

You cannot pass! The court's role as a gatekeeper

By Scott M. Gordon

The role of the gatekeeper is found in mythologies from many different cultures. In ancient Greece, Charon, the ferryman and Cerberus, the multi-headed dog, guarded the thresholds of the underworld; in Rome, Cardea was the goddess of doors and thresholds; in Etruscan mythology, Culsans was the protector of gateways; in Chinese mythology, Men-shens were the protectors of doorways, and in Hinduism, Narasimha was the protector of thresholds.

This role of gatekeeping placed on trial courts was discussed in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*), which charged trial judges with the role of gatekeeper to exclude expert testimony that lack a reasonable basis.

In *People v. Tidd* (2024) 104 Cal. App.5th 772 (*Tidd*), the trial court's role as a gatekeeper was tested and examined. In *Tidd* the defendant was charged with attempted murder, assault with a semi-automatic firearm and discharging a firearm from a motor vehicle. The charges resulted from a shooting that occurred at late one night in San Francisco. The victim had been drinking at a friend's apartment and left to walk home. As he walked it was clear that he was under the influence of alcohol. A white SUV drove past the victim, stopped, and backed up to where he was on the sidewalk. The driver got out of the SUV and spoke to the victim. Once the driver got back in the SUV the victim lifted his hands and extended his middle fingers at the driver (this gesture is historically recognized as an insult. In ancient Rome, it was known as *digitus im-*



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prudicus). The victim was then shot by one of the occupants of the SUV. The victim could provide little detail about the incident. The police subsequently found a vehicle matching the description and an unfired cartridge in the SUV. This cartridge, a cartridge case found near the scene, and a handgun found on the defendant's person were submitted for analysis.

At trial, the People called a criminalist with the San Francisco Police Department as an expert on firearm analysis, comparison and identification. The criminalist testified that he compared the cartridge case found at the scene and a cartridge case

from a round test fired from the recovered weapon. There are several actions and mechanisms involved in firing a semi-automatic handgun that can leave marks on a cartridge case. It is the comparison of these marks that is the subject of the expert testimony in this case.

In *Tidd*, the expert testified that he found "sufficient" similarities between the cartridge cases and that "both the [analyzed] cartridge case and the test fire w[ere] fired in the same firearm." This testimony was admitted over the Defendant's objection, pursuant to *Sargon*.

The Defendant argued that the trial court erred in allowing the

criminalist to testify as to a "match," as there is no scientific basis for a conclusion that every gun leaves a unique signature and marks on the cartridge case and because there are no objective standards to govern this type of analysis. The Defendant argued that the expert should have been limited to testifying as to the similarities between the analyzed cartridge cases.

In reviewing the court's discussion, it was noted that *Sargon* charges a trial court with acting as a gatekeeper to exclude expert testimony that is based on assumptions of fact without evidentiary support or on guesswork and conjecture.

The court went on to state that “[t]he trial court’s gatekeeping role does not involve choosing between competing expert opinions,” but it does require the trial court to make a “preliminary determination whether the expert opinion is founded on sound logic.” The trial court must “determine whether, as a matter of logic, the studies and other information cited by the experts adequately support the conclusion that the expert’s general theory or technique is valid.”

When confronting an issue of expert testimony, the court has a decision tree to follow regarding the admissibility of the proposed testimony. 1) Evidence Code §§ 801 and 802 - regarding the relevance of expert testimony and the qualifications of the testifying expert. EC § 801, provides that an expert can testify to an opinion if the subject matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and is based on the expert’s special knowledge, skill, experience, training, and education. EC § 802 describes the proper basis of the expert’s opinion. 2) Has the subject matter of the expert’s testimony been generally accepted in the relevant scientific community as described in *People v. Kelly* (1976) 17 Cal.3d 24 applying the rule established in *Frye v. United States* (1923) 293 F.1013.

In *Kelly*, the Supreme Court held the admissibility of expert testimony based on “a new scientific technique” requires proof the technique is reliable. (citation omitted) The technique is reliable if the proponent can show: “(1) the technique has gained general acceptance in the particular field to which it belongs, (2) any witness testifying

on general acceptance is properly qualified as an expert on the subject, and (3) correct scientific procedures were used in the particular case.”

Kelly applies to unproven techniques or procedures that appear “in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury,” such as “machines or procedures which analyze physical data,” because “[l]ay minds might easily, but erroneously, assume that such procedures are objective and infallible.” (citation omitted) “However, absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly /Frye*.” (citation omitted) “In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. *People v. Therrian* (2003) 113 Cal.App.4th 609. 3) As described in *Tidd*, is the proposed expert testimony supported by the technical and scientific information and studies relied on by the expert.

Trial courts in all disciplines are frequently faced with expert testimony on a vast variety of subjects ranging from a medical examiner testifying regarding the cause of death in a murder case to a forensic accountant testifying about the value of a business. The majority of issues presented are differences in opinions between opposing experts. The trier of fact, whether a jury or a judge in a bench trial, is tasked with weighing the differing opinions. However, in some cases, the court is called upon to make much more challenging decisions.

These decisions are the kind of gatekeeping decisions described in *Sargon* and subsequently in *Tidd*. The issue with the testimony presented in *Tidd*, was not whether the issue of firearms tool mark identification was the proper subject of expert testimony, but the fact that the expert in *Tidd* did not submit adequate information to support the validity of his technique. To this point, the court in *Tidd* said: “*Sargon* leaves to the jury the task of declaring a victor in the proverbial battle of experts, but it allows a contestant to take the field—or an expert to take the stand—only after demonstrating that ‘as a matter of logic, the studies or other information on which the expert relies adequately support the conclusion the expert has drawn.’”

The proponent of the evidence must show sufficient foundational evidence to establish the reliability of the process employed by the testifying expert. In *Tidd*, the question was also raised regarding a subjective expert opinion vs. an objective opinion that could be validated by proper foundation. The court found that in the instance in which an expert’s technique employs no articulable standards or minimum criteria for declaring a match between a known and questioned piece of evidence, the proponent of the expert testimony must show and individualized assessment of the expert’s ability to match or distinguish pieces of evidence, in this case, a cartridge found at the crime scene and one test fired from a weapon.

This foundation for the expert’s ability could be met with evidence of verified results of prior comparisons or regular testing as part of a

certification process (See: *People v. Rivas* (2015) 238-Cal.App.4th 967, regarding fingerprint comparison evidence).

The gatekeeping role of the court, as described in *Tidd*, has significance not only in criminal cases but in civil and family law cases where expert testimony is submitted. The use of expert testimony in any trial requires a good deal of preparation, as to the subject matter of the testimony, the qualifications of the expert witness, and the specific technique and/or process employed by the expert witness to reach the opinion that is to be submitted into evidence. To make a reference to the *Lord of the Rings*, the failure of preparation at any step, subjects the proponent of the evidence to hear those words of prohibition forcefully said by Gandalf at the Bridge of Khazad-dûm — “You cannot pass!”

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