

Authors' Response

Sir:

Ms. Seaman Kelly and Mr. Carney offer a cornucopia of misinformation, misdirection, and irrelevancy.

First, they badly misquote our article's description of the state of federal district courts' responses to proffers of and challenges to the admission of forensic handwriting expert testimony. Kelly & Carney say we wrote that, "since *Kumho Tire*, it is common for federal courts to restrict or exclude handwriting expert testimony." The actual statement in the article is: "Following *Kumho Tire*—when a *Daubert* challenge is raised, when competing presentations of the empirical research bearing on the field's claims are offered, and when the court makes a conscientious attempt to analyze the evidence under the applicable law—it has become common for federal district courts to restrict or exclude handwriting expert testimony." As the basis for that statement, we referred readers to the most comprehensive and continually updated review of the relevant case law: Faigman et al. (2002), Chapter 28, Sec. 1.4.3 and 2004 supplement to that chapter. Readers can read that chapter, or the judicial opinions themselves, and judge whether we accurately summed up the state of the case law for that subset of what conscientious lawyers and judges would regard as the best informed and most thoughtfully reasoned cases. Thus, when Kelly & Carney count other district court cases, or appellate decisions, or suggest we said anything about a "universal declaration," or that the issues in those *Daubert* hearings were limited to the question of general acceptance, they are not addressing anything we wrote.

Moreover, those who work as close to courts as readers of JFS do should know these elementary facts: First, federal district courts (like all trial courts) never make a "universal declaration" on anything. It is not within their power to do so. Such courts limit their pronouncements to applying the applicable law to the specific facts and issues in front of them. Second, the decisions of federal courts of appeals on the subject of admissibility of evidence mean very little because, under the Supreme Court's holding in *General Electric v. Joiner*, they have no choice but to affirm the district court's admissibility decision, in whichever direction it went, unless the court below committed a "clear error." The evidence on handwriting evidence is sufficiently unclear that an appellate court is unlikely to find that a district court's admissibility decision was clearly erroneous.

Even more irrelevant to our article, and even more misleading and inaccurate, Kelly & Carney write that "Professor Saks and the second critic [Mark Denbeaux] have both been excluded from testifying before the jury. The judges concluded each time that neither critic was qualified to testify as an expert on forensic document examination."

As to Dr. Saks, he has never been offered to a court as "an expert on forensic document examination." When asked if he is an expert on forensic document examination, he always answers "no." Although he has testified at some pre-trial hearings (including the Nevada case cited), he is not aware of ever being proffered as a witness for a jury; that certainly has never happened in his presence. But, were a party that was opposing admission (at least under the federal rules or comparable state rules) to offer a witness from such a hearing *in limine* to testify at trial about the weight to be accorded testimony that had at the pre-trial hearing been ruled admissible, it is hard to imagine the weight-testimony being excluded.

Federal Rule of Evidence 104(e) plainly recognizes "the right of a party to introduce before the jury evidence relevant to weight or credibility."

The one case cited by Kelly & Carney, concerning Prof. Denbeaux, is a rare departure from the rule. In a comparable decision, not mentioned by Kelly & Carney, where another trial court refused to allow Prof. Denbeaux to testify to a jury, the court of appeals reversed the ruling, holding the district court's exclusion to have been an abuse of discretion. (*U.S. v. Velasquez*, 64 F. 3d 844 (3rd Cir. 1995).) That seems a more conventional and correct ruling. In any event, as far as the Saks & VanderHaar article is concerned, Kelly & Carney have raised a completely irrelevant issue.

Kelly & Carney do not so much challenge our article's brief discussion of the law regarding the issue of what constitutes the "relevant community" for general acceptance purposes so much as to ignore what we (and many courts) have said. They argue that the "relevant community" for handwriting expertise would, under *Daubert*, consist exclusively of forensic document examiners. That is almost certainly incorrect. In our article we referred to the example of voice spectrography in which some courts relied on a narrow definition (forensic practitioners of spectrographic voice identification) and other courts drew a wider circle (acoustical engineers, statisticians, physiologists, and linguists in addition to forensic practitioners). It should therefore have been obvious that some courts use quite broad definitions of the relevant community. Moreover, numerous courts have expressed concerns about limiting their inquiry to any narrow group that makes its living selling what it seeks to promote in court. In the wake of *Daubert* and *Kumho Tire* the trend away from narrowly defined, self-serving communities has accelerated. As our article makes clear, we followed the judicial lead on this issue, but obviously did not limit ourselves to it.

On another point irrelevant to our article, Kelly & Carney inveigh against another article altogether, one on the use of signal detection theory to more fully analyze proficiency test data. (Phillips, Saks & Peterson, JFS 2001;46:294–308). We will leave it to readers to read or re-read that article and decide whether Kelly & Carney's point has anything to do with the purposes for which those illustrative analyses were conducted.

Kelly & Carney assert that we "allege[] that a few examiners urged those who received [our survey] to not participate," and that we made "this allegation without any objective evidence." What we reported about this matter was based on emails sent to us by several examiners who explained their refusal to participate on that basis. We had (and still have) no reason to think they were making it up.

Kelly & Carney's points about "wording problems" and of complaints by examiners that we did not permit them to stop the study in mid-data-collection and redesign it for us, and so on, were thoroughly explored, scrutinized, debated, and discussed in the JFS review process, and relevant aspects of those issues (especially those relevant to the reported research) were noted in the article itself.

Measures of statistical significance take into account sample size. Thus, when a proposition differed significantly from "well accepted as true," we can be confident that it did (at conventional levels of probability).

Finally, Kelly & Carney claim: "Professor Saks has little experience in conducting his own empirical research. His published articles focus on criticizing the works of those who do conduct

research.” In support of that claim they quote one judge who managed to overlook all evidence to the contrary. Considering the efforts that Kelly & Carney and their colleagues have gone to in probing Dr. Saks’s background—if nothing else, they surely have read his CV, and they obviously have read various publications (since they quote from them)—it is hard to believe they do not know that what they have written is untrue. Dr. Saks’s CV contains dozens of published empirical studies on a range of topics as well as several papers that focus on research methodology and statistics (one of which Kelly & Carney cite in their own letter). Moreover, numerous judicial opinions (on matters not involving handwriting) cite

some of that empirical work (including two U.S. Supreme Court decisions).

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