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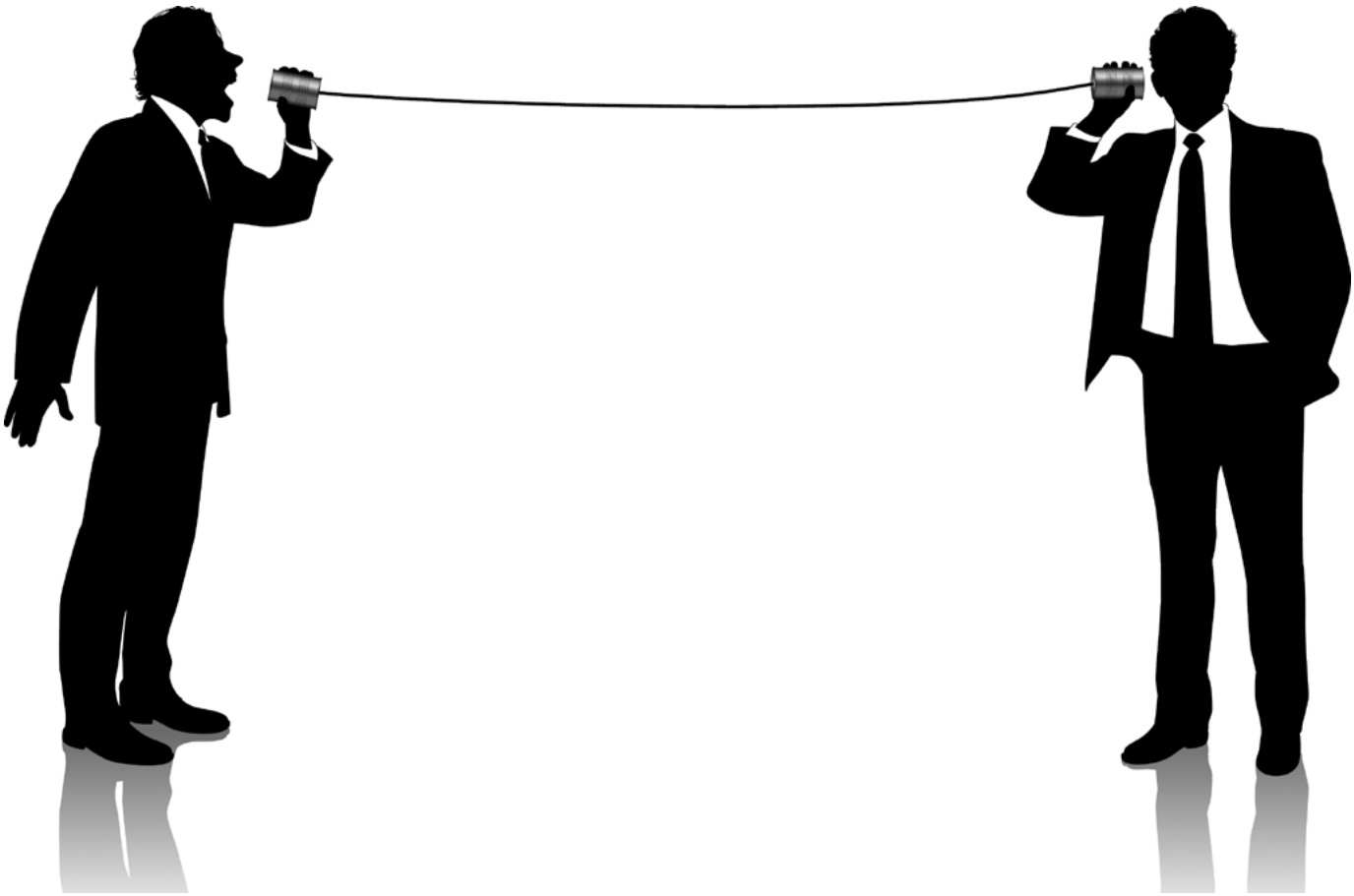

Using *Sanchez* to your advantage

BOTH SIDES HAVE FILED NONSENSE MOTIONS TO EXCLUDE EXPERT TESTIMONY BASED ON HEARSAY

Sanchez is scary. Ever since the California Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665, parties have struggled to understand the application of this decision to expert testimony in their cases. As a result, parties on both sides have filed nonsense motions seeking to exclude any expert opinions based on hearsay, making it clear that attorneys lack a thorough understanding of the Court's holding in *Sanchez*. It is crucial that attorneys understand the facts and holding in *Sanchez* so that they can avoid admissibility issues in their cases and prevent the other side from sneaking in inadmissible hearsay through the back door of expert testimony.

In this article I review and analyze *Sanchez* and its progeny through the lens of a personal-injury attorney. Further, I discuss the application of those rules to common aspects of a personal-injury case and how it might affect the testimony of certain experts and medical records. Finally, I discuss the pros and cons of waiving *Sanchez* objections and the tradeoff of expediency for control over what gets to the jury.

Review of *Sanchez*

Sanchez is a criminal case; however, the rule established in *Sanchez* is equally applicable to expert testimony in civil cases. In *Sanchez*, the defendant was arrested for possession of a firearm, possession of drugs with a loaded firearm, active participation in the "Delhi" street gang, and commission of a felony for the benefit of the Delhi gang. During the course of the criminal trial, a Santa Ana Police Detective testified for the prosecution as a gang expert. During direct examination, the detective testified as to the defendant's past contacts with police officers contained within various documents.

Before *Sanchez*, this type of case-specific hearsay was admissible for the limited purpose of setting forth the basis for the expert's opinions. California Evidence Code, section 801, subdivision (b) provides that an expert may provide

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an opinion "based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible, that is a type that reasonably may be relied upon by an expert in forming an opinion upon which the subject to which his testimony relates*, unless an expert is precluded by law from using such matter as a basis for his opinion." (Italics added.) Similarly, Evidence Code section 802 allows an expert to "state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion."

As a result of these statutes, experts were being used by the parties to introduce otherwise inadmissible evidence under the guise of expert testimony and claiming that the testimony was not being offered to prove the truth of the matter asserted. However, the Court in *Sanchez* aptly noted that the purpose for admitting this type of evidence was for the exact reason that it was otherwise inadmissible, i.e., it was being offered to prove the truth of the matter asserted. Accordingly, the Court determined that experts would no longer be allowed to testify as to case-specific testimony, even if it formed the basis of their opinions.

Having made that determination, the Court was faced with two questions: (1) how much substantive detail may be given by the expert; and (2) how the jury may consider the evidence in evaluating the expert's opinion. In answering these questions, the Court concluded: "An expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id*. at pp. 685-686 (italics in original).) However, "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.)

"Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean." (*Id*. at p. 676.)

While experts cannot testify to case-specific hearsay, they can still testify as to background information that is properly the matter of expert testimony. That is to say, in addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc. For example, "[a] physician is not required to personally replicate all medical experiments dating back to the time of Galen in order to relate generally accepted medical knowledge that will assist the jury in deciding the case at hand. An expert's testimony as to information generally accepted in the expert's area, or supported by his own experience, may usually be admitted to provide specialized context the jury will need to resolve an issue. When giving such testimony, the expert often relates relevant principles or generalized information rather than specific statements made by others." (*Id*. at p. 675.)

Recent decisions involving *Sanchez*

Post *Sanchez*, the analysis has become whether the testimony offered by the expert is case-specific hearsay or background information. This issue has been analyzed in multiple appellate decisions. Below are a few decisions that provide some guidance on this evaluation.

***People v. Veamatahau* (2020) 9 Cal.5th 16**

In *Veamatahau*, the Court emphasized that after *Sanchez*, "[t]he distinction between case-specific facts and background information [] is crucial – the former may be excluded as hearsay, the latter may not." (*Id*. at p. 26.) *Veamatahau* involved the admissibility of an expert opinion from a prosecution criminalist identifying pills that were in the defendant's possession as alprazolam.

The expert held a degree in chemistry, with an emphasis in analytical chemistry, and had previously worked for the Drug Enforcement Administration. Over the course of his career, he had tested for controlled substances thousands of times and had identified alprazolam hundreds of times. The expert did not conduct any laboratory testing of the pills that were in the defendant's possession but rather, matched the shape and markings on the subject pills to images of pills in a database called Ident-A-Drugs. The expert confirmed that this method of testing for the type of substance was generally accepted in the scientific community.

The defendant argued that the expert was merely conveying to the jury the opinions of third parties that had posted the information contained on the Ident-A-Drug database. The Court noted that "[s]imply because the Ident-A-Drug Web site served as the basis for the expert's ultimate opinion does not make information from the site case-specific." (*Id*. at p. 31.) "Information from the Ident-A-Drug database – that pills matching a certain description contain opioids – *was* hearsay but not case specific. It is no more case specific than if an expert divulged the equation – into which she entered the length of the skid marks she measured at the scene of the accident – to come to the conclusion that a defendant was traveling at the speed of 100 miles per hour before the crash." (*Ibid*.)

The decision in *Veamatahau* made it clear that *Sanchez* only applies to case-specific hearsay. Experts may still rely on and recite to a jury general background information that, although hearsay, is "generally accepted" in their specific field.

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***People v. Valencia* (2021) 11 Cal.5th 818**

Similar to *Sanchez*, the defendant in *Valencia* faced charges under the California Street Terrorism Enforcement and Prevention Act (STEP Act). This statute requires the prosecution to prove that the defendant or his gang associates engaged in "a pattern of criminal gang activity." The prosecution's gang expert testified that members of Arvina 13 committed predicate crimes on specified dates. The defendant appealed his conviction and sentencing enhancements under the STEP Act on the grounds that the prosecution's gang expert offered inadmissible case-specific hearsay.

The Court in *Valencia* provided further analysis on the issue of background facts, noting that "[h]allmarks of background facts are that they are generally accepted by experts in their field of expertise, and that they will usually be applicable to all similar cases. Permitting experts to relate background hearsay information is analytically based on the safeguard of reliability. A level of reliability is provided when an expert lays foundation as to facts grounded in his or her expertise and generally accepted in that field." (*Id*. at p. 836.) However, "if an expert gives testimony that goes beyond their own experience or beyond principles generally accepted in their field, the justifications for allowing greater evidentiary latitude cease to apply." (*Ibid*.)

The gang expert's testimony regarding the predicate crimes went beyond general knowledge and into the realm of case-specific hearsay. The basis for his testimony relative to these predicate crimes was "conversations with other officers and a review of police reports. Thus, the particular facts offered to prove predicate offenses are not the sort of background hearsay information about which an expert may testify. (*Id*. at p. 839.)

In *Valencia*, the Court provided further guidance on how to identify case-specific hearsay. Specifically, the parties should look at whether the information is applicable in all similar cases.

***Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796**

This decision involved multiple expert declarations filed by the plaintiff in opposition to Johnson & Johnson's motion for summary judgment. The trial court granted the defendant's motion for summary judgment as to the issue of causation, finding that the plaintiff's experts' opinions were inadmissible given that they were based on case-specific hearsay.

However, the Court of Appeal overturned the trial court's decision relative to the plaintiff's expert, Sean Fitzgerald. The court emphasized that an expert is permitted to rely on "[b]ackground information [which is] generally relied upon by experts in the witnesses' field of expertise." In that regard, the court noted that "while there may be situations where a much-published but absent expert whose views are well accepted in a particular field are repeated by a testifying expert to establish the premises of a proffered expert opinion, this is not one of them." (*Id*. at p. 186.)

Specifically, the plaintiff's expert could not testify as to the specific quantities of asbestiform fibers found by another non-designated expert, Dr. Longo, in Johnson and Johnson's baby powder samples that dated from within the exposure period. To allow the expert to testify about the work of another expert in the same case would be no different than the gang expert that testified as to the content of the police reports to establish that gang crimes were committed on specific dates as in the *Valencia* case.

Further, Mr. Fitzgerald could not rely on the testing and opinions of Dr. Longo, as there was no evidence that Dr. Longo had published anything or that his work was generally relied upon by others. Despite this, the court found that Mr. Fitzgerald had formulated his opinion based on principles generally accepted in his area of expertise (various published materials from government agencies, academic articles, reports of historical testing and testing from his own lab) and that he applied those principles upon a proper evidentiary foundation. (*Id*. at p. 187.)

The opinions of three other experts were also at issue in *Strobel* (Dr. Cohen, Dr. Finkelstein and Mr. Ay). The court found that their opinions were inadmissible to the extent that they were not competent to offer testimony about the presence of asbestos in Johnson & Johnson's baby powder. (*Id*. at p. 191.) However, the court further cautioned that this ruling did not mean that the experts may be barred from mentioning the presence of asbestos in Johnson & Johnson's baby powder, or the geology, mineralogy or asbestos testing issues.

The court provided guidance to parties seeking to obtain this type of testimony: "or any expert relying on another expert outside his area of expertise," the "distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. 'Using this technique,' ... [a]n 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." (*Id*. at pp. 191-192 (citing *Sanchez*, *supra* 63 Cal.4th at pp. 676-677).)

The *Strobel* decision was a very nuanced opinion that provided a framework for attorneys to understand the type of information that will be considered case-specific hearsay. It also provided guidance to practitioners on how to address expert testimony where the experts' opinions overlap.

Application of *Sanchez* to life-care planners

There are serious hearsay concerns when a life-care planner testifies about the cost of future medical needs. Most life-care planners have a nursing degree, which renders them unable to form an opinion as to the majority of a patient's future medical needs because this falls

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outside their accepted scope of practice. Thus, a life-care planner will generally testify that their opinions with respect to future medical care is limited to the cost of that care and not whether the care is in fact medically necessary. Limiting their opinion in this way ensures that they are not offering the statements made by treating providers and/or other experts to prove the truth of the matter asserted (i.e., whether the plaintiff needs the treatment).

Should the court still find that the testimony is improper case-specific hearsay, the use of hypothetical questions as suggested in *Sanchez* and *Strobel* should address any *Sanchez* objection tendered by the other side. This is only the first hurdle, however, in determining admissibility of a life-care planner's testimony.

The next hurdle is that some life-care planners (mostly ones retained by the defense) will base their opinion about the cost of future medical care on a second layer of case-specific hearsay pertaining to the cost of the recommended medical care. For example, the defense life-care planner's assistant will call specific facilities (sometimes a facility where your client has treated on a lien) and ask an employee at the facility for the cost of a specific medical service and whether the facility offers a discount for cash-pay patients. The assistant will then communicate what was conveyed during this phone call with the facility to the life-care planner. Under *Sanchez*, this is case-specific hearsay from the staff member at the facility to the assistant, then from the assistant to the life-care planner.

Now, the savvy expert will say that the basis for their opinions is these phone calls in conjunction with their experience and that the calling of facilities for this type of information is generally accepted in the field of life care planning. Thus, the opinions are admissible. However, *the basis* for the opinions, i.e., the case-specific hearsay about how much less your lien provider is charging cash patients, is not admissible.

An appropriate motion in limine would exclude the defense life-care planner from testifying as to this case-specific hearsay. In the body of the motion, outline all the case-specific hearsay that the life-care planner testified to in her deposition, such as the phone calls with the chiropractor's office where they said that they charge cash patients only half what they have charged your client, or the cash discount offered by the hospitals in the area. This is not to say that the life-care planner is prohibited from testifying about the reasonable cost for a particular service. Rather, the expert is prohibited from testifying about the hearsay statements that form the basis for her opinions. *Sanchez* can be used as a sword to cut out bad facts and create credibility issues for the opposing side's expert.

Application of *Sanchez* to your client's medical records

The defense industry loves to find inconsistencies in your client's medical records. Most commonly, it will be the existence of prior complaints of pain to the body part at issue in your case; however, it may also be things like a history of prior drug use. These statements within your client's medical records are hearsay. They are the epitome of out-of-court statements being offered to prove the truth of the matter asserted.

Before *Sanchez*, the court would allow these types of statements into evidence pursuant to Evidence Code section 802. However, after *Sanchez*, the specific statements in these records are inadmissible. This does not mean that the expert cannot offer opinions based on these records. What it means is that the expert cannot merely parrot the information into the record for the jurors. Nor can the attorney place the medical record up on the screen as an exhibit for all of the jurors to see.

Many attorneys do not understand this aspect of *Sanchez*. In my last trial in June of this year, a very seasoned trial attorney attempted to place my client's pain-management records before the jurors with his orthopedic expert on the stand. A *Sanchez* objection was asserted and defense counsel's response was, "Your Honor, my expert relied on these records in forming his opinions." The judge sustained the *Sanchez* objection and his expert was prohibited from testifying as to any specific information contained within the medical records. To get this type of information before the jury, the defense will be required to call your client's treating healthcare provider.

Sanchez limitations are not limited to statements made by your client to a physician. This extends to opinions of treating providers, such as a prior diagnosis of radiculopathy – a medical opinion by the treating provider. "It has long been settled that an expert may not simply repeat a third party's opinion and offer it up as confirmatory of his own." (*Strobel*, *supra*, at p. 186; see also *Whitfield v. Roth* (1974) 10 Cal.3d 874, 895 ["doctors can testify as to the basis of their opinion . . ., but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury"]); *People v. Campos* (1995) 32 Cal.App.4th 304, 308 ["an expert witness may not, on direct examination reveal the content of reports prepared or opinions expressed by nontestifying experts"].) Thus, the opposing expert may not testify that the basis for her opinion that the plaintiff was suffering from radiculopathy before the incident was based on the plaintiff's treating provider's notation of this condition one week before the incident.

Now I'm sure you're thinking, "Well, wait a minute. This seems like a problem for me, too. Because my experts are also relying on these records." It's true. This can be a huge problem if you are unprepared. This is why you need to know specifically what records your expert is relying on to render their opinions. If there is case-specific hearsay that is critical to your case, you have a couple

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options: (1) call the author of the record at trial; (2) depose the author of the record and play that testimony at trial; or (3) ask opposing counsel to stipulate to waiving *Sanchez*.

But before you elect the third option, you need to carefully review every single page of every record in the case, because there is likely something in those records that can hurt your case. Although a careful review is important for both sides, it is critical for the plaintiff because the plaintiff has the burden of proof. One of the most effective ways for the defense to prevent the plaintiff from meeting their burden is to throw as much stuff up against the wall as they can and hope that at least something sticks.

By stipulating to waive *Sanchez*, both sides' experts have a free pass to throw inadmissible evidence before the jury, which may or may not work to your benefit. This is why you need to know the records and the basis for your experts' opinions. One potential benefit to waiving *Sanchez* is eliminating testimony by numerous treating providers, which can result in an unnecessary consumption of time and money. However, it may also work to your detriment to waive *Sanchez* if there is harmful information in your client's records.

The only way to know whether to waive *Sanchez* is to understand the holding of *Sanchez*, the basis for your expert's opinions, and the basis for the opposing expert's opinions. If you understand these three things, then you will be able to control the narrative of your case, to the detriment of opposing counsel.

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