LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, AUGUST 23, 2021

PERSPECTIVE

Ruling clarifies precedent on expert reliance on hearsay

By Timothy D. Reuben and Stephanie I. Blum

What exactly can an expert rely on for his or her opinion to be admissible? This debate has been raging since the California Supreme Court issued its opinion in *People v. Sanchez*, 63 Cal. 4th 655 (2016), where the court held that case-specific hearsay statements cannot be relied on by an expert "unless they are independently proven by competent evidence or are covered by a hearsay exception." Now, in *Zuniga v. Alexandria Care Center, LLC*, 2021 DJDAR 8346 (Aug. 12, 2021), modified 2021 DJDAR 8439 (August 17, 2021), Division 7 of the 2nd District Court of Appeal has threaded the needle and further clarified this law, notably without ever mentioning the *Sanchez* decision or the hearsay rule.

Justice Dennis Perluss, joined by Justices John Segal and Gail Feuer reversed Los Angeles County Superior Court Judge Elihu Berle's exclusion of the plaintiff's expert's testimony, holding that "if the trial court rejected [the expert's] testimony simply because it was based on inadmissible evidence, without further consideration of the reliability of the data used, the court committed legal error." The *Zuniga* court further ruled that to the extent Judge Berle "impliedly found" the evidence unreliable, in light of the record, "there was no reasonable basis for the court to conclude" that the case-specific inadmissible evidence was not the type on which experts reasonably rely.

Rosalinda Zuniga, a housekeeper, sued her employer for Labor Code violations, including meal break and rest break violations, failure to make full and timely payments or reimburse employees, failure to maintain required records or provide accurate wage statements, and failure to pay minimum wages or compensate for overtime. Her lawyers also included a Private Attorneys General Act cause of action, seeking substantial penalties and attorney fees. After her individual claims were settled, the PAGA claim proceeded as a bench trial. PAGA penalties for these various violations can be extremely significant; individual penalties are assessed based on each violation, which typically are proven through a defendant's business records together with expert testimony. Following this approach, Zuniga based her case primarily on the defendant's timekeeping and payroll records plus the expert testimony which calculated the number of various violations and the financial penalties per violation. Zuniga's lawyers had obtained these business records from defendant in discovery in PDF format, and had entered the PDFs into evidence. Importantly, the PDFs of the defendant's business records were converted by a company named iBridge into Excel spreadsheets, which were also offered into evidence at trial. Depositions had been taken of both plaintiff's experts: a vice president of iBridge in charge of sales and business development, who simply testified that the defendant's PDFs had been properly converted to Excel, and Dr. Drogin, a statistics professor who reviewed the Excel spreadsheets, made calculations based on them, and substantively testified about the extent of the defendant's various violations.

It is not unusual for lawyers to stipulate to the admissibility of Excel spreadsheets that simply provide the same otherwise admissible information in a different format, and courts often encourage counsel to make such evidentiary agreements to avoid unnecessary trial time where there is no debate about the accuracy of such information, particularly because the data is in a more digestible format. But here, defense counsel did not stipulate and instead objected — something that might raise the ire of some trial judges. Moreover, it appears that nothing was offered to suggest that the Excel spreadsheets were inaccurate or anything other than a reproduction of the defendant's business records, albeit in Excel format.

Probably to the plaintiff's lawyers' surprise, Judge Berle sustained the objections to the authenticity of the Excel spreadsheets. As it turned out, the iBridge vice president had no direct knowledge of the underlying work product created by his company; he could only testify as to the general practice of how iBridge conducted these PDF conversions — indeed, the actual work was done in India. Based on this, Judge Berle found the iBridge executive had insufficient foundation to support the authenticity of the Excel spreadsheets and rejected them (even though the defendant's actual business records produced as PDFs were in evidence), and since Dr. Drogin based all his opinions and calculations on the Excel spreadsheets, Judge Berle also struck the entirety of the expert testimony.

The plaintiff attempted to resolve this issue by recalling Dr. Drogin, who in the meantime had conducted a comparison of the

Timothy D. Reuben *is the founder and managing principal of Reuben Raucher & Blum specializing in complex civil matters. He has practiced for over 40 years in federal and state courts and in arbitration and handles complex civil matters and all types of business litigation.*

Stephanie I. Blum *is the Family Law Department Chair at Reuben Raucher & Blum and has practiced exclusively in the area of Family Law for over 25 years. She is a Certified Family Law Specialist, having obtained her Certificate of Specialization from the California Board of Legal Specialization.*

PDFs and the Excel spreadsheets and testified that the information was the same. However, Judge Berle again struck this testimony since it was based on work done after Dr. Drogin had completed his testimony, so it had not been disclosed in his pretrial report or at his deposition, and experts cannot testify at trial to opinions that had not been previously disclosed. Cleverly, the defendant quickly rested, calling no expert at all; thus there was no chance for rebuttal, and so the trial court found that the plaintiff had not carried her burden and entered judgment for the defense.

The Court of Appeal properly reversed, but it did so not because the Excel spreadsheets were admissible, but only because it held that the trial court had improperly excluded Dr. Drogin's expert testimony which was based solely on the (inadmissible) Excel spreadsheets. The court expressly affirmed Judge Berle's ruling excluding the Excel spreadsheets (apparently not requiring the court itself to look at the PDFs, which were properly in evidence, and compare them to the data in the Excel spreadsheets, which presumably the trial court could and arguably should have done).

Pointing out that exclusion of evidence is reviewed under the abuse of discretion standard, the *Zuniga* opinion concludes: "Although the trial court might well have exercised its discretion differently, its decision to exclude the iBridge spreadsheets because Zuniga failed to provide foundational testimony necessary to authenticate them was far from arbitrary, capricious or patently absurd." The appellate court further affirmed Judge Berle's rejection of Dr. Drogin's "new analysis verifying the accuracy of the spreadsheets" because that work was undertaken "after he had completed his trial testimony." And, of course, the trial court can "reasonably" exclude an expert's opinions which were "not disclosed in his expert report, during his deposition, or even in his initial trial testimony." Possibly the expert might have been allowed to shore up the authenticity issue in rebuttal, but the defense strategy prevented that from happening.

The obvious lesson here is that an expert who is testifying even about as mundane an issue as a conversion of admissible evidence into a more readable format should have sufficient personal knowledge to do so, and that litigation support companies should not offer their sales representatives as experts.

Fortunately for the plaintiff, the appellate court was not prepared to allow the case to die based on what might be viewed as a technicality. In doing so, it found that the expert's testimony itself should not have been stricken, even though it was based on inadmissible evidence pursuant to the trial court's order, which the appellate court had itself not reversed.

Although *Sanchez* is not explicitly referenced, the appellate court actually settles some of the dispute over the meaning of *Sanchez*. As Evidence Code Section 801 states, the basis for an expert opinion must be reliable "whether or not admissible." As argued by this author in a prior article ("*Sanchez* Revisited; A better way to handle objections," Daily Journal, Sept. 24, 2019) and contrary to the conclusions of some jurists, *Sanchez* does not require case-specific information to actually be in the record for an expert to rely on it. Instead, if case-specific statements are not in evidence and as here not admissible, the court must then determine if the out-of-court, case-specific statements are reliable.

In *Zuniga*, the underlying data was from business records produced by the employer and also in evidence. The Excel spreadsheets were inadmissible based on a foundation objection, but they were "of a type reasonably relied upon by professionals in the relevant field." So although not in evidence and not themselves admissible, the Excel spreadsheets could be used by the expert because they were found to be sufficiently reliable: "Although we affirm the ruling excluding the spreadsheets as within the trial court's discretion, there was nothing speculative or conjectural about them." This is not inconsistent with *Sanchez*, but it does clarify that an expert may rely on out-of-court, inadmissible, but case-specific documents that are clearly reliable based on what is typical in the professional field. Here, Dr. Drogin testified he had used similar records from iBridge 10 to 15 times in the past, was familiar with iBridge's processes and quality control measures, and had recommended iBridge in other matters.

In *Sanchez*, a gang expert relied on statements in some inadmissible police reports to support his opinion justifying gang enhancements, but that expert had no personal knowledge and there was no showing of clear reliability of these out-of-court statements. The court found that the expert could not be the conduit for the introduction of otherwise inadmissible facts, and Sanchez had the further issue of the Sixth Amendment right to confront witnesses, not pertinent in a civil case.

Justice Perluss' opinions are typically filled with lessons for litigators and judges alike, and this was no exception. First, do not put an expert on the stand who cannot testify based on some degree of personal knowledge about the subject matter. Second, while most trial judges would not exclude PDF converted evidence based on authenticity, some clearly will do so, as Judge Berle did here, and that ruling may even be affirmed; so, do not make evidentiary stipulations about foundation and authenticity to shorten trial if you have a good faith (albeit weak and disfavored) objection, since sometimes it works. Third, don't have your expert base his or her opinion solely on work product of another expert without making that expert check and endorse that work product and so testify in deposition. Fourth, don't allow your opponent to fix a fundamental evidentiary problem during rebuttal. And finally, despite *Sanchez*, experts clearly can testify based on inadmissible, case-specific evidence if it is found to be both reliable and the type of evidence upon which such experts typically rely. ■