



F46 Is Your Handwriting Expert's Testimony Admissible? Navigating *Daubert/Kumho* Challenges to Enhance the Likelihood That Gatekeepers Will Find Handwriting Comparison Evidence Sufficiently Reliable To Be Admissible Under Federal Rule of Evidence 702 (Fed. Rule 702)

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After attending this presentation, attendees will better understand the factors that have led some courts to conclude that a handwriting expert's proffered testimony, as applied to the facts of that particular case, fell short of the reliability threshold required by Fed. Rule 702. Forensic Document Examiners (FDEs) will learn what they can and should consider doing to enhance the likelihood that gatekeepers will find handwriting comparison evidence sufficiently reliable to be admissible under Fed. Rule 702.

This presentation will impact the forensic science community by providing FDEs and other attendees with more effective foundational principles and tools for persuading gatekeepers that handwriting comparison evidence and the methods and reasoning underlying an FDE's opinion in a given case satisfy the reliability threshold of Fed. Rule 702.

In *Daubert*, the United States Supreme Court charged trial judges with the task of screening proffered expert testimony by making "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."¹ In *Kumho Tire*, the Court held that the trial court's gatekeeping responsibility applies to "all 'scientific,' 'technical,' or 'other specialized' matters within (Rule 702's) scope," emphasizing that a trial court's role is "to determine reliability in light of the particular facts and circumstances of the particular case."²

FDEs have traditionally premised the scientific validity and reliability of handwriting identification on three principles or tenets: (1) handwriting is unique, meaning that no two people write exactly alike; (2) no person can produce an exact duplicate of his or her signature or write exactly the same way twice; and, (3) no person can exceed his or her writing skill level at a given point in time. Recent district court decisions excluding or limiting the proffered testimony of handwriting experts have concluded that, regardless of whether handwriting analysis is characterized as science or art, there has been inadequate testing and insufficient data to support the scientific validity of the first two fundamental principles that have been espoused by virtually all FDEs as the underlying basis for handwriting identification. Perhaps most noteworthy is United States District Court Southern District of New York (SDNY) Judge Jed S. Rakoff's May 6, 2016, decision in *Almeciga v Center for Investigative Reporting, Inc.*, where the court considered "how well handwriting analysis fares under *Daubert* and whether (the proffered handwriting expert's) testimony is admissible as "science" or otherwise."³ In granting the defendant's motion to exclude Wendy Carlson's "expert" testimony, Judge Rakoff found that "handwriting analysis in general is unlikely to meet the admissibility requirements of Fed. Rule 702 and that, in any event, Ms. Carlson's testimony does not meet those standards."

The rationale underlying Judge Rakoff's analysis of the traditionally offered tenets of handwriting comparison and the validation studies offered in support of those tenets will be reviewed as will his Fed. Rule 702 analysis of



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the handwriting comparison process in general and as applied by the proffered “expert” to the facts of the particular case at hand. Some other recent court decisions limiting testimony on the part of handwriting experts will also be discussed.

Finally, a somewhat different, task-specific basis for establishing that handwriting comparison evidence in a given case is sufficiently reliable to be admissible under Fed. Rule 702 will be offered. Methods and strategies will be suggested for providing a court with the necessary baseline level of confidence to enable it to find that a proffered handwriting expert’s testimony rests on a reliable foundation as related to the particular task at hand (without having to reject Judge Rakoff’s decision in the 2016 *Almeciga* case).

Reference(s):

1. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
2. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
3. *Almeciga v. Center for Investigative Reporting, Inc.*, 2016 WL 2621131, F.Supp.3d (2016).

Handwriting Analysis, *Daubert/Kumho* Factors, Federal Rule 702