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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
April 2024

People v. Sanchez

PREPARATION AND OPPORTUNITY IN EXPERT DISCOVERY SINCE *SANCHEZ*, AND AVOIDING *SANCHEZ* ISSUES AT TRIAL

When the California Supreme Court handed down its opinion in *People v. Sanchez* (2016) 63 Cal.4th 665, it upended the process of how experts were used at trial. Now that courts and litigants are more familiar with *Sanchez*, its effects on how a case is prepared can largely be managed. As it relates to expert discovery, attention should be paid to how *Sanchez* impacts an expert's ability to testify, but litigants should also be aware of how *Sanchez* could potentially be misused. This article will attempt to highlight some of the *Sanchez* discovery issues you may encounter in a case, and how to respond to those issues so you are prepared for a *Sanchez* objection when it happens.

Experts are the vital bridge between complex facts and juror comprehension. Experts historically had the ability to rely on hearsay information in forming and testifying to an opinion. (Evid. Code, §§ 801, 802.) However, experts could also publish to the jury hearsay information that otherwise could not be admitted into evidence. The boundary lines between expert opinion and hearsay evidence were blurred, allowing experts considerable latitude to reference case-specific hearsay facts that otherwise were not admissible.

This practice permitted a side door through which evidence could bypass hearsay scrutiny and be presented to the jury under the guise that it was 'not admitted for the truth.' Although it was believed that the evidence could serve a limited purpose of allowing a jury to evaluate an expert's testimony, it was more often than not presented and treated as true. Nothing highlights this discrepancy better than the *Sanchez* case itself.

The use of hearsay evidence was front and center in *Sanchez*. Mario Sanchez was convicted of multiple felonies related to a drive-by shooting. In addition to the underlying charges, the State offered expert testimony that Mr. Sanchez committed those crimes to benefit a gang, which if proven, would allow for harsher sentencing. (*Sanchez*, *supra*, 63 Cal.4th at 698.) Consistent with the interpretation of the case law and evidence code at that time, the expert also testified to the case-specific facts that served as the basis of his opinion. The expert disclosed to the jury the contents of police reports and out-of-court statements to support his opinion about Mr. Sanchez's gang membership. He testified those matters were true and used those hearsay facts to opine that Mr. Sanchez's crimes benefited a gang. No additional witnesses were brought to lay a foundation or properly admit any of the gang evidence the expert relied on. (*Id.* at 673.)

The evidence supporting the gang enhancement was clearly "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." (Evid. Code, § 1200.) The expert in *Sanchez* admitted he had no personal knowledge of any of the gang-related facts. (*Sanchez*, *supra*, 63 Cal.4th at 673.) However, the testimony was allowed, as experts had historically been permitted to testify to case-specific hearsay evidence that supported an opinion for the purpose of allowing the jury to evaluate that opinion. The evidence was admitted over defense counsel's hearsay objection, and Mr. Sanchez was convicted of the underlying crimes and doing so to benefit a gang. The Supreme Court reviewed this conviction and focused specifically on the gang enhancement in light of the expert's use of case-specific hearsay evidence.

Evidence Code §§ 801 and 802

Evidence Code section 801, subdivision (b) allows an expert to rely on information "made known to him…before the hearing, whether or not admissible, that is of the type that reasonably may be relied upon by an expert in forming an opinion upon the subject which his testimony relates." An orthopedic expert can rely on the breadth of medical knowledge on the musculoskeletal system to explain trauma; an arborist can rely on and testify to the history of scientific knowledge of the failure profile of a specific species of tree, and for the expert in *Sanchez*, it was acceptable for the expert to rely on his years of training, education, and work in anti-gang activities as they were "of the type that reasonably may be relied upon by an expert in forming an opinion…" (Evid. Code, § 801, subd. (b).) This aspect of expert testimony is what establishes them as experts: their education, training, skill and experience that gives them knowledge and insight beyond that of a lay person. (Evid. Code, § 720.)

Evidence Code section 802, however, is where things got murky. Through this section an expert can testify about "the reasons for his opinion and the *matter*… upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (Emphasis added.) Pre-*Sanchez*, it was the interpretation of this section that allowed an expert to publish case-specific hearsay evidence to the jury. The justification was that disclosing those facts was a "matter" which their opinion was based on and thus permissible to disclose so that the jury could evaluate the testimony of the expert. It is not difficult to imagine however, how "jurors treat out-of-court statements admitted as basis evidence." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1128.) Jurors would "often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Id.* at 1131.) Although those facts could not be used to independently prove anything, the practical application was that the jury accepted them as true. (*Gardeley*, *supra*, 14 Cal.4th at 612.) It was thought, for years, that such an incongruity could be remedied by a limiting instruction. (*People v. Coleman* (1985) 38 Cal.3d 69, 92.)

In *Sanchez*, the California Supreme Court focused on Evidence Code sections 801 and 802 and sought to bring clarity to what and how an expert can testify. An expert may rely on hearsay information and "tell the jury *in general terms* that he did so." (*Id.* at 686.) An expert "who relies upon well-established scientific principles" could be perceived to be more credible than one "who relies on a single article from an obscure journal or on a lone experiment

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whose results cannot be replicated." (*Sanchez*, *supra*, 63 Cal.4th at 685-686.)

But case-specific facts cannot be presented through expert testimony if they are otherwise inadmissible hearsay. (*Id.* at 685.) The expert's opinion that Mr. Sanchez committed the crimes for the furtherance of his gang, being based solely on hearsay evidence, was found to be improper and his conviction on that charge reversed. *Sanchez* also did away with the idea that a limiting instruction could remedy any impact hearsay evidence may have beyond allowing a jury to evaluate an expert's opinion. The Supreme Court expressly stated that "hearsay…problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth." (*Sanchez*, *supra*, 63 Cal.4th at 684.)

After the opinion came down, there was concern as to how the opinion would be applied. In the intervening years, *Sanchez* has been shown to be a trap for the unwary who might believe evidentiary shortcomings can be fixed at the time of an expert's deposition of trial testimony. However, understanding the limits and applications of *Sanchez* at the outset of a case will allow an attorney to adequately prepare for and respond to most issues that may arise.

Discovery of case-specific facts and general background information

At the outset of any case, care needs to be given about case-specific facts that could create a *Sanchez* issue. Case-specific facts that trigger a potential exclusion under *Sanchez* are those "relating to the particular events and participants and alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at 676.) If the facts are "generally accepted by experts in their field of expertise, and…usually…applicable to all similar cases," then they are considered general background facts. (*People v. Valencia* (1021) 11 Cal.5th 818, 836.) General hearsay background facts within the expert's field of expertise can be conveyed to the jury without triggering *Sanchez* scrutiny. (*People v. Veamatahau* (2020) 9 Cal.5th 16, 27; compare *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796 [expert cannot publish other expert's work if it is outside the testifying expert's expertise].)

The distinction between what hearsay evidence an expert can testify to, and what evidence cannot be testified too is important to understand in the event of an objection or motion seeking the exclusion of that evidence. However, it is better not to leave anything to chance, and if you have important case-specific hearsay evidence, you should focus on making it admissible well in advance of having your expert rely on it.

Stipulations are probably the easiest way to avoid any *Sanchez* concerns. Stipulations to the admissibility of a document, for example medical records, may cut both ways. This requires scrutiny of the evidence and how it helps your case, but also how those same records could hurt it. Especially if the stipulation requires horse-trading some evidence you want for different evidence the Defendant wants.

Depositions are another way to avoid any hearsay issue. Deposing third-party witnesses (whether it be a treater, or police investigator, or percipient witness) will give you the opportunity to make the otherwise hearsay evidence admissible, allowing your expert to recite those facts to the jury. As a reminder, multiple levels of hearsay must have an exception at every level for the hearsay to be admitted. (Evid. Code, § 1201.) Deposing the author of a police report may help make admissible certain information in that police report, but if another officer took measurements or conducted a vehicle inspection (e.g., MAIT report), you will need to make sure that evidence is admissible as well, if you want your expert to testify to it.

Business records can be made admissible through Evidence Code section 1271. Medical records are often made admissible through the business records hearsay exception found in Evidence Code section 1271. However, there could be case-specific portions of those records beneficial to your case that do not fit within that exception, such as a specific causation opinion or impression of a doctor. In that instance you will need to anticipate how you will make that evidence admissible, such as deposing the treater who made the note.

Police reports need to be obtained early to learn of the existence of any third-party witnesses. This can be frustrated by local agency policies regarding the release of such reports, and there is little to do in that instance other than try to satisfy those requirements (e.g., filing a complaint and gaining subpoena power.) Private investigators can canvass the area where your client was injured to track down security footage or potential eyewitnesses. It is more work and uncertainty compared to a pre-*Sanchez* era, but being aware of the limitations of this type of evidence will position you to maximize the situation for your client's benefit.

Expert discovery

Generally, it will be easy for a litigant to separate the general background knowledge an expert may possess and a case-specific fact. The math that enables an expert to determine the stopping distance of a vehicle would be the general background of that expert, but the speed, vehicle weight, and skid marks of your client's vehicle would be case-specific information. Being aware of this distinction early will enable you to address any *Sanchez* issues by having your expert inspect the vehicle, the site, or deposing those who did. This additional layer of discovery may be frustrating in some instances, more so when a significant period of time has elapsed between the injury and your case workup.

In a case where I represented a couple who was rear-ended by a big rig, the lead investigating officer had quit the police force and moved to Florida. Although we ultimately found the person, and were able to secure his deposition testimony, if I had waited to do that until the end of the case or at the time of trial, I undoubtably would have had to prepare my case without his testimony. The lesson is simple, identify the *Sanchez* issues early and deal with them early. It is a good idea

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to track the important case-specific facts and the specific hearsay exception(s) that make them admissible much in the same way attorneys may have a 'hot docs' folder or similar. (See Evid. Code, § 1220, et seq.)

Advanced preparation with your expert is vital. Set aside time to speak with your expert, and specifically pay attention to which case-specific facts the expert finds more critical than others. Attorneys must now engage in a more meticulous preparation process to ensure that an expert's opinions are based on evidence that will be admissible at trial. Although technically, *Sanchez* only involves the publication of case-specific facts by an expert, it is a good practice tip to not be in a position where you need to make that argument to a judge. If that ruling goes against you, you will find your expert may be without that critical evidence and the efficacy of their opinion in jeopardy.

When it comes to examining defense experts, pay special attention to the case-specific facts that are relied on. Many attorneys already know to box a defense expert in during a deposition. In addition to the scientific, medical, or other background information the expert relies on, or other areas allowable by Evidence Code section 721, delve into the source of the case-specific information supporting their position. If the opinion is based solely on evidence excludable under *Sanchez*, consider an in limine motion or a motion to strike that opinion. My personal preference is not to fight with an expert on *Sanchez* issues at the time of deposition as it may give opposing counsel time to correct the mistake. Rather, I will extract the basis of those opinions and then make the admissibility argument in a motion to have the underlying opinion narrowed or excluded.

Relatedly, *Sanchez* does not allow an expert to recite hearsay case-specific facts while disclaiming any belief or knowledge about whether those facts are true or not. A self-serving qualification is essentially an implied limiting instruction and not-offered-for-the-truth claim all rolled into one, neither of which is allowed. *Sanchez* prohibits the introduction of that evidence, and it is the proponent's burden to establish admissibility.

With preparation and awareness of *Sanchez* issues, much of what could be accomplished pre-*Sanchez* can still be accomplished. It requires another step, and some additional effort and expense, but so long as you are aware of the need to take that extra step, you will be well prepared and the integrity of your case largely unaffected.

Traps and misuses:

Sanchez is narrowly focused on what case-specific facts an expert can disclose to the jury during direct examination. *Sanchez* did not affect non-case-specific hearsay consisting of the general "background information and knowledge" specific to the expert's expertise. (*Sanchez*, *supra*, 63 Cal.4th at 685.) The opinion did not affect an expert's ability to "tell the jury in general terms that [the expert]" relied on non-case-specific hearsay. (*Ibid.*) *Sanchez* only affects what case-specific facts an expert can present to the jury during direct examination, and does not affect cross-examination. (Evid. Code, § 721.) When preparing your case in discovery it is important to keep these limitations in mind and be wary of situations in which the scope and effect of the holding might be misunderstood.

Sanchez applies equally to plaintiff and the defense

There is nothing inherent in *Sanchez* that prohibits its application to defense experts. If you encounter any argument that *Sanchez* only applies to plaintiff's experts, it is most likely derived from a very specific portion of the opinion purportedly limiting its application to the "prosecution's expert." (*Sanchez*, *supra*, 63 Cal.4th at 670.) The Supreme Court, however, has equally applied *Sanchez* scrutiny to defense experts as well. (*Williams*, *supra*, 1 Cal.5th, 1185-86 [sustaining prosecution objection to defense expert testimony].) Thus, the admissibility requirements of *Sanchez* apply equally to both sides.

Case-specific facts do not have to be admitted to be relied on by an expert

The uncertainty of how to apply *Sanchez* has manifested in different ways. A claim that all case-specific facts that support an expert's opinion must be admitted into evidence before that opinion can be given, can be rebutted by the opinion itself. A *Sanchez* exclusion only comes into effect when an "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…" (Emphasis added, *Sanchez*, *supra*, 63 Cal.4th at 686.) If the expert does not relate a case-specific fact to the jury on direct, *Sanchez* is not triggered. However as mentioned above, it is a good idea to avoid a situation where an expert relies on a case-specific fact that does not have an independent basis for admissibility, in case an objection is made and you get an adverse ruling.

Conclusion

The preparation for expert deposition and trial fundamentally changed when the California Supreme Court decided *Sanchez*. The decision requires a holistic approach for trial preparation that must begin when case-specific facts are first acquired in discovery. Waiting until an expert's deposition or trial testimony to respond to a *Sanchez* issue may find you without a critical piece of case-specific evidence. Experts are vital to all our cases and require expense and effort to prepare. By being aware of *Sanchez* issues, you can adjust your discovery plan, allowing you to capitalize on the strength of an expert's testimony.

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