



Forensic Accounting Today

Newsletter of Ron J. Anfuso, CPA/ABV, An Accountancy Corp.



Ron J. Anfuso, CPA, ABV, CFF, CDF, FABFA*
28441 Highridge Road, Suite 110 • Rolling Hills Estates, CA 90274
Phone: (310) 378-6606 • E-mail: rja@anfusco.com
Website: www.anfusocpa.com • Blog: blog.anfusocpa.com

Issue 39

Serving all of California

Ron's Corner

On June 30, 2016, the California Supreme Court decided *People v. Sanchez* (63 Cal.4th 665). Certainly, this ruling has caused at least some attorneys who practice Criminal or Civil Litigation to reconsider how they bring evidence into a jury trial. But what about for Family Law litigation being there are no juries? I thought it might be of interest to Family Law attorneys to present the impact of the Court's decision on Family Law trials from my point of view, a forensic accountant who has testified hundreds of times in court. What I am presenting here is a somewhat abridged presentation related to my full article, which is posted on my website blog.

I certainly welcome your expertise and feedback. Also, if you have questions concerning the strategies and content of forensic accounting testimony, I invite you to post your questions to my blog or contact me directly. I hope you find this article helpful.

Ron

People versus Sanchez: Hearsay and Case-Specific Statement Considerations in Expert Testimony

By Ron J. Anfuso, CPA, ABV, CFF, CDF, FABFA

People versus Sanchez was a criminal case concerning gang-related crimes. The case addressed a vital issue related to the validity of expert testimony, which was whether the prosecution's expert's description of the defendant's past contacts with police should have been considered *hearsay* based on the expert never having met the defendant, nor having been present during the defendant's past contacts with police. Thus, the expert had no personal knowledge of these events. The other alternative was to consider the testimony *non-hearsay*, if determined to be offered merely as a basis for the expert's position.

The opinion addressed by the California Supreme Court established a bright line rule that, in such cases where an expert relates case-specific out-of-court statements and treats the testimony as true and accurate, the statements are hearsay. Thus, like all hearsay, such statements are inadmissible unless rendered admissible through the application of hearsay exception. The Court further ruled "*it cannot logically be maintained that such statements are not being offered for their truth.*" The Court's opinion relates to both Criminal and Civil Litigation cases because it could apply broadly to any expert testimony.

State Evidentiary Rules for Hearsay

Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content. Evidence Code section 1200, subdivision (a) formally defines hearsay as "*evidence of a statement that was made other than by*

a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." A hearsay statement is one in which a person makes a factual assertion out of court that the proponent seeks to rely on to prove the assertion is true. As previously mentioned, hearsay is generally inadmissible unless it falls under an exception.

State Evidentiary Rules for Expert Testimony

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates (Evidence Code, §720, subd. (a). An expert witness may express an opinion on a subject that is sufficiently beyond the common experience that the opinion of an expert would assist the trier of fact." (Evidence Code, §801 subd. (a).

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. 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 (or judge) will need to resolve an issue. As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.

An expert, by contrast, is also allowed to give an opinion about what those facts may mean. Generally, however, the expert is not permitted to supply case-specific facts about which he has no personal

knowledge. {*People v. Coleman* (1985 38 Cal. 3d 69, 92 (Coleman.))}

In common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. "*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...*" (Imwinkelried, *The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law* (2013) 3 U.Den. Crim. L.Rev. 1, 5; see Simons, *Cal. Evidence Manual*, supra, §4:32, pp. 326-327; 8 4:32, pp. 326-327; 2 Wigmore, *Evidence* (Chadbourn ed. 1978) §672, p. 933, italics omitted.)

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 expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience.

Both the common law and early California law recognized two exceptions to the general rule barring disclosure of, and reliance on, otherwise inadmissible case-specific hearsay. These exceptions covered testimony about property valuation and medical diagnoses. As to the former, "*courts recognized that experts frequently derived their knowledge by both*

custom and necessity from sources that were technically hearsay— price lists, newspapers, information about comparable sales, or other secondary sources.” (Kaye et al., The New Wigmore: Expert Evidence (2d ed. 2011)§4.5.1, p. 154; see In re Cliquot’s Champagne (1865) 70 U.S. 114, 141.)

The justification for these exceptions was threefold: “the routine use of the same kinds of hearsay by experts in their conduct outside the court; the experts’ experience, which included experience in evaluating the trustworthiness of such hearsay sources; and the desire to avoid needlessly complicating the process of proof...” (Kaye et al., The New Wigmore: Expert Evidence, supra, 8 4.5.1, p. 155; see 3 Wigmore, Evidence, supra, § 688, p. 4.) 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.”

Accordingly, in support of his opinion, an expert is entitled to explain to the jury (or Judge) the “matter” upon which he relied, even if that matter would ordinarily be inadmissible. When that matter is hearsay, there is a question as to how much substantive detail may be given by the expert and how the jury (or Judge) may consider the evidence in evaluating the expert’s opinion. It has long been the rule that an expert may not “under the guise of reasons [for an opinion] bring before the jury (or Judge) incompetent hearsay evidence.” (Coleman, supra, 38 Cal.3d at p. 92.) Courts created a two-pronged approach to balancing “an expert’s need to consider extrajudicial matters, and a jury’s (or Judge’s) need for information sufficient to evaluate an expert opinion” so as not to “conflict with an accused’s interest in avoiding substantive use of unreliable hearsay.” (People v. Montiel (1993) 5 Cal.4th 877, 919 (Montiel).) The Montiel court opined that “Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.]

Sometimes a limiting instruction may not be enough. In such cases, Evidence Code §352 authorizes the court to exclude from an expert’s testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]” (Ibid., citing Coleman, supra, 38 Cal.3d at pp. 91-93.) For the reasons discussed below, the Court concluded this 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 (or Judge).

Indeed, an expert’s background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, this decision does not affect the traditional latitude granted to experts to describe

Need a Financial Expert to Speak to Your Study Group or Bar Event?



Ron J. Anfuso can address any Forensic Accounting topic, including Moore/Marsden; marital standard of living and support needs analysis; financial specialists and Collaborative Law; gross cash flow available for support; DissoMaster™; divorce tax issues; divorce—what to expect; and business valuation.

To discuss your group’s needs, call Ron today!

background information and knowledge in the area of his expertise. The conclusion restores the traditional distinction between an expert’s testimony regarding background information and case-specific facts.

Any expert may still rely on hearsay in forming an opinion, and may tell the jury (or Judge) in general terms that he did so. Because the jury (or Judge) must independently evaluate the probative value of an expert’s testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the “matter” upon which his opinion rests. A jury (or Judge) may repose greater confidence in an expert who relies upon well-established scientific principles.

Comments

Much of the Sanchez criminal case decision hinges on the constitutionality of the use of hearsay that was relied upon by the prosecution’s expert witness. Although this case is instructive and is the law, commentators and Judges have differing opinions as to its applicability in Family Law cases. As always, each case will be adjudicated based on the specific facts and circumstances of the case.

However, in Sanchez, the trial Court’s admission of the inadmissible hearsay evidence was harmless error, as it was duplicative and weak compared to other properly admitted evidence that demonstrated gang membership.

The California Supreme Court granted review on March 22, 2017 and ordered the opinion to remain precedential (rule 8.1115(e)(3)). Any citation to this opinion must note grant of review and any subsequent action by the Court. (See Cal. Rules of Court, Rule 8.1115.)

What Does This Mean for Forensic Accountants?

If a tracing is performed and the Separator client kept the records for 20 years to prepare a complete and exhaustive tracing, will the opinion be tossed out unless the custodian of records of the financial institution can be brought to Court to authenticate the documents? This is a question needing only being answered once that issue is brought before a Court and an attorney objects to the foundation of the analysis. A Custodian of Records for a financial institution will likely be able to authenticate the records for the years prior to those kept in their micro-fiche.

Remember that all family law trials are bench trials and not jury trials. Judicial Officers are triers of fact and are capable of applying the appropriate weight to experts’ opinions. Speculation will not be considered. Facts likely will. Sanchez certainly causes some additional consideration over the admissibility of Expert Opinions when the Expert has relied on hearsay evidence in formulating his or her opinion.



5 reasons why you can trust Ron J. Anfuso as an expert witness

- Judges consider Ron a credible witness (over 30 appointments by judges pursuant to Evidence Code §730)
- Ron has testified in court nearly 500 times
- Ron consistently thoroughly prepares himself, including for the “unexpected,” so he doesn’t get caught off guard
- Ron is energized on the witness stand and thrives on difficult cross examination
- Ron’s thorough understanding of People v. Sanchez increases assurance he steers clear from inadmissible testimony

Call Ron Today to serve as your Forensic Account and Witness