Supreme Court Will Give Guidance on Excluding Expert Testimony

By David M. Axelrad and Mary Christine Sungaila

In "Will State Supreme Court Shift Balance of Power Between Judges and Juries?" (Daily Journal, August 14), attorney Martin Buchanan suggests that the issue before the Supreme Court in the *Lockheed Litigation Cases* (S132167) is whether California should radically transform the relationship between judges and juries by giving trial judges *Daubert*-type power (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)) to review the admissibility of expert testimony. In fact, California trial judges have long had the authority under the Evidence Code to determine whether an expert's opinion has a sufficient foundation to be admissible in evidence.

California Evidence Code Section 801 limits expert testimony to matter "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." Upon objection, a trial court is statutorily required to "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." (Cal. Evid. Code Section 803; see also, *Young v. Bates Valve Bag Corp.*, 52 Cal. App.2d 86 (1942).)

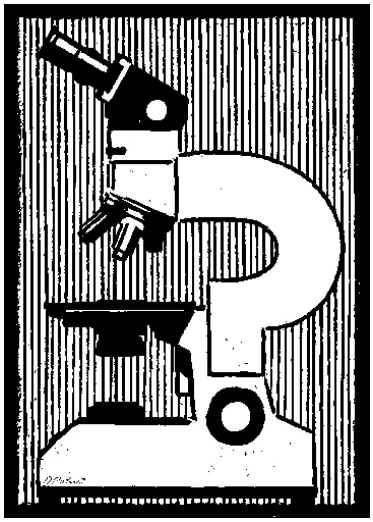
Under this statutory scheme, the Court of Appeal has consistently recognized a trial court's duty to examine the foundation of expert opinions and exclude testimony that lacks proper foundation. See e.g., *Pacific Gas & Electric Co. v. Zuckerman*, 189 Cal.App.3d 1113 (1987) ("Courts, both trial and appellate, have the responsibility of insuring that an expert's determination of value takes into account only reasonable and credible factors"); *id.* at 1136 (criticizing trial court for accepting expert's "conclusion[s] without any critical assessment of the reasoning employed and the assumptions relied upon," and reversing and remanding for a new trial); *Westrec Marina Management Inc. v. Jardine Ins. Brokers Orange County Inc.*, 85 Cal.App.4th 1042 (2000) (trial court did not abuse its discretion in excluding expert testimony on anticipated profits where expert failed to use "reliable statistical information" and "data to analyze [the] market"); *City of San Diego v. Sobke*, 65 Cal.App.4th 379 (1998) (trial court did not abuse its discretion in excluding expert testimony on valuation of goodwill, where testimony "was founded upon matter insufficient to form a proper basis for such opinion"); *Kotla v. Regents of University of California*, 115 Cal.App.4th 283 (2004) (trial court erred in admitting testimony of human resources expert as to whether an employer had a retaliatory motive in firing an employee because the expert opinion "lacked any reliable foundation" in the expert's professional experience or expertise.)

By requiring trial courts to review the foundation for expert testimony before allowing that testimony to be admitted, Evidence Code Sections 801 and 803 assure "the reliability and trustworthiness of the information used by experts in forming their opinions." (See Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid. Code, foll. Section 801, p. 21.) Recognizing that a trial judge must be able to fully examine the reliability of the foundation for expert testimony also gives effect to the basic principle that "[t]he value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed," and that "[w]here 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" and is therefore properly excluded from evidence. (*Zuckerman*, *supra*, at 1135.)

In an earlier decision in *Lockheed Litigation Cases* (115 Cal.App.4th 558 (2004) (*Lockheed I*)), the court upheld exclusion of the testimony of the plaintiffs' sole causation expert, Dr. Daniel Teitelbaum, based on the lack of a reliable foundation for his testimony, and then granted summary judgment for the defendants.

Teitelbaum had relied exclusively on a single survey of epidemiology studies to support his opinion that the defendants' chemicals — five cleaning solvents used in manufacturing aircrafts — increased the risk of contracting the types of cancer at issue. But the survey established only that painters exposed to a complex mixture of thousands of chemicals, containing only three of the defendants' five chemicals, showed an increased risk of cancer.

The plaintiffs argued that the court had no authority to examine these deficiencies because Evidence Code Section 801 allows a trial court to examine only whether the type of study on which an expert relies is generally of the type on which experts tend to rely — for example, epidemiology studies — without examining the relevance of the study's content to the particular opinion being offered. In affirming the trial court's exclusion of this testimony, the Court of Appeal made clear that Evidence Code Section 801 requires a link between the matter the expert relies on and the opinion being offered. The court concluded that "an expert opinion based on speculation or conjecture is inadmissible." (*Id.* at 564.)



In *Lockheed II*, now before the Supreme Court, the court reiterated that in "determining whether there is a reasonable basis for an expert opinion" under Section 801, a trial court "must examine the matter that the expert relied on in forming his or her opinion." The court made clear that this "analysis is limited to determining whether the matter relied on can provide a reasonable basis for the opinion or, on the other hand, reveals that the opinion is based on a leap of logic, conjecture, or artifice." (*Lockheed Litigation Cases*, 126 Cal.App.4th 271 (2005) (*Lockheed II*), review granted April 13, 2005, Case No. S132167.)

The *Lockheed II* plaintiffs claimed that the trial court abused its discretion by excluding the testimony of their sole general causation expert, Dr. Teitelbaum, because it lacked a reliable foundation. The court upheld the judgment in the defendants' favor, concluding that the trial court did not abuse its discretion by excluding Teitelbaum's testimony because, once again, that testimony was based on matter that did not support Teitelbaum's conclusions about the ability of the products at issue to cause the harm plaintiffs allegedly suffered.

Specifically, the *Lockheed II* court determined that:

- The epidemiology studies on which Teitelbaum relied did not show that the chemicals at issue increased the risk of contracting the type of adverse health effects the plaintiffs allegedly experienced. (See *Lockheed II* at 287-288.)
- The animal studies on which Teitelbaum had relied supplied no basis for his opinion in the case because they failed to show that any of the specific chemicals at issue were responsible for the plaintiffs' adverse health effects, they analyzed diseases that the plaintiffs did not have, and they could not be reliably extrapolated to humans. (*Id.* at 294-295.)
- Case reports did not support Teitelbaum's opinion about general causation. Case reports are anecdotal observations of symptoms in a single patient or a small group of patients. Case reports do not isolate or exclude potential alternative causes, investigate or explain the mechanism of causation, or draw conclusions about a chemical's ability to cause a particular adverse health effect in humans generally. (*Id.* at 295.)
- The treatises and registries of toxic effects which Teitelbaum relied upon concluded there was only a possible association between the chemicals and diseases at issue. This was insufficient in a toxic tort case, in which "a plaintiff must present expert testimony sufficient to establish to a reasonable medical probability" — that is "more than a mere possibility" — that the defendant's conduct contributed to the plaintiff's injury. (*Id.* at 287.)

The Court of Appeal reached a conclusion contrary to *Lockheed* in *Roberti v. Andy's Termite & Pest Control Inc.*,113 Cal.App.4th 893 (2003). In that case, Michael Roberti claimed that his autism was caused by in utero exposure to the pesticide Dursban, which was applied in the cellar of the Roberti home while his mother was pregnant with him. The trial court excluded the plaintiff's expert testimony at the motion in limine stage because the experts relied on a novel application of animal studies to humans that failed the "general acceptance" admissibility test set out in *People v. Kelly* and because the experts' causation opinions were speculative.

The *Roberti* Court of Appeal reversed, in part because it determined that "a more extensive preliminary admissibility test" under Section 801 of the foundation for the experts' causation opinions was inappropriate. (*Roberti* at 836.) The court dismissed this test as a "*Daubert*-style analysis" which applies only in federal courts.

But arrayed against *Roberti* are a number of recent appellate decisions that support a trial court's examination of expert testimony under Evidence Code Section 801, as approved in both of the *Lockheed Litigation Cases* opinions. *Geffcken v. D'Andrea*, 137 Cal.App.4th 1298 (2006) (upholding under Section 801, the trial court's exclusion of speculative and conjectural expert testimony in mold litigation); *Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal.App.4th 1108 (2003) ("Exclusion of expert opinions that rest on guess, surmise or conjecture is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?"); *Id.* at 1118 ("The plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury"); *Bushling v. Fremont Medical Center* 117 Cal.App.4th 493 (2004) (An "expert opinion may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact"); and *People v. Mitchell*, 110 Cal.App.4th 772 (2003) ("[R]egardless of whether evidence is deemed 'scientific,' it will not be admitted unless it is relevant. ... In California evidence is relevant only if it has 'any tendency in reason to prove or disprove any disputed fact.' And an expert's testimony must be based on matter 'that is of a type that reasonably may be relied upon by an expert.)

Pre-admissibility evaluation of the reliability of expert testimony is consistent with the emerging consensus in state courts across the country. Thirty-eight states require trial judges to determine the reliability of expert testimony before allowing that testimony to be heard by a jury. With the ever-increasing use of expert testimony, and the corresponding increase in complexity of the scientific studies on which experts rely, both the bench and the bar in California need guidance concerning the trial courts' ability to filter that testimony and limit parties to presenting to a jury only those expert opinions that have a proper foundation. The Supreme Court's upcoming analysis in *Lockheed II* of the trial courts' responsibility under Evidence Code Section 801 should provide that guidance.

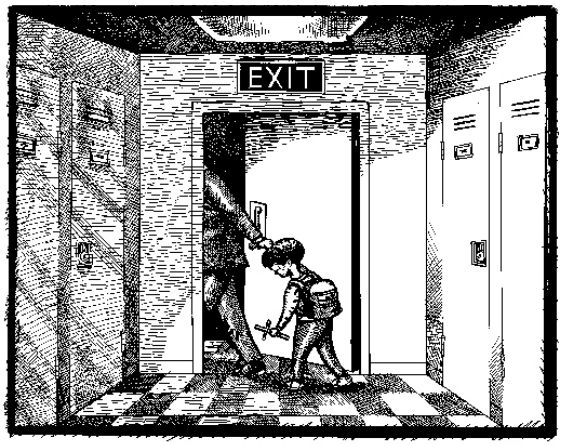
David M. Axelrad and **Mary Christine Sungaila** are partners at Horvitz & Levy, a civil appellate firm in Encino. They have represented defendants and amici in several appeals raising expert testimony issues, including the Lockheed Litigation Cases.

9th Circuit Was Wrong to Let School Censor Student's T-Shirt

By Michael Oberst

It is axiomatic in a country that values and protects the right of free speech and academic freedom that the society has to be willing to put up with a certain amount of personal discomfort if speech and thoughts are in fact going to remain free. There is no place where this is supposed to be more true than in the academic setting, especially among older students in high school and college. This is the main reason why the recent opinion of the 9th U.S. Circuit Court of Appeals, in a closely watched academic-freedom case, is so troubling.

It is true, of course, that school administrators are allowed to be more restrictive at the high-school level than at the college level. But any precedent that endows school administrators with wide latitude to censor public high schools provides college censors with a dangerous opening to argue for expanding censorship in higher education. In July, the full membership of the 9th Circuit refused to rehear en banc the case of high-school student Tyler Chase Harper. *Harper v. Poway Unified School District*, 2006 DJDAR 10022. Harper had worn to school a T-shirt with the message "Be Ashamed, Our School Has Embraced That Which God Has Condemned" emblazoned on one side, and "Homosexuality Is a Sin. Romans 1:27" on the other. Harper's T-shirt was not some example of hate speech coming out of the blue. Rather, it was in response — a protest — to a school-sponsored Day of Silence devoted to opposing what the school officials deemed intolerance against gay, lesbian, and transgender teenagers. Rather than see Harper's T-shirt as a form of protest against the official point of view embodied in the Day of Silence, school officials insisted that Harper's expression was harmful and disruptive, and they demanded that Harper remove the shirt. After refusing to do so, Harper was held in detention for the remainder of the day.



Harper sued, believing that, even as a high-school student, he had the right to express ideas, even unpopular ideas that might deviate from the official viewpoint. Yet in April, a panel of the 9th Circuit ruled 2-1 against Harper and, in the process, weakened high-school students' right to free speech. The vigorous expression of a point-of-view at odds with the official, prevailing point of view was seen as disruptive, as a form of harassment of gay students. Only one point of view, the official one, was to be allowed on the Day of Silence.

In his short-sighted majority opinion, Justice Stephen Reinhardt, well-known as one of the nation's most politically correct federal appellate-court judges, bizarrely interpreted a prior Supreme Court decision, *Tinker v. Des Moines*, 393 U.S. 503_(1969), when he determined that Harper's T-shirt constituted an "invasion of the rights of others." In effect, Reinhardt expanded the Supreme Court's definition of freedom from such a personal invasion to include the right of minorities (and only minorities, as he clarifies) to go about their day unoffended. In doing so, Reinhardt eschewed the fundamental First Amendment notion that the antidote to what someone might consider bad speech is not censorship or silence — but more good speech in response.

In a blistering dissent, Judge Alex Kozinski, a libertarian and possibly the single least politically correct judge of our day, attacked the majority's reasoning: "I have considerable difficulty with giving school authorities the power to decide that only one side of a controversial topic may be discussed in the school environment because the opposing point of view is too extreme or demeaning. ... [T]he fundamental problem with the majority's approach is that it has no anchor anywhere in the record or in the law."

Indeed, in his majority opinion, Reinhardt does more than create a right to suppress viewpoints that minority students (and administrators) deem offensive and detrimental to their "sense of self-worth." The *Harper* decision paves the way for blatant viewpoint discrimination in high schools across the nation, whenever the censored message touches upon issues that minorities hold dear. What members of the majority fail to understand is that, in the long run, members of historically unpopular or underprivileged minority groups have achieved legal equality in our society not by suppressing free speech but by vigorously exercising it. The 9th Circuit is doing these groups, and all of us, no favors.

Michael Oberst is a junior at Roxbury Latin School in Boston. He was an intern this summer with the Foundation for Individual Rights in Education.

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