

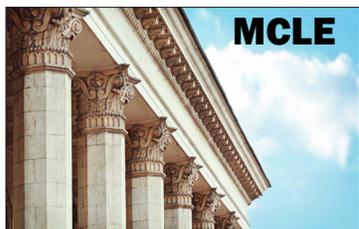
## Prevent experts from presenting hearsay to the jury

By Geoffrey Macbride

Experts explain complex evidence to make it accessible and understandable to a trier of fact. Since an expert must rely on years of education, training and experience to perform this task, the courts have granted them the ability to rely on a limited amount of hearsay when forming their opinions and present that hearsay to the trier of fact. However, this limited use of hearsay has been abused to present otherwise inadmissible evidence to a jury. The California Supreme Court took a step toward preventing this abuse with *People v. Sanchez*, 63 Cal. 4th 665 (2016). While the Supreme Court has limited an expert's ability to use hearsay, preparation and attention to foundation is necessary to keep an expert from improperly doing so. It is important to make sure its holding is applied in your case.

In *Sanchez*, the California Supreme Court substantially revised an expert's ability to rely on hearsay and relate it to the jury. *Sanchez's* revision was based on an extensive analysis of the common law origins an expert's ability to rely on hearsay. In common law, "an expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge." "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." These facts are generally established "by calling witnesses with personal knowledge of those case-specific facts." Once a witness provides the facts then, "[a]n 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." This does not permit the expert "to supply case-specific facts about which he has no personal knowledge."

*Sanchez* used hypothetical questions to illustrate the distinction be-



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tween an expert's use of generally accepted background information and case-specific facts. "Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts." "An 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. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it."

The court notes that while historical treatment of general background information and case-specific hearsay "differed significantly ... the line between the two has now become blurred." Courts blurred the line by allowing expert testimony concerning details in hearsay documents, if the document was reliable and pertained to the basis of the expert's opinion. Courts determined that any prejudice was cured with a limiting instruction. In other words, hearsay could be related to the jury so long as the jury could properly follow the instruction to not use the hearsay for the truth of the matter asserted. *Sanchez* found this standard untenable as the jury had to consider the hearsay for its truth to evaluate the strength of the expert's opinion.

"When any 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, the statements are hearsay. It

cannot logically be maintained that the statements are not being admitted for their truth." "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." If the case-specific hearsay statement contains multiple levels of hearsay each level must fall within an applicable hearsay exception.

This holding was later analyzed in *People v. Stamps*, 3 Cal. App. 5th 988, 996 (2016). *Stamps* reiterated that an expert could not testify about case-specific facts, which he treats as true, unless he has personal knowledge of the facts or if a hearsay exception applies. Furthermore, the underlying facts could not be included in a hypothetical question posed to the expert unless those facts had been proven by independent admissible evidence.

*Stamps* explained that if the expert's opinion does not require special expertise, and is only based on case-specific hearsay, then the expert is serving only as a "mere conduit" to put hearsay before the jury. In *Stamps*, an expert determined that pills found on the defendant were specific drugs by entering the pills' markings, color and shape into a website database and obtaining a match. It was undisputed that the website's results were hearsay. The court found that the expert was merely a hearsay conduit because no special expertise was necessary to compare the picture on the website with a picture of the pill taken from the defendant.

Preparation is key to ensure that an expert cannot skirt *Sanchez* and *Stamps* and place hearsay before a jury. These guidelines should help in laying the ground work for a potentially case-dispositive motion in limine excluding an expert's opinion.

**Check the affidavits accompanying document productions:**

*Sanchez* and *Stamps* can be avoided if the facts underlying an expert's opinion fall within an exception to the hearsay rule. If an expert's opinion relies on documents produced by third parties, check the affidavit that accompanies the production. Often these affidavits will attest to the documents authenticity, but will not satisfy the business record exception to the hearsay rule. If the business records, or some other, exception to the hearsay rule is not satisfied, then an expert cannot place this information before the jury.

**Focus on the case-specific nature of the pertinent facts:** Often the case-dispositive hearsay that a party attempts to introduce through a jury is limited to only a handful of facts or less. Separating these facts from the remainder of the expert's opinion and focusing on them will highlight the case-specific nature of the facts, pushing them into *Sanchez's* ambit and outside the presence of the jury.

**Demonstrate why an expert is not needed:** *Sanchez* and *Stamps* seek to prevent experts from being mere conduits to put hearsay before the jury. If an expert is only doing rote tasks which require no special expertise, then they are likely not needed and they will not be able to present hearsay to the jury. Focus on what the expert is doing to make the evidence more accessible to the jury, if anything. The less the expert is doing, the more likely a court will find that the expert is only serving as a conduit for hearsay.

**Geoffrey Macbride is an associate in the Murphy Pearson Bradley & Feeney's San Francisco office.**



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1. According to the California Supreme Court, experts are never permitted to relate hearsay statements to the jury.

True  False

2. Under common law, experts cannot relate to the jury information concerning case-specific facts about which they have no independent knowledge.

True  False

3. A "case-specific fact" is any fact that involves the participants of the case being tried.

True  False

4. One way to establish a case-specific fact is by calling witnesses with personal knowledge about the fact.

True  False

5. However, another way to establish a case-specific fact is by calling an expert to testify about the fact, whether or not the expert has personal knowledge about it.

True  False

6. When a case-specific facts are established, experts

may testify about specific information relating to those facts to help jurors understand the significance of the facts.

True  False

7. Experts can relate opinions about what an established case-specific fact means.

True  False

8. If no competent evidence of a case-specific fact has been, or will be, admitted, an expert can still be asked to hypothetically assume the truth of those facts.

True  False

9. The line between general background information and case-specific hearsay has been blurred, in part, by courts allowing expert testimony concerning details in hearsay documents if the document is reliable.

True  False

10. Courts reasoned that any prejudice created by allowing testimony about details in hearsay documents could be cured with a limiting instruction to the jury.

True  False

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11. A limiting instruction to the jury cures any prejudice created through an expert's reliance on case-specific hearsay, because the jury must consider the hearsay for its truth to evaluate the strength of an expert's opinion.

True  False

14. The rulings in *Sanchez* and *Stamps* may be avoided if facts underlying an expert's opinion fall within an exception to the hearsay rule.

True  False

12. Case-specific out-of-court statements relied on by an expert must be admitted properly admitted through an applicable hearsay exception.

True  False

13. If an expert's opinion

True  False

15. An expert may testify about case-specific facts when his role is limited to that of a "mere conduit."