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Hearsay, the experts say!

By John T. Brazier and Katherine Frank

California courts have long tolerated hearsay testimony related by expert witnesses as to both "general background information" and "case-specific facts," including inadmissible hearsay not falling within a recognized exception.

This past summer the California Supreme Court, in *People v. Sanchez*, 63 Cal. 4th 665 (2016), took the opportunity "to revisit and revamp" the hearsay rules related to expert testimony. The court said "the line between" the common law treatment of an experts' testimony as to general background information and case-specific hearsay facts "had become blurred."

Prior to *Sanchez*, California courts approached nearly all expert hearsay testimony the same — an expert witness could offer otherwise inadmissible hearsay under the guise that the out-of-court statement is not being offer for the truth of the matter asserted, but only to show what facts the testifying expert relied upon in forming his or her own expert opinions. To mitigate any damaging effects, courts could impose upon the jury a limiting instruction or, where the probative value is outweighed by the prejudicial value, exclude the expert's opinion.

Sanchez involved a gang-related offense. The expert, a veteran gang suppression officer, testified about characteristics of the gang to which the defendant supposedly belonged. The expert had never met the defendant and had no personal knowledge of the defendant's activities or the alleged acts. Instead, he relied on past reports, called "STEP notices," prepared by gang-unit police officers when they interact with either known or suspected gang members. The expert also relied on the recent convictions of other gang members and the records associated with the defendant's arrest. Then the officer testified to statements made by the defendant as contained in previous police documents, including a STEP report.

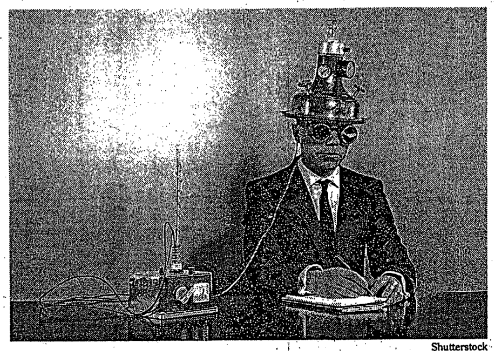
Based on this information, the expert said the defendant was a member of a gang and was engaged in gang activity at the time of his arrest. On appeal to the Supreme Court, the defendant argued that this constituted inadmissible, case-specific hearsay.

The *Sanchez* court recognized that "when an expert relies on hearsay to provide case-specific facts, considers the statements as true and accurate and then relates them to the jury as a reliable basis for the experts' opinions, it cannot logically be asserted the hearsay content is not offered for its truth." Indeed, the expert's testimony included specific statements made by the defendant in the STEP reports. While presented in the context of the facts upon which the officer drew his ultimate conclusion — that the defendant was a gang-member engaging in criminal gang activity — the practical effect was that the jury had to conclude such statements were true and accurate in order to find the experts' opinions were also true and accurate.

Thus, expert testimony "relating to the particular events and participants alleged to have been involved in the case being tried" constitutes "case-specific testimony," which, post-*Sanchez*, is no longer admissible. Expert testimony that is "general background and information" "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" remains admissible, even if it is hearsay.

In *People v. Stamps*, 3 Cal. App. 5th 988 (2016), the 1st District Court of Appeal followed *Sanchez* and further highlighted the pitfalls of the former paradigm. Stamps had been convicted of multiple drug charges stemming from possession of pills suspected to be oxycodone. At trial, an expert criminalist for the prosecution testified that the pills were a controlled substance. The criminalist's opinion was based solely on her comparison of the pill's identification markings against a website's image of the pill with the same markings. The website also identified and listed the chemical composition of the pills. The *only* analysis of the pills was the website comparison.

On appeal, the court said that permitting the expert's testimony about the website "allowed her to place case-specific non-expert opinion before the jury, with the near certainty that the jury would rely on the underlying hearsay as direct proof of the chemical composition of the pills." The court acknowledged that, before *Sanchez*, the criminalist's testimony would likely have been admissible hearsay. Further, the court reasoned, "the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."



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Stamps acknowledged that *Sanchez* had "jettisoned altogether" this "not-for-its-truth rational" by announcing "the 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."

Sanchez and *Stamps* were both criminal cases, so there was certainly a constitutional element to the opinions. In civil cases, however, the constitutional impact of hearsay rules is not considered. For example, in *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, 216 Cal. App. 3d 388 (1989), the distinction between background and case-specific fact is not critical, though the hearsay analysis does fall in line with *Stamps* and *Sanchez* despite being published over 25 years earlier.

In *Continental*, the expert was to testify as to the costs to repair a plane that had sustained damage in a landing accident. The expert had assigned the task of preparing the cost analysis to two subordinate employees who actually gathered the specific materials' pricing and labor costs and compiled the information in a spreadsheet report. The expert had seen the report, but admitted he did not verify the data because the costs "looked to be in the ballpark" of what he would have expected. However, upon objection, the court did not allow the expert to testify as to the work of the subordinates or the existence, or substance, of the cost reports they prepared. As a result, the expert could only advise the jury that the basis of the damages' cost estimate was his personal inspection of the plane.

On appeal, the questions were should the expert have been allowed to (1) testify that he relied on the subordinates' work-product/analysis in forming his opinion, and (2) testify as to the specifics of the their report.

The *Continental* court recognized that "while an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible." And that expert may not offer such testimony "under the guise of reasons bring before the jury incompetent hearsay evidence." Not making a strong as a distinction between general background and case-specific facts, the court stated, "while an expert may rely on inadmissible hearsay in forming his or her opinion ... and may state on direct examination the matters on which he or she relied, the expert may not testify as to the details of those matters if they are otherwise inadmissible."

At the same time, the *Continental* court carefully considered when an expert may not rely on out-of-court statement, such that an "[expert] may not relate an out-of-court opinion by another expert as independent proof of fact. [Citation.] It is proper to solicit the fact that another expert was consulted to show the foundation of the testifying expert's opinion, but not to reveal the content of the hearsay opinion."

Thus, the court found that while the expert had been properly instructed not to testify regarding the contents of the subordinates' report, the trial court erred in precluding him from testifying that he relied on the cost and price figures submitted to him by his staff members in forming his opinion.

Thus, hearsay is hearsay, even for experts.

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