


EXPERT ADVICE

Experts, Hearsay, and the 'Sanchez' Case

The California Supreme Court has clarified when an expert can rely on hearsay—and when the expert can tell a jury about it.

BY DAVID A. SHIMKIN | OCTOBER 2, 2017

Nothing is certain except death, taxes, and the rule that allows experts to rely on and testify about hearsay. Right?

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Not so fast.

As the California Supreme Court recognized in *People v. Sanchez*, 63 Cal.4th 665 (2016), the common law recognized that experts frequently acquired their knowledge from hearsay, and that, to reject a professional physical or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others “would be to ignore the accepted methods of professional work and to insist on ... impossible standards.” *Sanchez*, 63 Cal.4th at 676 (citing Volek, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later* (2011) 80 Fordham L.Rev. 959, 965, fn. omitted, quoting 1 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (2d ed. 1923) § 665).

DEALING WITH HEARSAY

The *Sanchez* court also made clear, however, that experts cannot testify about case specific facts unless that information, which is typically hearsay, is otherwise admissible or has already come into evidence (or will later come into evidence).

Before *Sanchez*, experts in California could recite hearsay that they relied upon in forming their opinions as long as it was reasonably reliable. The *Sanchez* court made clear that when an expert tells a jury about case-specific out-of-court statements and relies upon them (*i.e.*, treats them as true), “it cannot logically be maintained that these types of statements” made by experts are not being admitted for their truth. *Sanchez*, 63 Cal.4th at 686.

WHAT CAN YOU DO?

So what does this mean practically?

It means that if you want your expert to rely on perceptions or data that were experienced or gathered by someone else, it will be necessary to get those witnesses to the stand to testify about that information. Alternatively, you must find an applicable hearsay exception. If that testimony does not come in from the witnesses or through such exception, the expert will be limited to testifying that he or she relied on certain undisclosed information that gathered from conversations with those witnesses, but the expert will not be able to provide any specifics.

CASE IN POINT

Consider this example: Assume there is a property damage suit where a plaintiff luxury apartment building is suing a developer for shoddy workmanship. The plaintiff retains a cost of repair expert to testify about how much money it will cost to replace or repair various components of the building, such as plumbing, architectural, and mechanical features. As part of the plaintiff's investigation of the defects, the plaintiff hires not only this particular cost of repair expert but also various plumbing, architectural and mechanical specialists to determine the respective costs of various repairs.

Let's say that at trial the plaintiff only puts on the stand the cost of repair expert. He testifies within his expertise about how long the building will be out of operation given the various repair schedules that will have to be accommodated. The repair expert will certainly be able to give that opinion but a problem will arise if he starts testifying about information and calculations that he obtained from the other experts unless they testify as well or a hearsay exception applies.

If the facts that the expert wants to rely on prove to be inadmissible, he will only be able to state that he spoke to, say, the plumbing expert, and that, based on his discussion with that person, he was able to draw certain conclusions. In other words, the expert who takes the stand will be permitted to give his opinion, but will *not* be able to relate to the jury what the plumber told him or what the plumber may have put in a report.

BE AWARE OF THE HEARSAY ISSUE

So to ensure that your expert will be permitted to testify about case-specific facts that may be hearsay, be aware of what hearsay exceptions may apply and how many levels of hearsay you have to resolve. Also, contact witnesses early for depositions to preserve their testimony for trial. Otherwise you will face a motion in limine or *Sanchez* objection at trial that could severely hamper your case.

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