The California Supreme Court Addresses Application of the Hearsay Rule to Expert Testimony - *People v. Sanchez*, 2016 WL 3557001

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In a significant new decision, *People v. Sanchez*, 2016 WL 3557001, the California Supreme Court considers application of the hearsay rule to out-of-court statements offered as expert "basis" testimony. The case is essential reading for all California trial attorneys. If you try cases - read it!

People V. Sanchez was a criminal case concerning gang-related crimes. At issue was admission of a prosecution expert's description of the defendant's past contacts with police offered as a basis for the expert's opinion testimony. The expert had never met the defendant, had not been present during such past contacts with the police, and no personal knowledge of same. The question posed was whether the expert's description of the defendant's past contacts with police was inadmissible hearsay or non-hearsay simply because it was offered as a basis for the expert's opinion.

In a lengthy opinion, the Court in *People v. Sanchez* addresses in considerable detail application of the hearsay rule to expert testimony and establishes a bright line rule that where an expert relates to the jury case-specific out-of-statements and treats the content of those statements as true and accurate, those statements are hearsay. And, like all hearsay, such statements are inadmissible unless rendered admissible through applicable hearsay exception. In so ruling, the Court concluded that it "cannot logically be maintained" that such statements are not being offered for their truth. The Court explicitly disapproved its prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a

trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay concerns and, in the context of criminal cases, Confrontation Clause concerns.

While this is a criminal case which also addresses Confrontation Clause concerns in admission of such out-of-court statements in expert "basis" testimony, the Court's discussion of the hearsay rule as it applies to expert testimony, and its bright line rule for application of the rule to case-specific out-of-statements offered as expert "basis" testimony, applies equally in the civil and criminal contexts.

People V. Sanchez provides a lengthy primer on the hearsay rule and application of the rule to expert testimony. The court addresses the difference between an expert's testimony regarding her knowledge in her field of expertise, which is traditionally not barred by the hearsay rule, and testimony by an expert relating case-specific facts about which the expert has no personal knowledge, which has been traditionally precluded. The Court noted that this distinction between generally-accepted background information and the supplying of case-specific facts is customarily handled through the use of hypothetical questions.

Going back to the common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. "Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts...." (Imwinkelried, The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law (2013) 3 U.Den.Crim. L.Rev. 1, 5; see Simons, Cal. Evidence Manual, supra, § 4:32, pp. 326–327; 2 Wigmore, Evidence (Chadbourn ed.1978) § 672, p. 933, italics omitted.) An examiner may ask

an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it. The expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience.

But, the Court stated that the line between an expert's testimony as to general background testimony and case-specific testimony has become "blurred", noting that case-specific facts in an expert's testimony is often handled with an inquiry into reliability, admission of the case-specific facts, and a limiting instruction to the jury. Setting a new bright-line test, the Court held this "paradigm" is no longer tenable.

Accordingly, in support of his opinion, an expert is entitled to explain to the jury the "matter" upon which he relied, even if that matter would ordinarily be inadmissible. When that matter is hearsay, there is a question as to how much substantive detail may be given by the expert and how the jury may consider the evidence in evaluating the expert's opinion. It has long been the rule that an expert may not " 'under the guise of reasons [for an opinion] bring before the jury incompetent hearsay evidence.' " (Coleman, supra, 38 Cal.3d at p. 92, 211 Cal.Rptr. 102, 695 P.2d 189.) Courts created a two-pronged 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 an accused's interest in avoiding substantive use of unreliable hearsay." (People v. Montiel (1993) 5 Cal.4th 877, 919, 21 Cal.Rptr.2d 705, 855 P.2d 1277 (Montiel).) The Montiel court opined that "[m]ost 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. [Citation.] [¶] Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 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. [Citation.]" (Ibid., citing Coleman, supra, 38 Cal.3d at pp. 91–93, 211 Cal.Rptr. 102, 695 P.2d 189.) Thus, under this paradigm, there was no longer a need to carefully distinguish between an expert's testimony regarding background information and case-specific facts. The inquiry instead turned on whether the jury could properly follow the court's limiting instruction in light of the nature and amount of the out-of-court statements admitted. For the reasons discussed below, we conclude this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury.

. . . . . .

Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. 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 properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.

In conclusion, the court adopted the following rule:

When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.

In a footnote following this statement of the new rule, the Court explicitly disapproved its prior decisions concluding that an expert's basis testimony is not offered for its truth, or that a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and, in the context of criminal cases, Confrontation Clause concerns.

Takeaways

1. *People V. Sanchez* seems less a recasting of the traditional distinction between an expert's testimony regarding background information and his testimony as to case-specific facts than it is a reassessment and realignment of the rules to be applied by trial courts to maintain the sanctity of that distinction. It is stiffening of the rules to be applied by trial courts to maintain that traditional distinction.

2. In light of *People v. Sanchez*, trial courts, upon proper objection, will more closely police expert testimony to ensure case-specific facts presented by an expert as a basis for opinion are otherwise admissible under applicable hearsay exceptions. When opposing counsel objects to case-specific facts offered by an expert as hearsay, the trial court can longer overrule that objection simply because those facts are a basis for the expert opinion testimony. Absent applicable hearsay exception, that objection will be sustained. This new rule gives well-prepared trial counsel a significant tool to challenge and preclude opposing party expert testimony which is not supported by admissible evidence.

3. Trial counsel presenting expert testimony will need to more closely scrutinize, and be well-prepared to address, the admissibility of case-specific facts relied upon by an expert, or risk having such testimony precluded or rendered ineffective in the eyes of the jury.

4. While *People v. Sanchez* does not directly concern the use of hypotheticals and assumed facts to elicit opinion testimony, the same rationales apply. Trial counsel may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence and then ask the expert what conclusions the expert would draw from those assumed facts. But, if no competent evidence of such case-specific facts has been, or will be, admitted, the expert cannot be asked to assume them.

5. The sloppiness with which many trials courts have policed the use of case-specific hearsay in expert testimony will be subject to more-strenuous appellate examination. Admission and a limiting instruction is no longer a viable option for the trial court. Trial counsel will be well-served to recognize this new reality and place greater attention on establishing an evidentiary basis for admission of case-specific facts which provide the basis for offered opinion testimony.

6. More broadly, *People v. Sanchez* is an excellent primer on hearsay and application of the hearsay rule to expert testimony. Great language and case quotes for in limine options and pocket briefs addressing hearsay issues at trial.

7. *People v. Sanchez* is required reading for California civil and criminal trial attorneys.