Reliable Foundation Necessary For Expert Opinion Testimony

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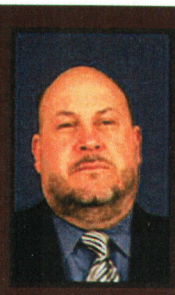

I. INTRODUCTION

Since the advent of the seminal decisions of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. (1993), Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) and General Electric v. Joiner, 522 U.S. 136 (1996), there has been significant focus regarding the role of the court in determining the admissibility of expert testimony. Federal case law abounds with discussion of the court's "gate keeper function" and the analytical framework employed to evaluate scientific evidence. The gravamen of three Supreme Court decisions is whether the proffered testimony is "grounded in the methods and procedures of science." Daubert at 590. In other words, is the opinion testimony based upon a reliable and trustworthy scientific foundation.

On the other hand, many state courts do not follow Daubert. Thus, a question posed is what arguments can be employed in such jurisdictions to challenge expert opinion testimony. This article serves to detail such an approach under California law. Comparison of code citations to those in states where the reader practices may assist in developing a basis for excluding the opinion at issue.

II. OVERVIEW

The issue of standards for admissibility of expert scientific testimony was discussed in People v. Leahy, 8 Cal. 4th 587 (1994). There, the court declined to follow Daubert and its progeny, the court reaffirming allegiance to the Frye v. United States., F 1013 (D.C. Cir. 1923) "general acceptance" evidentiary standard. As employed in California, Frye functions to limit admission of novel scientific techniques. This analysis has consistently held not to apply to the admissibility of expert testimony. Roberti v. Andy's Termite & Pest Control, 113 Cal.App.4th 893 (2003).

Regardless, California courts, like all jurisdictions, remained tasked with determining the relevancy of the evidence sought to be admitted. As this requirement applies to expert testimony, the proponent of evidence must establish a reasoned scientific basis for the opinion because if it is based on speculation and conjecture, such cannot aid the trier of fact in the determination of causation.

III. ADMISSIBILITY OF EXPERT TESTIMONY

Since the beginning of modern jurisprudence, it has always been the function of the court to determine the admissibility of evidence. Evidence Code section 310 provides:

> 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. Determinations of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article II (commencing with section 400) of Chapter 4.
>
> And, "no evidence is admissible except relevant evidence." Evid. Code § 350.

Evidence Code section 210 provides:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

When examining the admissibility and thus the relevancy of the proposed evidence, the court must ensure that it is reliable, i.e., that it is not based upon assumption, conjecture, speculation, or hypothesis. (*Jefferson's California Evidence Bench Book*, § 29.40 (3d ed. 2005).) Proof of this requirement is found throughout the Evidence Code, best demonstrated in its demand that testimony be based upon personal observations of witnesses, including those of experts. Evidence Code section 702(a) provides:

> Subject to section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

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to the Sedona Conference and its various publications. All such efforts will be rewarded, not simply in public recognition of superior judicial service, but also in the benefits of an improved, more efficient judicial system.

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1. See Fed. R. Civ. P. 26(f).
2. See Interim Report On The Joint Project Of The American College Of Trial Lawyers And The Institute For The Advancement Of The American Legal System (Aug. 1, 2008), available at www.actl.com.
3. See The Sedona Conference Cooperation Proclamation (2008), available at www.thesedonaconference.org.
4. See, e.g., William Butterfield, The Case For Cooperation, 10 Sedona Conf. J. 339 (2009); Steven S. Gensler, The Bulls-Eye View Of Cooperation In Discovery, 10 Sedona Conf. J. 363 (2009).
5. See, e.g., Capitol Records, Inc. v. MP3tunes, LLC, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009); In re Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litigation, 2009 WL 2461716 (E.D. La. Aug. 7, 2009); Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n, 2009 WL 2243854 (S.D. Ohio July 24, 2009); Dunkin' Donuts Franchised Restaurants LLC v. Grand Cen. Donuts, Inc., 2009 WL 1750348 (E.D.N.Y. June 19, 2009); Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418 (D.N.J. May 19, 2009); Newman v. Borders, Inc., 257 F.R.D. 1 (D.D.C. April 6, 2009); William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. March 19, 2009); S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, Fed. Sec. L. Rep. P 95,045 (S.D.N.Y. Jan. 13, 2009); Covad Communications Co. v. Revonet, Inc., 254 F.R.D. 147 (D.D.C. Dec. 24, 2008); Gipson, et al v. Southwestern Bell. Tel. Co., 2008 U.S. LEXIS 103822 (D. Kan. Dec. 23, 2008); Aguilar v. Immigration and and Customs Enforcement Div. of U.S. Dept. of Homeland Sec., 255 F.R.D. 350 (S.D.N.Y. Nov. 21, 2008); Mancia v. Mayflower Textile Services. Co., 253 F.R.D. 354 (D. Md. Oct. 15, 2008)
6. See Judicial Endorsements (as of October 30, 2009), www.thesedonaconference.org.
7. Rule 408 of the Federal Rules of Evidence provides that offers to compromise a "claim" that is disputed as to "validity or amount," and "conduct or statements made in compromise negotiations," are not admissible as evidence. The Rule generally refers to settlement negotiations regarding substantive claims in litigation, but could be extended, by agreement of the parties, and/or order of a court, to include settlement of claims and disputes regarding discovery.
8. See, e.g., E-Discovery Committee, www.cpradr.org (panel of neutrals available to assist parties in resolving e-discovery issues out of court); Court Appointed Special Masters/Discovery Masters, www.jamsadr.com (listing similar capabilities).

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Obviously, not all cases can be proven by personal eyewitness accounts. Accordingly, the case law and the Code recognize numerous forms of evidence that exist outside of this parameter. Thus, there are various exceptions that allow for, under the appropriate circumstances, the admissibility of certain evidence. For example, section 1200, et. seq., of the Evidence Code defines the hearsay rule and its exceptions. This segment of the Evidence Code is informative in that it emphasizes the criteria of reliability and trustworthiness integral to any decision made by the trial court as to the admissibility of evidence. These exceptions recognize that under certain circumstances, the out-of-court statement, to be introduced to prove the truth of the matter asserted, constitutes competent evidence because there exists a viable foundation for its credence and veracity.

These same considerations are applicable to expert opinion testimony. Evidence Code section 801 sets forth the basis that must be established before an expert can offer opinion; specifically mandating that the testimony be based upon personal knowledge or 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. To enforce this requirement, reference is made to Evidence Code section 803, which states:

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> The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.
>
> (See Young v. Bates Value Bag Corp. (1942) 52 Cal. App. 2d 86, 96 ["Where an expert witness bases his opinion entirely upon incompetent matter, or where it is shown that such incompetent matter is the chief element upon which the opinion is predicated, such opinion should be rejected altogether."])

Evidence Code sections 801 and 803, which were codified with the rest of the modern Evidence Code in 1965, consolidated and restated existing case law concerning the admission of expert testimony. (Recommendation proposing Evidence Code [January 1965, Cal. Law Revision Comments, Report 1965, p. 17]; see also Arellano v. Moreno, 33 Cal. App. 3d 877, 844 (1973).) As is discussed in the Law Commission Comments, "[t]he California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case." (Cal. Law Revision Commission Comments (1965), Deering's Ann., Evid. Code §§ 800 through end; p. 10.) The Commission noted that the variation and permissible basis of expert opinion is unavoidable in light of the wide variety of subject matters upon which such an opinion can be offered. (Id.) Accordingly, it was noted that: "[i]t was not practical to formulate a detailed statutory rule that lists all the matters upon which an expert may properly base his opinion for it would be necessary to prescribe specific rules applicable to each field of expertise." (Id. at 11.) The Commission stated: "It is possible to formulate a general rule . . . this standard is expressed in subdivision (b) ..." (Id.) As to section 801(b) as it regards the "reasonably relied-upon" standard, the Commission observed:

> Second, and without regard to the means by which the expert familiarizes himself with the matter upon which the opinion is based, the matter relied upon by the expert in forming his opinion must be of the type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates. In large measure, **this assures the reliability and trustworthiness of the information used by experts in forming their opinions.**
> (Id. at 11 (emphasis added)).

In this context, the California Supreme Court has expressed the need for "judicial caution" in admitting expert scientific testimony to avoid juries from being unduly swayed by it. People v. Leahy, supra. Leahy affirmed that judicial standards for evaluating expert testimony have "prevented justice from becoming a matter of amateur guesswork based on unreliable techniques and has helped to assure determinations...are not influenced by the vagaries of pseudo-science. Id., at 103.

Accordingly,

> Evidence Code § 801 "requires judges to exclude expert opinion unless based on matter that is the type that reasonably may be relied upon by experts in the field. [T]his command calls for the exclusion of expert opinion whenever based on matter that is inappropriate because of failure to abide by protocols or methodologies experts in the field would observe."

Mendez, *Expert Testimony and the Opinion Rule, Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. Rules 411, 427 (2003).

It is also well established in California that matters that are irrelevant or speculative are neither trustworthy nor reliable and thus not a proper basis for expert opinion. Cal. Law Rev. Comments, supra, at 10; Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096 (1993). Accordingly, section 801 sets a "threshold" requirement of reliability for expert testimony. People v. Gardeley, 14 Cal. 4th 605, 618. (1996). Furthermore, "the foundational requirements governing expert testimony" in both sections 801 and 803 were "reasonably and rationally formulated to ensure the relevancy of such evidence." People v. Ramos, 15 Cal. 4th 1133, 1176 (1997).

In the matter of the Lockheed Litigation Cases, 115 Cal. App. 4th 558 (2004), the appellate court considered the issue of an analysis of the peer-reviewed literature relied on by plaintiffs' expert to support his opinion of general causation. The expert contended that the referenced

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scientific data, published in a review of specific epidemiologic literature, substantiated his opinion that the chemicals at issue were capable of causing the cancers or injuries suffered by the plaintiffs. In sustaining the trial court's decision that the expert's opinion was based on an unreliable foundation, the appellate court reaffirmed that the trial court is required to exclude testimony based on matter which is not a proper foundation for an opinion or as the court succinctly stated:

> An expert opinion has no value if its basis is unsound, (People v. Lawley (2002) 27 Cal.4th 102, 132 [115 Cal. Rptr. 2d 614, 38 P.3d 461]; People v. Bassett (1969) 69 Cal.2d 122, 141, 144 [70 Cal. Rptr. 193, 443 P.2d 777].)

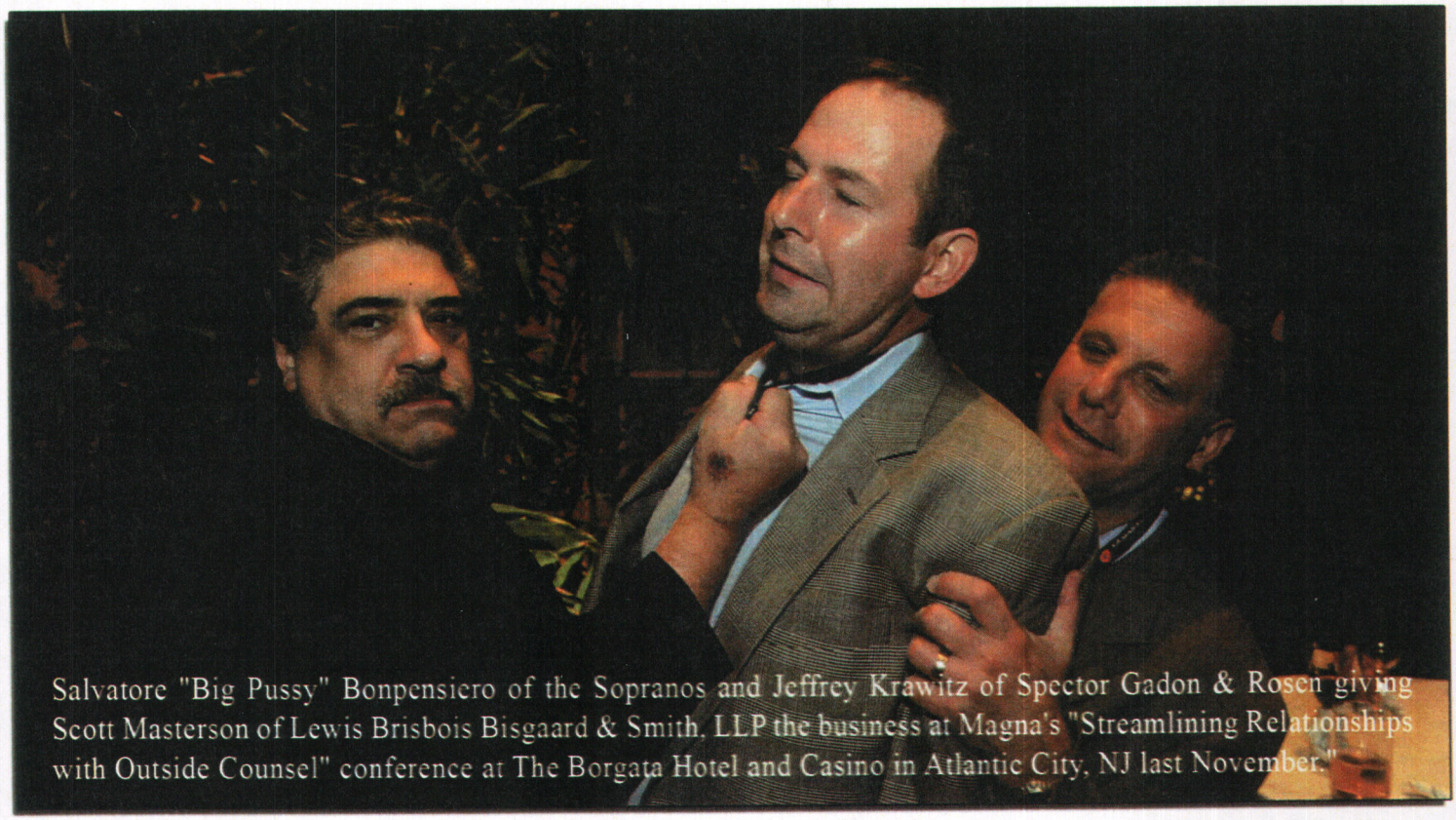
The court continued, holding:

> The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.]
> Id. at 564.

For those practitioners whose expert opinion challenges have been frustrated, hope does exist. In the recent Los Angeles Superior Court decision in Camino v. Exxon Mobil Corporation, Case No. 038086, the Honorable Carolyn Kuhl was receptive to the defense arguments regarding plaintiffs' expert's inability to cite to competent scientific evidence supporting the claim that petroleum solvents were capable of causing brain cancer. In sum, plaintiffs' expert could not proffer a reasoned explanation supporting his causation argument. Thus, the court concluded said opinion had no evidentiary value.

IV. Conclusion

Expert testimony cannot be divorced from science. Thus, to expose the specious nature of questionable testimony, one should demonstrate to the court why the proffered evidence cannot support a causation opinion.



Salvatore "Big Pussy" Bonpensiero of the Sopranos and Jeffrey Krawitz of Spector Gadon & Rosen giving Scott Masterson of Lewis Brisbois Bisgaard & Smith, LLP the business at Magna's "Streamlining Relationships with Outside Counsel" conference at The Borgata Hotel and Casino in Atlantic City, NJ last November.