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PERSPECTIVE

Sanchez revisited: A better way to handle objections

By Timothy D. Reuben

The California Supreme Court wreaked havoc on the trial courts when it issued its decision in *People v. Sanchez*, 63 Cal. 4th 665 (2016), and changed the rules for admissibility of expert testimony. The court held that "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law." Although *Sanchez* was a criminal case which dealt substantially with the application of Sixth Amendment principles guaranteeing the right of a criminal defendant to confront his or her accuser, *Sanchez* broadly analyzed to what extent an expert may testify about or rely on hearsay in providing opinions at trial.

Since the *Sanchez* ruling, trial courts in civil matters have struggled with how to apply its ruling and unfortunately have differed in exactly how to do so. Some judges have excluded or limited expert testimony under the incorrect interpretation that any case-specific facts that an expert relies on must be introduced into evidence, which can lead to absurd results at trial, requiring the attempted admission of massive amounts of evidence that would historically be both unnecessary and downright wasteful. But a careful reading of *Sanchez* from the point of view of civil proceedings demonstrates that many trial courts have overreacted to its ruling, and that in fact the courts should not require all the evidence an expert relies on to be admitted either at trial or in any evidentiary hearing.

Sanchez was prosecuted for firearm and illegal drug possession. A gang expert testified at trial and relied on a number of police reports and other police documents to opine that Sanchez was also a gang member and that his criminal activity supported the illegal activities of a particular gang. The expert testified that the underlying statements in the police reports and documents were true and admitted he had no direct personal knowledge of the information, and the prosecution never offered any of the underlying officers involved in the reports or documents to testify directly to the facts on which the expert relied. The California Supreme Court reversed the finding of street gang enhancements, ruling that the expert's testimony to the jury about facts specific to Sanchez's case should not have been admitted, since the facts were based on hearsay and that, in violation of the Sixth Amendment, Sanchez did not have an opportunity to confront his accusers (i.e., the police who prepared the reports and were otherwise involved in the documents). Thus much of the opinion is devoted to Sixth Amendment issues, which are entirely irrelevant in a civil case.

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But the Supreme Court does discuss admissibility of expert testimony which relies on hearsay at great length, and it is this language which has caused confusion in civil proceedings. California Evidence Code Section 801 specifically allows an expert to rely on facts and evidence "whether or not admissible, 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." The court goes on to note that under Evidence Code Section 802, an expert is also entitled to testify to "the reasons for his opinion and the matter ... upon which it is based." But the court determined that the introduction through expert testimony of incompetent hearsay cannot be cured by an instruction to the jury not to consider such hearsay for the truth of the matter asserted, "because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (Emphasis in original.)

As a result of *Sanchez*, attorneys in civil cases have objected to expert testimony based on any case-specific fact that is not actually in evidence, and trial courts have frequently sustained such objections. Indeed, it has become routine for *Sanchez* objections to be made — not just in trial and not just involving a jury — but in any evidentiary proceeding. In order to overcome this objection, a party has frequently been required to introduce into evidence any fact on which an expert relies, regardless of how mundane. So, for example, in a simple divorce case where accountants review various financial records in order to perform a cash flow analysis, create a child support calculation, or calculate a standard of living, objections are made that the experts have based their analysis on hearsay — i.e., the couple's financial records. If

this interpretation of a *Sanchez* objection is followed, a trial or hearing may be unnecessarily complicated and lengthened as parties are required to put in mountains of documents, call custodians of records, and otherwise introduce evidence which is case-specific which has traditionally been summarized in accounting reports. Such an interpretation of *Sanchez* — while allowing lawyers to throw an unpleasant wrench into the judicial process — is counterproductive to efficient trials and hearings and unnecessarily burdens parties.

Perhaps more importantly, overuse of *Sanchez* objections is contrary to the language of the opinion — which is admittedly not terribly well articulated for use in civil proceedings. The court specifically stated: "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (Emphasis in original.) This language would suggest — albeit vaguely — that the hypothetical accountant expert can still opine as to his calculations and can generally identify what was examined but just can't specifically explain what his or her numbers are calculated from; nonetheless, the expert's conclusions are admissible. The court went on to state: "[t]here is a distinction to be made between allowing an expert to describe the type of source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." Notably, that final phrase of this sentence is critical, and is further explained by the court in the next paragraph: "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (Emphasis in original.) This language — while not fully explicated — makes clear that there are *two* ways an expert can both rely on and testify about case-specific facts: if the facts are actually admitted (i.e., independently proven) *or if they are covered by a hearsay exception*. Obviously, if the facts are in evidence, an expert can rely on them and discuss them, but importantly case-specific facts that are relied on *do not* need to be actually admitted into evidence; rather they just need *to be admissible*. So in the hypothetical involving the financial expert's calculations, if the expert has relied on case-specific business records, he or she should be allowed to testify about the details in those underlying records as support for his or her opinions. And in such an instance, there is no requirement that the admissible evidence an expert relies on actually needs to be admitted — particularly where to do so would require extensive trial time and expense, such as subpoenaing records and custodians and admitting thousands of pages of non-controversial documents.

Of course, some would legitimately argue that it is not always evident whether case-specific facts relied on by an expert are "covered by a hearsay exception." While the accountant in a divorce case or the economist in an employment case may clearly be relying on business records (e.g., a couple's bank statements, wage statements, etc.) which are covered by the business records exception, other evidence containing case-specific facts may not so obviously be covered by a hearsay exception. Therefore, what trial courts should do is require parties prior to trial and after expert depositions to meet and confer specifically about *Sanchez*-type objections. Such a discussion can obviously occur at a pretrial conference of the lawyers which covers other trial topics. Simply put, rather than waste time at trial, attorneys for the parties should be required to raise any known objections to expert testimony based on *Sanchez* to avoid such issues at trial. If a legitimate *Sanchez* objection is made and there is no agreement as to whether the subject fact is covered by a hearsay exception, parties can either seek in limine a determination regarding whether the fact is covered by a hearsay exception or make appropriate efforts to independently prove at trial any case-specific fact which the expert seeks to rely on.

Sanchez has unfortunately caused confusion, and its directions regarding how to follow its holding are not sufficiently articulated, which has led trial courts to apply it inconsistently. While the obvious and laudable intent of *Sanchez* is to assure a trial based on reliable evidence, practical application of the holding can be challenging, particularly since the opinion's language must be carefully parsed to understand its ruling. However, it does not appear that the Supreme Court intended to preclude expert testimony based on hearsay, nor to prevent discussion of case-specific facts obtained from hearsay evidence which would be admissible — such as business records or admissions by parties. So for example if an expert reviews an opposing party's deposition (which is admissible for any purpose) or a company's business records, that expert should be allowed to testify about the specifics of that admissible hearsay without objection. ■

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