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ARTICLE

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Standards for Admissibility of Testimony of Writing Experts

Heidi K. Brown*

> "*One day I shall explode like an artillery shell and all my bits will be found on the writing table.*"[1]
> –Gustave Flaubert

Experts routinely play a vital role in the resolution of legal disputes involving a wide range of subject matter, from "hard science" topics like blood-spatter analysis,[2] to "soft science" matters such as damages quantification,[3] to art authentication,[4] to gang tattoos,[5] to the distinct skills of Brazilian "gaucho chefs" known as "churrasqueiros."[6] Because many legal cases turn on the meaning, context, impact, or integrity of a writing, numerous litigants have proffered writing experts to render opinions on a variety of issues. These include (1) the usage of language, phrasing, or typography in a particular industry, trade, or profession; (2) the substantive or technical quality of a piece of writing; (3) the methodology of drafting certain document genres; (4) the cultural context of writings; and (5) comparisons of the content and style of two writings. Often, such experts are qualified based on professional roles as professors of creative writing, legal writing, English, literature, linguistics, or rhetoric.

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1 Attributed to Gustave Flaubert. *See* https://www.goodreads.com/quotes/129938-one-day-i-shall-explode-like-an-artillery-shell-and.

2 *See, e.g.*, Rasmussen v. City of New York, No. 10 Civ. 1088(BMC), 2011 WL 744522, at *2 (E.D.N.Y. Feb. 23, 2011).

3 *See, e.g.*, Hughes v. The Ester C Co., 317 F.R.D. 333, 343 (E.D.N.Y. 2016).

4 *See, e.g.*, Fletcher v. Doig, 196 F. Supp. 3d 817, 824 (N.D. Ill. 2016).

5 *See, e.g.*, United States v. Garcia, 447 F. App'x 752 (8th Cir. 2011).

6 *See e.g.*, Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127, 1139 (D.C. Cir. 2014).

In fact, lawyers have retained *legal writing* professors and practitioners to serve as experts to analyze different types of documents, not all necessarily legal documents but which still have legal effect. A legal writing expert engaged for the first time might wonder, What exactly is the standard for admissibility of expert testimony regarding a writing? This article provides guidance regarding that standard so that lawyers[7] and writing experts can be better prepared to anticipate evidentiary challenges and avoid the dreaded phone call to the client. It is never pleasant to report that, after the client's financial outlay and the lawyer's and an expert's substantial exertion of labor, the court granted opposing counsel's motion *in limine* to exclude the expert from testifying at trial.

Part I of this article summarizes the current criteria for admissibility of expert testimony under Federal Rule of Evidence 702 (FRE 702) and the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[8] and its progeny. Part II surveys case law in which litigants have proffered experts in a variety of writing milieus to assist the trier-of-fact. This section is designed to give new legal writing experts a flavor of different contexts in which lawyers engage writing experts and to flag possible evidentiary pitfalls that may arise therein. Part III offers tangible guidance for legal writing experts (and the counsel who hire them) to develop expert opinions, reports, and testimony in a way that will appropriately satisfy the admissibility criteria of FRE 702 and *Daubert.* Legal writing experts can assist the trier-of-fact and the legal process by applying the concrete and reliable legal writing standards and analytical methodologies that are well-established in legal academia and law practice.

I. Federal Evidentiary Standards Regarding Expert Testimony

In a 1935 article, Lloyd Rosenthal, a graduate of Cornell Law School and a research assistant for the Law Revision Commission of the State of New York, analyzed the history of the development of expert testimony. He acknowledged that "the effective administration of justice requires aid

7 *See* Lyle Griffin Warshauer & Michael J. Warshauer, *Prepping Your Expert*, TRIAL, Sept. 2012, 15 ("Expert witnesses can be blindsided when their opinions are attacked in court. Advising them about the rigors of litigation is essential—it can be the difference between winning and losing your case." "If a *Daubert* challenge is to be defeated, it is up to the trial attorney to advise the expert about the decision. You must not only provide the expert with the relevant facts and records, but also explain how his or her opinion may be attacked in litigation."); W. William Hodes, *Navigating Some Deep and Troubled Jurisprudential Waters: Lawyer—Expert Witnesses and the Twin Dangers of Disguised Testimony and Disguised Advocacy*, 6 ST. MARY'S J. LEGAL MAL. & ETHICS 180, 183 (2016) (commenting on the problems with expert witnesses "exceeding the boundaries of proper expert testimony" and the reality that "too often, . . . these excesses are encouraged by the lawyers presenting the testimony of the experts").

8 509 U.S. 579 (1993).

from other branches of learning and science."[9] He cited a judge's notation in a 1553 case pending at the Court of Common Bench in the United Kingdom which stated that "we do not despise all sciences but our own, but we approve of them, and encourage them as things worthy of commendation."[10] The 1553 case specifically referred to the helpfulness of experts in written language. In particular, it referenced individuals skilled in the study of Latin to assist the court which was "in doubt about the meaning" of a word.[11]

Four hundred and forty years later, in 1993, the United States Supreme Court issued a decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[12] establishing an evolved modern standard governing the admissibility of expert-witness testimony at trial. *Daubert* involved a lawsuit by infants and their guardians *ad litem* against a pharmaceutical company. They sought to recover for limb-reduction birth defects allegedly resulting from their mothers' ingestion of an anti-nausea drug during pregnancy. The trial court had granted summary judgment in favor of the drug company based, in part, on an affidavit from the company's expert. The expert had opined that the drug posed no risk factor for human birth defects.[13] In response to the affidavit, the plaintiffs proffered testimony of eight other "well-credentialed experts." These experts linked the drug to birth defects by relying "on animal studies, chemical structure analyses, and the unpublished 'reanalysis' of . . . human statistical studies."[14] The trial court rejected the plaintiffs' experts, finding that their testimony failed to satisfy the "general acceptance" standard for admissibility of expert opinions. The Court of Appeals for the Ninth Circuit agreed, relying on the 1923 case of *Frye v. United States.*[15] Under *Frye*, expert opinion based on a scientific technique was inadmissible unless the technique was "generally accepted" as reliable in the relevant scientific community.[16]

As the *Daubert* Court noted, however, Congress had enacted the Federal Rules of Evidence in 1975. The rules represented the culmination of a long journey initially launched from a 1938 recommendation by former Attorney General William D. Mitchell. Mitchell had advocated for

9 Lloyd L. Rosenthal, *The Development of the Use of Expert Testimony*, 2 L. & CONTEMP. PROBS. 403, 405 (1935).

10 *Id.* (quoting Saunders, J., in Buckley v. Rice, I Plowd. 125 (1554)).

11 Rosenthal, *supra* note 9, at 408.

12 509 U.S. at 582.

13 *Id.* at 583.

14 *Id.* at 579.

15 *Id.* at 584 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

16 *Id.*

the appointment of an advisory committee to draft a new set of evidentiary rules.[17] The January 2, 1975, version of FRE 702 stated, "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."[18] The *Daubert* Court held that FRE 702 directly addressed the admissibility of expert testimony and thus superseded the *Frye* "general acceptance" standard.[19] The Supreme Court vacated the Ninth Circuit's decision (which had been based on *Frye*) and remanded the case for further proceedings.[20]

Building on the threshold consideration of a witness's qualifications to testify as an expert, the *Daubert* Court provided a new set of factors for courts to use in determining whether opinion testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue" as required in FRE 702. These factors include (1) whether the expert's theory or technique has been tested,[21] (2) whether the theory or technique has been subjected to peer review and publication,[22] (3) the technique's "known or potential rate of error" and "the existence and maintenance of standards controlling the technique's operation,"[23] and (4) the degree of acceptance of the theory or technique within the scientific community.[24] The Court was careful to assert that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."[25] Thus, the Court emphasized that this type of evaluation should be "flexible"[26] and attentive to "principles and methodology, not on the conclusions that they generate."[27] The Court reiterated that, to be admissible, expert testimony must be both reliable and relevant.[28]

In 1999, the Supreme Court revisited the standard for admissibility of expert testimony in *Kumho Tire Company, Ltd. v. Carmichael*.[29] *Kumho Tire* involved a products-liability action brought by a vehicle driver against a tire manufacturer and a distributor. The driver sued for damages related to injuries he sustained when a tire on his vehicle blew out and the car

17 Josh Camson, *History of the Federal Rules of Evidence*, American Bar Association, https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html (last visited Mar. 12, 2018).

18 Murrell v. Cargill Meat Logistics Solutions, Inc., No. 7:05–CV–80 (CDL), 2007 WL 7629012, at *2 (M.D. Ga. Feb. 8, 2007).

19 *Daubert*, 509 U.S. at 589.

20 *Id.* at 598.

21 *Id.* at 592.

22 *Id.* at 593.

23 *Id.* at 594.

24 *Id.*

25 *Id.* at 593.

26 *Id.* at 594.

27 *Id.* at 595.

28 *Id.* at 597.

29 526 U.S. 137 (1999).

flipped over.[30] The *Kumho Tire* Court explained that, while the *Daubert* Court had focused on admissibility of *scientific* expert testimony,[31] the same principles should apply to *all* expert testimony.[32] The Court emphasized that the judiciary's "gatekeeping function" with regard to experts is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[33] The Court reasserted the importance of judges having "leeway" and "latitude" when measuring the reliability of a particular expert's opinions.[34]

In 2000, Congress amended FRE 702 to incorporate the factors and principles identified in *Daubert* and *Kumho Tire*, settling on language that was modified slightly—in style only—in the 2011 Amendments. [35] The current version of FRE 702 states,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> - the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> - the testimony is based on sufficient facts or data;
> - the testimony is the product of reliable principles and methods; and
> - the expert has reliably applied the principles and methods to the facts of the case.

Thus, when evaluating the admissibility of expert testimony, federal courts today (and state courts that have adopted the *Daubert* standard)[36] are tasked with conducting a three-part analysis, assessing (1) the expert's qualifications, (2) the reliability of the expert's methodology and underlying data, and (3) the relevance of the expert's opinions to the case at hand (i.e., the helpfulness-to-the-trier-of-fact factor).[37] Notably, the Advisory Committee Notes in the 2000 Amendments to FRE 702 state

30 *Id.*

31 *Id.* at 141.

32 *Id.* at 147.

33 *Id.* at 152.

34 *Id.*

35 FED. R. EVID. 702, advisory committee's notes to 2011 amendment.

36 For a helpful chart listing which states use the *Frye* standard and which have adopted the *Daubert* standard, see https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/.

37 Stanacard, LLC v. Rubard LLC, No. 12 Civ. 5176 (CM), 2016 WL 6820741, at *1 (S.D.N.Y. Nov. 10, 2016).

that "rejection of expert testimony is the exception rather than the rule."[38] Nonetheless, federal courts will exclude expert testimony that is "speculative or conjectural."[39]

Litigants periodically attempt to exclude an opponent's expert from trial if the witness intends to render opinions that bear on the ultimate issue in the case. They argue that such evidence "invades the province" of the trier-of-fact.[40] FRE 704(a) clarifies that an expert opinion "is not objectionable just because it embraces an ultimate issue."[41] Instead, the rule is that though an expert "may opine on an issue of fact within the [trier of fact's] province, he may not give testimony stating ultimate legal conclusions based on those facts."[42] As stated in *Burrell v. Adkins*,[43] "[a]n expert's legal conclusion invades the court's province. . . . Expert testimony on issues of law, either giving a legal conclusion or discussing the legal implications of evidence, is inadmissible."[44]

Courts also have emphasized that admissible expert testimony must journey "beyond the general experience and common understanding of laypersons."[45] Federal courts acknowledge that experts who opine about topics or subjects that are well within the average factfinder's scope of knowledge or experience provide no value to the legal process.[46] Courts recognize the gamble that a factfinder may supplant his or her own good sense and sound judgment with the expert's assessments "simply because expert analysis is dressed in a cloak of science and inflated by the degrees

38 FED. R. EVID. 702, advisory committee's notes to 2000 amendment; *see also* Hilaire v. DeWalt Industrial Tool Co., 54 F. Supp. 3d 223 (E.D.N.Y. 2014) (granting a motion to preclude the testimony of an expert because his proposed testimony was not reliable); Anthony U. Battista et. al., *Reliability at the Gate: To Allow Expert Testimony or Not, A Comprehensive Overview*, 43 THE BRIEF 28, 29, 36 (2014) ("the exclusion of expert testimony still is rare"; "exclusion of expert testimony is always the last resort for a court"); Peter Durney & Julianne C. Fitzpatrick, *Retaining and Disclosing Expert Witnesses: A Global Perspective*, 83 DEF. COUNS. J. 17, 22 (2016) ("Generally, post-*Daubert*, and despite the now-routine challenges, rejection of expert testimony for lack of reliability has been the exception rather than the rule.").

39 New York v. United Parcel Serv., Inc., 15-CV-1136 (KBF), 2016 WL 4735368, at *4 (S.D.N.Y. Sept. 10, 2016); Bah v. City of New York, 13-CV-6690 (PKC), 2017 WL 435823, at *9 (S.D.N.Y. Jan. 31, 2017).

40 *See, e.g.,* Cameron v. Teeberry Logistics, LLC, No. 3:12–CV–181–TCB, 2013 WL 7874709, at *1 (N.D. Ga. May 21, 2013); Al-Turki v. Robinson, No. 10–CV–02404–WJM–CBS, 2013 WL 603109, at *5 (D. Colo. Feb. 15, 2013).

41 FED. R. EVID. 704(a).

42 *United Parcel Serv.*, 2016 WL 4735368, at *4; *see also* United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991); Hibbett Patient Care LLC v. Pharmacists Mut. Ins. Co., No. 16-0231-WS-C, 2017 WL 2062955, at *3 (S.D. Ala. May 12, 2017). For a helpful discussion of the permissibility of expert testimony about an "ultimate issue," see Hodes, *supra* note 7, at 187–88.

43 No. CV01-2679-M, 2007 WL 2771602 (W.D. La. Aug. 17, 2000).

44 *Id.* at *1.

45 Disalvatore v. Foretravel, Inc., No. 9:14-CV-150, 2016 WL 3951426, at *9 (E.D. Tex. June 30, 2016).

46 Fast v. Coastal Journeys Unlimited, Inc., No. 6:16–CV–00060–MC, 2016 WL 7331557, at *3 (D. Or. Dec. 16, 2016); *see, e.g.,* Godfrey v. Iverson, 559 F.3d 569, 573 (D.C. Cir. 2009) (holding that no expert was needed to determine the standard of care of an athlete who stood by while his bodyguard beat someone); Boucher v. CVS/Pharmacy, Inc., 822 F. Supp. 2d 98, 108 (D.N.H. 2011) (holding that expert testimony "as to whether a cane would have reduced the risk of a fall" was unnecessary, because the "beneficial effects of a cane are a matter of common knowledge").

and training of the witness."[47] Rather than exclude the testimony, though, courts also have stated that cross examination and rebuttal experts provide sufficient vehicles for managing such a risk.[48]

Some evidence scholars have noted an "extraordinary undercurrent of rebellion" by some federal judges who "apply significantly more lenient standards for expert testimony" than FRE 702 and *Daubert* permit.[49] No attempt is made here to resolve perceived inconsistencies in federal courts' application of FRE 702 and *Daubert* across jurisdictions, nor to propose a solution for enhancing consistency therein. Instead, the focus here is on how various courts have addressed the admissibility of writing experts in particular, to clarify for new writing experts how to appropriately withstand an opposing counsel's or a court's methodical adherence to the FRE 702 and *Daubert* standards as such rules are currently written. With proper forethought and respect for the purpose of expert testimony, writing experts can indeed play a helpful role in assisting the trier-of-fact. The following section describes a variety of types of engagements of writing experts, to give new experts a sense of how such opinions and testimony have been used in other cases.

II. Litigants Have Proffered Expert Opinions on Writings Across a Spectrum of Legal Matters

Against the foregoing backdrop of FRE 702, *Daubert*, and *Kumho Tire*, litigants have proffered experts in writing and written works to render opinions in a variety of legal matters and capacities. Some writing experts have provided affidavits, reports, or deposition testimony that assisted in settling legal matters without the need for trial,[50] and others have gone the distance and testified at trial.

47 *Fast*, 2016 WL 7331557, at *3.

48 Nielsen Audio, Inc. v. Clem, No. 8:15-CV-2435-T-27AAS, 2017 WL 1483353, at *3 (M.D. Fla. April 24, 2017); *see also* Battista et al., *supra* note 38, at 28 ("Although federal courts have great flexibility in their gatekeeping capacity, they would much rather rely on cross-examination to weed out evidence that might be premised on less than adequate methods than exclude an expert's opinion in its entirety.").

49 David Bernstein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 NOTRE DAME L. REV. 27, 29, 30 (2013); *see also* David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 WM. & MARY L. REV. 1, 8 (2015) ("[A] number of courts have simply ignored the Rule 702 amendment . . ."); *see also* Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 374, 388 (2012) (noting that "circuit courts readily affirm district courts' qualification of law enforcement experts [in federal drug prosecutions] that do not apply" the *Daubert* factors, and that "the federal judiciary is largely ignoring the requirements of Rule 702").

50 Notably, a lawyer might alternatively engage an expert as a non-testifying expert; FRCP 26(a)(2)(A) does not require litigants to disclose the identity of non-testifying consultants, and such individuals are not required to submit written reports. Durney & Fitzpatrick, *supra* note 38, at 19–20.

A consideration of the role of a "writing expert" in litigation might prompt one first to assume we are referring to *handwriting* experts. Handwriting experts typically have educational qualifications in the study of forensic document analysis, or professional experience working in "questioned document" laboratories. They examine human penmanship to resolve issues of authenticity.[51] In contrast, the writing experts at issue here are retained by litigants to delve into the *methodology* of producing a written document. These experts might be tasked with analyzing the concepts, sources, language, vocabulary, and punctuation selected by the author in the synthesizing, drafting, editing, and revising process. Or such experts might focus on the *end product* of the writing process. Litigants might be disputing a document's substantive or technical quality, the context of the language therein, its sufficiency in scope, or its clarity. Alternatively, perhaps these types of experts will *compare* two writings: their content, context, structural framework, or style.

In the cases described in the following sections, many writing experts qualified as such by virtue of their professional roles as professors of creative writing, legal writing, English, literature, linguistics, or rhetoric. Others had significant professional or industry experience analyzing categories of documents such as contracts, police affidavits, white papers, patent applications, or music lyrics. The following case survey is intended to inform new writing experts (and lawyers) about the varieties of subject matter and scope in expert engagements involving writings, but also to clarify the standard for admissibility of expert testimony about a written work. In preparing to render expert opinions and ultimately testify at trial, writing experts must consider matters of reliability of methodology, relevance, limitations on the ability to opine on the ultimate issues in the case, and the provision of context beyond the range of knowledge or experience of the trier-of-fact.

A. Litigants Often Engage Writing Experts to Provide Opinions on the Grammatical Construction of a Writing

In today's arena of modern written communications, grammatically challenged Twitter "tweets"[52] and poorly punctuated Facebook postings

51 *See, e.g.*, In re Lawrence Michael O'Brien, 555 B.R. 771, 775 (D. Kan. 2016) (expert examined signatures on loan documents); Simone Ling Francini, *Expert Handwriting Testimony: Is The Writing Really On The Wall?*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 99, 108 n.78 (2006). For helpful articles about the practice of presenting and cross-examining handwriting experts in court, see Marcel B. Matley, *Using and Cross-Examining Handwriting Experts*, 13 PRAC. LITIGATOR 5, 21 (2002); Thomas W. Vastrick, *Forensic Handwriting Comparison Examination in the Courtroom*, 54 JUDGES J. 3, 32 (2015). For an article about the debate over the validity of handwriting experts see Paul Giannelli & Carin Cozza, *Forensic Science:* Daubert *Challenges to Handwriting Comparisons*, 42 No. 3 CRIM. L. BULL. 3, article 9 (2006).

52 *See generally,* Trump Grammar, Twitter, https://twitter.com/trumpgrammar?lang=en; Polly Higgins, *Donald Trump's grammar, syntax errors: Times when the English language took a hit*, *AMNEWYORK* (Mar. 10, 2017), http://www.amny.com/

are shrugged off by some as unimportant nit-picking. Others might argue that true *expertise* in and emphasis on proper grammar are needed now more than ever. Indeed, courts have recognized the unimpeachable qualifications of certain writing experts in the areas of grammar conventions and language construction. Judges will allow these experts to render opinions at trial about the meaning of words and punctuation that will assist the trier-of-fact. Judges will disallow testimony by experts whose opinions intrude upon the trier-of-fact's ability to read text and construe and interpret language and typography for themselves.

1. Grammar Experts Who Do Not Provide Insights Beyond the Capability of the Trier-of-Fact Risk Exclusion Under *Daubert* and FRE 702

When legal writers are asked to list names of experts in legal writing and other genres of written work, of course Professor Bryan A. Garner immediately springs to mind. He is the editor-in-chief of *Black's Law Dictionary* and the author of numerous widely used legal writing books including *The Redbook: A Manual on Legal Style*. Professor Garner is a well-known and highly regarded legal writing expert. Despite Professor Garner's unassailable qualifications as an expert on legal writing, drafting, editing, and style, a federal court excluded his opinion testimony in a 2013 case entitled, *Lind v. International Paper Co.*[53]

In *Lind*, a company and several of its terminated employees disputed the terms of Change in Control (CIC) agreements after a merger.[54] The company contended that the employees had received the full amount of their allocated compensation in accordance with the express language in the CIC agreements.[55] Alleging ambiguity in the phrasing of the agreements, the employees argued that the company owed them additional bonus payments and incentive awards. The employees designated Garner as their expert witness. He prepared an expert report opining that the language of the bonus provision in the CIC agreements was ambiguous.[56] He further provided a construction of the terms of the

news/donald-trump-grammar-syntax-errors-times-when-the-english-language-took-a-hit-1.124713 17; *see also* Caitlin Gibson, *The Trump administration has a spelling problem. But how bad is it really? We investigate.*, WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/ news/arts-and-entertainment/wp/2017/02/15/ the-trump-administration-has-a-spelling-problem-but-how-bad-is-it-really-we-investigate/?utm_term=.dae7366d5a30; Lee Moran, *Donald Trump's Tweet About GOP's 'Failed Obamacare Replacement' Backfires,* HUFFINGTON POST (July 14, 2017, 5:55 AM EST), http://www.huffingtonpost.com/ entry/donald-trump-failed-obamacare-replacement-tweet_us_ 59687b48e4b0 d6341fe7db82; Carla Herreria, *Merriam-Webster Steps In After Trump Tells America To 'Heel'*, (Aug. 19. 2017, 7:26 PM EST), http://www.huffingtonpost.com/entry/merrian-webster-trump-heel-heal_us_5998aeeee4b01f6e801ef6f9.

53 Mar. 12, 2014, Order, available in the docket of Lind v. Int'l Paper Co., No. A–13–CV–249–DAE, 2014 WL 4187128 (W.D. Tex. Aug. 21, 2014).

54 *See* Defendants' Opposed Motion to Exclude the Testimony of Plaintiffs' Expert Bryan A. Garner, *Lind*, No. 1:13-CV-00249-LY, 2013 WL 11089050, at *1 (W.D. Tex. Dec. 13, 2013).

55 *Id.* at *1.

56 *Id.*

agreements, based on grammatical rules.[57] The company filed a motion to exclude Garner's testimony, asserting that his opinions on ambiguity and grammatical interpretation represented legal conclusions that were neither relevant nor reliable.[58] In its brief in support of the motion, the company recited the principle that whether a contract term is ambiguous is a "pure question of law" for the court to decide and therefore outside the ambit of expert testimony.[59]

The company's lawyers further clarified the distinction between admissible and inadmissible expert testimony concerning interpretation or construction of a writing. They acknowledged a circumstance in which an expert could testify about trade usage of terms in an agreement:

> [W]hile in some limited situations expert testimony on the issue of "trade usage" has been allowed *after* a determination of ambiguity, here, Garner's opinions are not based on trade usage and not offered to explain specialized terms. . . . Garner offers his commentary on the language of the agreements solely in light of purported grammatical principles, based not on any experience in the industry but rather on his experience as an expert on legal writing. "In the absence of specialized trade usage, expert testimony regarding proper contract interpretation is inadmissible, as is expert testimony regarding the legal significance of the contract language."[60]

The company insisted that Garner's testimony would not aid the trier-of-fact, and therefore it fell short of the FRE 702 standard.[61]

In their opposition brief, the employees *conceded* that contractual ambiguity is a question of law within the court's province.[62] Instead, the employees emphasized that "[w]hen the fact finder interprets an ambiguous contract, the rules of grammar are to be followed."[63] Therefore, they argued that Garner's testimony would help the trier-of-fact by giving context to principles of grammatical construction. To lay the foundation for his expert testimony, the employees reiterated that Garner is "a well-recognized legal linguistic expert with special expertise in lexicography, drafting conventions, linguistics and the usage of the English language [who] has spent his entire professional life analyzing, writing about, and teaching drafting, and is nationally recognized as an expert in linguistics, lexicography, usage, and construction."[64]

57 *Id.*

58 *Id.* at *3.

59 *Id.*

60 *Id.* (internal citations omitted).

61 *Id.*

62 Response to Motion to Exclude Bryan A. Garner, *Lind*, No. 1:13-CV-00249, 2013 WL 11089057 (W.D. Tex. Dec. 23, 2013).

63 *Id.*

64 *Id.*

In its reply brief,[65] the company pointed out that the employees' opposition brief cited no cases in which a court permitted testimony by a grammar expert to help the trier-of-fact interpret phrasing within an agreement.[66]

The Texas federal court granted the company's motion to exclude Garner's testimony.[67] The court cited FRE 702, *Daubert*, and *Kumho Tire*, and held that Garner's opinions on ambiguous contract language constituted legal conclusions.[68] The court reiterated the rules that "[i]nterpretation of an unambiguous contract is a question of law for courts," and "[a] trial court cannot consider expert testimony in making the determination that the contract is ambiguous."[69] The court acknowledged the exception allowing expert opinions that provides context for contractual terms invoking "specialized trade usage." The scope of Garner's testimony did not include trade-usage opinions.[70] The court determined that Garner's opinions based solely on grammatical principles were "inadmissible as expert testimony regarding the legal significance of the contract language itself."[71]

Similarly, in *Coyote Portable Storage, LLC v. PODS Enterprises, Inc.*,[72] a litigant designated Professor Ross Guberman as an expert to render opinions regarding the meaning and interpretation of royalty provisions in a portable storage facility franchise agreement. [73] Professor Guberman is an "expert grammarian" and lawyer who has taught legal drafting at the George Washington University Law School.[74] Professor Guberman planned to give expert testimony regarding "the grammatical nuances of a sentence," "proper use of commas, the correct syntactic interpretation of the sentence, and the essential rules of contract drafting that compelled his conclusions."[75] The franchisee filed a motion *in limine* to exclude Professor Guberman from testifying at trial, arguing that "it is the Court's job alone to interpret and give meaning to the terms of a contract."[76] In granting the motion to exclude the expert testimony, the Georgia federal court noted that he was "not testifying about a technical term in the contract which needs explaining."[77]

65 Reply in Support of Defendants' Opposed Motion to Exclude the Testimony of Plaintiffs' Expert Bryan A. Garner, *Lind*, No. 1:13-CV-00249-LY, 2013 WL 11089053 (W.D. Tex. Dec. 27, 2013).

66 *Id.*

67 Mar. 12, 2014, Order, available in the docket of *Lind*, 2014 WL 4187128.

68 *Id.* at *4.

69 *Id.*

70 *Id.*

71 *Id.* at *5.

72 No. 1:09–CV–1152–AT, 2011 WL 1870593 (N.D. Ga. May 16, 2011).

73 *Id.* at *2.

74 *Id.* at *4, n.3.

75 *Id.* at *4.

76 *Id.*

77 *Id.* at *5.

Further, a New York federal court rejected grammar-interpretation assistance from a writing expert in *Sand v. Greenberg*.[78] In *Sand*, the litigants disputed the interpretation of one party's written $525,000 Offer of Judgment made pursuant to FRCP 68. The civil procedure rule allows a party to make an offer to permit the court to enter judgment against it on specified terms. If the opposing party rejects such offer and does not obtain a more favorable judgment, the offeror is entitled to recover its post-offer litigation costs. The plaintiff served a Notice of Acceptance of the offer and filed a Proposed Final Judgment. The original written Offer of Judgment contained this language: "inclusive of all damages, liquidated damages and/or interest plus reasonable attorneys' fees, costs and expenses actually incurred." Upon the filing of the Notice of Acceptance, the parties disagreed over whether the foregoing language meant that the dollar amount of the offer *included* attorneys' fees.[79]

The defendant who made the original Offer of Judgment proffered a legal writing professor from a Philadelphia law school as an expert to opine on the interpretation of the attorneys' fees phrasing.[80] Rejecting the expert, the court asserted that it "does not need the assistance of the expert to interpret this sentence."[81] Performing its own grammatical analysis, the court distinguished between the actual language of the offer, which included the words "and/or" and "plus," and possible alternative phrasing which could have stated the words "inclusive of" followed by a list of items linked by serial commas.[82] The court interpreted the actual language as limiting the scope of the word "inclusive" to the words that immediately followed: solely damages, liquidated damages, and interest.[83] The court applied grammar rules and dictionary definitions to analyze the absence of a comma and the presence of the word "plus." Ultimately, the court concluded that attorneys' fees constituted a separate item from the categories of damages included in the offer.[84]

In contrast, in *American Patent Development Corp. v. MovieLink, LLC*,[85] a trial judge adjudicating a patent claim considered the expert

78 No. 08-CIV-7840(PAC), 2010 WL 69359 (S.D.N.Y. Jan. 7, 2010).

79 *Id*. at *1.

80 *Id*. at *2.

81 *Id; see also* United States v. Stile, No. 1:11–CR–00185–JAW, 2013 WL 6448594 (D. Maine Dec. 9, 2013) (rejecting a *pro se* motion for funds to hire an English-language grammatical expert to analyze the grammar in a statute under which a defendant was charged; acknowledging that the defendant had a court-appointed lawyer "who possessed a Juris Doctor degree and who is fully capable of analyzing the grammatical structure").

82 *Sand,* 2010 WL 69359, at *3.

83 *Id.*

84 *Id.* at *3, *4.

85 604 F. Supp. 2d 704 (D. Del. 2009).

testimony of an English professor who provided opinions regarding "the function of a comma in English grammar" and its intentional use by authors of a patent claim.[86] Denying opposing counsel's motion to strike the expert's declaration, the court (without much analysis) held that the grammar expert was "qualified to testify as to the function of a comma in English grammar and . . . her methods of analysis were sufficiently reliable for her opinion to be admissible under Rule 702."[87]

Linguistics[88] scholar Professor Lawrence M. Solan helps shed light on circumstances in which language experts should be regarded as helpful to the trier-of-fact, even if at first glance, the interpretive activity seems like it might "usurp the role of the judge or the jury." Professor Solan and his co-author, Professor Peter Tiersma, explain,

> In cases involving complex language about which there is understandable disagreement between the parties, linguists can serve a role by acting as tour guides, walking the judge or jury through the disputed language, and explaining how the disputed language is an example of well-studied linguistic phenomena. The linguist's ultimate interpretation is not very important, and sometimes should not be given at all.[89]

In other words, if experts "act as guides through difficult passages," using their expertise "to explain how it is that various interpretations are available, their testimony is more likely to be accepted by courts than if they attempt to tell a court what a legal text means."[90]

2. Writing Experts Who Explain Terms of Art and the Usage of Grammar and Phrasing in the Context of a Particular Trade or Industry Should Withstand *Daubert* and FRE 702 Scrutiny

A federal district court in Maryland explained the difference between (1) an expert's focus on telling a trier-of-fact how to construe an agreement and (2) an expert's effort to place certain language and grammatical constructs within the context of a particular trade or industry. The

86 *Id*. at 708, 711.

87 *Id.* at 708; *see also* Central Elec. Co-op. v. U.S. West, Inc., No. Civ. 05–6017–AA, 2007 WL 4322577, at *5 (D. Or. Dec. 4, 2007) (considering the analysis of an "expert in English grammar, discourse analysis and the use of computer-assisted techniques for vocabulary and grammar analysis" in interpreting a public-utility regulation).

88 Professor Solan writes about the usefulness of linguistics experts at trial, which covers broader territory than the expert analysis on written works discussed here. For instance, Professor Solan describes experts in dialects, accents, phonetics, and discourse analysis, to name but a few categories of forensic linguistics. *See, e.g.*, Peter Tiersma & Lawrence M. Solan, *The Linguist on the Witness Stand: Forensic Linguistics in American Courts*, 78 LANGUAGE 221, 223 (2002) (noting "the presence of more than one hundred published judicial opinions that deal with linguistic expertise"); Lawrence M. Solan, *Linguistic Experts as Semantic Tour Guides*, 5 FORENSIC LINGUISTICS 87 (1998) [hereinafter Solan, *Linguistic Experts*]; Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?,* 66 TENN. L. REV. 1167 (1999) [hereinafter Solan, *Legal Systems*].

89 Tiersma & Solan, *supra* note 88, at 234–35.

90 *Id*. at 234.

former lies within the province of the trier-of-fact, while the latter brings information to the table that may be outside the common knowledge and experience of the factfinder. In 1859, in *Day v. Stellman,*[91] while interpreting the text of patents, assignments, and other written instruments, the court noted,

> while the interpretation and construction of all written instruments is for the court, it nevertheless will bring to its aid the testimony of witnesses to explain terms of art, and make itself acquainted with the material with which the contracts deal, and with the circumstances under which they were made; but neither the testimony of witnesses in general, nor of professors, experts or mechanics, can be received, to prove to the court, what is the proper or legal construction of any instrument of writing. Such evidence is inadmissible.[92]

Patents and insurance contracts are areas in which writing experts should be welcome at trial *if* they enlighten the trier-of-fact to context not otherwise discernable by a layperson.[93]

In 2013, in interpreting language of insurance contracts (a genre of writing which some courts have recognized as "confusing"[94]), the Maryland federal court in *Emcor Group, Inc. v. Great American Insurance Co.*[95] recited the trade-usage rule.[96] In *Emcor*, one party sought to offer opinion testimony of an expert in fidelity-insurance contracts to explain the meaning and scope of the policy's coverage language. The court deemed the proposed expert testimony "hardly illuminating,"[97] declaring that the expert could not opine on how the contracting parties understood the policies, nor on the construction of the insurance contract, unless a particular term carried "a peculiar meaning in a trade, business or profession."[98]

Also in the insurance context, however, Professor Susan Chesler of Arizona State University's Sandra Day O'Connor College of Law was retained as an expert to opine regarding the applicability of a policy exclusion in an insurance coverage dispute.[99] Professor Chesler teaches

91 7 F. Cas. 262 (D. Md. 1859).

92 *Id.* at 263–64.

93 *See, e.g.,* Tiersma & Solan, *supra* note 88, at 234.

94 Adamson v. Wadley Health Sys., No. 07-1081, 2008 WL 4649084, at *12 (W.D. Ark. Oct. 20, 2008); Quintana v. State Farm Mut. Automobile Ins. Co., No. 14CV00105 WJ/GBW, 2014 WL 11512633, at *7 (D.N.M. Dec. 4, 2014).

95 No. ELH-12-0142, 2013 WL 1315029 (D. Md. Mar. 27, 2013).

96 *Id.* at *9 (internal citations omitted).

97 *Id.* at *22, n.14.

98 *Id.* (internal citations omitted).

Legal Method and Writing, Legal Advocacy, Contracts, Contract Drafting and Negotiating, and Intensive Legal Research and Writing. In the federal lawsuit, she submitted an expert report containing her "opinion of the meaning and applicability of that exclusion based on contract interpretation principles generally, and most specifically on the plain meaning of the language used by the drafter."[100] Opposing counsel deposed Professor Chesler, but the matter ultimately settled before she could testify at trial.[101] Opposing counsel did not file a motion *in limine* to exclude her testimony.

Again, Professor Solan's work offers guidance regarding when an expert should be permitted to opine regarding "the meaning of texts." He refers to the usefulness of experts in parsing "tricky passages—passages about which the parties argue sensibly in favor of conflicting positions."[102] He posits that "if a party can give a juror more confidence in the rightness of her position by converting, at least in part, an intuitive sympathy into a structured understanding, then the Rules of Evidence say that the party should be allowed to do so."[103]

Further, a specific focus on *business usage* of language and punctuation rather than mere grammatical construction perhaps tilted the scale in favor of a tribunal's reliance on testimony from a writing expert in an ethics inquiry concerning a judicial candidate in Oregon. Professor Rebekah Hanley, a professor of legal research and writing at the University of Oregon School of Law, was retained to render expert opinions about the meaning of a comma in a judicial candidate's biographical statement. Professor Hanley's expert qualifications stemmed from her legal writing training, experience, and knowledge. She served in two federal clerkships, worked in a law firm, taught legal writing for over a decade, authored numerous publications, and delivered many presentations within the legal writing academy. She also held the role of Assistant Dean for Career Planning and Professional Development for four years, advising students on résumé-drafting.[104]

99 Email from Susan Chesler, Clinical Professor of Law, Ariz. State Univ., to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Research on Legal Writing Professors as Expert Witnesses* (June 7, 2017, 4:41 PM EST) (copy on file with author).

100 *Id.*

101 *Id.*

102 Tiersma & Solan, *supra* note 88, at 94.

103 *Id.* at 94, 97 (referring to the helpfulness of experts in putting a large or complicated "corpus" of text in context, or raising "to the jury's attention a range of possible interpretations that is available to everyone, but which might have gone unnoticed").

104 *Professor Rebekah Hanley Resume*, UNIV. OF OR. SCH. OF LAW, https://law.uoregon.edu/images/uploads/entries/RHanley_resume_March_2016_v2.pdf (last visited Mar. 23, 2018).

In Deschutes County, Oregon, a concerned party had filed an anonymous complaint against a circuit-court judge for allegedly misrepresenting his qualifications in a 2014 Voters' Pamphlet. The judge had included five words punctuated by a comma: "Trial Academy, Stanford Law School." The judge never had matriculated at, nor graduated from, Stanford. He had attended a weeklong insurance defense training program on Stanford's campus.[105]

At first glance, this matter seemed to turn on the grammatical construction of a single comma. On its face, applying the same principles as the *Lind* court did, a federal court (rather than the Oregon Commission on Judicial Fitness and Disability) might have assessed this dispute as not worthy of expert testimony. Of course, French writer, Flaubert, perhaps would object; there is some debate over whether he or Oscar Wilde was the original source of the quote, "I spent the morning putting in a comma and the afternoon removing it."[106] Professor Hanley did not prepare a written expert report, but provided testimony under oath at a judicial-fitness hearing before the Oregon Commission. This tribunal certainly has different evidentiary standards than federal courts applying FRE 702 and *Daubert*.[107] Nonetheless, the result in this case helps distinguish between basic grammar principles and punctuation in the context of trade usage. Rather than focusing solely on the grammatical impact of the comma, Professor Hanley opined about the common practice of résumé writers to use the comma format in describing educational and professional qualifications and experience. She indicated that, while the judicial candidate "could have used greater 'precision,'" the reference to Stanford was not "misleading."[108] Opposing counsel raised no objections regarding her testimony. The Commission unanimously voted to dismiss the complaint against the candidate.[109]

Based on the foregoing cases, writing experts should be cautious about rendering opinions that veer into the judicial lane of determining contract ambiguity, that state legal conclusions regarding the effect of

105 Scott Hammers, *Miller Ethics Complaint Heard*, BEND BULL., (Oct. 16, 2015 12:01 AM) http://www.bendbulletin.com/localstate/3600839-151/miller-ethics-complaint-heard.

106 *See* David Galef, Letter to the Editor, *Flaubert's Comma*, N.Y. TIMES (Oct. 20, 1991) http://www.nytimes.com/1991/10/20/books/ l-flaubert-s-comma-084991.html; https://quoteinvestigator.com/tag/gustave-flaubert/.

107 The Commission applies the following evidentiary standard: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible." OR. COMM'N OF JUDICIAL FITNESS DISABILITY R. P. 13(d), http://www.courts.oregon.gov/rules/Other%20Rules/CJFDRulesOfProcedure.PDF (last visited Mar. 23, 2018).

108 Hammers, *supra* note 105.

109 Claire Withycombe, *Commission Recommends Dismissal of Complaint Against Deschutes Judge*, BEND BULL., (Jan. 7, 2016, 5:53 AM) http://www.bendbulletin.com/localstate/deschutescounty/3884128-151/commission-recommends-dismissal-of-complaint-against-deschutes-judge.

written language, or that merely apply fundamental grammar principles, which actions could be construed in their basic form as infringing on "institutional roles."[110] Instead, a court is more likely to accept the assistance of a writing expert who can shed light on words, phrases, and grammatical structures which (1) have particular usage, meaning, or significance in a trade, business, or profession, (2) fit within the larger context of a complex document, or (3) are subject to a range of multiple interpretations which are not necessarily apparent to the trier-of-fact.[111]

B. Lawyers Engage Writing Experts to Opine on the Substantive Quality of Writings

Assessing the *quality* of a piece of writing—perhaps in creative genres like poetry, literature, or memoir as contrasted with business, legal, or technical written works—may at first seem like a subjective endeavor. We might think that the positive attributes of a collection of an author's words are "in the eye of the beholder."[112] Yet courts have considered opinion testimony of experts about the merit or value of writings in both literary and business scenarios.

Litigants have offered writing experts in cases involving alleged "obscene" writings. This perhaps would have piqued Flaubert's interest, as he was the victor in his own 1857 obscenity trial involving *Madame Bovary*. For example, in *United States v. Whorley*,[113] the government charged a defendant with importing "obscene material" when he electronically obtained and transmitted sexually explicit anime cartoons and emails containing graphic images of children.[114] To challenge the government's allegation under 18 U.S.C. § 1462 (1996) that he had used a computer to transport "obscene" material, the defendant proffered an English teacher as an expert witness. The expert planned to render an opinion regarding "how juvenile sexual content often accompanies the educational experience of literature and creative writing."[115] The government objected to the introduction of any expert testimony concerning the history of juvenile nudity in art and filed a motion to exclude the expert's testimony.[116] In denying the motion, the court cited FRE 702 and the *Daubert* standard, noting courts' "wide discretion" to

110 Tiersma & Solan, *supra* note 88, at 237; Solan, *Linguistic Experts*, *supra* note 88, at 90.

111 Solan, *Linguistic Experts*, *supra* note 88, at 97.

112 Margaret Wolfe Hungerford, MOLLY BAWN (1878).

113 400 F. Supp. 2d 880 (E.D. Va. 2005).

114 *Id*. at 881.

115 *Id*. at 882.

116 *Id.*

admit or exclude expert testimony.[117] The *Whorley* court evaluated how the expert planned to compare the defendant's electronic correspondence "with works of literary value such as *Lolita*, *The Color Purple*, *Tender is the Night* and *A Diving Rock on the Hudson*,"[118] focusing on language and content. In the court's view, the proposed testimony satisfied FRE 702[119] by assisting the jury in understanding whether the defendant's emails "appeal to the prurient interest or lack serious literary value"[120]—the test for obscenity under the Supreme Court test in *Miller v. California*.[121]

Similarly, in a California state case, *In re Martinez*,[122] a prison inmate filed a habeas corpus petition claiming that prison personnel should not have confiscated a book in his possession on the grounds of obscenity. The prison officials deemed the book—*The Silver Crown*, by Mathilde Madden—to be contraband because it contained explicit sexual content and potentially could incite violence.[123] The court described the book as "involv[ing] werewolves, witches, a ghost, and magic spells. It is 262 pages long with 44 chapters. There is a fair amount of violence in it, but that is not dwelt upon and is not shocking or gory."[124] The court noted that the book contained "a great number of graphic sexual encounters" between consenting adults.[125] The prison's operational procedure banned "obscene material."[126] In his habeas petition, the prisoner contended that the book was no more violent than "recognized great works of literature, such as Homer's *Iliad* and Dostoyevsky's *Crime and Punishment*."[127] In support of his "traverse" (the document filed by the prisoner in response to the government's opposition to the habeas petition), the prisoner attached a declaration by a professor of creative writing. The professor rendered an expert opinion that the prisoner's book was not obscene, but instead possessed "literary merit."[128]

117 *Id.*

118 *Id.* at 884.

119 *Id*. at 885.

120 *Id.*

121 413 U.S. 15 (1973).

122 216 Cal. App. 4th 1141 (Cal. Ct. App. 2013). Scholars have indicated that California, which had long held out against adopting *Daubert*—"waded into the *Daubert* tide" in 2012 in *Sargon Enterprises, Inc. v. University of Southern California*, 288 P.3d 1237 (Cal. 2012). *See* David L. Faigman and Edward J. Imwinkelried, *Wading Into the Daubert Tide:* Sargon Enterprises, Inc. v. University Of Southern California, 64 HASTINGS L.J. 1665 (August 2013).

123 216 Cal. App. 4th at 1144.

124 *Id*. at 1145.

125 *Id.*

126 *Id*. at 1146.

127 *Id*. at 1148.

128 *Id*. at 1149.

Evaluating whether the book had "literary value," the court expressly considered the expert's declaration, first acknowledging the professor's credentials. He was a creative-writing professor at San Francisco State University who also taught at other institutions, wrote books, and had received literary awards.[129] The expert opined,

> [T]he book is about more than sex. . . . [I]t seems to me that the book is an exploration of the confines of a certain society, one that is in some ways similar to our own but that also contains magical elements. It's about freeing oneself from one's greatest fears, and in this way this is clearly a work of literature. It's not Tolstoy, fine, but this author knows how to move story, carry out a plot, with a theme, and how to give her characters a certain depth characteristic of literary fiction.[130]

The court pointed out that the prison proffered no opposing expert to explain that the book lacked "serious literary value."[131] Nodding to the prisoner's expert's opinion, the court credited the book's literary devices, plot, points of view, characters, dialogue, retrospective, and suspense.[132] Ultimately, the court held that the book did "not lack serious value and thus should not have been withheld" by the prison on the basis of obscenity.[133]

Further, in the business context, in *American Association for the Advancement of Science v. Hearst Corp.*,[134] the publisher of *Science* magazine sued the publisher of *Science Digest* magazine for trademark infringement after the latter produced a revised edition of its periodical that resembled its competitor. The court heard evidence and testimony at a five-day trial.[135] In ruling on the trademark-infringement claim and a motion for a preliminary injunction, the court referenced *Science* magazine's expert in the area of science writing who "acknowledged that the [*Science Digest*] magazine does contain some articles of good quality."[136]

Conversely, in *Parsi v. Daioleslam,*[137] the court rejected an expert proposed by plaintiffs who were asserting a defamation claim against a journalist. The proposed expert planned to offer opinions that the journalist's written work fell below the applicable standard of care for quality. The expert was an Associate Professor of Journalism and Mass Communication at the University of North Carolina.[138] In preparing his

129 *Id*. at 1161.

130 *Id*. at 1161–62.

131 *Id.*

132 *Id.*

133 *Id*. at 1163.

134 498 F. Supp. 244 (D.D.C. 1980).

135 *Id*. at 247.

136 *Id*. at 250.

137 852 F. Supp. 2d 82 (D.D.C. 2012).

138 *Id*. at 86.

expert report which was dubbed "terse" by the court, the professor had read merely a few English-language articles written by the journalist. He had examined none of the journalist's articles written in Farsi and had reviewed no discovery in the case.[139] The journalist filed a motion *in limine*.

In applying the FRE 702 standard, the court first determined that the facts and data upon which the expert based his opinions were "patently insufficient for the task he was given."[140] Further, the expert gave vague responses in his deposition when asked to describe his methodology. He could not convincingly explain why he chose a one-page 1996 Society of Professional Journalists' Code of Ethics as the applicable professional standard.[141] He failed to explain how he reliably applied any relevant professional standard to the journalist's writings. In fact, he testified that he did not systematically check the writer's sources to determine if assertions in his articles could or could not be substantiated.[142] He did not itemize any unfounded facts or deceptive statements in the journalist's work[143] that fell below the alleged standard of care. He could not identify any of the sources linked in the journalist's online articles that the expert purportedly had read or tried to verify.[144] The court granted the journalist's motion to exclude the expert from testifying at trial.[145]

The foregoing cases demonstrate that writing experts analyzing the *quality*[146] of a writing should withstand *Daubert* and FRE 702 scrutiny when they (1) identify recognized quality criteria within a given writing genre or industry, (2) provide examples of writing that meets such criteria, and (3) then use a reliable methodology to compare the written work in question against the genre or industry standard. In contrast, writing experts likely will be deemed unhelpful to the trier-of-fact and excluded

139 *Id.*

140 *Id.* at 89.

141 *Id.* at 86, 89.

142 *Id.* at 90.

143 *Id*. at 87.

144 *Id.*

145 *Id.* at 90.

146 Distinct from analyzing content-focused attributes of a piece of writing like the experts in the foregoing cases, a writing expert may be retained to provide insights on *technical* quality, focusing on standards of presentation and professionalism. In *Constant v. Mellon Bank, N.A.*, No. 02:03CV1706, 2006 WL 1851296 (W.D. Pa. July 3, 2006), a marketing specialist sued her employer for wrongful termination. A prior year-end evaluation had critiqued her "lack of attention to detail" in written documents she had produced in her marketing role, and encouraged her to "focus on self-editing and learning to proofread her own work." *Id*. at *3. The employee engaged an adjunct associate professor at a college to render an expert opinion that the edits and revisions by other personnel to her written work were "arbitrary" and not based on "lack of quality." *Id*. at *8, n.5. In a written report, the expert opined that the employee's writing "meets or exceeds the qualifications for a professional writer's post." *Id.* The trial court referenced the expert report, yet granted summary judgment in favor of the employer. *Id*. at *11.

from testifying at trial if they (1) review an insufficient body of facts or data relevant to the legal matter, (2) rely upon a flawed or unrecognized standard or methodology for evaluating writing quality, or (3) apply a recognized standard or methodology in an unreliable way.

C. Parties Engage Writing Experts to Opine on the Context of Language in a Writing

Experts also may be retained to provide opinions regarding the cultural, artistic, or professional context of a written work. For instance, in *United States v. Herron*,[147] the government charged an aspiring "gangsta rap" artist with numerous counts of racketeering, conspiracy, and firearms offenses. The government sought to present evidence at trial in the form of music videos showing the artist rapping lyrics referring to gangs, violence, and drug dealing.[148] The purpose of the government's video evidence was to prove the existence of the rapper's "criminal enterprise," his leadership thereof, his "unlawful possession and use of firearms," and related crimes.[149] In response, the rap artist proffered an expert to testify about the context of the rap lyrics. Specifically, the expert planned to render the opinion that, "based on the traditions, patterns, roots, and antecedents of hip-hop music, including gangsta rap, . . . song lyrics and expressions by artists in this medium which are designed to create or develop their image, and/or promote their work, may not be taken as expressions of truth by virtue of being stated or sung by the artist."[150] The government filed a motion to exclude the expert testimony. In evaluating the motion, the court first described the expert's qualifications:

> Dr. Peterson is the Director of Africana Studies and Associate Professor of English at Lehigh University and holds a Ph.D. in English from the University of Pennsylvania. . . . He has written extensively on hip-hop culture, themes, and narratives, including publications in peer-reviewed journals and contributions to encyclopedias and anthologies. . . . He has appeared as a commentator on these topics on national news media. . . . He has also conducted interviews of prominent rap artists such as Snoop Dogg and Nas.[151]

The court acknowledged the expert's specialized knowledge and corresponding qualifications under FRE 702 "[b]ased on his historical, ethnographic, and linguistic study of hip-hop."[152]

147 No. 10–CR–0615 (NGG), 2014 WL 1871909 (E.D.N.Y. May 8, 2014).

148 *Id*. at *1.

149 *Id.*

150 *Id.* at *7.

151 *Id*.

152 *Id.*

In its motion *in limine*, the government argued that the court should exclude the expert from trial because his testimony "(1) cannot be the product of reliable principles or methods, (2) would not be helpful to jurors, and (3) goes beyond the bounds of proper expert testimony."[153] The court rejected each argument, finding that the expert would provide useful context for the jury, especially jurors unfamiliar with hip-hop or rap, about the truthfulness or authenticity of statements made in gangsta rap lyrics.[154] To protect against the risk of invading the province of the trier-of-fact, the court indicated that it would limit the scope of the expert's testimony to "the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap."[155] Regarding his methodology, the expert could describe and compare examples of lyrics from the music genre, but he could not "opine on the truth or falsity of the lyrics or representations in the rap-related videos" or the artist's other lyrics. He also would not be permitted to decipher those statements for the jury.[156] The court also invited the government to proffer its own qualified counter-expert on this subject matter.[157]

The *Herron* case contrasts with *United States v. Wilson,*[158] in which the same federal court eight years earlier precluded an expert in the field of rap culture from testifying that rap lyrics routinely describe violent, sexual, and other provocative acts not necessarily "rooted in actual events."[159] In *Wilson*, the government charged a defendant with the murder of two undercover New York Police Department detectives.[160] During a search of the defendant's pockets during his arrest, police found handwritten rap lyrics containing violent references to the act of shooting individuals in the head. The language alluded to police equipment, such as protective vests and Glock firearms.[161] The defendant engaged a professor of Black American Studies at the University of Delaware[162] as a testifying expert to counter the government's contention that the lyrics found in the defendant's pocket constituted a handwritten confession. While noting that expert testimony about rap culture has been admitted in copyright and trademark cases,[163] the court rejected the expert's opinion that the handwritten lyrics were not a confession.[164] Regarding methodology, the

153 *Id.*

154 *Id.*

155 *Id.* at *8.

156 *Id.*

157 *Id.*

158 493 F. Supp. 2d 484 (E.D.N.Y. 2006).

159 *Id*. at 486.

160 *Id*. at 485.

161 *Id*. at 488–89.

162 *Id*. at 486.

163 *Id*. at 489–90 (citing BMS Entertainment/Heat Music LLC v. Bridges, No. 04 Civ. 2584 (PKC), 2005 WL 1593013, at *3 (S.D.N.Y. July 7, 2005) (professor who studies African-American culture and hip-hop music described "call-and-response format" of a song); Boone v. Jackson, No. 03 Civ. 8661 (GBD), 2005 WL 1560511, at *1–2 (S.D.N.Y. July 1, 2005) (experts analyzed lyrics and phrasing in two songs)).

164 *Id*. at 490.

court emphasized that the expert indicated no intention to compare the handwritten text to other lyrics in the rap industry.[165]

In a different vein, in *Betker v. City of Milwaukee*,[166] a homeowner offered testimony from an individual with expertise in the methodology of drafting police affidavits. The homeowner had filed an action against a police officer for allegedly violating the homeowner's rights in executing a no-knock search warrant. The homeowner alleged that the written affidavit supporting the warrant application contained misrepresentations.[167] At trial, the expert testified regarding the process of writing affidavits. The jury found in favor of the homeowner. The police officer filed a motion for a new trial alleging, *inter alia*, several erroneous evidentiary rulings including the admissibility of the expert.[168] In denying the motion for a new trial on several grounds, the court emphasized the expert's qualifications: he had served twenty-three years as a police officer, including seventeen years on the SWAT team; he had served as head of the Minneapolis Police Academy for four years; he had designed the police curriculum for the State of Minnesota; he had authored a book on police ethics; and he had experience writing (and in supervising and educating others in writing) affidavits and search warrants.[169] The court held that the expert's qualifications "were more than sufficient, and his testimony was reliable and relevant."[170]

If engaged to provide context about the cultural, artistic, or professional context of a written work, writing experts should be sure to employ a sound methodology and describe representative examples of the particular genre of writing as a benchmark against which to compare the writing at issue.

D. Litigants Retain Writing Experts to Render Opinions Regarding Editing Standards and Methodology

Writing experts may be retained to render opinions on the applicable standards and methodology for editing written works. For example, in *Lish v. Harper's Magazine Foundation*,[171] a fiction writer and teacher sued a magazine for publishing a copyrighted letter he wrote to his creative-writing students. The magazine cut the letter to half its size without marking deletions with ellipses.[172] At trial, each side called experts "to

165 *Id.* Further, the defendant ignored court rules regarding expert disclosures. *Id.* at 489.

166 22 F. Supp. 3d 915 (E.D. Wis. 2014).

167 *Id.* at 919.

168 *Id.*

169 *Id.* at 927–28.

170 *Id.* at 928.

171 807 F. Supp. 1090 (S.D.N.Y. 1993), *amended as to damages*, No. 91 CIV. 0782 (MEL), 1993 WL 7576 (S.D.N.Y. Jan. 7, 1993).

172 *Id.* at 1093.

testify about common practices in the industry with respect to editing, [the] use of ellipses, and other related topics."[173] First assessing the experts' qualifications, the court noted that the fiction writer's expert was a contributing editor to three magazines, an essayist, a creative-writing teacher, and the author of four books and numerous articles. He previously had served as a literary editor at other prominent magazines and as a professor of literature and writing at Harvard.[174] Likewise, the magazine's expert was the chief cultural correspondent for the *New York Times*, had served as an editor at several magazines, and had written two books and numerous articles.[175] The court allowed the experts to present competing testimony over whether the magazine's edits had "transformed the [fiction writer's] Letter from 'a serious and sometimes moving and impressive piece of work' to a piece that made [the author] look ridiculous."[176] The court ultimately held that the publication was not fair use, and thus the magazine violated the author's copyright.[177]

In the foregoing example, these writing experts provided industry context that likely was outside the common experience of the average trier-of-fact: magazine-editing standards, the grammatical role of an ellipsis in the specific setting of trimming words to fit within a publication, and the resulting effect on the tone and message of the content.

E. Attorneys Engage Writing Experts to Provide Opinions about Communication Techniques in a Writing

Litigants also might hire experts to provide opinions as to the *clarity* of writings by focusing on the use by authors (intentional or otherwise) of phrasing that misleads or confuses readers. Distinct from a determination of whether a document is ambiguous or unclear (which the *Lind* court stated was within the court's province), these experts focus on the effect of the drafter's language choices that potentially confuse a reader. For example, in a class-action consumer lawsuit against an insurance company in *Iorio v. Allianz Life Insurance Co. of North America,*[178] consumers alleged that an insurance company misrepresented information regarding annuity bonuses in its sales brochures and Statements of Understanding (SOU). The consumers engaged an expert to testify at a deposition regarding "the ability of the ordinary reader to understand the policies based on a review of the written materials alone."[179] The expert was a professor of legal writing and linguistics at the University of Southern

173 *Id*. at 1095.

174 *Id.*

175 *Id.*

176 *Id*. at 1096.

177 *Id*. at 1105.

178 No. 05CV633 JLS (CAB), 2008 WL 8929013 (S.D. Cal. July 8, 2008).

179 *Id*. at *25, n.19.

180 *Id*.

California.[180] The insurance company filed a motion *in limine* to exclude the expert's testimony on the grounds that (1) the jury was capable of determining whether the insurer's written materials were confusing or unclear,[181] (2) the proposed testimony had "no relationship to the facts of [the] case" because the consumers did not read the same documents the expert analyzed, and (3) the expert failed to "employ the academic or intellectual rigor one expects to find in scholarly work" because he did not read the consumers' deposition transcripts and examined only one of six of the insurer's brochures and SOUs.[182]

In their opposition brief, the consumers countered that their "renowned linguistics expert" was not "being offered to interpret the terms of the insurance policy—a function which is obviously reserved for the Court."[183] Instead, the consumers propounded the expert's testimony to highlight the insurance company's purposeful selections of "communication techniques" and "carefully chosen omissions" intended to deceive its insureds. [184] In ruling on the motion, the court acknowledged it was "unclear as to whether there is a discernable line between expert opinion of 'communicative techniques' and such an opinion invading the province of the jury, who are 'average readers' themselves."[185] The court granted the motion, but indicated it would invite an offer of proof at trial and address then whether to admit the expert testimony.[186] Ultimately, the consumers moved for final approval of a class-action settlement of the case.

For opinions regarding the "comprehensibility" of a writing to survive FRE 702–*Daubert* scrutiny, writing experts likely will need to go beyond stating what the "average reader" could or could not understand.[187]

181 Defendant Allianz Life Insurance Co. of North America's Memorandum of Points and Authorities in Support of its Motion *in Limine* No. 2 to Exclude Expert Testimony and Evidence from Vincent Gallagher, Edward Finegan, and Frank Caliri, at 14, available in the docket of *Iorio*, 2008 WL 8929013.

182 *Id*. at 15–16.

183 Plaintiffs' Opposition Brief to Defendant Allianz Life Insurance Co. of North America's Motion in Limine No. 2 to Exclude the Expert Testimony of Gallagher, Finnegan, and Caliri, *Iorio*, No. 305CV00633, 2009 WL 3500950, at *20 (S.D. Cal. Apr. 30, 2009).

184 *Id.*

185 Jan. 27, 2010 Order at 15, available in the docket of *Iorio*, 2008 WL 8929013.

186 *Id*. at 16. In a New York state class-action lawsuit, *Michels v. Phoenix Home Life Mutual Insurance Co.*, No. 95/5318, 1997 WL 1161145, at *22 (N.Y. Sup. Ct. Jan. 7, 1997), class members objected to a Class Notice as "confusing, misleading, vague, or missing certain necessary details." The court rejected the objections, stating, "[t]he notice clearly sets forth in plain English all information necessary to inform Class Members of their options." *Id.* The court noted that "a number of experts in legal writing and dispute resolution have provided the Court with favorable analyses regarding the clarity of the notice," citing two affidavits submitted in briefs in support of the approval of the class action settlement. *Id.* Notably, however, New York state courts apply the *Frye* standard. *See* In re New York City Asbestos Litigation, 148 A.D.3d 233, 241 (N.Y. App. Div. 2017) (Kahn, J., concurring) ("New York has consistently resisted adopting the *Daubert* standard.").

187 Professors Tiersma and Solan state that, for example, "the admissibility of linguistic expert testimony on the comprehensibility of jury instructions is uncertain at best." Tiersma & Solan, *supra* note 88, at 227.

Instead, they should focus on *how* the use of particular words, grammar, and syntax affect a reader's understanding.

F. Parties Have Engaged Writing Experts to Opine on the Propriety of White-Paper-Drafting Methodology

Litigants also may engage experts to render opinions on the integrity of the analytical methodology used in documents like "white papers" written by stakeholders in a particular industry, such as the pharmaceutical field. In *In re Prograf Antitrust Litigation*,[188] a drug manufacturer filed a citizen petition with the Food and Drug Administration (FDA) challenging the approval process of a generic alternative drug for organ transplant patients. Purchasers of the generic drug countered that the drug manufacturer's FDA petition was a sham designed solely to perpetuate the manufacturer's monopoly and interfere with the business interests of a generic drug competitor.[189] In support of the petition, the manufacturer had submitted white papers addressing the generic substitution of drugs designed for transplant patients, recommending "bioequivalence testing."[190] In response to the manufacturer's motion for summary judgment, the purchasers attacked the "reliability and credibility" of the manufacturer's analysis, citing expert testimony that the "white papers contained no scientific or medical data, but were instead premised on theoretical and unsupported physician concerns."[191] The court found material facts in dispute and denied the drug manufacturer's motion for summary judgment.[192]

In contrast, in *Rheinfrank v. Abbott Laboratories, Inc.*,[193] a consumer filed a products-liability action against a drug manufacturer, alleging that her baby had suffered injuries from an anti-epileptic drug the mother had ingested during pregnancy. Before promoting the sale of a new drug, manufacturers must submit a New Drug Application to the FDA proving that the medication is "efficacious."[194] The manufacturer had submitted letters to the FDA, with accompanying white papers.[195] The consumer argued that the drug company had "submitted misleading or incomplete information" in its correspondence with the FDA.[196] The consumer proffered testimony of four experts who reviewed and opined on the allegedly deceptive information contained in the white papers. The parties

188 No. 1:11-MD-02242-RWZ, 2014 WL 4745954 (D. Mass. June 10, 2014).

189 *Id*. at *1, *7.

190 *Id*. at *8.

191 *Id.*

192 *Id*. at *11.

193 119 F. Supp. 3d 749 (S.D. Ohio 2015), *reconsideration denied by* 137 F. Supp. 3d 1035 (S.D. Ohio 2015), *aff'd* 680 F. App'x 369 (6th Cir. 2017).

194 119 F. Supp. 3d at 762.

195 *Id.* at 763, 764.

196 *Id.* at 767.

submitted numerous *Daubert* cross-motions seeking to exclude or limit expert testimony and also filed cross-motions for summary judgment.

In determining whether to admit the consumers' experts' opinions at trial, the court decided that "an expert's opinion that the FDA would have reacted differently if the submissions to the FDA . . . had been supported by different evidence is speculative."[197] The court concluded that "[t]estimony about what [the drug company] could have and should have researched or stated to the FDA in its applications is speculative."[198] The court ultimately granted the manufacturer's motion for summary judgment, in part, on the consumers' claims of design defect, negligent misrepresentation, fraud, and unjust enrichment.[199]

The lesson from the foregoing cases is that the *Rheinfrank* experts went too far in trying to link the flawed methodology in the white papers' drafting process to the FDA's ultimate decision, which the court deemed speculative. The *Prograf* experts appeared to stick with attacking the white papers' drafting methodology, relaying that this genre of writing requires reliance on scientific or medical data, but the documents in question were merely "theoretical" and lacked substantiated support. While lawyers deposing or cross-examining an expert might try to push the witness to speculate, smart experts in this context will limit themselves to evaluating the methodology within the four corners of the document, and whether it is sound or flawed.

G. Litigants Retain Writing Experts to Compare Two Texts

Finally, litigants may engage experts to compare two separate writings, such as patent applications, copyrighted music, or screenplays. In a 1924 patent-infringement case, *Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co.*[200] (a case which obviously pre-dates FRE 702 and *Daubert* by several decades), an expert submitted an affidavit in support of a preliminary injunction describing his expertise in evaluating descriptions and disclosures in patent applications.[201] The lower court considered this expert's opinions and those of a competing expert who had twenty-five years of expertise in preparing and prosecuting patent applications, writing descriptions, and rendering opinions on patent matters.[202] Both experts analyzed the language and text of the descriptions and disclosures of types of beds in two separate patent applications. The lower court considered the experts' affidavits, in addition to exhibits and

197 *Id.* at 768.

198 *Id.*

199 *Id*. at 792.

200 1 F.2d 673 (9th Cir. 1924).

201 *Id*. at 674.

202 *Id*.

models, and conducted a full hearing before concluding that the defendant had infringed upon the plaintiff's patent.[203] The appellate court likewise relied upon the opinion of the plaintiff's expert about the description and disclosure of the beds in the two patent documents, yet reversed the lower court's finding of patent infringement.[204]

Similarly, in *MCA, Inc. v. Wilson*,[205] in a non-jury trial, the court admitted the testimony of opposing music plagiarism experts in a copyright infringement case relating to songs. The plaintiff's expert, who had twenty-six years of experience studying music plagiarism, presented comparison charts to highlight commonalities and similarities between the two songs in question. The court indicated it was "impressed to an exceptional degree" by the expert's methodology and presentation, referencing the "excellent charts"[206] linking the chord structure, harmony, rhythm, succession of notes, and lyrics of the two songs.[207]

In contrast, in *Durkin v. Platz*,[208] screenwriters filed an action against authors of an unpublished manuscript, seeking a declaratory judgment that the screenwriters owned the copyright in their work. The manuscript authors proffered an English professor at Clemson University as an expert to testify that the screenwriters "did not add any significant or original material in preparing the screenplay and are not entitled to any copyright interest in the screenplay as a derivative work."[209] The methodology of the proposed expert's opinion testimony was to compare the screenplay to the manuscript. He planned to discern whether the screenwriters added original material to the manuscript that was significant and, therefore copyrightable. The screenwriters filed a motion to exclude such expert testimony on the grounds that the expert was "not qualified, he base[d] his opinion on unreliable methodology, and his proffered testimony [was] irrelevant."[210] Regarding the expert's qualifications, the court acknowledged that the witness was (1) an English professor at Clemson University specializing in rhetoric, linguistics, and literature; (2) the founder and CEO of a scholarly publishing company; and (3) the author of "articles and books about the nature and teaching of writing and literature, the state of publishing, research methodology and ethics, film and literary analysis, copyright and plagiarism, and the adaptation of literary works into film."[211]

203 *Id*. at 675.

204 *Id*. at 678–79.

205 425 F. Supp. 443 (S.D.N.Y. 1976).

206 *Id*. at 449.

207 *Id*. at 449–50.

208 920 F. Supp. 2d 1316 (N.D. Ga. 2013).

209 *Id*. at 1326.

210 *Id.*

211 *Id*. at 1330.

The court first determined that, while the expert was qualified to opine about plagiarism, he was unqualified to render opinions about copyright law.[212] The court next concluded that the expert's proposed testimony failed both the reliability and relevance elements of the standard for admissibility. In comparing the screenplay and the manuscript, he used the wrong legal standard under the Copyright Act.[213] Further, his testimony was irrelevant because (1) he reached conclusions not in dispute, opining that the screenplay was not copyrightable as an *original* work when the parties were debating its protection as a *derivative* work, and (2) his opinions addressed pure issues of law.[214] Pointing out that that the manuscript authors' opposition brief was "essentially an essay on *Daubert* that does not relate the law to the specifics of this case,"[215] the court granted the motion to exclude the expert.[216]

The key takeaway from the foregoing expert's missteps, which resembled the journalism expert's fumblings in *Parsi*,[217] is for a writing expert to first identify the proper industry or legal *standard* against which to evaluate the written work, and then to apply such standard in a reliable manner. Further, when appropriate and relevant, writing experts might consider using charts or other visual aids, particularly when analyzing excerpts of a particular lengthy "corpus" of work, as Professor Solan describes,[218] or when comparing passages from more than one document.

III. A Legal Writing Expert's FRE 702–*Daubert* Framework for Success

In many cases, litigants use writing experts in a variety of pretrial capacities (i.e., affidavits, expert reports, depositions) without these witnesses' necessarily needing to "go the distance" and testify at trial. Nonetheless, writing experts, particularly *legal writing* experts here, are wise to keep FRE 702 and the *Daubert* factors in mind from the onset of their retention as expert witnesses. Being mindful of the FRE 702–*Daubert* standards, starting from the initial task of analyzing the

212 *Id.*

213 *Id*. at 1331-32.

214 *Id*. at 1332.

215 *Id.* at 1330, n.12.

216 *Id.* at 1333.

217 *Parsi*, 852 F. Supp. 2d at 86, 89 (the journalism expert could not convincingly explain why he chose a one-page 1996 Society of Professional Journalists' Code of Ethics as the applicable professional standard in analyzing another journalist's body of work).

218 Solan, *Linguistic Experts*, *supra* note 88, at 88.

client's facts and legal issues, and continuing throughout the process of drafting FRCP 26(a)(2)(B) reports, and while testifying in depositions,[219] will help ensure admissibility of such opinion testimony at trial if ultimately needed. The following sections provide guidance as to how legal writing experts engaged to analyze the substantive or technical integrity of a document can satisfy the FRE 702–*Daubert* criteria, through employing the concrete and reliable legal writing standards and analytical methodologies that are well established in legal academia and law practice.[220]

A. Qualifications of a Legal Writing Expert

The threshold step in every FRE 702–*Daubert* analysis is to establish the proposed witness's qualifications as an expert, focusing on the individual's relevant "knowledge, skill, experience, training, or education."[221] For a legal writing expert, this likely will include a law degree, plus some combination of these: summer law-clerk work; judicial-clerkship experience; years in law practice researching, writing, and editing legal documents; membership in a local, state, or federal bar; authorship of legal scholarship; presentations at legal writing conferences; membership in legal writing organizations such as the Legal Writing Institute, the Association of Legal Writing Directors, SCRIBES: The American Society of Legal Writers, or the Association of American Law Schools' Section on Legal Writing, Reasoning, and Research; membership in bar associations; and years of experience teaching legal writing. FRCP 26(a)(2)(B) specifically requires an expert's written report to describe "the witness's qualifications, including a list of all publications authored in the previous 10 years."[222] The expert also must identify "all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition."[223] Notably, a court will not deem an expert witness unqualified

219 Dr. Terri LeClercq, a legal writing scholar and language expert with a Ph.D. in English and who taught for twenty-three years at the University of Texas School of Law, reports that, over her many years of experience serving as a legal writing expert, "[o]nce the opposing side has taken my deposition, generally they do not fight my appearance [at trial]." Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

220 The application of legal writing standards may arise in unexpected scenarios. Idaho Senator James Risch complimented former FBI Director James Comey on the quality of the written memorandum he submitted prior to his testimony before the Senate Intelligence Committee on June 8, 2017, stating, "I find it clear. I find it concise, uh, and having been a prosecutor for a number of years and handling hundreds, maybe thousands of cases and read police reports, investigative reports, this is as good as it gets." *See* C-SPAN, Risch & Comey on Legal Writing, https://www.c-span.org/video/?c4673000/risch-comey-legal-writing (last visited Apr. 16, 2018).

221 FED. R. EVID. 702.

222 FED. R. CIV. P. 26(a)(2)(B)(iv).

223 FED. R. CIV. P. 26(a)(2)(B)(v).

224 *See, e.g.,* Brand v. Comcast Corp., 302 F.R.D. 201, 209 (N.D. Ill. 2014); New York v. United Parcel Serv., Inc., No. 15-CV-1136 (KBF), 2016 WL 4735368, at *13 (S.D.N.Y. Sept. 10, 2016); Ford v. County of Hudson, No. 07–5002 (KM)(MCA), 2014 WL 2039987, at *15 (D.N.J. May 16, 2014).

simply because he or she has never previously published[224] on the specific issue at hand or testified as an expert.[225] Courts recognize that every testifying expert was a first-timer at some point.

Further, even if a legal writing expert has never personally drafted the specific type of document that is the subject of the expert engagement, this reality is not at all fatal to the expert's qualifications to render opinions regarding this genre of writing at trial. Courts readily acknowledge that they "will not exclude experts regarding industry standards generally at issue in a case merely because they do not have expertise in a sub-specialty."[226] An expert's limited experience "in a particular subject matter does not render him unqualified so long as his general knowledge in the field can assist the trier of fact."[227] Further, courts have stated that "an expert witness is not strictly confined to his area of practice, but may testify concerning related applications; a lack of specialization does not affect the admissibility of the opinion, but only its weight."[228] Interestingly, even if legal writing experts might honestly consider themselves *not* to be experts on a particular type of document, such a personal self-assessment is irrelevant. One court has noted,

> Just as an individual cannot simply declare himself to be an expert, a person cannot simply declare himself not to be an expert. Instead, the court must examine the individual's education, training, and experience, and decide if these credentials make the individual qualified to offer an expert opinion.[229]

While most of the writing experts involved in the cases discussed earlier unquestionably met the threshold qualification test, courts will not hesitate to reject experts who lack the requisite "knowledge, skill, experience, training, or education."[230] Legal writing experts may have the opposite problem, however, and should prepare for an attack by opposing

225 Clena Investments, Inc. v. XL Specialty Ins. *Co.*, 280 F.R.D. 653, 662 (S.D. Fla. 2002) ("Every expert found to be qualified by a court must be so designated a first time"); Kauffman v. Federal Exp. Corp., No. 02-4068, 2007 WL 1062591, at *2 (C.D. Ill. Apr. 5, 2007); Canamar v. McMillin Texas Mgmt. Servs., LLC, No. SA–08–CV–0516 FB, 2009 WL 2432012, at *2 (W.D. Tex. Aug. 4, 2009).

226 Kucharski v. Orbis Corp., No. 14-CV-05574, 2017 WL 1806581, at *5 (N.D. Ill. May 5, 2017); *see, e.g.,* Diaz v. Comm'r of Soc. Sec., No. 07-2276 (JLL), 2008 WL 2668812, at *5 (D.N.J. June 27, 2008) ("Properly qualified medical experts of different specialties can, and often do, offer opinions about medical conditions not within their specialties.").

227 Piskura v. Taser Int'l, Inc., No. 1:10–CV–248–HJW, 2013 WL 3967323, at *8 (S.D. Ohio July 31, 2013) (internal citations omitted).

228 United States v. Liu, 716 F.3d 159, 168-69 (5th Cir. 2013) (internal citations omitted).

229 Harvey v. Novartis Pharm. Corp., 895 F. Supp. 2d 1206, 1211 (N.D. Ala. 2012) (ultimately finding that a maxillofacial surgeon was not an expert in the cause of osteonecrosis of the jaw).

230 *See, e.g.,* Latham v. Edelbrock Corp., No. 07-713-GPM, 2009 WL 3156545, at *2 (S.D. Ill. Sept. 26, 2009). In this products-liability case involving a crash of an all-terrain vehicle, the manufacturer proffered witnesses who were not qualified as experts in technical writing to render opinions that carburetor manual instructions constituted sufficient warnings to consumers. On a motion *in limine*, the court further determined that non-expert or lay opinion testimony would not be

counsel for being *over*-qualified for the particular task at hand. Dr. Terri LeClercq, a legal writing scholar and language expert with a Ph.D. in English and who taught for 23 years at the University of Texas School of Law, indicates that "[o]pposing attorneys attack [her] Ph.D. in English and say [she is] not qualified to be a 'common reader and interpreter.'"[231]

B. Reliability of the Opinions and Methodology of Legal Writing Experts

The reliability prong is the next component of the FRE 702–*Daubert* analysis. FRCP 26(a)(2)(B) requires experts to describe in their written reports (1) a complete statement of all opinions the witness will express and the basis and reasons therefore, and (2) the facts or data considered by the expert in forming such opinions. Legal writing experts should bear in mind FRE 702 subsections (b), (c), and (d) when drafting the statements of opinions in their FRCP 26 reports. They must describe the underlying facts and data reviewed and lay the foundation for the reliability of their methodology.

1. FRE 702(b): Review of Sufficient Facts or Data

FRE 702(b) requires that expert testimony be "based on sufficient facts or data." Thus, to avoid being excluded from trial on a motion *in limine* (or embattled during cross-examination), legal writing experts first should ensure that they have reviewed "sufficient facts or data" from the client's case.[232] One court indicated that "the term 'data' encompasses the reliable opinions of other experts."[233] Litigation teams often select and prepare packets of case materials and send them to their experts for review. If experts feel they need additional material to conduct a "sufficient" review, they should request counsel to supply supplemental documentation or access to client personnel or witnesses.

Notably, a 2010 amendment to FRCP 26 changed the requirement that testifying experts must produce "data *and other information*"[234] and

helpful to the trier-of-fact and excluded the witnesses from testifying at trial. *See also* State v. Hilburn, 625 So. 2d 235, 237 (La. Ct. App. 1993). The defendant, appealing a murder conviction, proffered an expert witness in "writing patterns," with twenty years of experience grading junior-high and high-school essays, to opine that a "neatly folded[,] typed suicide letter" in the victim's lap was indeed a suicide note. In excluding the witness, the court emphasized that the witness, whose essay-grading career had concluded eight years earlier, had written no articles on writing-pattern analysis, could name no authors thereof, and was unaware of any such authors.

231 Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

232 *See, e.g., Parsi,* 852 F. Supp. 2d at 89 (the facts and data the expert relied upon were "patently insufficient"); *see also* United States v. Mamah, 332 F.3d 475 (7th Cir. 2003); Newkirk v. ConAgra Foods, Inc., 727 F. Supp. 2d 1006, 1016-18 (E.D. Wash. 2010).

233 McLean v. Air Methods Corp., Inc., No. 1:12–CV–241–JGM, 2014 WL 280343, at *2 (D. Vt. Jan. 24, 2014).

234 FED. R. CIV. P. 26, advisory committee's notes to 2010 amendment (emphasis added).

instead limits disclosure to "facts or data considered by the witness in forming" the expert opinions. Under the prior rule, litigants argued for the production of *draft* expert reports and information that could reveal attorney work product: "theories or mental impressions of counsel."[235] Now, draft expert reports are protected from discovery.

2. FRE 702(c): Reliability of the Principles and Methods Employed

FRE 702(c) requires that an expert's testimony be "the product of reliable principles and methods." The non-exclusive *Daubert* factors provide guidance on how to evaluate reliability: (1) whether the expert's theory or technique has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the technique's "known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation," and (4) the degree of acceptance of the theory or technique within the scientific community. These factors certainly can be applied to theories, principles, and techniques used by experts in evaluating written expression and the substantive or technical quality of a piece of writing. Indeed, in providing opinions regarding the quality of a document that contains legal and factual analysis, or the integrity of the drafting, editing, and finalizing process, legal writing experts can implement the standards that have been developed, vetted, tested, applied, and widely (if not universally) accepted within legal academia and law practice. These principles are "grounded in an accepted body of learning or experience" in the legal writing academy and field.[236]

Legal writing scholars consistently write about the methodology of written legal analysis in which writers use logic formulas to (1) state the legal issues in question, (2) identify the elements or factors of the relevant legal rule(s), (3) synthesize rules or sub-rules from multiple sources of law, (4) illustrate such rules through carefully selected precedent on point, (5) apply the rule components to the facts of the client's case, and (6) predict an outcome (in a piece of objective legal writing) or assert a reasoned position (in a persuasive legal document). Legal writing scholars further emphasize that, to be credible and valuable to a reader, a written legal

235 FED. R. CIV. P. 26(b)(4), advisory committee's notes to 2010 amendment ("Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel."). The exceptions include (i) information about compensation for the expert's study or testimony, (ii) facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, and (iii) assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed. FED. R. CIV. P. 26(b)(4)(C); *see also* Durney & Fitzpatrick, *supra* note 38, at 20; Warshauer & Warshauer, *supra* note 7, at 16 (draft expert reports are not discoverable); Battista et al., *supra* note 38, at 33–35.

236 FED. R. EVID. 702, advisory committee's notes to 2000 amendment.

analysis must be based on reliable legal-research methodology. The author must find and sift through statutes, regulations, or cases in the appropriate jurisdiction, assess their hierarchical authority, synthesize rules from these multiple sources, and ultimately provide the reader with the requisite information to discern whether the legal rules constitute mandatory or merely persuasive authority. A written analysis also must contain an appropriately thorough and ethical rendition of the pertinent facts bearing on the legal analysis. Beyond substance and depth, additional technical standards include proper citation to the factual record and the sources of law, in compliance with the legal-citation rules adopted in the governing jurisdiction. These typically include *The Bluebook: A Uniform System of Citation* or local-court style manuals.[237] Legal writing standards obviously also include adherence to sound principles of English grammar and punctuation. Using the *Daubert* vernacular, the tenets and techniques that legal writing experts use to create and evaluate written legal analyses have been tested, subjected to peer review, distilled into standards, and broadly accepted across the legal writing community. Legal writing professors and practitioners who are engaged as expert witnesses for the first time might call upon some of the sources cited below as references for these widely recognized benchmarks.[238]

Law professors Cathy Glaser, Jethro Lieberman, Robert A. Ruescher, and Lynn Boepple Su, in their book, *The Lawyer's Craft*,[239] define legal analysis as "a highly structured *approach* for making predictions about how courts will likely resolve legal questions."[240] While these professors characterize the thinking part of legal analysis as "an art, not a scientific or mathematical method," contending that "[t]he answer to a legal question is rarely definitive,"[241] this does not mean a written legal analysis cannot be subjected to *Daubert*-worthy reliability standards. Indeed, FRE 702 and *Kumho Tire* confirm that expert testimony can be based on "scientific, technical, or other specialized knowledge." Further, even if some scholars might argue that the process of researching, theorizing about, and crafting solutions to a legal conundrum is more artistic than scientific, the act of writing a cogent and well-reasoned legal analysis solidifies the legal

237 *See, e.g.,* NEW YORK LAW REPORTS STYLE MANUAL, https://www.nycourts.gov/reporter/files/2017-SM.pdf .

238 Just as Professors Tiersma and Solan note that "[l]inguistics is a robust field that relies on peer-reviewed journals for dissemination of new work," and "the [linguistics] expert has available a number of well-accepted instruments and a great deal of learning on which to base an analysis," so do legal writing experts—as evidenced by the multitude of legal writing resources cited herein. Tiersma & Solan, *supra* note 88, at 225.

239 CATHY GLASER ET AL., THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY (2002).

240 *Id.* at 8.

241 *Id*. at 15.

writer's creativity, intellectual processing, and trial-and-error into a structural framework analogous to a mathematical proof. In fact, Professor Robin Wellford Slocum, in her book, *Legal Reasoning, Writing, and Persuasive Argument*, compares written legal analysis to "a mathematical equation" that "logically build[s]."[242]

Professor Glaser and her coauthors use mathematical terminology—the concept of a "legal proof"—to describe how legal writers present logical legal analyses in writing.[243] Legal writers "identify the issue," "state the applicable rule," "validate [the] rule by citing and discussing the 'rule cases,'" "apply the rule to the facts of [the] case," "validate [the] application by showing that [the client's] case is analogous to the rule cases whose holdings match the predicted holding of [the client's] case, and distinguishable from the rule cases whose holdings do not match [the] predicted holding," and state the conclusion.[244] These authors describe this type of written legal reasoning as a "deductive syllogism."[245]

Professors Christine Coughlin, Joan Malmud Rocklin, and Sandy Patrick, coauthors of *A Lawyer Writes: A Practical Guide to Legal Analysis*,[246] corroborate that "[o]ver time, attorneys have established a common preference for how a legal argument is presented"[247] in writing. They reiterate that a clear written legal analysis states the legal issue, explains the law, applies the law to the client's facts, and asserts a conclusion.[248] These authors emphasize that, while law professors teaching novice legal writers may use different acronyms or mnemonics to visually frame a written legal analysis, each system follows the same logic flow: e.g., IRAC (Issue, Rule, Application, Conclusion); CREAC (Conclusion, Rule, Explanation of Rule, Application, Conclusion); CRRPAP (Conclusion, Rule, Rule Proof, Application, Prediction).[249] Within this logic structure, lawyers regularly employ alternative methods of reasoning: rule-based reasoning (applying a checklist of elements or a collection of factors from a legal rule to client facts);[250] analogical reasoning (engaging with the principle of *stare decisis*, comparing and

242 ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT, 113 (2d ed. 2006).

243 GLASER ET AL., *supra* 239, at 64.

244 *Id.*

245 *Id.*

246 CHRISTINE COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS (3d ed. 2013).

247 *Id.* at 81.

248 *Id.; see also* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS, 91 (3d ed. 2011) (explaining the basic paradigm of legal analysis).

249 COUGHLIN ET AL., *supra* note 246, at 82–83.

250 *Id.* at 131.

contrasting precedent with the client's facts);[251] integrating rule-based and analogical reasoning;[252] and incorporating public-policy considerations.[253] Of course, these authors affirm that "effective editing and polishing distinguish the professional from the unprofessional."[254]

Professor Charles R. Calleros, in his book, *Legal Method and Writing*,[255] likewise characterizes the IRAC formula as a method of deductive legal reasoning that "provides at least a rough organizational framework for most legal analyses in office memoranda, answers to essay examinations, and briefs."[256] Of course, after many years of experience drafting memoranda, briefs, mediation papers, etc., in law practice, expert legal writers might no longer consciously think in (or use the parlance of) IRAC terminology. However, Professor Calleros highlights the structural framework's usefulness in training novice legal writers to craft logical and thorough analyses.[257] Consistent with other legal writing scholars, Professor Calleros emphasizes that the legal writer's responsibility is to identify legal issues in play,[258] extract a legal rule from applicable sources of law (based on considerations of primary and secondary authority, jurisdiction, and weight of authority),[259] apply the rule components to the client's facts,[260] and state a conclusion.[261] He describes how legal writers often shift from deductive reasoning to inductive reasoning, comparing and contrasting case law to the client's facts "to reach a conclusion about either (1) the outcome of another specific case (analogical reasoning), or (2) the likelihood of the truth of a general proposition."[262] Professor Calleros indicates that, in addition to considering the most logical ways to organize multiple issues or sub-issues,[263] expert legal writers value clarity,[264] scope and depth of analysis,[265] and attentive revision.[266] Standards of "effective legal writing" mandate that writers properly cite to authority,[267] disclose directly adverse authority,[268] and refrain from advancing disingenuous positions.[269] Professor Calleros summarizes solid

251 *Id*. at 135.

252 *Id*. at 147.

253 *Id.* at 173; *see also* EDWARDS, *supra*, note 248, at 55–62.

254 COUGHLIN ET AL., *supra* note 246, at 247.

255 CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (6th ed. 2011).

256 *Id*. at 82; *see also* SLOCUM, *supra* note 242, at 112 (explaining the "deductive analytical pattern" used by legal writers).

257 CALLEROS, at 83; *see also id*. at 219 (referencing various acronyms used in teaching legal writing methodology: IRAC, CRAC, CREAC, or CRuPAC).

258 *Id*. at 84.

259 *Id*. at 90–94.

260 *Id*. at 101.

261 *Id*. at 104.

262 *Id*. at 142.

263 *Id*. at 242.

264 *Id*. at 268.

265 *Id*. at 294.

266 *Id*. at 301.

267 *Id*. at 305.

268 *Id*. at 346.

269 *Id*. at 347.

written advocacy as reflecting "sound analysis, sensible organization, and effective writing style."[270]

The writing methodology espoused by Professor Laurel Currie Oates and Professor Anne Enquist in their book, *Just Memos*[271] reflects consistent principles. These scholars describe the benchmark of a predictive written analysis as a "well-organized, easy-to-read, concise document."[272] In step with other analysts of legal writing standards, Professors Oates and Enquist describe how legal writers must "set out the applicable tests, rules, or definitions and then apply them to the facts of [the] client's case."[273] These authors explain that, when reading a legal memorandum, attorneys anticipate seeing "the applicable rules, examples of how those rules have been applied in analogous cases, each side's arguments, and a conclusion. In addition, the attorney expects to see each of those types of information in specific places."[274] Professors Oates and Enquist reiterate that "[t]hese expectations are not born of whim. Instead, they reflect the way United States attorneys think about legal questions."[275]

These scholars indicate that expert legal writers must exercise judgment about "what are the legally significant facts," "what statute(s) or common law doctrine will govern," "which cases are the key analogous cases," "which arguments the court will find persuasive," and "how the case will turn out."[276] Authors of an objective written legal analysis must "present the facts accurately and objectively"; they must "not set out legal conclusions, misstate facts, leave out facts that are legally significant, or present the facts so that they favor one side over the other."[277] Legal writers must "cite authority to support each of the points" made to "show that [the writer has] the support of the law, other courts, and other legal minds."[278] Regarding proofreading and professionalism, Professors Oates and Enquist attest that even "small errors can have serious consequences" and "can make the difference between [a] client winning and losing, between competent lawyering and malpractice."[279] Finally, they describe how the editing process must focus on "sentence structure, conciseness, precision, grammar, and punctuation."[280]

By further example, *The Handbook for the New Legal Writer*, authored by Professors Jill Barton and Rachel H. Smith,[281] states that documents

270 *Id*. at 379.

271 Laurel Currie Oates & Anne Enquist, Just Memos (2d ed. 2007).

272 *Id.* at 9.

273 *Id.* at 215.

274 *Id*. at 175.

275 *Id*. at 176.

276 *Id*. at 10.

277 *Id*. at 160.

278 *Id.* at 11.

279 *Id*. at 272.

280 *Id*. at 282.

281 Jill Barton & Rachel H. Smith, The Handbook for the New Legal Writer (2014).

providing objective legal analysis are "expected to accurately advise the reader" and "must be scrupulous, balanced, and reliable."[282] Persuasive legal analyses likewise "must be logical, credible, and compelling."[283] "Both types of documents require a careful legal analysis."[284] Professors Barton and Smith advise that legal documents should be

> organized using a format known as "CREAC" . . . which requires the writer to identify and fully explain the relevant legal authorities before applying those authorities to the facts from the legal question. After doing so, the writer walks the reader through the law and analysis so that the reader understands the logical progression of the writer's thinking. CREAC thus helps guarantee that the writer's legal analysis is sound and meticulously supported.[285]

These scholars reiterate that "CREAC is the preferred structure for most analytical legal documents, including memos, motions, briefs, and judicial opinions. Judges, lawyers, and legal writing professors all expect these documents to follow the CREAC format."[286] As a starting point, "[e]very legal analysis depends on legal research. Before a memo, motion, brief, letter, email, or judicial opinion containing legal analysis can be prepared, [the writer] must first conduct accurate and thorough legal research."[287]As part of a reasoned legal analysis, legal writers must identify the applicable legal rule(s), either with "legally significant terms that need to be defined and interpreted," or with a checklist of elements that must be satisfied, or factors that the trier-of-fact must weigh or balance.[288] Additionally, legal writers must properly cite to the factual record and legal authority, or they risk undercutting the efficacy and integrity of the written document[289] and its underlying research.[290] Regarding writing style, "complicated legal doctrine is best explained and understood when presented in plain language."[291]

Additionally, Professor Richard K. Neumann, Jr., author of *Legal Reasoning and Legal Writing: Structure, Strategy, and Style*,[292] advocates the foregoing logic formula to support legal conclusions.[293] Professor

282 *Id*. at 3.

283 *Id*. at 4.

284 *Id.*

285 *Id*. at 27 (acknowledging other acronyms in footnote 1).

286 *Id.*

287 *Id*. at 263.

288 *Id.* at 42–43.

289 *Id*. at 45.

290 *Id*. at 281.

291 *Id*. at 91.

292 Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style (6th ed. 2009).

293 *Id*. at 93–94 (referencing the acronyms of CRAC and CRuPAC); *see also* Kamela Bridges & Wayne Schiess, Writing for Litigation, 99-100 (2011) (describing the "organizational structure typically used for legal analysis"); Helene S. Shapo et al., Writing and Analysis in the Law, 135, n.1 (6th ed. 2013) (referencing IRAC, TRAC, CRAC, and CREAC organizational methods).

Neumann further substantiates the importance of proper citation of authority; "[b]ad citation form, on the other hand, is instantly noticed and causes the reader to suspect that the writer is sloppy and therefore unreliable."[294]

Legal writing professors and practitioners engaged as expert witnesses for the first time can look to numerous additional scholarly resources, including a plethora of other legal writing books, plus articles in peer-edited academic journals and publications such as *The Journal of the Legal Writing Institute, Legal Communication & Rhetoric: Journal of the Association of Legal Writing Directors, The Scribes Journal of Legal Writing, The Second Draft*, and *Perspectives*. These sources describe standards of legal writing methodology in concordant terms. Further, these principles and frameworks routinely are discussed and analyzed by legal writing professors and practitioners at local, regional, national, and international conferences.

Additionally, courts consistently hold briefs submitted by counsel to corresponding legal writing quality standards. Judges often take the time to explain in written judicial opinions how lawyers have either failed to meet such benchmarks, or how, by satisfying such quality criteria, brief-writers enabled the court to adjudicate a case efficiently and soundly.[295] In these written opinions, courts commend analytical logic, language clarity, reliable research, proper citation to the factual record and applicable law, adherence to court procedural and technical formatting rules, plus proofreading, grammar, spelling, punctuation, and professionalism.

The foregoing scholarly and practice-oriented sources demonstrate that the principles and techniques of written legal analysis have been tested, subjected to peer review, distilled into standards, and broadly accepted within the legal writing community. Accordingly, a legal writing expert who relies on such methodologies in analyzing the substantive or technical quality of a piece of written legal analysis should withstand scrutiny under FRE 702(c) and the *Daubert* reliability factors.

294 NEUMANN, *supra* note 292, at 239; *see also* BRIDGES AND SCHIESS, *supra* note 293, at 103 ("Both the substance and the form of your legal citations affect your credibility with the judge . . . . Incorrect citation can hurt your credibility.").

295 For more information about courts' admonitions of lawyers who submit briefs that fall short of judges' expectations regarding quality legal writing (and appreciation of lawyers who do submit quality briefs), see Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL. PROF. 259 (Spring 2017); Heidi K. Brown, *Converting Benchslaps to Backslaps: Instilling Professional Accountability in New Legal Writers by Teaching and Reinforcing Context*, 11 LEGAL COMM. & RHETORIC: JALWD 109 (2014).

3. FRE 702(d): Reliability of the Application of the Principles and Methodology to the Client's Facts

A legal writing expert also must satisfy subsection (d) of FRE 702 and reliably apply the pertinent principles and evaluative methods to the facts of the client's case. To do so, legal writing professors and practitioners serving as expert witnesses should consider conveying the extent of their personal experience in having applied the methodologies described above.

The typical 1L legal writing professor teaches an average of 37.5 legal writing students per semester, according to a survey conducted by the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI) in 2015.[296] Many first-semester 1L legal writing curricula require students to write a draft of a closed-research memorandum and then meet with the legal writing professor one-on-one to discuss the teacher's critique of and feedback on the draft.[297] Students then submit a revised memorandum for a grade. In most legal writing programs, students repeat this process for an open-research memorandum assignment in the fall semester.[298] They then replicate the same process twice more in the spring semester when transitioning to persuasive legal writing. Students write drafts of two briefs, conference with their professors on both drafts, revise the drafts, and then submit the briefs for a grade. Thus, in each academic year, using the foregoing data and assignment progression, the typical legal writing professor applies his or her legal writing methodology—assessing and measuring the quality and integrity of a written legal analysis—a total of approximately 300 times: 8 papers per student (4 drafts and 4 revisions) for approximately 37.5 students. The 2015 ALWD-LWI survey reports that the typical legal writing professor reads an average of 1,540 pages of student work per term, and spends an average of 47.5 hours per semester in conferences with students evaluating written work.[299] Their analytical methodology is

296 Ass'n of Legal Writing Directors & Legal Writing Inst., Report of the Annual Legal Writing Survey 83 (2015), http://www.alwd.org/wp-content/uploads/2017/03/2015-survey.pdf [hereinafter 2015 ALWD-LWI Survey]. The 2015 survey had 194 respondents. A 2017 survey report updated the *institutional* data based on 182 responses to a subsequent 2016-2017 survey; data based on *individual* professor responses to the 2016-2017 survey has not yet been evaluated. In the 2017 report, 59 respondents reported teaching a mean of 37.5 students. *See* Ass'n of Legal Writing Directors & Legal Writing Inst., Report of the Annual Legal Writing Survey 90 (2017), https://www.lwionline.org/sites/default/files/Report%20of%20the%202016-2017%20Survey.pdf [hereinafter 2017 ALWD-LWI Survey].

297 In the 2015 ALWD-LWI Survey, with regard to professors' individual process of evaluating students' written work, 192 respondents reported providing "comments written on the paper itself and in the margins." *Id*. at 17. Further, 149 provide a "general feedback memo addressed to all students," 134 give a "feedback memo written specifically for the individual student," 175 write "short comments . . . at the end of the paper," 186 deliver "comments in person during [the] conference," and 149 provide "grading grids or score sheets." *Id*. at 17.

298 In the 2015 ALWD-LWI Survey, 154 respondents reported using "a combination of closed and open library research assignments" in the 1L program. *Id*. at 12.

299 *Id*. at 83.

applied across a wide range of skill sets and writing competency levels. Most professors also must numerically quantify the evaluative results to distinguish each student's paper from his or her fellow classmates' work, and eventually assign individual grades in compliance with the institution's mandate for assessments and grading distribution.[300] Of course, many legal writing professors also teach upper-level writing courses where they employ similar evaluative methodologies.[301]

Lawyers engaged to serve as expert witnesses can lay a similar foundation for describing their individual professional experience applying reliable legal writing methodology to different genres of written legal work. While this might seem like a time-consuming endeavor, practitioners serving as expert witnesses might provide context for the reliability of their evaluative methodologies by going back through their timesheets for a reasonable time period, and quantifying (if possible) the number of legal memoranda, motions, briefs, mediation papers, and other written legal analyses they have written, reviewed, edited, finalized, and submitted.

Overall, to withstand FRE 702–*Daubert* scrutiny as to the reliability of their application of particular methodologies, experts first can explain that the above-referenced analytical methodologies have been tested by professors and practitioners who have distilled the process of written legal analysis into the formulas and guidelines appearing in countless scholarly and practice-based works. Expert legal writers vet these methodologies in the classroom and law office in large volume every academic and billable year. After laying that foundation, experts then can describe how they applied the same methodology to the particular document or set of documents involved in the client's litigation.

C. Relevance of the Legal Writing Expert's Opinions

Circling back to the remaining component of FRE 702—subsection (a)—to be admissible at trial, the legal writing expert's specialized knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue." In formulating written opinions and testimony that will assist the trier-of-fact, the expert should resist inching into the

300 *Id*. at 10. In the 2015 ALWD-LWI Survey, 178 respondents reported that the 1L course grade is included in the students' GPAs. Only five respondents reported grading on an "honors, pass, fail" basis, and three reported grading on a "purely pass/fail" basis. In the 2017 ALWD-LWI Survey, 164 respondents reported that the predictive legal writing course grade is included in the students' GPA, and 152 respondents reported that the persuasive legal writing course grade is included in the students' GPA. *Id*. at 30.

301 2015 ALWD-LWI Survey at 24, 27; 2017 ALWD-LWI Survey, *supra* note 296, at 53.

territory of rendering opinions on issues of law, asserting legal conclusions, or discussing the legal implications of evidence.

This restraint could present a challenge for some experts, either by virtue of the craftiness of opposing counsel or sheer human nature. Dr. LeClercq shared that, in her experience in depositions, once opposing counsel realizes they are not making headway in attacking her qualifications, "they spend hours attempting to get [her] to make a legal conclusion."[302] She cautions that "[s]ometimes they are successful and my attorney is horrified and I am mortified."[303] Legal writing experts should remain alert to subtle yet persistent attempts by opposing counsel to elevate an expert witness to the role of trier-of-fact through the conversational give-and-take of deposition questioning and the natural instinct for cooperative smart individuals to share what they know and think.[304] Many an expert has gotten caught in the trap of straying beyond the scope of the opinions rendered in their carefully crafted expert reports, much to the chagrin of the lawyer defending the deposition.[305] Experts swept up in the enthusiasm of answering a deposing attorney's series of questions, who opine on issues outside the bounds of their expert engagement, also run the risk of contradicting the opinions of other experts retained by the client. Legal writing experts must exercise vigilance, be intimately familiar with the breadth and limits of the four corners of their expert reports, and resist the ego's desire or the helpful teacher's instinct to expound further.

The FRE 702(a) relevance prong also tests whether the expert offers insights "beyond the general experience and common understanding of laypersons."[306] As the *Lind* and *Sand* cases indicated, some courts have considered basic grammatical principles to fall within the common understanding of the trier-of-fact, while others have permitted grammar expertise.[307] In today's arena of casual written communications peppered

302 Email from Dr. Terri LeClercq, President and Consultant, Legal Editor's Ink, to Heidi K. Brown, Dir. of Legal Writing and Assoc. Professor of Law, Brooklyn Law Sch., *Expert witness* (June 21, 2017, 9:02 AM EST) (copy on file with author).

303 *Id.*

304 In an International Association of Defense Counsel webinar, the attorney-presenter advised: "play off of the expert's confidence and teaching instincts to elicit as much substantive testimony as possible." John T. Lay, Deposing Your Opponent's Expert 21 (International Association of Defense Counsel, Mar. 19, 2014 Webinar), http://www.iadclaw.org/assets/1/7/Deposing_Your_Opponents_Expert_Presentation.pdf.

305 One article noted,

> As soon as an expert witness starts testifying to matters outside the scope of the question asked or the matter at hand, he or she is in dangerous waters, and risks making statements that would be to the detriment of your client's interest in the case. The importance of keeping statements within the scope of testimony must be stressed to the expert witness.

Megjabeen Rahman, *15 Attorneys Share Their Expert Witness Horror Stories*, THE EXPERT INSTITUTE, Jan. 11, 2016, https://www.theexpertinstitute.com/15-attorneys-share-their-expert-witness-horror-stories/.

306 *Disalvatore*, 2016 WL 3951426, at *9.

307 2014 WL 4187128; 2010 WL 69359.

with emojis instead of words, normalization of "covfefe" Tweets,[308] and the troubling abandonment of apostrophes by many users of electronic communications, courts may someday routinely recognize grammar expertise as "specialized knowledge" which satisfies the standards for admissibility of expert testimony at trial. But in the near future, to definitively satisfy the FRE 702(a) relevance prong, legal writing experts should endeavor to go beyond basic principles of grammar construction to provide helpful guidance to a trier-of-fact, for example, in how grammar constructs play a role in documents within certain trades or industries, or how grammatical choices open up a document to different interpretations.[309] Indeed, legal writing experts engaged to analyze written works who use the methodologies accepted in the legal writing community and described above likely offer insights "beyond the general experience and common understanding of laypersons," thereby satisfying FRE 702(a).

IV. Conclusion

On writing, Flaubert encouraged assiduous care: "Whatever the thing you wish to say, there is but one word to express it, but one verb to give it movement, but one adjective to qualify it; you must seek until you find this noun, this verb, this adjective." Legal writers who, based on their knowledge, skill, experience, training, and education, pay similar heed to precise and thoughtful selection of concepts, sources, language, vocabulary, and punctuation in the process of drafting, editing, and revising a written work are particularly well-suited to serve as expert witnesses. Armed with greater awareness of the FRE 702 and *Daubert* criteria from the outset of a lawyer-expert relationship, experts and the lawyers[310] who engage them can be better prepared to ensure admissibility of helpful expert testimony. Employing the reliable methodologies that have been tested, subjected to peer review, distilled into standards, and broadly accepted within the legal writing community, these experts can withstand FRE 702–*Daubert* scrutiny and provide helpful services to triers-of-fact, positively impacting the administration of justice.

308 Matt Flegenheimer, *What's a "Covfefe"? Trump Tweet Unites a Bewildered Nation,* N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html.

309 Solan, *Linguistic Experts*, *supra* note 88, at 97.

310 *See, e.g.,* Warshauer & Warshauer, *supra* note 7, at 20 (A trial lawyer's "task is to educate [experts] about the admissibility requirements and to prepare them to testify about their opinions. Litigation can be a lion's den for expert witnesses unfamiliar with the process. Don't send them out alone; prepare and protect them each step of the way"); *see also* Solan, *Legal Systems*, *supra* note 88, at 1193 (acknowledging that, in many cases in which courts have rejected linguistic expert testimony, "the problem appears to lie in the fact that lawyers at times ask linguists to do too much"); Solan, *Linguistic Experts*, *supra* note 88, at 102 ("Lawyers who ask linguists to testify must recognize just what it is that linguists do, and structure their requests accordingly. Linguists can help in this process by enquiring into the legal issues, and pointing out just when their opinions add little to what jurors already know as native speakers.")