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LAW OFFICES OF MICHAEL PIUZE

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

Use *Sargon* as your WAZE for examining and presenting expert opinion

IF YOUR EXPERT IS SUBJECT TO A 402 HEARING, YOU HAD BETTER KNOW YOUR CASE LAW

402 hearings are preliminary-fact determinations to decide the admissibility of evidence. They are driven by the Evidence Code. Evidence Code section 402, subdivision (a) states, "When the existence of a preliminary fact is disputed, its existence or non existence shall be determined as provided in this article. (b) The court may hear and determine the question of admissibility outside the presence or hearing of the jury..."

The statute continues to provide a list of definitions that you need to know.

A "preliminary fact" means a fact upon the existence or non existence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.) The "admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege." (*Ibid.*) *Proffered Evidence* means "... evidence, the admissibility or inadmissibly of which is dependent upon the existence or non existence of a preliminary fact." (Evid. Code, § 401.)

Evidence Code section 403, subdivision (a) ties it all together: "The proponent of the *proffered evidence* has the burden of producing the evidence as to the existence of the *preliminary fact...*" The evidence will be admissible or inadmissible depending on a list of considerations.

If your expert is subject to a 402 hearing, you had better know your case law. "[T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc.*, (1992) 2 Cal.App.4th 1516, 1523.)

When you hire an expert, you must be familiar with the law as well as any prior rulings that involve that expert in scenarios where your expert's findings might be questioned.

Sargon is the case to know

Sargon Enters, Inc., v. University of S. Cal. (2012) 55 Cal.4th 747, is a case you should be familiar with before you hire any expert. *Sargon* reinforced existing law that judges should review experts' opinions and act as gatekeeper to ensure that improper opinions are not offered, particularly speculative ones. Let it act as your WAZE to get you where you want to go, fast! (For the less app-literate: WAZE is the world's largest community-based traffic and navigation app, enabling drivers to share real-time traffic and road info.)

Sargon was a breach of contract/lost profits case involving a small dental implant company versus the University of Southern California, which had entered into a contract to test the plaintiff's implant. The Supreme Court held that the plaintiff's expert's opinions on damages were speculative and inadmissible. It encouraged trial courts to examine experts' use of foundational materials to see whether the experts' conclusions are logically supported by the materials used. Defense firms have tried to characterize this holding as new legal requirements for the admissibility of expert testimony. Wrong. *Sargon* did not change the law. *Sargon* explained the law.

Sargon retained an expert called Skorheim. During his 402 hearing he sought to introduce a theory of lost profits based on Sargon's 1998 revenues, to which he applied a growth rate based on industry projections. The trial court excluded this testimony, terming it a "sea change" in Skorheim's opinion. After the trial court announced its tentative ruling excluding the market share-based expert opinion, Sargon advised the court that it would call Skorheim as a rebuttal witness to refute USC's defense expert, and would prepare a lost profits analysis based upon a "traditional, standard type of analysis configured to the market" that would "replicate and use the historical financial data in some substantial form." Sargon never put on such evidence.

The California Supreme Court relied on Evidence Code sections 402, 801 and 802 and provides excellent insight into judicial thought process.

"Evidence Code section 801 governs judicial review of the type of matter; Evidence Code Section 802 governs judicial review of the reasons for the opinion. The stark contrast of the wording between the two statutes strongly suggest that although under section 801(b) the judge may consider only the acceptability of the generic type of information the expert relies on, the judge is not so limited under section 802." (*Id* at p. 771.)

"Under Evidence Code sections 801, subdivision (b), and 802, the 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 speculative." (*Id.*, at pp. 771-72.)

The expert in *Sargon* did not pass the section 801 test. He relied on data not relevant to the lost profits damages; data that was "not based on matter...that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates..." (*Id*. at p. 776.)

The expert in *Sargon* also failed the section 802 test. "The trial court properly considered this circularity (regarding success and innovation) in the reasoning as a basis to exclude the testimony under Evidence Code section 802." (*Id*., at p. 777.)

Sargon's WAZE routing

Sargon listed some specific roads for the court to take when admitting expert testimony by focusing on the expert's methodology and principles: The court should:

- Determine whether the matter relied on is founded on "sound logic" and can provide a reasonable basis for the opinion, or whether that opinion is based on a leap of logic or conjecture;
- Determine whether as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's theory is valid; and
- Exclude "clearly invalid or unreliable" expert opinion.

Sargon listed some roads for the court to avoid on this journey:

- Do not focus on the expert's conclusions;
- Do not choose between competing expert opinions;
- Do not weigh an opinion's probative value;

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• Do not substitute its own opinion for the expert's opinion; and
• Do not resolve scientific controversies.

Sargon is not limited to lost-profit cases

Although the routes provided in *Sargon* are a roadmap, remember that *Sargon* was a lost-profit case and the plaintiff's damages were confined by Civil Code section 3301: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." *Sargon* does not make it impossible to put on a lost-profits damages case. It provides the framework to work within as soon as you hire your expert.

Expert evidence should not be excluded as speculative merely because the expert cannot say with absolute certainty what the damages [lost profits] would have been. "The lost profit inquiry is always speculative to some degree. Inevitably, there will always be an element of uncertainty. Courts must not be too quick to exclude expert evidence as speculative merely because the expert cannot say with absolute certainty what the profits would have been. Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative. A reasonable certainty only is required, not absolute certainty." (*Id*., at p.775.)

Using the *Sargon* framework

Sargon does not offer clarification regarding specific areas of expertise. That is up to you to do, since expert opinions are area specific. *Sargon* does not specify the requirements for expert qualifications. These remain subject to Evidence Code section 720. *Sargon* is not limited to 402 hearings. Expect the defense to use it in motions to attack your experts. Knowing such attacks are likely, always review your experts' opinions to ensure that proper foundational materials are used and that any facts, studies or other materials cited by the expert logically support the conclusions that your expert will offer.

Recent cases cite *Sargon* as authority to exclude expert declarations in summary- judgment motions, using expert counter-declarations. For example, in *Lynn v. Tatitlek Support Servs., Inc*. (2017) 8 Cal.App.5th 1096, 1116-17, the court stated:

> Dr. Glass's declaration states conclusions, without stating any medical or scientific bases for reaching his opinions. For instance, without knowing how many hours Formoli slept while at the Base, including the night before the accident, Dr. Glass states that Formoli was fatigued at the time of the accident. Dr. Glass also concludes Formoli's fatigue was the cause of the accident, whereas this was nothing more than pure speculation. Furthermore, Dr. Glass's declaration states opinions that rest on common knowledge rather than on matters of a type reasonably relied upon in forming a medical opinion.

And in *Sanchez v. Kern Emergency Med. Transportation Corp*. (2017) 8 Cal.App.5th 146, 155-56, 213, the court observed, "Cases dismissing expert declarations in connection with summary judgment motions do so on the basis that the declarations established that the opinions were either speculative, lacked foundation, or were stated without sufficient certainty.'... [U]nder Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion." [Citing *Sargon*.] "[T]he gatekeeper's role '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."

I will leave you with the following quote from *Sargon*: "World History is replete with fascinating "what ifs.... " (*Id.* at 781.) Protect your case from the "what ifs" and use *Sargon* as your WAZE.

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