

Is Your Handwriting Expert's Testimony Admissible?

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Before you hire an expert to examine a questioned document, you should have a good understanding of the law regarding the admissibility of testimony from handwriting experts. There are people in the marketplace who hold themselves out as experts - some of whom may have been successfully qualified as an expert in other cases - that may not pass muster given the present state of the law regarding handwriting analysis.

THE ADMISSIBILITY OF EXPERT TESTIMONY GENERALLY

Any discussion about handwriting experts in a federal court case must start with Rule 702 of the Federal Rules of Evidence, which states that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The U.S. Supreme Court has held in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999), that the trial court must act as a gatekeeper and determine, at the outset, whether the purported expert is qualified to express a reliable opinion based on sufficient facts or data and the application of accepted methodologies. These cases indicate that a trial court should flexibly apply a two-step inquiry. A court should first determine whether the expert's testimony reflects "scientific, technical, or other specialized knowledge." That is, the court must make "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." *Daubert*, 509 U.S. at 592-93. Second, the court should ensure that the proposed expert testimony is relevant and will aid the trier of fact. *Daubert*, 509 U.S. at 592-93.

In performing this gate-keeping responsibility, trial courts may consider whether a theory or technique can be or has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. In this way, a trial judge is given discretion to consider these "*Daubert* factors" in determining how and in what manner to make reliability determinations for potential expert witnesses.

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HANDWRITING ANALYSIS

There is some dispute regarding whether handwriting analysis is sufficiently reliable to be admissible under Rule 702. However, most courts agree that the field of forensic document examination is premised on the assumption that no two persons' handwriting is exactly alike. The field assumes that each person has a unique handwriting pattern that allows the person to be identified through a comparison of proper handwriting specimens. Analysts subjectively assess the qualities and quantities of characteristics such as pen lifts, shading, pressure and letter forms. All acknowledge that this is not an exact science and that different experts can reach different conclusions.

Many courts have recognized the American Board of Forensic Document Examiners ("ABFDE") as an appropriate accrediting organization for handwriting experts. This organization has been held to have a legitimate certification process and verifiable professional standards. There are other organizations that purport to certify experts in this field, but some are simply mail order businesses that sell certificates. Other organizations have their roots in graphology, which is the "art" of determining personality traits from looking at a person's handwriting.

(As a side note, a few years ago I took the deposition of a bank's handwriting expert who was accredited by a graphology-based organization. After some pushing, the expert acknowledged his belief that he could determine personality traits from handwriting. When pushed further, he testified that my handwriting indicates that I am stubborn. People who know me would say that this expert was a great graphologist.)

Qualified handwriting experts will first determine whether a questioned document contains a sufficient amount of writing to permit identification. Then, the expert will determine whether he can obtain adequate other examples of the subject's handwriting. If the questioned document and the exemplars contain sufficient identifiable characteristics, the expert considers both the similarities and the differences in the writings, and determines if there is a match. Often, experts consider unexplained differences in writing to be more important than similarities.

Even though the ultimate litigation goal is to determine the author of a particular document, many good handwriting experts will only go so far as opining that the writing is either consistent or inconsistent with having been authored by the person in question. If you are faced with an expert that is willing to make 100% definitive statements about authorship on the record, it should be a red flag regarding the person's qualifications and professional affiliations.

IS IT ADMISSIBLE EXPERT TESTIMONY?

Most courts allow properly qualified document examiners to testify as expert witnesses. For example, one court recently determined "as a general proposition, that forensic document examiners, who are equipped with the proper background qualification and who employ the accepted methodology in their analysis, can serve to assist the trier of fact, in some regards, through providing reliable testimony about similarities or differences, or both, between a questioned writing and comparative exemplars." *Wolf v. Ramsey*, 253 F.Supp.2d 1323, 1344 (N.D.Ga.

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2003). In this case, of the plaintiff's two proposed experts, only the one that was accredited by the ABFDE was allowed to testify as an expert.

This does not end the analysis, though. Even after a document examiner has been accepted as an expert witness, there can be a dispute regarding whether testimony should be limited to discussing the similarities and differences between various exemplars, or whether the testimony may also include an ultimate conclusion regarding the identity of an author. While there is still some conflicting case law, it appears that the better reasoned cases hold that witnesses may discuss similarities and differences in writing, but they may not state an ultimate conclusion regarding the identity of the author. These cases argue that, while the "science" of handwriting analysis is sufficiently well-founded to identify subtle differences and similarities for a trier of fact, there is no firm evidence that an analyst can make definitive statements about identity. For this reason, the cases argue, ultimate conclusions regarding authorship do not satisfy the requirements of Rule 702.

ARE THERE DIFFERENCES FOR CASES IN TENNESSEE STATE COURTS?

If you have a case pending in state court, there are additional factors that you should consider. First, Rule 702 of the Tennessee Rules of Evidence is different from the federal rule. Under the Tennessee rule, the scientific, technical or specialized knowledge must substantially assist the trier of fact. Under the federal rule, the expert is only required to "assist", not "substantially assist." For this reason, the Tennessee Supreme Court has not fully embraced the *Daubert and Kumho Tire* analysis described above. Instead, it held in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), that Tennessee trial courts should apply the more narrow state rules of evidence. This means that state trial courts should take a more active role in evaluating the reasonableness of the expert's reliance upon the bases of his testimony.

While this would suggest that it might be harder for nonscientific expert testimony like handwriting analysis to be admitted in Tennessee, this is not necessarily the case. There are at least two reasons for this. First, even though the Tennessee Supreme Court has expressly declined to "adopt" *Daubert and Kumho Tire*, it has stated that the *Daubert* factors for examining the reliability of expert testimony "are useful in applying our Rules 702 and 703." *McDaniel*, 955 S.W.2d at 265. So, when a state trial court is determining whether to allow expert testimony from a handwriting expert, it should be looking at the same factors as its federal counterparts. Second, because handwriting analysis has a long history of being accepted as a valid field for expert testimony in Tennessee, there is a strong prejudice toward continuing to allow it.

In the end, it appears that Tennessee courts may take a different analytical path to get to the same result as the federal courts.

CONCLUSION

If you need to retain a handwriting expert, be sure to check for recent decisions from the relevant jurisdiction - the law on this subject continues to evolve. Also, carefully review the curriculum vitae of your expert, and your opponent's expert, to make sure you understand their training and professional affiliations. Last, unless you find

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recent law to the contrary, you should plan your proof around the notion that your expert's testimony will be limited to a discussion of the differences and similarities between various writings.