The California Supreme Court's new limitation on an expert's ability to rely on hearsay evidence

People v. Sanchez *created new and significant challenges to dealing with hearsay evidence*

By Andrew Johnson

As plaintiffs' attorneys, we have many obstacles to overcome in collecting and presenting admissible evidence to a jury whether the evidence be in the form of physical evidence, witness testimony, or documentary evidence. When it comes to documentary evidence, the obstacles can be even higher to overcome given the rules of hearsay and the practicality of finding and deposing individuals who have stated opinions or facts contained within the documents.

For decades, plaintiff and defense attorneys alike, have been able to utilize expert testimony in order to present otherwise inadmissible hearsay evidence under the theory that the evidence was not in fact being presented to offer the truth of the matter contained within it, but was being offered only as the basis for the expert opinion. On June 30, 2016, the California Supreme Court published it's ruling in the case of *People v. Sanchez*, (2016) 63 Cal.4th 665, which completely changed an attorney's ability to present hearsay evidence through expert testimony and which has created new and significant challenges to dealing with hearsay evidence.

While *Sanchez* addresses several issues, including the Sixth Amendment Confrontation Clause and what constitutes "testimonial hearsay," this article will focus on the new dynamic created by *Sanchez* in relation to California Evidence Code sections 801 and 802 and the practical challenges which now face plaintiffs' attorneys in collecting and presenting admissible evidence.

Expert reliance on general knowledge hearsay vs. case-specific hearsay

Hearsay evidence is formally defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." (Cal. Evidence Code § 1200(a).) Dating back to common law and early case law, experts have been given significant latitude regarding what hearsay evidence they are allowed to testify about. Since that time Courts have separated the type of hearsay to which an expert is testifying into two categories: (1) background information and general knowledge, and (2) case-specific facts. While general knowledge hearsay may include mathematics, physics, medical testing or other accepted mediums of knowledge within a given experts profession, case-specific fact hearsay relates to particular events or participants to which the expert has no actual personal knowledge.

The rules of hearsay have traditionally not barred an expert from testifying regarding his general knowledge in his field of expertise, recognizing that experts frequently acquire their knowledge from hearsay and that to reject experts from testifying regarding their professional knowledge would ignore accepted professional methods and insist on impossible standards. The *Sanchez* ruling did not disrupt this standard as it states "our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony regarding such background information has never been subject to exclusion as hearsay." (*Id.* at 685.)

What the *Sanchez* court did change however, was the long accepted and evolved premise of how an expert could rely on, and testify, regarding case-specific facts contained in hearsay evidence. At common law, experts were typically precluded from testifying in regard to case-specific facts to which they had no knowledge. However, even prior to the California Evidence Code being enacted in 1965 there were already exceptions as to when an expert could relate otherwise inadmissible case-specific hearsay such as testimony regarding property valuation and medical diagnoses. The justification for these exceptions was very practical: (1) the expert routinely used the same kinds of hearsay in their conduct outside the court, (2) the expert's expertise included experience in evaluating the trustworthiness of the hearsay sources, and (3) the desire to avoid needlessly complicating the process of proof. (Kaye et al., The New Wigmore: Expert Evidence (2d ed. 2011) § 4.5.1 p. 153-154.)

Case-specific hearsay: A thing of the past?

In 1965 when the California Legislature enacted the evidence code, the common law exceptions allowing experts to rely on and relate case-specific fact hearsay, and the reasoning behind said exceptions, were codified into Cal. Evidence Code § 801 and § 802. Cal. Evidence Code § 801(b) provides that an expert may provide an opinion "based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible*, *that is of a type that reasonably may be relied upon by an expert in forming an opinion upon which the subject to which his testimony relates*, unless an expert is precluded by law in from using such matter as a basis for his opinion." (italics added).

Similarly, Cal. Evidence Code § 802 allows an expert to "state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." Based on this codification, the ability of an expert to testify regarding case-specific facts had evolved. Under this precept, reliability of the information used by experts in forming their opinion is the key inquiry as to whether the expert testimony can be admitted. Additionally, the expert would be entitled to explain to the jury the matter upon which he relied, thus making otherwise inadmissible case-specific hearsay evidence admissible as the basis for the expert's opinion, while remaining inadmissible to prove the truth of the matter asserted.

This is the paradigm that existed for two decades. As long as the evidence was reasonably reliable, ordinarily inadmissible case-specific hearsay evidence could be admitted as the basis for an expert's opinion, assuming the expert relied on said evidence, regardless of whether the evidence was hearsay because it was not going to prove the truth of the matter asserted, it was merely going to show the basis for the expert opinion. Since the evidence is not going to prove the truth of the matter asserted, it is by definition not hearsay. In drafting the Code of Evidence, the California Legislature was obviously mindful of the practical applications of these rules. To disallow experts from explaining the basis for their opinions based on hearsay, despite the hearsay documents being reasonably reliable, creates an untenable court system and a near impossible burden in obtaining admissible evidence.

The above described rule regarding an expert's ability to rely on and recite case-specific hearsay evidence was not simply allowed with free reign. As exemplified by the Supreme Court in *People v. Coleman*, (1985) 38 Cal.3d 69, the Court must still use its discretion in deciding what information is admissible based on weighing its probative value versus the potential prejudicial effect. (Cal. Evidence Code § 352.) In *Coleman*, the Supreme Court ruled that allowing the prosecution's expert to recite hearsay letters of the Defendant's deceased wife constituted reversible error in that, pursuant to Cal. Evidence Code § 352 the highly prejudicial effect of the letters far outweighed any probative value. The letters should therefore not have been allowed to be admitted as the basis for the prosecution expert's opinion.

The Supreme Court subsequently created a two-step approach to balancing an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, so as not to conflict with the interest in avoiding substantive use of unreliable hearsay. The Court in *People v. Montiel*, (1993) 5 Cal.4th 877 ruled that "most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth." Furthermore, "sometimes a limiting instruction will not be enough. In such cases, Cal. Evidence Code § 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value." (*Id.* at 919.) Simply put, the *Montiel* Court kept in effect the idea that experts may rely on, and relate to the jury, case-specific hearsay evidence as long as there is a limiting instruction to the jury that said evidence is not going to prove the truth of the matter asserted but instead is going only to show the basis for the expert opinion. The *Montiel* Court also specifically notes the need for courts to use the discretion afforded them by Cal. Evidence Code § 352 so as not to allow unreliable or prejudicial hearsay evidence to be admitted under the guise of the basis for an expert opinion.

It is the standard created by the *Montiel* Court which has governed litigators' ability to admit case-specific hearsay evidence since 1993. Under this standard the admissibility of case-specific fact hearsay simply turned on whether a jury could properly follow the court's limiting instruction regarding the nature of the hearsay evidence. If the limiting instruction is not sufficient, the Court has discretion to exclude the evidence under Cal. Evidence Code § 352. The evidence was not considered to be hearsay because it did not go to prove the truth of the matter, it only served as the basis for the expert's opinion. The *Montiel* Court kept in effect the practical nature of allowing an expert to rely on and relate to the jury case-specific hearsay evidence as long as the evidence was reliable and not overly prejudicial. For over 20 more years, California litigators used experts to admit case-specific hearsay evidence as the basis for their opinion. As long as the evidence was reasonably reliable and not overly prejudicial, a limiting instruction was sufficient to allowing the evidence to be admitted regardless of whether it contained hearsay. This practical approach allowed litigators to admit hearsay evidence through their expert without having to

break down the walls of hearsay, which in many cases would be impossible. In June 2016 the California Supreme Court decided to destroy this practical dynamic and ruled that whenever an expert relates case-specific fact hearsay they are in fact offering that hearsay content for its truth.

The new bright line rule on case-specific hearsay

The *Sanchez* case deals with several issues, including the Sixth Amendment confrontation clause and what constitutes "testimonial hearsay;" but the most astounding ruling that comes out of the *Sanchez* decision, and the one that is most relevant to any civil litigator is this: "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be admitted through an applicable hearsay exception. Alternatively the evidence can be admitted through an appropriate witness." (*Id.* at 684.) The *Sanchez* Court specifically and purposely destroyed the pre-existing standard regarding what case-specific hearsay evidence an expert can rely on, stating that, "we conclude this paradigm (allowing an expert to rely on case-specific hearsay evidence with a limiting instruction that the evidence goes only to the basis of the expert opinion and not to the truth of the matter asserted) is no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury." (*Id.* at 679.)

The *Sanchez* court recites its reasoning for this new paradigm by stating that when an expert relies on hearsay to prove case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot be logically asserted that the hearsay content is not being offered for its truth. (*Id.* at 682-683.) The expert is essentially telling the jury, "you should accept my opinion because it is reliable in light of these facts upon which I rely," which means the expert is offering those facts for their truth. (*Id.* at 686.) While this reasoning may seem logical, it is certainly not practical, and does not comport with the Legislature's 1965 enactment regarding evidence, nor the 50 years of case law which has followed.

The *Sanchez* Court makes sure that there is no confusion about the new rule they are putting forth. "In sum, we adopt the following rule: when any expert relates to the jury case-specific out-of-court statements, and treats the contents of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot be logically maintained that the statements are not being admitted for their truth." We disapprove our prior decisions[1] concluding that an expert's basis testimony is not being offered for the truth, or that a limiting instruction, coupled with the trial court's evaluation of the potential prejudicial impact of the evidence under Cal. Evidence Code § 352 sufficiently addresses hearsay [and confrontation clause] concerns." (*Ibid.*)

The *Sanchez* Court destroyed the ability to allow experts to rely on case-specific hearsay evidence unless it is subject to a hearsay exception. It purposefully and with specificity disapproved of prior California Supreme Court decisions which allowed such evidence to be relied upon and admitted. Going forward, litigators will need to be very aware of the *Sanchez* opinion and take proactive steps to ensure that important evidence is not deemed inadmissible hearsay, given that an expert's reliance on said evidence will no longer be sufficient to have it admitted.

What are the practical ramifications of this decision?

The ramifications of this decision are significant. Whether talking about medical records, police reports, incident reports, or witness statements, it is commonly necessary to rely on hearsay evidence to some degree. Prior to *Sanchez*, as long as the source of the information was reliable, an expert could base their opinion on said evidence and the evidence could be admissible to show the basis for the expert's opinion. That is no longer the case.

Pursuant to *Sanchez*, all case-specific hearsay evidence must now be subject to a hearsay exception in order to be admissible or relied on by an expert. It is well known that there are several hearsay exceptions to Cal. Evidence Code § 1200(a) including but not limited to business records, party admissions, prior consistent or inconsistent statements, dying declarations, non-party declarations against interest, statements regarding state of mind or physical condition, and past recollection recorded to name a few.[2] It is now more important than ever to be familiar with these exceptions and know the full extent to which they will create an exception to hearsay. Evidence obviously comes in all shapes and forms and some hearsay issues will be more easily overcome then others based on how practical, or possible, it is to break down the wall of hearsay.

Medical records: An example

Take medical records as an example. Medical records may be the least affected by *Sanchez* given the hearsay exceptions available and the practicality of turning hearsay evidence into actual admissible evidence through witness testimony. Medical records themselves would typically be subject to a business record exception allowing portions of the record to be admissible. Statements made by the patient contained within the records can commonly be admitted through a state of mind or physical condition exception to hearsay. But what about the physician opinions and diagnoses contained within the medical records?

Prior to *Sanchez*, a proper expert could review the records and form their own opinion based on the diagnoses of other physicians. Those medical records, including the physicians' opinions contained within them, would then be admissible in order to show the basis for that

expert's opinion. Not anymore. Now, if an attorney is interested in admitting a medical record which includes a physician's opinion, that attorney will be required to depose that physician so as to make the opinion no longer hearsay. In some cases this may have occurred anyway, in others, this may be an incredible burden to overcome. At least when it comes to medical records, the physician is identified and it is at least feasible to find and depose them. Just hope they are still in the area.

Police reports

When it comes to police reports, the *Sanchez* burden can become almost impossible. With police reports, it usually comes down to one issue: witness statements. If the witness can be tracked down, then there is no issue. But what about when the witness is gone and cannot be found? Prior to *Sanchez*, an accident reconstructionist could use witness statements contained in the police report as a basis for their opinion. Therefore the witness statements could become admissible, not to prove the truth of the matter, but to show the basis for the expert opinion. Again, that is no longer the case. The reality of the matter is that litigators will have to invest significantly more time and money in order to find witnesses since their statements will now be otherwise inadmissible. Of course it is always best practice to have the witness testify in person, but that is not always possible. Prior to *Sanchez* the jury was at least still able to hear the witness statement, even if just through an expert.

The impossible burden: Prior similar occurrences

Where the *Sanchez* decision really hurts civil Plaintiffs' attorneys is in regard to cases which involve, or necessitate, the showing of prior similar occurrences. While the above mentioned hypotheticals will affect defense attorneys as well, those same defense attorneys are ecstatic to see the *Sanchez* decision as it nearly destroys a Plaintiff's ability to show prior similar occurrences.

Prior similar occurrences can commonly be some of the most important pieces of evidence a Plaintiff has in showing liability. Whether it is a case involving a dangerous animal who has a history of attacks, an employment discrimination case in which other employees were discriminated against as well, or a case involving a dangerous condition of property in which there have been other incidents, showing the existence of, and defendant's knowledge of, prior similar incidents can often be the nail in the coffin, so to speak. If you have the evidence, it destroys a defendant's ability to say "well, it never happened before." In some cases, such as imposing liability onto a business for failure to prevent third party conduct, prior similar incidents are essentially an element of duty. Without being able to show prior incidents, a duty won't even exist. So where does that leave Plaintiffs' attorneys in the wake of *Sanchez*?

Statements contained in police reports, incident reports, or basically any written report will be considered hearsay even if portions of the report are admissible through a business records exception. Obtaining the reports themselves can be a challenge all in itself. Assuming you are able to obtain the reports, they can commonly be redacted so that the names of the complainants or witnesses are not obtainable. In context of an employment case, there may be several reports in which past or present employees reported misconduct. In a dangerous condition of property case, there may be several reports, police or otherwise, in which other individuals reported the exact same dangerous condition which is at issue in your case. So assuming you have the reports, what do you do with them now?

Prior to *Sanchez*, a proper expert could review the reports and base their opinions on the hearsay contained within them. A proper limiting instruction could be given and the jury would be able to evaluate the evidence. Now, Plaintiffs' attorneys will be forced to depose each and every person who made a statement contained in a report in order to make the statement admissible. If the reports are redacted, you will first have to obtain some sort of protective order just to identify who you need to depose. The practical application of this idea is outrageous. Just contemplating the investment required to hunt down individuals who made statements years in the past is daunting, if not impossible.

What do we do now?

The Supreme Court's ruling in *Sanchez* has changed decades of law in that any case-specific facts relied on by an expert are now ruled to go to the truth of the matter asserted, making them hearsay. In practical terms, this means that all hearsay statements and opinions must either be subject to a hearsay exception, or admitted through an appropriate witness. Hearsay statements can no longer be admitted as the basis for an expert opinion.

As litigators, all we can do is move forward using the laws that exist. As far as this issue goes, that means making sure you are aware of what evidence is hearsay, how many levels of hearsay exist, what portions of that evidence are subject to hearsay exceptions, and what steps you will need to take in order to overcome the enormous burden imposed by *Sanchez*. It also means that these issues will need to be addressed on the front end of case analysis since obtaining admissible evidence will take additional time and investment. There will be significant hurdles to overcome in obtaining evidence necessary to prosecute cases and no longer will we be able to fall back on having hearsay evidence admitted for the purpose of explaining the basis of expert opinion.

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Endnotes

[1] *People v. Bell*, (2007) 40 Cal.4th 582; *People v. Montiel*, (1993) 5 Cal.4th 877; *People v. Ainsworth*, (1988) 45 Cal.3d 984; *People v. Milner*, (1988) 45 Cal.3d 227; *People v. Coleman*, (1985) 38 Cal.3d 69; *People v. Gardeley*, (1996) 14 Cal.4th 605; all specifically disapproved of.

[2] Cal. Evidence Code § 1270-1272; § 1220-1227; § 1235, § 1236; § 1241, § 1230, § 1250, § 1237.