Sargon the Gatekeeper

Hon. Nathan R. Scott
Orange County Superior Court

Michael S. LeBoff
Klein & Wilson

Victoria Wilkerson
VWM Analytics, LLC

Joshua J. Stowell
Knobbe Martens Olson & Bear LLP
Doing the right things for the right reason in the right way is the key to Quality of Life!

Stephen R. Covey
Crudely: Best Results at Lowest Cost
Protection for Self-Represented Litigants
Protection for Self-Represented Litigants
Protection for Self-Represented Litigants
Protection for Self-Represented Litigants
Advisory Committee on Providing Access and Fairness

Purpose:
The committee makes recommendations for improving access to the judicial system, fairness in the state courts, diversity in the judicial branch, and court services for self-represented parties.

In addition to the duties described in rule 10.34, the committee must recommend to the Governing Committee of the Center for Judicial Education and Research, proposals for the education and training of judicial officers and court staff.

Date Established: 2014
The Myth of the Generalist Judge

Edward K. Cheng
THE MYTH OF THE GENERALIST JUDGE

Edward K. Cheng
JOURNAL ARTICLE

Scientific Expert Testimony and Intellectual Due Process

Scott Brewer

*The Yale Law Journal*

Vol. 107, No. 6 (Apr., 1998), pp. 1535-1681

Published by: *The Yale Law Journal Company, Inc.*

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“What happened?!"
The “Gatekeeper”

“[T]he trial court acts as a gatekeeper to exclude expert opinion testimony that is

(1) based on matter of a type on which an expert may not reasonably rely,
(2) based on reasons unsupported by the material on which the expert relies, or
(3) speculative.”

Evidence Code section 801 (judicial review of type of matter)
Evidence Code section 802 (judicial review of reasons for opinion)
Is the Testimony Reasonable and Supported?

• Experts may not rely on speculation or conjecture.
• Experts must provide credible support for their opinions.
• Experts must use reasonable comparisons.

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<td>Market Share (2007)</td>
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<td>4.8%</td>
<td>7%</td>
<td>17%</td>
<td>22–23%</td>
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</table>

• The availability of lost profits may depend on whether the plaintiff is “established”
WHAT IF?
Challenges to Expert Testimony in Federal Courts
Federal Law Shaped by Two Cases

- Trial judges must ensure that scientific expert testimony “rests on a reliable foundation and is relevant to the task at hand”

- Trial judge’s general “gatekeeping” obligation extends to “technical” and other “specialized knowledge”
Federal Rule of Evidence 702

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:

(a) 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;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.
Red Flags

- Heavy reliance on plaintiff’s testimony
- Past performance ignored
- Untraditional methods
Case Study
How can your damages expert help?

§ Clear Demonstratives
§ Data and Statistics
§ Vet Underlying Assumptions
Actual vs. Projected: **1,642%** Growth Post-DOI

- **Pre DOI Avg:** $655K
- **Post DOI:** $11.4M - $23.2M
Historical Market Indices Returns vs. Plaintiff Projections

- S&P 500: 5%
- NASDAQ: 6%
- Dow Jones: 6%
- Russell 1000: 5%
- NASDAQ Computer: 9%
- Silicon Valley 150: 9%
- Morgan Stanley High-Tech 35: 9%
- Plaintiff Projections: 756%
Number of Deals: Silicon Valley

Source: PricewaterhouseCoopers/National Venture Capital Association

Plaintiff’s Selected Benchmark
— Perfect timing
— No industry downturn
— Skills equate to profit
— Transferable skills possessed
— Personnel available
— Financing available
— Research and development resources available
— Successful identification of comparable company

Ladder of Speculation
How do you make your position defensible?
Triangulate Damages

- Industry
- Past
- Damages $
- Projections
Trending Revenue: Example 1

Actual Revenue
Projected Revenue

Trending Revenue: Example 2

2009: $10,000,000
2010: $18,000,000
2011: $8,000,000
2012: $12,000,000
2013: $8,000,000
2014: $16,000,000
2015: Question mark
Trending Revenue: Example 2

- Actual Revenue
- Projected Revenue
- Precipitation (in)
Advice for Choosing and Guiding Experts

Identify the expert’s area of expertise
- Many experts will not have expertise in the underlying subject matter (e.g., damages experts)
- The expert may need to rely on the testimony of other witnesses

Assess the “reasonableness” of the opinion
- Hogs get slaughtered
- Don’t ignore gaps or flaws in the expert’s reasoning (e.g., circular reasoning)
- Is the opinion consistent with the plaintiff’s metrics or the metrics of similarly situated plaintiffs?
Advice for Choosing and Guiding Experts

Ensure experts have identified supporting material for their opinions
  • Reliable document
  • Testimony from other witnesses that will withstand cross examination

Hire experts early and get them involved in the case
  • Coordinate testimony with other witnesses
  • Make sure documents are produced in discovery that the expert needs to rely upon
Considering Whether to File a Sargon/Daubert Motion

*Sargon/Daubert* motions typically reveal effective lines of cross examination

Judges do not decide which expert is more reliable or credible

Precisely identify the problematic testimony

Can the nonmoving party adequately supplement the testimony?
How to Raise Sargon Issues to Trial Court

Motion for summary adjudication/judgment
Motion in limine
402/403 hearing
Voir dire opposing expert
Motion to strike testimony
What about court trials?
What is Standard of Review?

Except to the extent the trial court bases its ruling on a conclusion of law (which we review de novo), we review its ruling excluding or admitting expert testimony for abuse of discretion.