Handwriting Evidence in Federal Courts — From *Frye* to *Kumho*

REFERENCE: Zlotnick J, Lin JR: Handwriting evidence in federal courts — From *Frye* to *Kumho*; *Forensic Sci Rev* 13:87–99; 2001.

ABSTRACT: In federal courts, the admissibility of scientific expert testimony in the last century has been governed by three major standards. The first of these standards, the "general acceptance" test, arose from the 1923 *Frye v. United States (Frye)* and required that any technique or method introduced in court be generally accepted by the relevant community of scientists. The more liberal "relevancy" standard of the Federal Rules of Evidence was enacted in 1975, and required the expert witness to be qualified by knowledge, skill, experience, training, or education. Finally, the "reliability" standard stated in the *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)* opinion was handed down by the U.S. Supreme Court in 1993, supplanting the *Frye* general acceptance test as the sole determining factor in considering the admissibility of scientific expert testimony, and suggesting falsifiability, peer review and publication, and error rate as additional factors useful in evaluating a scientific technique.

Changing views on expert testimony have also resulted in published criticisms of several forensic fields, especially those with subjective components. The first such field to be questioned, which also has been the subject of great debate, is expert handwriting identification. Challenges leveled against handwriting identification began with a law review article published in 1989 (and two subsequent articles); other challenges have been based on the requirements outlined in the Federal Rules of Evidence and *Daubert*. These challenges resulted in several court opinions with disparate views of handwriting identification, though testimony by an expert in the field was not rejected. In *U.S. v. Starzecpyzel*, handwriting evidence was admitted as nonscientific expert testimony under the Federal Rules of Evidence after failing a review under the factors outlined in *Daubert*. In *U.S. v. Velasquez (Velasquez)*, the testimony of a document examiner was accepted, while the testimony of an expert critic of handwriting identification was rejected by the district court; however, on appeal, the Third Circuit held that both witnesses met the requirements of the Federal Rules of Evidence, and thus both testimonies were admissible. *U.S. v. Jones (Jones)* demonstrated yet another situation, where handwriting identification was challenged under *Daubert*. There the court found that because handwriting identification was never viewed as scientific evidence under *Frye,* it should not therefore be reviewed under *Daubert*. The *Jones* court admitted handwriting identification as nonscientific evidence, but stated that admissibility of nonscientific evidence should be governed by the facts of future cases.

After some time and many other opinions on the admissibility of expert testimony under *Daubert*, several federal circuits permitted review of nonscientific expert testimony under the factors outlined in *Daubert,* while other federal circuits restricted such reviews only to purportedly scientific testimonies. In the latter arenas, determining whether handwriting identification was a scientific field or not had bearing on how it was reviewed for admissibility, if it was reviewed at all. This situation ended in March 1999 with the U.S. Supreme Court opinion of *Kumho Tire Co., Ltd. v. Carmichael (Kumho)*, which held that the *Daubert* factors may be used for review of all expert testimony as the courts see fit, regardless of whether the field is considered scientific. In the wake of *Kumho*, two other cases challenged handwriting identification: *U.S. v. Paul (Paul)* and *U.S. v. Hines (Hines)*. The *Paul* case, like *Velasquez,* dealt with exclusion of an expert critic of handwriting identification, and also like *Velasquez*, the court appeared to rely on the Federal Rules of Evidence rather than the factors outlined in *Daubert* to form its judgment. *Hines,* however, represented a significant departure from earlier cases, as handwriting identification was partially excluded in that the document examiner was permitted to testify to similarities and differences but was not allowed to opine as to the authorship.

In sum, the federal courts are currently evaluating the admissibility of handwriting identification in a variety of ways. Though handwriting identification continues to be widely admitted as a form of expert testimony, the recent changes in admissibility requirements and challenges from the legal community have generated a climate where admissibility should no longer to be taken for granted. Because *Kumho* is a relatively recent case, its long-term effects on the admissibility of many fields of forensic science, including handwriting identification, are yet unknown.

KEY WORDS: Admissibility, *Daubert*, expert testimony, Federal Rules of Evidence, *Frye*, *Kumho*, handwriting, questioned documents.