Preparing experts post-*Sargon*

Sargon reaffirmed that expert opinion cannot be speculative or based on conjecture

By Torsten Bassell

A trial is a completely different animal than litigation. In litigation, the Code of Civil Procedure is the primary guide that courts and lawyers must follow. To that end, the Code of Civil Procedure permits all types of evidence, contentions, and opinions to be asserted and produced during the course of discovery. By doing so, it allows the parties to avoid surprise by ferreting out all possible arguments and information that their opponents might use against them at trial.

However, in stark contrast, the primary guide to follow for trial work is the Evidence Code. It acts as a filter to ensure that certain arguments, documents, and opinions never enter the courtroom.

It provides a rubric by which the court protects the case from being decided or influenced by improper matter.

For this reason, the California Supreme Court's opinion in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 makes sense. It simply reaffirms the principle that a trial court must not permit into evidence an expert opinion, that is based on a weak and speculative foundation.

The court determines all questions of admissibility

The evidence code empowers the court to determine all questions of admissibility. Although *Sargon* did not fully describe the origin of a trial court's exclusionary powers, it is important to understand those powers before considering the impact of the *Sargon* case.

Evidence Code section 310, subdivision (a) provides that: "*All questions of law* (*including* but not limited to questions concerning the construction of statutes and other writings, *the admissibility of evidence*, and other rules of evidence) *are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2* (*commencing with Section 400*) of Chapter 4." In other words, when the trial court is presented with a question about whether a piece of evidence (i.e., an expert opinion) is admissible, it must determine its admissibility by following the procedures outlined under sections 400 through 406 of the Evidence Code.

By exercising its powers under those sections, the trial court is constantly acting as a "gatekeeper" to prevent improper evidence from being admitted at trial. For example, while an expert may be qualified to testify as an expert at trial, the expert's opinions must be relevant to be admissible. When the relevance of the expert's opinions depends on the existence of the preliminary facts relied on in forming those opinions, Evidence Code section 403 empowers the court to determine whether or not those preliminary facts exist and whether they are permissible to serve as a basis for the experts' ultimate opinions.

Speculative and conjectural evidence is out

For those familiar with the Evidence Code, *Sargon* did not change the law whatsoever. Rather, it reinforced principles that are useful to the prepared plaintiff 's attorney.

At the outset of the discussion in *Sargon*, the Court stated: "This case stands at the intersection of *two legal principles*: (1) Expert *testimony must not be speculative*, and (2) lost profit *damages must not be speculative*. We will discuss both principles, then apply them to this case." (*Sargon*, 55 Cal.4th at 769.)

In regard to the first principle, Evidence Code section 801 provides: "If a witness is testifying as an expert, *his testimony in the form of an opinion is limited to such an opinion as is* ... (b) *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, unless an expert is precluded by law from using such matter as a basis for his opinion."

In construing Evidence Code section 801, the Court looked towards the California Law Revision Commission's comments to Evidence Code section 801, which explained that "'under existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion.' (citation.)" (*Sargon*, 55 Cal.4th at 770.)

The expert's opinions were speculative and conjectural

The expert's opinions in *Sargon* were speculative and conjectural. With such a principle in mind regarding speculative opinions, *Sargon*'s outcome was predictable. The entire case revolved around whether Sargon Enterprises – a small dental implant company – lost $200 million to $1 billion in profits due to the established breach of contract by USC. (*Id.* at 753.) In other words, the big issue in *Sargon* was the dollar amount of the damages and the causation of those damages.

At the trial court level, Sargon Enterprises attempted to introduce expert testimony on the issues of causation and damages. Specifically, it proffered the expert testimony of James Skorheim, whose proffered opinions the trial court analyzed during an eight-day evidentiary hearing. (*Sargon*, 55 Cal.4th at 755.)

Skorheim based his ultimate opinion regarding the amount of lost profit damages on a "market share" approach.

Skorheim's "market share" approach was based upon a comparison of Sargon Enterprises to *six other large, multinational* dental implant companies that were the dominant leaders in the industry, and which controlled in excess of 80 percent of global sales (described as the "Big Six"). (*Sargon*, 55 Cal.4th at 756.) In essence, based on his "market share" approach, Skorheim opined that Sargon Enterprises would have become one of the Big Six if not for the breach of contract by USC. (*Id.* at 757.) Hence, Skorheim was able to project lost profits of $200 million to $1 billion dollars.

However, when the trial court looked more closely at the bases for Skorheim's opinions, it discovered that Sargon Enterprises was a very small company, whose annual profits peaked in 1998 at around $101,000, and, unlike the big companies, it had no meaningful marketing department, research and development organization, or parent company to assist it. (*Ibid.*) But given Sargon Enterprises' lack of money and structure, Skorheim tried to base his opinion on the amount of lost profits by arguing that Sargon Enterprises was one of the few "innovators" in the dental implant industry, which meant that if one of the Big Six dropped out of leadership (which he also speculated would occur), then in 10 years Sargon Enterprises would have become one of the Big Six. (*Ibid.*)

Yet, Skorheim admitted that being "innovative" bears no direct relationship to whether a company may garner a large market share. He also admitted that, even absent the breach, Sargon Enterprises would have had to remain competitive by investing significant amounts of money (which it did not have) in research and development like other major manufacturers regularly did. In essence, Skorheim's analysis of damages was based on a completely speculative assumption that Sargon Enterprises would have become one of the Big Six implant companies in the world if the breach of contract by USC had not occurred. (*Id.*)

Additionally, in calculating lost profits, Skorheim did not consider any past profits that Sargon Enterprises ever realized. (*Id.* at 759.) Rather, he simply considered the profits of market leaders and argued that those would be Sargon Enterprises' lost profits. (*Ibid.*) While the trial court, the Court of Appeal, and the California Supreme Court addressed Skorheim's testimony and claims in greater detail than this article, it is sufficient to say that Skorheim's testimony provided no data or basis upon which a logical connection could be made between USC's breach of contract and Sargon Enterprises going from a $100,000 company to a $200,000,000+ company.

In its opinion, the California Supreme Court explained: "The trial court also excluded the expert testimony for proper reasons. It properly found the expert's *methodology was too speculative* for the evidence to be admissible. *The court assumed that Skorheim's market share approach would be appropriate in a proper case. We will do so also*. An *expert might be able to make reasonably certain lost profit estimates based on a company's share of the overall market*. But *Skorheim did not base his lost profit estimates on a market share Sargon had ever actually achieved*. Instead, he opined that Sargon's market share would have increased spectacularly over time to levels far above anything it had ever reached. He based his lost profit estimates on that hypothetical increased share." (*Sargon*, 55 Cal.4th at 776.)

Preparing experts post-*Sargon*

While on an initial glance, *Sargon* may appear to raise the burden on what expert opinions are admissible, it simply reaffirmed the law prohibiting speculative and conjectural opinions at trial. *Sargon* does, however, serve as a reminder of how to handle preparation of experts.

It is crucial to maintain constant communication with your experts regarding their analysis of the case. If you simply turn everything over to your experts and wait until their depositions to learn about their full analysis, it may be too late to ask them to do further analysis on an issue.

For example, in *Sargon*, the Supreme Court took issue with the fact that Skorheim could not provide a logical basis to infer that Sargon Enterprises would have achieved the market share. Part of the reason for this was the lack of similarities between Sargon Enterprises and the major companies, as well as the fact that Sargon Enterprises was a small company incapable of fully capitalizing on the success of their implant if USC had not breached the contract.

Therefore, if dealing with a similar situation with one's own expert, constant communication allows you to identify the logical leaps in the expert's analysis before those opinions are offered at deposition. If you were Sargon's lawyer, then you might have asked Skorheim some of the questions the trial court asked him during the evidentiary hearing. By doing so, you could have identified the weak bases for his opinions and pushed him to gather more data to support the claim for lost profit damages.

More importantly, by insisting on constant communication with your expert, you are better able to get an idea for whether the reasoning the expert relies on is sound. After all, if your expert tells you that one of your clients would have been Michael Jordan but for having his Nikes stolen when he was 12 years old, then you would know that your expert either needs more data or needs to be let go.

Educate your experts early regarding the requirements

Another crucial thing that must be done at the outset of any retention is to educate your experts about the legal requirements for their opinions. You need to explain that it is not only their opinions that cannot be speculative, but also the studies and data the opinions are based on.

For example, there are experts who will find and rely on an "abstract"

of a study, to support their opinions. However, without knowing the full details of the study, it becomes speculative to use a one-paragraph conclusion in the abstract to support their own opinions. Also, if the similarities between the data relied upon and the facts of the case differ, then the expert must know that further research and investigation are needed to develop a better foundation for whatever opinions will be offered at trial.

Provide your experts with all case materials

It is crucial to provide your experts with all the materials you have on a case. There are attorneys who isolate out certain materials for certain experts, assuming that those materials are the only ones the expert needs. However, by doing so, the attorney may overlook a crucial document that could be the linchpin of support for the expert's opinion.

If costs are a concern, make sure to communicate that to the expert when providing the materials. Feel comfortable telling the expert that much of what you send may be irrelevant, but that you wanted to provide everything, *knowing* that the expert would be able to cast aside materials that are irrelevant.

With that said, there are certain experts who will relish receiving a giant stack of materials, because they see it as a wonderful opportunity to bill endless hours for reviewing all of it. When possible, you should identify and avoid such experts before you retain them. A quality expert will know what is irrelevant to his opinion and not bill you for reviewing the materials if they were not reviewed in detail.

Cross-examine your experts to discover problem areas

Many attorneys turn everything over to their experts and assume that the experts will take care of everything they need at trial. However, you should not view any expert as a "pro" that you do not have to constantly vet.

Rather, you should always be probing your experts for their opinions and their foundations, and then cross-examine them before the opposing party ever takes the experts' depositions. By doing so, you can discover the weaknesses in your expert's opinions, point them out to the expert, and insist that further research and analysis be done to solidify the foundation for those opinions.

Educate yourself to better support your experts' opinions

You should never coach your experts or tell them what to say. However, many experts do not take the time to do all of the independent research on a case that can be done. Consequently, it is important that you educate yourself about the subject matter of the expert's testimony and then find research or materials that may help that expert to support his opinions.

For example, consider the case where there is a high intensity zone on a herniated disc in a cervical MRI. From learning about spinal imaging and reading about high intensity zones, you may discover that there are studies and journal articles that contend that a high intensity zone on a herniated disc in a cervical MRI are indicative of acute causation – i.e., the herniated disc occurred near the time of the accident.

However, your expert may never pull any of the research or articles supporting that causation issue. So, while your expert might opine that the accident caused the injury, a causation opinion would be bolstered by articles and treatises to point to in order to explain why the accident caused the injury.

Conclusion

Keep in mind that *Sargon* deals with the quality of the underlying data supporting an expert's opinion. It does *not* address a related issue from *People v. Sanchez*, which governs what data might or might not be able to be discussed at trial given its hearsay nature.

However, when it comes to experts, the most important first hurdle for any trial is ensuring that your expert's ultimate opinions will be admissible. When it comes to whether all of the underlying materials will be admissible, you will have to analyze that separately under other cases such as *Sanchez*.


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