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POINT OF VIEW

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Game Changer: In People v. Sanchez, the California Supreme Court Changed the Rules of Admissible Expert Testimony

When we are in the courtroom, we are not merely family law litigators, we are trial lawyers. This requires us to stay aware of evolving case law outside the family law arena. In *People v. Sanchez* (2016) 63 Cal. 4th 665, the California Supreme Court substantially changed the rules for the admissibility of expert witness testimony, on both direct and cross-examination. Although *Sanchez* was a criminal case, the Court did not limit application of its expert testimony ruling to criminal cases. Whether our family law cases involve competing forensic accountants, appraisers, valuation experts, mental health professionals, or other esoteric expert witnesses, the old rules governing expert testimony are now gone, replaced by the new *Sanchez* standards.

Prior to *Sanchez*, an expert witness was permitted to testify relatively freely about the content of hearsay evidence relating to the circumstances of the case at hand, if that evidence constituted a basis for the expert's opinion. In *Sanchez*, the Court rejected the legal fiction that an expert's testimony about case-specific facts is not offered for its truth.

In *Sanchez*, a Santa Ana police detective testified for the prosecution as a gang expert. He testified about gang culture, membership, territory, etc. He then testified about the defendant and related the particulars of the defendant's background, conduct and arrest, all of which he obtained from police reports. On cross, the detective admitted that he had never met the defendant and was not personally present during the defendant's contact with the police. The Court recognized that the validity of an expert's opinion depends on the assumption that the hearsay underlying the opinion is true, since "if the hearsay that the expert relies on and treats as true is not true, an important basis for the opinion is lacking" [Sanchez at 682-683]. The Court concluded that the law regarding expert use of hearsay must be changed. An expert may still rely on hearsay in forming an opinion, and may tell the court in general terms that he or she did so. What an expert cannot do is relate case-specific facts asserted in hearsay statements as true, unless they are independently proven by competent evidence or are covered by a hearsay exception [Sanchez at 685-686].

Three months after *Sanchez* was published, the First District decided *People v. Stamps* (2016) 3 Cal. App. 5th 988, which explains the new *Sanchez* standards and their practical application to expert witness testimony. In *Stamps*, a Contra Costa County criminalist identified pills discovered in defendant's possession based on a visual comparison of the seized pills with those displayed on a website called Ident-A-Drug. The witness performed no confirming chemical analysis of the pills. Because the website content upon which the witness relied was inadmissible hearsay, and because that content was case-

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specific, the expert's testimony about the website was inadmissible under the new *Sanchez* rule, and the judgment was reversed on that ground. After *Sanchez*, the *Stamps* court wrote,

> reliability is no longer the sole touchstone of admissibility where expert testimony to hearsay is at issue. . . .If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. The underlying fact also may not be included in a hypothetical question posed to the expert unless it has been proven by independent admissible evidence. If the hearsay relied upon by the expert is not case-specific, as we read *Sanchez*, the evidence still is admitted for its truth and is therefore hearsay, but we tolerate its admission due to the latitude we accord experts, as a matter of practicality, in explaining the basis for their opinions. Where general background hearsay is concerned, the expert may testify about it so long as it is reliable and of a type generally relied upon by experts in the field, again subject to the court's gate keeping duty under [Sargon Enterprises Inc. v. University of Southern California (2012) 55 Cal. 4th 747].

[Stamps at 996, citations omitted].

On July 13, 2017, the First District decided *People v. Jeffrey G.* (2017) 13 Cal. App. 5th 501, which provides the latest judicial interpretation of the *Sanchez* rationale and rules. In *Jeffrey G.*, trial was conducted less than two weeks before *Sanchez* was published. The prosecution's three mental health expert witnesses included in their testimony case- specific hearsay evidence about the defendant that lacked independent evidentiary support in the record. On the basis of such testimony, the trial court, in what it acknowledged was a close case, denied the defendant's petition for transfer from a hospital to a conditional release program. The First Appellate District concluded that introduction of the unsupported testimony by the experts was prejudicial, because it was reasonably probable that the court would have ruled in the defendant's favor had the hearsay evidence not been admitted. The Court reversed and remanded for a new hearing based upon the new *Sanchez* standards.

Judge Lawrence Riff of the Los Angeles Superior Court has provided a practical and perceptive review of the new *Sanchez* standards in an article published in the Los Angeles Daily Journal [Riff, *Experts and Hearsay Rules: Cross Versus Direct*, L.A. Daily J. (Feb. 17, 2017), available online at https://legacy.dailyjournal.com/mcle.cfm?ref=article&eid=954276&evid=1&qVersionID=625&qTypeID=8&qSPCtypeID=17&qcatid=20]. The article summarizes the new rules of the road and emphasizes the difference between an expert's permissible direct testimony and preparation of an effective cross-examination of the expert under the *Sanchez* guidelines. On cross-examination of an expert, the hearsay rules are substantially different. Evidence Code section 721(b) permits an expert to be cross-examined "in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal or similar publication." Before such cross-examination may proceed however, a foundation must be established that the expert "referred to, considered or relied" upon the publication in forming his or her opinion, that the publication has already been admitted into evidence, or that the publication has been established as a reliable authority by the testimony of the witness, by other expert testimony, or by judicial notice.

In this brave new world, preparing your expert's direct testimony now requires greater care and scrutiny. The art of cross-examination will involve even more creativity, preparation, and strategy. The demarcation line between generalized knowledge and case-specific facts becomes crucial. Justice Corrigan's opinion for a unanimous court in *Sanchez* is required study for every lawyer entering a courtroom to call his or her own expert or to challenge on cross-examination the opposing party's expert.

As trial lawyers enter this new era in the search for truth in the courtroom, one is reminded of the closing line from the elegant quotation from Justice Cardozo emblazoned across the West entrance of Berkeley Law: ''Here is the high emprise, the fine endeavor, the splendid possibility of achievement, to which I summon you and bid you welcome.''

Counsel, call your first witness.