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# Expert Testimony Excluded under Kyocera Where Party Failed to Establish its Expert Possessed the Necessary 'Advanced Training and Experience'

November 1, 2024

Reading Time : **2 min**

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The Federal Circuit's decision in *Kyocera Senco Industrial Tools Inc. v. International Trade Commission* articulated a bright-line test for patent expert admissibility: to testify from the perspective of a "person of ordinary skill in the art" (POSITA), the expert must at least meet the definition of a POSITA for the patents-in-suit. Absent that level of skill, *Kyocera* holds that the witness's testimony is not sufficiently reliable or relevant enough to be relied on by a fact-finder.

Applying *Kyocera*, the court in *Wave Neuroscience, Inc. v. Brain Frequency LLC* excluded an expert witness's testimony where the party failed to show that the expert was sufficiently skilled. The plaintiff, Wave Neuroscience, Inc. ("Wave"), sued Brain Frequency LLC ("Brain") for infringement of a patented technology for treating neurological disorders. At the claim construction stage, the parties disagreed about the level of experience required to be a POSITA in this field. Brain proposed that a POSITA would have, among other things, "advanced training and experience" in either electroencephalogram (EEG) or transcranial magnetic stimulation (TMS) technology. Wave's proposed POSITA, on the other hand, required training or experience in both EEG and TMS.

The court determined that the patents at issue were focused on a TMS technique, which uses EEG results, but only as one part of the process. Thus, the court reasoned, EEG training and experience, by itself, could not qualify an expert to testify about TMS. Accordingly, the court agreed with Wave and found that a POSITA would have advanced training or experience in both EEG and TMS.

Under this definition, the court found that Brain failed to demonstrate that its expert had sufficient skill. Although Brain's expert had a graduate degree in neuroscience and work experience in EEG, the Court determined that his TMS experience was lacking based on his curriculum vitae (CV). The only mention of TMS experience in the expert's CV was a two-year research project in which the expert was the "primary investigator." The court disregarded this work because there was no evidence that, as a primary investigator, the expert had a hands-on or technology-facing role where he could have received the required training or experience. Moreover, the defendant's descriptions of the expert's experience were too vague for the Court. There were no details about the scope of the expert's TMS work, the TMS training the expert may have received as part of the study or even a copy of the publication associated with the project. Accordingly, the court would not "take the leap" in assuming the expert had the required experience and found that Brain failed to meet its burden to demonstrate that its expert was qualified to testify under *Kyocera* and Rule 702.

**Practice Tip:** Following *Kyocera*, differences between an expert's precise background and the defined level of skill in the art are no longer just fertile areas for cross examination, but grounds for exclusion. Accordingly, practitioners should either ensure that their proffered expert meets the POSITA definition proposed by both sides, or in cases where the level of skill is proposed after experts are selected, ensure that their expert provides detailed evidence beyond his or her CV to demonstrate that every aspect of the proposed definitions are met.

*Wave Neuroscience, Inc. v. Brain Frequency LLC*, No. SA-23-CV-00626-XR (W.D. Tex. Oct. 4, 2024) (Order Granting Plaintiff's Motion to Strike).

## Categories

International Trade Commission