” The trial judge had mischaracterized several points about Marsh’s testimony, such as saying she had not asked to see originals. The district court also asked the wrong questions. For example, when the district court found problems with her change of opinion after seeing a second exemplar signature, the Court of Appeals said that had to do with credibility and concluded: “Thus, the district court’s inquiry should have been on whether professionals in the field of handwriting analysis agree that the addition of a second sample allows for a conclusion as to the validity of the signature at issue. The only testimony before the district court was Marsh’s....”

The Seventh Circuit had issued the *Malachinski* opinion, and so its *Deputy* opinion takes issue with the district court’s misreading of that former opinion. Marsh had not been rejected as an expert witness, but her testimony had been restricted to what was in her report. At page 24: “By incorrectly focusing on *Malachinski* and other issues relating to credibility, the district court did not properly assess whether handwriting analysis in general, or Marsh’s expert opinion in particular, is admissible under Rule 702. Therefore, we must reverse....” The district court was to hold a proper hearing on admissibility.

COMMENTARY: This case report is an object lesson in how best experts can prepare for a *Daubert* hearing. One is advised to review one’s report for mistakes, to have clear explanations ready for all aspects of one’s work, including theory, method and equipment, and to master the professional references which support one’s work. If Lehman Brothers had not had the wherewithal to appeal, Marsh would have had a flawed ruling stand as the final word on her reliability and credibility. And that prospect is a strong motivation for an expert to do exemplary work on every case.

Duggan v Marshall, et al., 7 S.W.3d 888, 1999 Tex. App. LEXIS 9465 (Ap Houston TX 1999)

Duggan claimed she had received a Tax Resale Certificate from Marshall Petroleum, but her handwriting expert testified that the signature was not Marshall’s. Other evidence supported that opinion.

COMMENTARY: A routine case of admissibility, but one that reminds the attorney to be sure of the opinion one’s expert has arrived at.

Economy Linen & Towel Service, Inc., v McIntosh, 2001 OH App LEXIS 4145 (Oh Ap 2001)

Defendant appealed jury verdict on contract. He contended at trial that handwritten “36” for duration of contract in months had been altered from “0” he had agreed to. Harold F. Rodin testified as plaintiff’s expert document examiner regarding the alleged alteration. McIntosh wanted to voir dire Rodin on his background in Graphoanalysis or graphology. At *12: “The trial court granted appellant’s motion and permitted cross-examination before any opinion was given. After receiving assurances from Economy that Rodin would not give opinions based upon graphology, the trial court did not permit appellant to ask Rodin to define graphology.” The court did not abuse its discretion. At *13: “The trial court was within its discretion to determine that it would not permit a detailed explanation of graphology because Rodin would not be permitted to testify concerning graphology or base his opinions on graphology.” Further, the ruling avoided confusion for the jury.

Defendant/appellant offered Andre Moenssens as rebuttal witness to Rodin, but the trial court did not permit Moenssens to testify. Moenssens was offered to impeach Rodin regarding graphology and that Rodin had falsely claimed on his CV that he had studied with or under Moenssens. However, since Rodin did not base his opinion on graphology, that part of Moenssens' testimony was irrelevant. Since had blocked Rodin's CV from being entered into evidence, the claim of study with Moenssens was not in evidence and so was not available to be rebutted. Moenssens was irrelevant on every issue he was proffered for.

COMMENTARY: This is a most instructive case. First, review your expert's entire background before trial in order to have all points of possible attack covered. Second, never abandon a good expert because of irrelevant mudslinging by the opposing expert. Third, make very clear to the trial court what is and is not the basis of your expert's opinion. When I issue a report based entirely on technical and/or scientific reasons, some opposing experts will reply in a completely off the wall fashion that unlike them I am not ignorant of some other aspect of handwriting, such as scientific reports in the medical literature. I immediately tell my attorney/client that, if they had had any viable reply to my opinion, they would have given it. Therefore, the fourth lesson from this case: Never panic whatever reply is mounted against your expert's intelligent and objective opinion, because, if it does not address the expert fact at issue but instead the expert personally, it is a tacit surrender by the opposition and an admission of its own expert inferiority hiding behind the cowardice of the gossiper.

Regarding the issue of whether Rodin had studied with Moenssens, it could well be in reference to a one-week intensive Moenssens had given to IGAS people at least twice in the 1970s with a test given on the last day. However, he wrote in a law journal paper that he thought IGAS people may have committed perjury in testifying that studying with him during his one-week intensive in document examination was studying with him. So never take an attack on face value, because a full look into the facts may show the attack to have little to no merit.

Eubanks v Hale, 752 S2 1113 (AL 1999)

This was a case of disputed results in a sheriff's election. Pertinent Alabama statute and rules of court say handwriting evidence by expert or witness familiar with person's writing *shall* be permitted. Trial court apparently did not permit Dr. Richard Roper to testify because he said "no" when asked did he look at certain writings with a telescope, which Alabama Supreme Court took to have meant "microscope." Since time was of the essence in resolving the dispute, Alabama Supreme Court did not remand but counted votes in accordance with what Roper's opinion would have been if he had testified, but the count did not change things due to other evidence.

COMMENTARY: This would be an instance where the legislature would have satisfied itself of the sufficient reliability of handwriting evidence before making it admissible by statute and being so satisfied as even to require its admission by use of the word *shall*. For the Alabama Supreme Court to count votes based on Roper's opinion is for the Court to act on the opinion as if it had been found reliable and admissible.

Florence v Commonwealth, 120 S.W.3d 699, 2003 Ky. LEXIS 182 (KY 2003); rehearing denied by *Florence v. Commonwealth*, 2003 Ky. LEXIS 294 (Ky. 2003)

Chris White testified as handwriting expert for the Commonwealth. On appeal defendant said did not hold a *Daubert* hearing. In Kentucky, once appellate courts hold reliability has been satisfied, trial courts can take judicial notice of it. However, a trial court could still hold a *Daubert* hearing if it believes that would be helpful or if it had doubts regarding the particular expert's testimony. Florence had not raised a specific issue about reliability while the had taken judicial notice of the reliability of handwriting analysis, and so there was no abuse of discretion. What disturbed the Supreme Court was White's testimony that handwriting analysis was "more precise than DNA evidence, thus, in effect, testifying in favor of his own testimony." However, there had been no objection at the time, so the issue was not preserved for appeal.

COMMENTARY: At least Kentucky is sensible about the whole thing. The expertise itself can be subject to judicial notice, but a party can challenge a specific expert's testimony if there are grounds for doubting such expert's reliability.

Gilmer v. Colorado Institute of Art, et al., 12 Fed. Appx. 892, 2001 U.S. App. LEXIS 13743, 2001 Colo J CAR 3273 (10 Cir 2001)

In her suit against the Institute, Gilmer alleged that Dan Swanson had sexually harassed her, and she offered a letter from him in support. The district court held a hearing in which handwriting experts for each side testified. The found Gilmer "had forged the threat" and struck all claims of harassment by Swanson from the complaint. On appeal, Gilmer alleged that her Seventh Amendment rights had been violated by a pre-trial finding of forgery. However, at pages *7 and *8 the Court of Appeals says: "We see no problem in the court's addressing the forgery question itself in the manner in which it did.... Many courts have found the fabrication of evidence to be an abusive litigation practice, or even a type of fraud on the court.... A trial court clearly has the authority to examine the authenticity of evidence before submitting it to a jury. *See generally* Fed. R. Evid. 901. And Gilmer obviously has no right to submit fabricated evidence to the jury." Several case citations are given in support of these statements.

Defense expert said the threat part of the letter was a tracing, and plaintiff's expert did not contradict that, even agreeing that the threat part was in a different ink than the rest of the letter. Swanson testified his original letter was three, not two pages, and without marginal writings where the threat was. He said the threat was made of words from his lost third page.

COMMENTARY: The report infers both experts were ethical and competent, since they essentially agreed.

Greenberg Gallery, Inc. v Bauman, 817 FS 167 (D.C. DC 1993); affirmed without opinion, 36 F.3d 127 (DC Cir 1994)

Headnote 1: "It can be judicially noted that handwriting, like fingerprints, is subject to established objective tests, expert opinions about which are admissible."

Plaintiff's expert looked at a purported Calder mobile for ten, then later for two, minutes, maybe other short period, and was positive of forgery. It was exact copy of mobile in archival photo, but Calder never made an exact copy, therefore it was a forgery, and therefore original existed somewhere else in the world, and therefore this was a forgery. He never examined the signature. Defendant's expert

examined the mobile for one and a half hours and examined the signature and said it was absolutely accurate. She also checked provenance, which began with plaintiff's expert back when it was first sold.

COMMENTARY: This case illustrates that the expertise of handwriting identification has nonlitigation uses. Art experts routinely engage in signature verification when authenticating art works. This was a post-*Daubert* decision, and it illustrates that applying it and the Federal Rules did not involve the peculiar legal theory invented by the anti-expert experts.

Guevara v Mansour, 2001 Ca. App. Unpub. LEXIS 460 (CA App 2001)

Nancy Cole testified to the authenticity of a deceased woman's signatures and initials on a disputed will. Her testimony was found to be more credible than that of two lay witnesses.

COMMENTARY: A routine case of admissibility that has the added virtue of reiterating California's rule that expert handwriting evidence can be credited above lay testimony, citing *In re Clark's Estate*, 93 Cal. App. 2d 110, 208 P.2d 737 (1949), in which expert testimony prevailed over that of attesting witnesses to prove falsity of a signature.

Hall v Director of Corrections; California State Attorney General, 2003 U.S. App. LEXIS 18501, 343 F.3d 976, 2003 Cal. Daily Op. Service 8169, 2003 Daily Journal DAR 10208 (9 Cir 2003)

Hall was convicted of murder based on his confession and on two documents from a jail house informant, Cornelius Lee, there being no physical evidence against him. The documents were admitted into evidence without the informant's testimony to authenticate them. In a post-conviction evidential hearing, expert testimony for both prosecution and defendant confirmed erasures on the documents, which purportedly reported questions from the informant and answers by Hall, each taking turns to write. Lee testified he would rewrite the question aster Hall wrote his answer. Hall's expert testified to erasures, disturbances of fiber and overwriting. The trial court, holding that Lee's testimony was not credible, "except to the extent that it is supported by scientific evidence" [note 7], ordered a new trial, but this was reversed by California Court of Appeals. All further state actions by Hall were to no avail. The Ninth Circuit reversed the conviction and ordered an unconditional writ of *habeas corpus* unless a new trial was granted within 120 days.

COMMENTARY: The handwriting expertise to detect overwriting by Lee combined with other expertise to present what the trial court characterized as "scientific evidence." The handwriting and document expert evidence was a significant factor in granting the reversal.

Hamburg v State, 820 P2 523 (WY 1991)

This case predates *Daubert*, but it is too good not to share.

Court summary: "(1) nomination petition [for candidacy in election] could be subject of forgery....; (4) evidence was sufficient to support conviction with respect to some signatures but not others...." Appellant of the New Alliance Party sought the seat vacated by Congressman Dick Cheney. Some

signatures that he collected were suspicious, and upon investigation “it appeared that some of the signatures on the petition were obtained from the cemetery.” At page 525. Footnote 2 then reads: “The state, in Count 1 of the information, explained this Chicago voting phenomenon differently: ‘[E]ach of them being then deceased.’ At oral argument in *Schutkowski v. Carey*, 725 P.3d 1057 (Wyo. 1986), counsel for appellee accounted for one of the original actors in unambiguous language: ‘He was deceased and remained deceased through the entire trial.’ Former Wyoming State Senator Win Hickey said she wanted to be buried in Chicago so that she could remain active in politics.”

Richard L. Crivello was the document examiner for the State. “He concluded that some of the signatures had been forged. He gave his opinion that appellant had probably written at least twenty- one of the names on the petition.” They then define “forgery” and “writing.” Appellant’s contention that a petition cannot be the subject of a forgery is defeated because it is the “substance of the instrument, as distinguished from its form or name, [that] is determinative of whether it may support a charge of forgery.” At pages 525-526. Nor does fact no one was harmed help him: “Appellant cannot be absolved because his scheme was unmasked before his name was actually placed on the ballot.”

At pages 529-530 the discussion underlines the excellence of using the terminology for certitude in handwriting opinions first established by ABFDE and later adopted by other organizations, most notably ASTM Committee E-30. Having clearly explained his methodology, “The expert testified that the names of Sandra Dockins and Suzanne Pratt were *definitely* written by Mr. Hamburg. He testified that several other signatures on the petitions were ‘*very probably* prepared on the petitions by Mr. Hamburg.’ (Emphases added.)” The then defines “probability” and equates it to levels of proof required at trial. Conviction for forging other than the names “definitely” written by Mr. Hamburg was overturned, the two “definitely” written by him equated to proof beyond a reasonable doubt.

COMMENTARY: This case is well worth citing when terminology for expressing certitude in handwriting opinions is challenged. This is the first reported court case reviewed where the parallel to levels of proof at trial I have long suggested is directly confirmed. Hopefully, ASTM and others will incorporate the parallel in the official statement of the terminology, and also restate it as being truly a five-step range. As noted in comments on other cases, the careful use of the terminology of probability showed that Mr. Crivello was being very scientific and precise in his examination, evaluation and reporting of the handwriting evidence.

Harris v Fremont Investment and Loan, et al., 22005 Cal. App. Unpub. LEXIS 5322 (CA App 3 Div 2005)

As plaintiff, Harris lost and appealed, the trial court's judgment being upheld. His handwriting expert at trial was James A. Blanco. The trial court and Court of Appeal found Blanco's testimony to support defendants/appellees' position. At *22: "Moreover, Harris's own handwriting expert testified as to the difficulties in assessing authenticity. Blanco testified that a signature can change over 10 years. Medical problems contribute to handwriting deterioration. Photocopies obscure detail and make authentication more problematic. Blanco testified that in assessing the authenticity of Dr. Love's signature on a document, he could not make an accurate determination absent a microscope." The exemplars used had been written 12 to 30 years before the disputed signature.

COMMENTARY: It is an object lesson that, if an expert witness is to go against recognized standards such as having exemplars much closer in date than10 years, he must put forth compelling reasons for doing so. The case report gives no indication that several such violations of standards were supported by valid reasons in this case. The cross-examiner must have done a masterful job of soliciting all the weaknesses in the expert opinion, while apparently plaintiff attorney did nothing to

rehabilitate the witness. At trial, expert witnesses are at the mercy of their own client/attorney as to what to take up on redirect and after trial at the mercy of the court as to what is important to put into the written decision.

Succession of Vincent Lovoi, 777 S2 627, 2000 LA Ap LEXIS 3443 (LA Ap 2000)

Claimants produced an olographic will that gave nothing to their sister, who presented testimony of handwriting expert Mary Ann Sherry. Sherry said two different people wrote the will and the exemplars supplied to her. The ordered the will probated because, among other reasons, it was not shown whether or not the exemplars were written by decedent.

COMMENTARY: The handwriting expert is at the mercy, as it were, of one's own client. It is rudimentary that the client/attorney clearly prove the exemplars to be genuine writings of the one who purportedly made them. It is in part self-protection for the expert to bring to the client's attention all that must be proved as foundation for the expert opinion.

Nebesho v Brown and Milos, 2004 Pa.Super. 83, 846 A.2d 721, 2004 Pa. Super. LEXIS 308 (Superior Ct PA 2003)

In reviewing a complex equity action, the Superior Court summarily states at *23: "Under difficult circumstances, the Chancellor fashioned relief in as an equitable a manner as could be devised." The central issue of fact was whether Nebesho's signature on a deed, which conveyed her half interest in their family home to her first husband Brown, was forged as she claimed. At *13-*14: "Brown next argues that the court erroneously concluded that Nebesho established by clear and convincing evidence that the transfer of the property was a fraudulent transfer. He relies on his own self-serving statement that Nebesho appeared at the notary's office and executed the deed, as well as the statement by the notary public 'that she would not have notarized a document unless both subscribers appeared before her and presented photo identification.' Brown's brief at 11. He further relies on the testimony of his handwriting expert, Curtis Baggett, who opined that Nebesho's signature on the deed was in fact Nebesho's. He disregards the fact that the Chancellor found that Nebesho's handwriting expert, John S. Gencavage, was 'more credible and persuasive' and that his testimony was corroborated by testimony other than 'the self-serving testimony of Brown, which...we did not find credible.' C.O. at 7.

"Although Brown acknowledges that witnesses' credibility and the weight to be given their testimony is for the fact finder to decide, he focuses on the Chancellor's failure to announce that Nebesho met her burden of proof by clear and convincing evidence. However, he cites no authority requiring the Chancellor to enunciate such a statement and we conclude that a failure to make this statement is not error."

COMMENTARY: There is no question that expert handwriting evidence is admissible as reliable. Curtis Baggett is the same person who is in the case *Brown v State*, 1999 Tex. App. LEXIS 805, discussed supra.

People v Olson AKA Soliak, Superior Court, Los Angeles, Case No. A325036. Notice of Motion to exclude any expert testimony concerning handwriting analysis. October 1, 2001. [Printed from Internet]

This is included for two reasons. First, to illustrate the kinds of things one can find on the Internet by searching such terms as “handwriting AND expert” and individual names. Second, as an example of the tortuous reasoning processes of some attorneys attempting to circumvent the plain and unequivocal provisions of the law when law and facts are in the way of their clients’ avoidance of the truth. The argument pretends to explain how the troubles that handwriting expertise had had with *Daubert* proved it did not meet California’s *Frye* standard adopted in *People v Kelly*, 17 CA3 24, 130 CA Rpt 144, 549 P2 1240 (1976), and reaffirmed in the case *People v Leahy*, 8 CA4 587, 34 CR2 663 (1994). Even though Federal Courts of Appeal already in 2001 had solidly sided with admissibility of handwriting expert testimony, the Notice of Motion pretends that only the isolated district court cases rejecting or restricting the expertise had ever happened. Naturally, no California court that I am aware of was ever misled by such lawyerly cleverness of argumentation and silliness of theory regarding expert handwriting testimony.

In re the Marriage of Ronald F. and Marie Richardson; Ronald J. Richardson, as Executor, etc., Respondent, v. Marie Richardson, Appellant, Court of Appeal, State of California, Fifth Appellate District, F032260, Super. Ct. No. 154564, Opinion, April 13, 2000. Not to be published in the official record.

Marie claimed that her deceased, divorced husband intended her to have the proceeds of a medical insurance settlement. In support of the claim she presented a letter to decedent’s former attorney purportedly signed by decedent. At page 6: “The trial court found, as we do, that Marie forged the letter. We have reviewed the testimony of the handwriting expert and find it credible and unimpeachable.”

COMMENTARY: The expert was Marcel B. Matley of San Francisco.

Rogers v State, Court of Appeals, Mississippi, No. 92-KA-01170 COA, 1992. [Printed from Internet]

State “disclosed that Frank Hicks, a handwriting expert, would be called to establish that a handwritten check list concerning the murder of the victim and the disposition of the body and evidence may have been written by Rogers.” It was not error that denied Rogers’ *in limine* to exclude the testimony since it was not speculative. Hicks had explained all aspects of his opinion and “noted certain discrepancies in the handwriting samples and explained how these affected his conclusion.” An expert opinion need not be beyond a reasonable doubt, only the State’s case need be. The testimony was above the level of mere speculation and was helpful to the jury in understanding the evidence.

COMMENTARY: The testimony was clearly found to be reliable, and it is intimated that the cautious expression of the opinion enhanced its reliability. I cannot recall a case report where the expert handwriting witness is described as giving such intelligent consideration to contrary indicators. It ought to be standard practice to delineate contrary data, but it seems to be rarely considered except when the contrary is summarily dismissed as inconsequential.

Spann v State, 772 S2 38 (FL 2001); 857 S2 845, 28 FL L Weekly S 784, 2003 FL LEXIS 465 (FL 2003); rehearing denied, 2003 Fla. LEXIS 1731 (FL 2003)

In the report at 857 S2 845, the court summary in part states: "(1) *Frye* standard did not apply to forensic handwriting identification evidence...." Defendant wrote a note telling another person how he should testify. He denied writing it, but then admitted doing so when handwriting experts were hired and he was ordered to give samples. The State wanted its expert to testify that the samples had been intentionally disguised. A *Frye* hearing was held on admissibility of expert testimony as to determining disguise in handwriting. "The trial court found that the proffered testimony would 'assist the jury in determining the fact in issue,' that the proffered testimony 'is indeed based on scientific principle, which has gained acceptance in the field of Forensic Document Examination,' and that the 'witness is qualified....'" However, the expert was ordered not to render an opinion of intentional disguise, only providing the various possible explanations for the traits in the handwriting. On appeal, defendant shifted focus from admissibility of testimony as to disguise to reliability of the entire field of handwriting expertise. That objection was not preserved at trial, but, if it had been, forensic handwriting identification is admissible in Florida which follows *Frye*. The paper by Jennifer L. Mnookin, "Scripting expertise: The history of handwriting identification evidence and the judicial construction of reliability," 87 *Virginia Law Review*, 1723-1845 (December 2001), which attacks the expertise, is quoted to show that the expertise is not novel and has long been accepted by courts of law.

COMMENTARY: There has been a great deal of primary research published on the indicia of deliberate disguise in handwriting and how to discern it, and there are a number of reported court cases confirming the admissibility of such testimony. It is delightful to see a law review article, written to prove handwriting expertise inadmissible, quoted in support of admissibility. I wonder if anyone has congratulated Professor Mnookin on having been so quoted by Supreme Court of Florida.

State v Crosby, 302 Utah Adv Rep 36, 1996 UT LEXIS 93, 927 P2 638 (UT 1996)

"The Court of Appeals transferred the case [to the Utah Supreme Court] for determination of proper standard for admitting scientific evidence." Polygraph evidence is not admissible, but handwriting expert was sufficiently qualified. Defendant could not dispute inherent reliability of handwriting evidence where defense counsel also took affirmative steps to place it before court. George Throckmorton, defense expert, "indicated that in his opinion, Detective Hutchinson [prosecution expert] lacked the necessary qualifications to be nationally certified in the field." Nevertheless, Brent Hutchinson was found sufficiently qualified. *State v Rimmasch*, 776 P2 388 (UT 1989), four years before *Daubert*, had set standards in Utah and was ruling.

COMMENTARY: *Rimmasch* set essentially the same reliability standards as *Daubert*, and thus one can infer that the two experts would have been equally admissible in Federal Court. It is contrary to legal rule for one expert witness to testify to the qualifications and credibility of another. This cases raises questions we should consider. If one knows of the rule, would it be unethical so to testify anyway? And if one does not take effort to learn of legal rules applicable to one's expertise, would that be unethical?

State v Griffin, 691 A.2d 556, 1997 RI LEXIS 101 (RI Supreme Ct 1997)

In affirming murder conviction, Supreme Court of Rhode Island held that "record evidence supported admission of expert testimony that defendant was author of threatening letter that was sent to prosecution witness while defendant was awaiting trial." This case report has a literary expression reminiscent of late Nineteenth and early Twentieth Century prose combined with later idiom. There was "the factual-trident that pinned Griffin to the murder." He killed victim because he "took mortal offense at this query." "Some of Griffin's compeers later heard him crow about the killing." That is only at page 557, and the entirety makes for delightful reading.

At page 558: "Griffin assigns error to the admission of handwriting analyst's testimony." He denied having written the exemplars used. "Comparing the handwriting in the warden's letter to the script on the waiver-of-rights form, the expert found multiple points of agreement.... His testimony limned the idiosyncracies of Griffin's penmanship, noted a number of significant comparable features, and concluded that Griffin was the author of the witness-threatening letter. In this court, as below, Griffin tries to undercut this opinion by identifying a host of perceived cracks in the expert's authentication edifice. But his arguments go to the weight of the expert's remarks, not to their admissibility." Then ending at page 559, there was ample opportunity for cross-examination and to "emphasize any infirmities.... In brief, we see no basis for Griffin's suggestions that the trial justice flouted Rule 901."

COMMENTARY: I just had to quote the charming prose at length. Bottom line: The testimony is reliable and admissible.

State v Harper, 2000 Ohio App LEXIS 6015 (OH App 2000); affirming sentence after remand, 2001 Ohio 8875, 2001 Ohio App LEXIS 5969 (OH App 2001)

Detective Thomas Bennett, document examiner for the Columbus Police department, testified that defendant had signed false names to two separate driver license applications and very probably a third. Defendant's photos on all three licenses issued in those names supported Bennett's opinion. All claims of error regarding the expert testimony were found to be without merit. Convictions for multiple counts of forgery and other charges were affirmed with remand for reconsideration of the sentences imposed.

COMMENTARY: The case text suggests Detective Bennett did quality work.

State v Keith, 1998 OH App LEXIS 4990 (OH Ct Ap 1998)

The ins and outs of the use of handwriting expert Phillip Bouffard are a bit complicated, but they make the report well worth reading. In summary, Bouffard testified that two signatures on two letters available only in photocopy were so identical that one, if not both, had to be a forgery. That Bouffard withdrew one statement in his report went to the weight, not admissibility, of his opinion, since it did not affect his conclusion. Besides, defendant later admitted the letters were false. In Ohio, "Handwriting analysis is a proper subject of expert testimony. See *State v Loza* (199 St. 3d 61, 76-77, 641 N.E.2d 1082)."

COMMENTARY: It seems that the expertise itself is reliable in Ohio, while presumably that would not mean an individual expert or an particular opinion could not be challenged.

State v Loza, 71 OH St3 61, 641 NE2 1082 (OH 1994)

Court of Appeals had affirmed conviction and death sentence for four counts of aggravated murder, and the Supreme Court also affirmed. Court's syllabus states in part: "(10) admission of expert testimony that defendant wrote inculpatory letters was not plain error; (11) seizure, copying, and admission of letters from jail did not violate defendant's First or Fourth Amendment rights...." Defendant had been observed loading trash into someone else's Dumpster. Incriminating evidence was recovered, leading to Loza's arrest, trial and conviction. At trial Stephen Greene gave expert testimony identifying Loza as writer of letters admitting culpability for the murders. At page 1101: "Because the defense did not object to this testimony at trial, reversal requires a finding of plain error." There was none. Greene was qualified. "Additionally, 'It is a well settled rule in this state * * * [that handwriting comparisons] * * * may be made * * * by persons skilled in handwriting, such as are usually called experts.' *Bell v. Brewster* (1887), 44 Ohio St. 690, 696, 10 N.E. 679, 683."

COMMENTARY: Ohio is thus another state refusing not just to reinvent the wheel but also to deny its existence.

State v Matthews, 814 So.2d 619, 2002 La. App. LEXIS 1409 (LA App 2002); remand, 855 So.2d 740; affirming conviction, 859 So.2d 863, 2003 LA App LEXIS 3034 (LA Ct Ap 2003); rehearing denied, 2003 La. App. LEXIS 3504; reinstated on rehearing, 2004 La. LEXIS 478 (LA 2004)

In forgery conviction, defendant was convicted at trial and appealed. "The Court of Appeals, 814 So.2d 619, vacated conviction and sentence. *Certiorari* was granted. The Louisiana Supreme Court, 855 So.2d 740, remanded." On remand, the Court of Appeals, 859 So.2d 863, affirmed conviction, ruling among other things that "witness was properly permitted to testify as expert on field of handwriting analysis." At 871-872: "Defendant contends the trial court erred in qualifying Officer Chana Pichon as an expert in handwriting analysis. Defendant argued that handwriting analysis failed to meet the criteria set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*...." Louisiana Supreme Court adopted *Daubert* for determining reliability of scientific evidence in *State v Forest*, 628 So.2d 1113 (LA 1993). The trial judge was fully satisfied the criteria had been met, and the Court of Appeals cites *U.S. v Velasquez* as authority on the matter. As to defendant's exemplars, there had been no plain error in admitting them.

COMMENTARY: At page 873 the report gives a quote from the trial judge expressing his satisfaction with the admissibility of the handwriting evidence. In paraphrase, he says it is a field of expertise, people have individual styles, and the evidence is not general knowledge and thus helpful to the jury. One can infer that Pichon did a good job of answering the challenges offered by each *Daubert* criterion.

State v Picerno, 2004 RI Super LEXIS 33 (RI Superior Ct 2004); 2004 RI Super LEXIS 57 (RI Superior Ct 2004)

<u>2004 RI Super LEXIS 33:</u>

Pauline Patchis issued a "preliminary opinion" for defendant that he had not made the disputed initials, but for reasons unknown she did not testify. Defendant then produced Charles Shure to testify. At *39 and following Mr. Shure comes in for critical review of his qualifications, and his opinion

is rejected by the judge. The state produced a Mr. Breslin as an expert in rebuttal, who said he had no idea whether the initials were genuine or not. Neither witness was ruled to be an expert, there being no need to since, unlike a jury, the judge would not be misled by claims to expertise. Apparently neither witness reviewed the excellent papers in the professional literature on the examination of initials, because the court found there was no reliability to the exercise. However, in the instant case, both witnesses acknowledged Picerno's known initials had no consistency, presumably meaning stable traits reliable for identification.

Although Mr. Shure comes in for extended disparagement of his qualifications, the bottom line is that the court gives him and Mr. Breslin the same evaluation at *55: "Without a credible opinion from Mr. Shure as to authorship and with an inconclusive opinion about authorship by Mr. Breslin, this was deprived of any scientific testimony that could assist it in further addressing the question defendant Picerno tried to raise concerning the initials. All that remained of the experts' testimony was their musings about the physical similarities and dissimilarities between the known and questioned writings -- comparisons that the Court had done already, even prior to the reopened suppression hearing, without them. Neither of the experts' pedestrian comparisons in this regard was at all helpful to the Court.

"Absent any assistance from the expert witnesses, this Court simply returns to its earlier view of the evidence surrounding execution of the rights form. See section B.1., supra (detailing evidence of waiver). Nothing about the initialing of the rights form itself changes this Court's view of evidence."

COMMENTARY: Mr. Shure had had Picerno make exemplars to be used as comparison material. This violated the *post litem motam* rule, but there is no mention that the State objected. Mr. Shure was a member of NADE, but as of this writing records show he was never certified by NADE. Though it is not true, as the was led to believe, that one can join merely by paying dues, the organization is open to the neophyte whom it endeavors to nourish into becoming better educated and eventually certified. NADE certification is a rigid process requiring complete examination of test documents, a written professional report, both written and oral tests, as well as documented experience and letters from attorney/clients verifying claimed experience and competence. I say this to warn the reader that representations about an organization in the case law might well be the false fruit of incomplete or even incorrect information from unknowing or biased witnesses, as it was the fruit of woefully incomplete and incorrect information in this case.

Taylor v Abernathy, 149 NC Ap 263, 560 SE2 233, 2002 NC App LEXIS 182 (2002); review denied, 2003 NC LEXIS 155 (NC 2003); review denied, *Taylor v Weir*, 2003 NC LEXIS 155, 156 (NC 2003)

Defendant claimed signature in question was forged. At page 235: "On rebuttal, plaintiff called handwriting expert Charles Perrotta to testify to the validity of Romer's signature on the 10 July 1978 contract. The trial court...would not allow him to render an opinion on the authenticity of the signature...."

At page 238 it is said that the trial court considered Perrotta as a qualified expert but did not consider his methodology, which was testified to in detail, while holding handwriting analysis in general as being not scientific. There was no showing "that there has been any kind of scientific examination of the ability of people using this methodology to arrive at the correct result." It was used for years but there was no scientific basis for it beyond that use. At page 239 the Court of Appeals replies. On the contrary, case law only requires the expert to be "better qualified than the jury.... There is simply no requirement that a party offering the testimony must produce evidence that the testimony is based in science or has been proven through scientific study." Rules allow expert testimony based on

"technical or other specialized knowledge," not merely scientific knowledge. The gatekeeper role merely requires asking whether the testimony is "sufficiently reliable," not whether it is scientifically reliable.

North Carolina adopted *Daubert* in *State v Goode*, 341 NC 512, 461 SE2 631 (1996). "In making this determination of reliability, our Supreme Court noted that our courts have focused on the following indicia of reliability: '...the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting [the] scientific hypotheses on faith, and independent research conducted by the expert.'" Then at page 240: "The record sufficiently establishes that Perrotta's testimony meets the four indicia of reliability set forth in *Goode*." It was error in law for the trial court to exclude Perrotta's testimony, and so the matter was remanded for a new trial.

COMMENTARY: The indicia of reliability given in this case seem far more practical and reasonable, with more universal application, than the *Daubert/Kumho* criteria. Certainly, one might argue in a court that they would be the more reasonable criteria for expert evidence which deals with an everyday reality and addresses practical matters that ordinary people have some experience with. Most importantly, the eminently sensible view that technical and practical expertise needs only a technical and practical basis for reliability, not a theoretical or scientific basis, should appeal to most fairminded judges.

The idea, that a historical fact of court acceptance for a standard forensic expertise should be discarded in favor of a very recent theoretical fabrication of what makes science to be science, requires two most unreasonable conclusions. First, all the great scientists of history were not scientists at all, and there were no scientists until Popper and his followers put their blind faith into his most unempirical theories of what constitutes empirical science. Second, courts for hundreds of years have been utter fools in the vast majority, if not all, of their rulings on expert evidence. Both these inescapable, logical conclusions of the position of the anti-expert experts show how terribly impertinent and pretentious they truly are. They are as the gad flies of ancient Athens, biting the rumps of mighty steeds, and they will sooner or later be generally recognized as such. I refrain from using the term the philosophers of Athens applied to St. Paul and which is translated as "babbler," although the critics' writings, so repetitious of themselves and each other by prolifically picking up and dropping common ideas and common expressions, fit the Athenian bird analogy quite well.

In re Mary Jo Townsend, Debtor; Townsend v Morequity, Inc., No. 01-26777, United States Bankruptcy Court for the Western District of Pennsylvania, Motion to Strike Expert Testimony, Memorandum Opinion and Order, April 29, 2004. [Printed from Internet.]

Thelma Greco was handwriting expert for debtor/plaintiff to prove debtor's signature on a mortgage had been forged by her husband. J. Wright Leonard was handwriting expert for defendant and testified that the mortgage signature was genuine. Morequity moved that Greco's testimony be stricken under *Daubert*, the motion was granted, and debtor's signature on the mortgage was found by the to be genuine.

Greco had completed Andrew Bradley's basic course, but the court found that only certified her as having the foundation to become qualified. She was a member of National Association of Document Examiners, had not completed a course offered through NADE and was not a candidate for board certification by NADE. Leonard, on the contrary, was board certified by NADE and sat on its Board of Directors. Greco used a "cross check" system which was not peer reviewed nor generally accepted in the field, while Leonard testified she had never heard of "cross check" until she read Greco's report. Greco was found unqualified, her methodology not meeting *Daubert* and other relevant criteria, and

her testimony was stricken. Leonard was found credible and her opinion supported by non-expert evidence.

COMMENTARY: Greco had not done her homework nor showed familiarity with things of common knowledge among document examiners, such as pertinent ASTM standards. To Leonard's credit, comments attributed to her regarding Greco's work were all objective and technical. I do not know of any course of study offered by or through NADE. The organization does provide its members with data on current courses, conferences and other educational events offered by any other organization. It has never officially endorsed or criticized any of these things. Its certification testing is entirely objective, measuring the candidates' competence and knowledge without any prior or prejudicial requirement that such competence or knowledge be acquired in any particular way or with any particular organization.

The system used by Greco is probably that described in Doris M. Williamson's and Antoinette E. Meenach's book, *Cross-check system for forgery and questioned document examination*, Chicago, Nelson-Hall, 1981. The text has some good ideas, which would be found in any standard, recognized text. But the system itself is, in my opinion, highly flawed.

U.S. v Achiekwelu, 112 F.3d 747, 1997 U.S. App. LEXIS 9393 (4 Cir 1997); certiorari denied, *Achiekwelu v U.S.*, 522 U.S. 901, 118 S. Ct. 250, 139 L. Ed. 2d 179, 1997 U.S. LEXIS 5915, 66 U.S.L.W. 3262 (US 1997)

"This case is interesting and somewhat unusual, involving, as it does, the activities of someone who tried to defraud and was himself successfully defrauded by someone else. The criminal proceedings were only directed at the one whose plan produced, from his point of view, favorable results." Defendant presented testimony of retired FBI handwriting expert who "testified that he had examined two sets of exemplars: the faxed documents that Gupta had received and a set of genuine documents that Achiekwelu provided. He further testified that, in his opinion, the same person probably had not signed the two sets of documents."

COMMENTARY: A routine case of admissibility with the added aspect that faxed handwritten documents are permitted to be the subject of expert opinion. It is nice to see the con get conned with neither con escaping some kind of retribution.

U.S. v Atkins, 1998 U.S. App. LEXIS 6689 (4 Cir 1998)

Conviction for bank fraud and embezzlement upheld. It was not error to permit a bank manager to compare defendant bank teller's known writing with bank codes found in her cash drawer. At page *7: "Atkins also challenges the admission of the piece of paper containing a series of codes and numbers found in her cash drawer."

COMMENTARY: One not a document examiner was properly permitted to give expert testimony on handwriting. It was a combination of personal acquaintance and testimony from comparison. Further, "a series of codes and numbers" were identified as to its maker.

U.S. v Battle, No. 98-3246, 1997 (D.C. No. 97-40005-01, District of Kansas); WL 596 966 (10th Cir. Aug. 6, 1999); 117 FS2 1175 (D.C. KS); 188 F.3d 519 (10 Cir 1999); cert. denied, 120 S.Ct. 602 (1999) [Court of Appeals' Order and Judgment printed from Internet.]

The third of six issues Battle raised on appeal from drug conviction was: "(3) the district court erred in admitting expert testimony concerning a signature on a Western Union money transfer record." Dennis McPhail, a document examiner, was found fully qualified and testified from Battle's exemplar signatures that he had signed "Anthony Jenkins" to the money transfer record. In reply to challenge that McPhail's testimony did not meet *Daubert* criteria, the Court of Appeals said there was no abuse of discretion by trial court, and: "Our study of the record on appeal convinces us that McPhail's proffered testimony met the reliability and relevancy test of *Daubert*."

COMMENTARY: This unequivocal ruling on reliability, which the critics seem not to have been able to find in their diligent research for pertinent court cases, is surely unequivocal.

U.S. v Bentz, 2000 U.S. App. LEXIS 27631 (6 Cir 2000); Reported in Table Case Format at: 2000 U.S. App. LEXIS 35139

Defendant was designated recipient of her son's social security benefits. He was incarcerated, but defendant did not report this fact which made him unqualified for the benefits. A request for reconsideration was filed after Social Security Administration canceled his benefits because of his incarceration. At *4-5: "Although a handwriting examiner testified that the Request for Reconsideration was not written in Bentz's handwriting, the form contained her address, telephone number, and what appeared to be her signature." Her conviction for fraudulently obtaining social security benefits was affirmed.

COMMENTARY: Defendant at least had a good sense of semantics. She called Social Security to enquire why benefits had been canceled, and in reply to where her son was living she said he was out of town. When the official said he was in prison, she replied, "Well, that's kind of like being out of town."

U.S. v Brown, 2005 U.S. App. LEXIS 22703 (2 Cir 2005)

Defendant submitted that handwriting analysis does not satisfy requirements for admissibility so that the district court was obliged to restrict the expert witness from expressing an opinion of authorship. "Similar attacks on handwriting analysis have been rejected by our sister circuits. [Citations omitted.] While our own court has not addressed the issue, we have routinely alluded to expert handwriting analysis without expressing any reservation as to its admissibility under Rule 702." The following cases are then cited, all of which are Second Circuit decisions and are discussed in this paper: U.S. v Tin Yat Chin, U.S. v Badmus, and U.S. v Tarricone.

COMMENTARY: This full paper discusses other Second Circuit cases where expert handwriting evidence was received apparently without challenge as to reliability of the field itself. This select list includes only U.S. v Chin.

U.S. v Chin, 288 F. Supp. 2d 240, 2003 U.S. Dist. LEXIS 18520 (E.D. NY 2003); vacated and remanded, 371 F.3d 31, 2004 U.S. App. LEXIS 10707, 93 AFTR2 (RIA) 2519, 64 Fed R Evid Serv (Callaghan) 517 (2 Cir 2004)

Conviction for impersonation of a federal employee and tax evasion was vacated and case remanded for new trial. The district court limited the testimony of July Tay, an expert for defendant, to the linguistic differences between Cantonese and Mandarin and the expert's opinion that Tin Yat Chin is a native Cantonese speaker, but the expert could not say the voice that witnesses testified to hearing over the phone was not Chin's because he could not have faked the Mandarin accent they heard. That restriction was proper. There is extensive discussion of the proper reasons for the limitation, which Chin could attempt to cure on retrial.

However, the ruling excluding certain receipts as not being authenticated and admissible as non-hearsay was not harmless error. Chin had proffered a handwriting expert to testify that Chin had signed receipts which would put him in Queens when Government witnesses claimed he was in China. His wife and store personnel would also testify in support of his being in Queens. The district court set too high a standard for authentication and wrongly rejected the proffer.

COMMENTARY: Tay cited literature to support her theory of inability of a Cantonese speaker to disguise successfully in Mandarin voice, but it was not on Chinese and she was inadequately familiar with it. Also, she had one 25-minute conversation with Chin, during only 15 seconds of which he spoke Mandarin. Contrariwise, the expert handwriting evidence ought to have been admitted.

U.S. v Crisp, 324 F.3d 261; 2003 U.S. App. LEXIS 6021, 60 Fed R Evi Serv (Callaghan) 1486 (4 Cir 2003); cert. denied, *Crisp v U.S.*, 157 L.Ed.2d 159, 121 S.Ct. 220, 2003 U.S. LEXIS 6388 (US 2003)

Conviction for bank robbery was affirmed. Fingerprint and handwriting identification was challenged on appeal on basis of abuse of discretion in admitting it, asserting that neither met *Daubert* factors other than general acceptance. Fingerprint cases are often cited in support of challenge to handwriting expertise and *vice versa*.

While in jail, Crisp tried to pass a note to an accomplice, saying what story he should give about the robbery. Thomas Currin, handwriting expert, identified Crisp as writer of note. At page 268: "The *Daubert* decision, in adding four new factors to the traditional 'general acceptance' standard for expert testimony, effectively opened the courts to a broader range of opinion evidence than was previously admissible. Although *Daubert* attempted to ensure that courts screen out 'junk science,' it also enabled the courts to entertain new and less conventional forms of expertise."

At page 270 begins consideration of handwriting, with the sadly epidemic idea that no two people write exactly alike and thus experts can identify a writer. "In addition, he [Crisp] asserts that handwriting experts have no numerical standards to govern their analyses and that they have not subjected themselves and their science to critical self-examination and study.

"While the admissibility of handwriting evidence in the post-*Daubert* world appears to be a matter of first impression for our Court, every circuit to have addressed the issue has concluded, as on the fingerprint issue, that such evidence is properly admissible...." [Citations omitted.]

At page 271, Currin is quoted as saying that standards are the uniqueness of certain similarities and the quality and skill of the examiner. He used size, spacing of letters, and misspelling, but mostly form

of letters. The noted: “To the extent a given handwriting analysis is flawed or flimsy, an able defense lawyer will bring that fact to the jury’s attention, both through skillful cross-examination and by presenting expert testimony of his own. But in light of Crisp’s failure to offer us any reason today to doubt the reliability of handwriting analysis evidence in general, we must decline to deny our courts and judges such insights as it can offer.”

The dissent says, in essence, that it must meet all *Daubert* factors, and that it fails even general acceptance since only handwriting experts accept it. District courts are cited that reject it, and critics are quoted to support the dissent. The claim is made that academics will discover scientific truth since they are disinterested financially.

COMMENTARY: The critics do not like the idea that opposing attorneys are given the burden of proper cross-examination to expose flawed expert opinions in handwriting. What else in the world are they being paid for? But the critics are right to dislike this idea, since to make a proper cross- examination of an incompetent expert in any field the attorney needs to consult with a competent member of that same field, not those who posture as experts on all expertise and even flunk expertise in their own field when the bases of their opinion and performance are closely studied. As to academics being financially disinterested, does not Stelmach in *Starzecpyzel* claim qualification to offer scientific testimony re handwriting precisely because he can garner grant money to do research? And getting to testify so often, as Saks and Denbaugh do as anti-expert experts, does not seem to be disinterested pursuant either to one’s financial well-being or to one’s ego satisfaction.

U.S. v Elmore, 56 MJ 533, 2001 CCA LEXIS 259 (US Nvy Mar Cps Ct/Cr Ap, NMCM 99 01013, 2001). [Printed from Internet.]

It was not abuse of discretion to deny motion *in limine* to exclude testimony of handwriting expert Marc Jaskolka, who described “handwriting analysis as a learned skill rather than a scientific process.” Reasoning in *Ruth* and *Starzecpyzel* cases adopted to support admissibility of opinion both as to observations and opinion that defendant “may have written” endorsements, numerals and initials on back of stolen postal money orders. “[W]e is convinced that, whether a rigorous Daubert/Kumho Tire analysis is employed, or an older, traditional scrutiny under Mil. R. Evid. 702 is used, expert testimony in the field of handwriting analysis is generally valid and reliable and may properly be admitted in trials by court-martial.”

COMMENTARY: It is ironic that *Starzecpyzel*, the case standing preeminently for exclusion of opinions by handwriting experts, should be cited in support of admissibility of opinions in *Elmore*. The analysis given is quite extensive and in depth.

U.S. v Gonzales, and related cases, 90 F.3d 1363, 1996 U.S. App. LEXIS 18433, 45 Fed. R. Evid. Serv. (Callaghan) 226 (8 Cir 1996)

Various convictions relating to illegal drugs and money laundering were affirmed. A search warrant turned up notebooks “consistent with drug notes” and Western Union cash receipts. At *5: “Further, Debra Springer, a handwriting expert who analyzed the writing on the MTAs [money transfer applications], testified as to how many documents were produced by each individual.” Gonzales contended that the admission of this testimony was error. In footnote 5, the Court of Appeals states that the admission of this evidence was not abuse of discretion. The MTAs were admissible because

of the foundation the government had established, and the portions filled out by the defendants were not hearsay but an admission by a party-opponent. At *22: “A handwriting expert connected the defendants to a number of these transactions.”

COMMENTARY: Not only was the handwriting expert properly admitted, but she was a key to some of the convictions, being the one to connect the defendants to the criminal acts of money laundering. By inference, the jury would have found her evidence to be proof beyond a reasonable doubt.

U.S. v Hernandez, Tenth Circuit, June 19, 2002, No. 01-1194 (D.C. No. 99-CR-75-N, District of Colorado); 42 Fed Appdx 173; 2002 U.S. App. LEXIS 12153; 89 AFTR 2d (RIA) 3049

Conviction was upheld for making and for aiding and abetting the making of false claims against the United States. Sole issue on appeal was whether district court abused its discretion in allowing handwriting identification. “Believing that the district court in so doing did not abuse its discretion, we affirm.” After a *Daubert* hearing the district court ruled that Joseph Mongelluzzo was qualified as an expert on questioned documents but was restricted to “identifying the physical mechanics and characteristics of handwriting and then pointing out similarities....” He could not say defendant wrote the tax documents in question nor even that they had a common authorship. The government did not appeal the partial exclusion. The district court’s memorandum and order “considered all aspects of *Daubert* and *Kumho*, and then issued its Solomonic order which apparently pleased and displeased both parties!”

COMMENTARY: Details of the *in limine* testimony are not given so the case report must be taken on face value. However, it seems that the government never appeals the restrictions placed on its handwriting expert witnesses, which makes one suspect federal prosecutors do not consider them worth the bother, a most unfortunate and self-defeating attitude (attitude,} if it be so.

U.S. v Hubbard; U.S. v Lyon, 1996 U.S. App. LEXIS 24813, 96 F.3d 1223, 96 Cal. Daily Op. Service 7098, 96 Daily Journal DAR 11619 (9 Cir 1996)

Defendants registered vehicles in California and Texas. Claiming that the original title documents were lost, they applied for duplicates that came back with the space for mileage figures being blank. They filled in a lower figure and altered the odometer. In a search with a warrant, the “lost” titles were found in Hubbard’s desk. At *8: “A handwriting expert testified that Lyon had written at least some of the mileage figures on vehicle documents.”

COMMENTARY: The handwriting expert was permitted to identify the maker of numerals, a more difficult task than for a signature or for extended handwriting or handprinting.

U.S. v Johnson, 2002 WL 44242, 30 Fed. Appx. 685, 2002 U.S. App. LEXIS 525 (9 Cir 2002); certiorari denied, 537 U.S. 1241, 123 S. Ct. 1374, 155 L. Ed. 2d 213, 2003 U.S. LEXIS 1889, 71 U.S.L.W. 3567 (US 2003)

The admissibility of handwriting expert identification of defendant’s handwriting on I-94 forms is affirmed.

COMMENTARY: In this as in other cases, the Federal Supreme Court denied *certiorari*, which, as far as I know, is the closest we have come to having a U.S. Supreme Court ruling on the post-*Daubert* admissibility of handwriting expertise.

U.S. v Jones, 880 FS 1027 (E.D. TN 1995), 1997 US Ap LEXIS 3696; 1997 Fed Ap 0082p; 46 Fed R Evid Serv (Callaghan) 885; 107 F.3d 1147 (6 Cir 1997); cert. denied, 1997 U.S. LEXIS 4185; 521 US 1127, 117 S.Ct. 2527 (1997)

Handwriting expert evidence is a technical skill, and its reliability is to be decided on a case by case basis. Federal Rules of Evidence 901(b)(3) provide for authentication of a document by "[c]omparison...by expert witnesses with specimens which have been authenticated." Grant Sperry of USPS was Government expert.

107 F.3d 1147, at page 1157: “We are quite convinced that handwriting examiners do not concentrate on ‘posing and refining theoretical explanations about the world,’ *Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795, but instead use their knowledge and experience to answer the extremely practical questions of whether a signature is genuine or forged.” With lots of quotes from friend and foe alike, the court says in footnote 10: “In deciding that handwriting analysis does not rest on ‘scientific knowledge,’ we do not decide whether other tasks performed by forensic document examiners...are based on scientific knowledge.”

Then at page 1160: “In short, expert handwriting analysis is a field of expertise under the Federal Rules of Evidence. This decision, however, does not guarantee the reliability or admissibility of this type of testimony in a particular case. Because this is not scientific expert testimony, its reliability largely depends on the facts of each case.” Then later, to support the expert’s admissibility: “To put it bluntly, the federal government pays him to analyze documents, the precise task he was called upon to do in the district court.” Then the court says Sperry outlined his procedure and used enlarged exhibits which enabled the “jury to observe firsthand the parts of the various signatures on which he focused.” At page 1161: “But we wish to emphasize that just because the threshold for admissibility under Rule 702 has been crossed, a party is not prevented from challenging the reliability of the admitted evidence.”

COMMENTARY: Courts are meant to resolve real disputes in a reasonable and common sense fashion, not serve the ego and academic impulses of inventors of new scientific myths about what truth is and is not. In effect, the anti-expert experts propose that we all suffer any injury unless and until alleged scientists like them tell us it is their considered opinion that we do otherwise. The forger is left all practical, time-tested means of fraud, but Risinger and company say we must forego all practical, time-tested means of countering the forger’s fraud. And they assert this on the basis of theories which are neither practical nor time-tested, much less established in any way other than general acceptance among those who are willing to swallow mass belief in the collective word of a few academics. In brief, whereas *Daubert* ended the *Frye* rule of general acceptance, only general acceptance supports the precise criteria *Daubert* put in place of general acceptance.

U.S. v Kehoe, 2002 U.S. App. LEXIS 23201; 59 Fed R Serv 3d (Callaghan) 812; 310 F2 579 (8 Cir 2002); rehearing denied, 2003 U.S. App. LEXIS 361 (8 Cir 2003); certiorari denied, *Kehoe v U.S.*, 2003 U.S. LEXIS 3938 (2003)

Carl McClary was handwriting expert for the government. At page 593: “The district court did not abuse its discretion in finding McClary’s testimony to be reliable.” No analysis is offered.

COMMENTARY: Since it goes against their staunchly held position, no doubt the anti-expert experts will assert this case is to be ignored since there is no explanation why the admissible is admissible, although obviously it was because both the trial court and the Court of Appeals considered the requirements of the Rules and of *Daubert* satisfied. McClary is a fine gentleman who gives much time to serve us all in the E-30 Committee of American Society for Testing and Materials. I find it no surprise that he should meet and pass any challenge to his expertise.

U.S. v Mann, 2000 U.S. App. LEXIS 6673 (8 Cir 2000)

Mann was convicted of writing a threatening letter to the President. He addressed threatening letters from the prison where he was and signed “Chuck Mann.” A handwriting expert identified Mann had handprinted three threatening letters to judges and also the envelopes.

COMMENTARY: Evidence as to identification of handprinting is properly admitted. It might also be a case of criminality by stupidity, given the defendant’s self-identification in the letters and that he wrote to two other prisoners about plans to escape and their hatred for the President.

U.S. v Mooney, 315 F.3d 54, 2002 U.S. App. LEXIS 27130, 60 Fed R Evid Serv (Callaghan) 60 (1 Cir 2002)

At page 61, *et seq.*, in section titled “III. EXPERT TESTIMONY,” Court of Appeals upholds admissibility of expert handwriting testimony after *Daubert* hearing both as to observations and as to conclusion of authorship. At page 62: “Finding the *Daubert* factors relevant to his evaluation of the reliability of the expert’s testimony, the judge noted that all the factors were met in this case.” At page 63: “The defendant, however, misunderstands *Daubert* to demand unassailable expert testimony. As we previously explained,

“Daubert does not require that the party who proffers expert testimony carry the burden of proving to the judge that the expert’s assessment of the situation is correct.... It demands only that the proponent of the evidence show that the expert’s conclusion has been arrived at as a scientifically sound and methodologically reliable fashion.

“*Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998).”

And also at page 63: “The *Hines* opinion, of course, has no binding effect.”

COMMENTARY: Unfortunately, the handwriting expert who did so well is not named. The opinion provides a very sensible interpretation of *Daubert/Kumho*, one that I believe is the correct one, the one that makes most sense from a reading of those cases.

U.S. v Paul, D.C. Docket No. 1:97-CR-115-1-GET (N.D. GA 1997); affirmed, 1999 U.S. App. LEXIS 9050; 51 Fed R Evid Serv (Callaghan) 1462; 12 Fla L Weekly Fed (832)175 F.3d 906 (11 Cir 1999)

Denbeaux was disqualified and Ziegler admitted. Denbeaux did not possess acceptable degree of knowledge, would not have assisted jury, and was not a qualified expert. He had done nothing beyond his "Exorcism" article.

COMMENTARY: Finally, a court required some useful, valid expertise from the anti-expert expert.

U.S. v Prime, 2002 US Dist LEXIS 18629, 220 FS2 1203 (W.D. WA 2002); affirmed, 363 F.3d 1028, 2004 U.S. App. LEXIS 7365 (9 Cir 2004); certiorari denied in *Prime v U.S.*, 125 S. Ct. 1005, 160 L. Ed. 2d 1007, 2005 U.S. LEXIS 1067, 73 U.S.L.W. 3438 (US 2005)

220 FS2 1203:

This is a counterfeiting case in which Secret Service expert Kathleen Storer identified portions of 76 exhibits as having been written by which of three suspects. The court reviews handwriting cases applying *Daubert.* Bottom line is that the court rules on admissibility of the proffered evidence in the context of the current case, not on the expertise in general nor on academic disputes. An expertise need not be proven perfect. All four *Daubert* factors were satisfied to the satisfaction of this judge. At page 1216 the double-edged sword of the critics' position is wisely given: "However, the apparent recent trend to exclude FDE testimony is a result, the Court believes, of an excessively rigid application of *Daubert*. Since *Daubert* applies to both criminal and civil cases, such an approach may, one day, result in unfortunate consequences for a criminal defendant who is denied the ability to present the best evidence that he did not author an extortion demand or pen a forged signature. The Court declines to follow this trend on the record before it."

NINTH CIRCUIT DECISION:

The district court's rulings are fully upheld as to admission of handwriting expertise. The Ninth Circuit reiterates at length the bases for the rulings and ends by citing six cases from six other Federal Circuits which ruled handwriting expert testimony admissible under *Daubert*.

COMMENTARY: This case report for district court, 220 FS2 1203, is highly recommended both for review of the dispute and for the legal reasoning it provides. That Federal Public Defenders appear particularly anxious to have all such expertise tossed out seems fraught with promise of much malice to their own work.

The case report for the Ninth Circuit, 363 F.3d 1028, discusses at length how each *Daubert* factor was met and how they view the current weaknesses in the field. For example: "While Kam's study demonstrates some degree of error, handwriting analysis need not be flawless in order to be admissible." If any of us needed to be flawless in order to perform any service, we would all have to stay in bed on any given morning for fear of flaw.

U.S. v Rivenbank, 1996 U.S. App. LEXIS 6081 (4 Cir 1996)

Convictions for bank fraud, wire fraud, mail fraud and possession of firearm by convicted felon are affirmed. Several checks and two wills were forged against a man's estate. Thomas Goyne testified to signatures being traced, simulated, "or some other imitation method."

COMMENTARY: Goyne seems to have done a lot of work on this case. The report is worth reading for the brazenness of Rivenbank and his girlfriend. He made self-incriminating statements and even filed a complaint with the FBI, showing an agent two forged $150,000 checks on a long-closed account and saying that the heirs were preventing him from having what decedent had given him.

U.S. v Ruth, 42 MJ 730, 1995 WL 450976 (Army Ct Cr Ap 1995); affirmed on other grounds, 46 MJ 1 (CAAF 1997)

Handwriting expertise is technical rather than scientific, nor is it novel. The appointment of Denbeaux as defense expert was denied because he was a law professor and not an examiner of documents nor did he have knowledge of the case at hand. Defense counsel was told he could cross-examine S. A. Horton, the handwriting expert, with Denbeaux's article, but he never did.

COMMENTARY: Denbeaux and his like have turned trials, at least criminal cases involving techniques of identification, into findings about theoretical musings rather than findings of fact. They did so by creating a new case law at the trial level which admits "experts" lacking all expert knowledge of the identification issues in the case at bar. It used to be that one had to know relevant facts, now one merely need assert that one's speculative theorizing, devoid of all factual content, is relevant. At least the *Ruth* required case specific knowledge. Hopefully more and more courts will prefer reality over speculative musings.

U.S. v Sanders and Wilson, 59 Fed. Appx. 765; 2003 U.S. App. LEXIS 4305 (6 Cir 2003); cert denied, *Sanders v US*, 157 L.Ed.2d 95, 124 S.Ct. 140 (2003); cert. denied, *Wilson v US*, 2003 U.S. LEXIS 8588 (US Dec 1, 2003)

Objection to admissibility of testimony by handwriting expert, James Regent, was not made at trial, and so issue was not preserved for appeal. Objection was only to judge's describing witness as an expert. Nevertheless, if the issue were properly appealed, trial judge's decision to admit the evidence was proper because the expert was highly qualified and he explained the basis for his opinion.

COMMENTARY: The expert apparently gave conclusion as to maker of the writing. It is of note that the Court of Appeals made it a point to rule the testimony properly admissible when it could have skirted the issue.

U.S. v Scarborough, 128 F.3d 1371, 1997 U.S. App. LEXIS 29790, 47 Fed. R. Evid. Serv. (Callaghan) 1395, 158 A.L.R. Fed. 725, 1997 Colo. J. C.A.R. 2609 (10 Cir 1997)

Beverly Mazur, handwriting expert with Nebraska Police Crime Lab, testified that ten Express Mail labels had been made out by the same person. Some of them had Scarborough's name and address.

Another issue of interest is that the drug-alert dog had an on-the-job reliability rate of 92% correct. On loan to the Postal Service the rate dropped to 79%, but that did not make reversible error when a search was based on the dog's alert.

COMMENTARY: A routine case of admissibility. There are more than 100 such routine cases in the full list, which tells us that handwriting expertise has long since triumphed over its critics, but some of us are not paying attention to legal reality.

U.S. v Taylor, 88 F.3d 938, 1996 U.S. App. LEXIS 18140, 10 Fla. L. Weekly Fed. C 180 (11 Cir 1996)

Conviction and sentence for sending threatening communications were affirmed in case growing out of stalking of long-standing, 20 years, and for which defendant had previously been convicted.

Refusal to comply with subpoena for handwriting exemplars, and then disguising them when finally complying, supported sentence enhancement. He freely admitted that he had written cards and letters to the victims, amounting to some 1,000 items, but this was not sufficient compliance with need for exemplars because he did not admit to writing the cards in question. The government expert finally used the signature on the fingerprint card taken when Taylor was arrested.

COMMENTARY: A routine case of admissibility, but not, hopefully, a routine case of competence. Why not use the more or less 1,000 admittedly genuine writings to the same folks as exemplars, unless one is so unskilled at comparing handwritings that only precisely similar letters, words and phrasing will do?

U.S. v Van Wyk, 83 FS2 515 (D. NJ 2000); 2001 U.S. App. LEXIS 6290 (3 Cir 2001); certiorari denied, 534 U.S. 826, 122 S. Ct. 66, 151 L. Ed. 2d 33, 2001 U.S. LEXIS 5666, 70 U.S.L.W. 3234 (US 2001)

Although James R. Fitzgerald, an FBI agent, was qualified as a forensic stylistics expert by attending seminars, teaching, researching, and doing the work, he could not testify to the identity of the author of unknown writings since forensic stylistics lacks reliability, no known rate of error, no recognized standard, no meaningful peer review, and no accreditation in field. He could, however, testify to similarities between defendant's writings and the threatening communications as an aid to the jury. At page 518 there is an interesting ruling: "The expert need not have complete knowledge about the field in question, need not be certain, and need not be unbiased." The first two items are standard, but the third gives one pause. Nevertheless, an expert may not base opinions on speculation.

At page 521 it is described how Gerald McMenamin's first book was cited by the government to support reliability, but the court gives this assessment: "Due, however, to the dearth of published cases or journals addressing forensic stylistics, the novelty of this field, and the fact that it has only been approved by law enforcement, the Court has no way of determining whether the McMenamin article is merely self-legitimized."

COMMENTARY: In his second book, McMenamin dismisses this case as going against his expertise, since the witness supposedly followed Don Foster's methods, which McMenamin said are quite faulty. In a recent case in San Diego County, *People v Flinner*, the trial judge ruled McMenamin's expertise inadmissible under California *Kelly/Frye/Leahy* rule because it had no general acceptance,

the *Van Wyk* case providing strong argument for that finding. Although nothing in handwriting comparison parallels the difficulty that the *Van Wyk* and *Flinner* courts properly recognized in forensic linguistics, *Van Wyk* is often quoted to support inadmissibility of the former, just as *Van Wyk* cites several handwriting cases.

The citation and specific quote from *Flinner*, is: *People v Flinner*, California Superior Court, San Diego County, Case No. SCE 211301 (Motions), Reporter's Transcript of Proceedings, June 30th, 2003, El Cajon, California, before The Honorable Allan J. Preckel. At page 21, lines 17-24, the court rules: "The motion for reconsideration is granted. The Court has been made aware of no criminal case in California that has allowed the introduction of evidence of forensic linguistics or stylistics. Such evidence, including the testimony of Dr. McMenamin, will not be admitted at this trial without first passing muster consistent with the requirements of the *Kelly* and *Leahy* cases. To date, the requisite showing of reliability has not been made."

U.S.; Government of the Virgin Islands v Velasquez, 64 F2 844, 33 V. Is. 265 (3 Cir 1995)

Lynn Bonjour, government handwriting expert, made a very positive impression on the Court of Appeals, as evidenced by several places in the record. Defendant sought to introduce Mark P. Denbeaux at trial as an expert witness as to the limitations of handwriting identification, but he was ruled inadmissible. The Court of Appeals held both experts admissible under *Daubert*. Ms. Bonjour gave, succinctly and very clearly, an intelligent methodology which she followed. In a footnote at page 279 the court quotes Ms. Bonjour's estimate of Professor Denbeaux's "Exorcism" article: "Ms. Bonjour acknowledged that she had read Professor Denbeaux's law review article, although her critique — 'it's a lot of gibberish' — was less than glowing."

At page 278 is stated why Denbeaux was admissible: "In particular, we point to the Professor's eight years of self-directed research on handwriting analysis and his co-authorship of a law review article on the subject." The research referred to was literature research, not laboratory or field research.

COMMENTARY: The Court of Appeals very explicitly asserts the scientific reliability of handwriting identification. The challenge was precisely that the expertise was not scientifically reliable, but the Court of Appeals states that the trial court rejected this challenge and the Court of Appeals did also. When one rejects one of two prongs of a complete disjunction (handwriting expertise is not scientifically reliable), one necessarily accepts the other (handwriting expertise is scientifically reliable). However, the critics, not liking what clearly contradicts their thesis, said that the ruling of the *Velasquez* court was ambiguous. This is typical of their perception and reporting of reality.

Vasquez v State, 975 SW2 415 (Ct Ap TX Austin 1998)

Conviction was for sexual assault on child. Expert testimony on witness' truthfulness and on statement analysis was admissible only on rebuttal of contrary attacks by defense. Linguistics or stylistics is here called "statement validity assessment" or "statement validity analysis." At page 418: "Specific testimony that statement validity analysis indicates that the person's statement is in fact an account of real events is usually inadmissible and may be adduced only to rebut specific testimony that such analysis indicates that the statement is not an account of real events." Also, at page 418: "He [the expert] also noted that the complainant 'tells about something that didn't happen,' which is another characteristic of statements that are not fabricated."

COMMENTARY: First a puzzlement regarding the last item: So, a fabricated story only tells of what did in fact happen? Or to ask it in another way: A statement that is not fabricated contains fabrications? That kind of amazing insight seems typical of this kind of expertise. This case ought never be used against handwriting identification, although it has been, since the latter never purports to offer independent proof of the truthfulness of statements. The most famous course text on this dubious skill contains within itself every single trait that the author asserts is a sign of an allegedly false statement.

West v State, 793 S2 870, 2000 AL App LEXIS (AL Ct Cr Ap 2000) [There is a complex series of further appeals from 2000-2003 going up to the U.S. Supreme Court and back, but none seem to address further the issue of document examination.]

In a complex chronology, the prosecution was held to have made timely disclosure to defense counsel of the documents in question and of the testing with its resulting report. Appellant/ West was convicted of murder, and letters he had written to his girlfriend had had portions obliterated by her before they were handed over to the prosecution. Steven Drexler, document examiner for the State, tried various techniques until he could make the writing under the obliterations clearly legible. They amounted to confessions by defendant. Alabama is on the *Frye* standard, and what Drexler did was not novel, being based on his knowledge of how to use magnification, lighting and chemicals, and the results were easily read by anyone. It seems that by the time trial ended, the defense had more time to test the documents, with assurance from the court that the costs would be covered, yet they did not do so.

COMMENTARY: Some facets of questioned documents examination are strictly technical, as Drexler's work was in this case. Outside of that, it's a matter of what any ordinarily sensible person would do or not do, while the finest examination is, some of us would maintain, truly scientific. This case shows that the Alabama Court of Criminal Appeals knows the difference when it sees it, and that is heartening to those of us doing practical work in pursuit of the facts.

Williams v State, 2002 WY 184, WY LEXIS 222, 60 P3 151 (WY 2002)

Ruling that the handwriting expert's testimony was admissible, the trial court said: "Again, the Court agrees that the area of handwriting analysis has been utilized in Wyoming and has been relied upon by trial courts.... Again, the Court sees no reason to exclude the testimony of Mr. Crivello under traditional expert witness standards nor under the *Daubert*-type analysis." The Supreme Court stated: "Accordingly, we hold that the district court properly considered each of the four enumerated factors first set forth in *Daubert* and thereafter explicitly adopted by this court in *Bunting*. Likewise, the court appropriately found that the proffered handwriting expert was sufficiently qualified through adequate experience and specialized expertise in the area as expressed in *Bunting*." Appellant argued Crivello was not certified and that handwriting analysis suffered various flaws.

An explicit ruling is made: "Finally, we take this opportunity to clarify that this court does not adopt that rule of law expressed in the opinion *United States v. Starzecpyzel*..., holding that forensic document examination cannot be regarded as scientific knowledge within the meaning of the rule regarding admissibility of expert testimony and that as such, a *Daubert*-style review did not prove necessary in such an instance."

COMMENTARY: This is an excellently reasoned opinion by the Wyoming Supreme Court and is recommended to your study. Crivello showed mastery of the writings in the field and a facility to explain all aspects of his expertise with clarity. No factor supporting his admissibility seemed to have been left out.

Young v City of St. Charles, et al., 244 F.3d 623, 143 Lab Cas (CCH) P59,194, 2001 U.S. App. LEXIS 4552 (8 Cir 2001); affirming dismissal of second suit, 34 Fed. Appx. 245, 2002 U.S. App. LEXIS 8898 (8 Cir 2002); ceritorari denied, 537 U.S. 1035, 123 S. Ct. 553, 154 L. Ed. 2d 454, 2002 U.S. LEXIS 8573, 71 U.S.L.W. 3351 (US 2002)

Young filed suit over his dismissal as a police officer, and the district court granted motion to dismiss his suit. Upon appeal by Young, Eighth Circuit upheld granting the motion to dismiss the suit. Young had submitted copies of forms during the original hearing process on his dismissal. He was accused of submitting falsified documents, and a report by a handwriting expert was part of the basis for Young's dismissal. In his appeal "Young also alleges that the handwriting expert was not qualified under the standards set forth in *Daubert*...." This issue was not specifically addressed any further, but the appeal was denied and the dismissal of Young's suit by the district court affirmed.

COMMENTARY: In order to give an authoritative opinion, a court of law need not always give all the details of why and wherefor. Most case reports simply give the final word on the matter, and often do not even state the specific decision, as when an appeal court will say it finds no merit in the appellant's other points of error. The law professors pretending to be experts about handwriting thus show they are less than expert in law, since they either ignore or do not grasp a point lay people understand quite well. However, they do not hesitate to cite an opinion which at least seems to conclude as they do but which gives no explanation at all.

Document examiners will find an element in this case all too familiar in their practice. The police officials said Young submitted only copies of the requested forms that were found to be false, but he later contended that he had produced originals and that they had lost them, failing to follow proper chain-of-custody practice in submitting them to the handwriting expert. Nor did the Court of Appeals bother explaining why that contention was unconvincing.