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REPORT

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EXPERTS: CAN'T LIVE WITH THEM, CAN'T LIVE WITHOUT THEM



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In recent years, jurors have come to expect experts to testify at trial even when their opinions are unnecessary. Thus, jurors may take note when litigants don't call an expert. This may impact what they think about a litigant's case.

Numerous legal scholars have written about the so-called "CSI Effect." The term was originally coined to describe what can happen to jurors who regularly watch crime investigation shows like *CSI: Crime Scene Investigation*, *Law & Order*, and *48 Hours*. These jurors may place an undue emphasis on expert testimony and expect to hear detailed expert opinions regarding every disputed fact—even in civil trials.

Under California law, an expert generally is permitted to offer an opinion if: (a) the subject is sufficiently beyond common experience such that the expert's opinion would assist the trier of fact; and (b) the opinion is based on matter of a type that reasonably may be relied upon by an expert in forming an opinion. (Evid. Code, § 801.)

Yet, litigants increasingly hire experts to opine on a wide range of topics that are within a layperson's common knowledge, making their opinions inadmissible—for example, whether a sidewalk crack was dangerous; whether a pedestrian walkway was adequately illuminated; whether someone was susceptible to a trip hazard; or whether a floor was slippery when wet. (In fact, certain experts are famously hired to give an opinion on all of these unrelated lay

issues.) Perhaps litigants call these experts simply to satisfy jurors' desire to hear expert testimony.

Deciding whether to call an expert is not always easy. On one hand, if the defendant presents no expert to counter the plaintiff's, the defendant's case may appear weaker to a jury because it lacks apparent "expertise" on the plaintiff's side. On the other hand, counsel run the risk of turning a simple dispute into a costly, complex "battle of the experts."

"The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" (*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163 & fn. 2, quoting "Subterranean Homesick Blues.")

But if a particular subject can be understood *only* by experts, expert opinion testimony is *required* to establish a prima facie case. (See *Huffman v. Lindquist* (1951) 37 Cal.2d 465, 473–475.) For instance, experts generally are required to establish the standard of care in malpractice and construction defect cases. Additionally, if establishing the fair market value of real property is an essential element of a plaintiff's case, Evidence Code section 813 *requires* the plaintiff to establish it through the testimony of either an owner of the property or an expert.

In other cases, expert opinions are *prohibited*. For instance, experts cannot opine on pure questions of law. Nor can they interpret contracts, statutes, ordinances, or safety regulations promulgated pursuant to statutes. "Each courtroom comes equipped with a "legal expert," called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181, quoting *Burkhart v. Washington Metropolitan Area Transit Authority* (D.C. Cir. 1997) 112 F.3d 1207, 1213.)

Over the last decade, the California Supreme Court has significantly limited the admissibility of expert testimony. In particular, the Court has instructed trial courts to act as a gatekeeper by excluding expert opinions that are based on unsupportable underlying materials or speculation (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*)), and it has limited litigants' efforts to use experts to sneak in inadmissible hearsay regarding case-specific facts (*People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)). Perhaps the Court did so in response to the CSI Effect. Or, perhaps it did so in response to experts' increasing use of junk science and speculation to support their opinions.

Whatever the reason, because experts can either be a useful litigation tool or a damaging obstacle, trial counsel should familiarize themselves with the rules governing the admissibility of expert testimony to either effectively employ or combat expert opinions. If an expert is central to a litigant's case, counsel can utilize multiple tools to guide the court's rulings.

***Sargon*—The Trial Judge Is “The Gatekeeper”**

Sargon instructs trial courts to act as a “gatekeeper” to exclude expert opinions based on assumptions that lack any evidentiary support. That means when an expert refers to studies and other information as the underlying support for his or her opinion—and the opponent objects that the expert's opinion is unsupportable or speculative—trial courts *must* hold a hearing outside the jury's presence to ensure there is some reasonable support for the underlying evidence. This is now commonly known as a “gatekeeper hearing.”

In this hearing, the court must conduct a “circumscribed inquiry” to determine whether, as a matter of logic, the expert's underlying source material “adequately support[s] the conclusion that the expert's general theory or technique is valid.” (*Sargon, supra*, 55 Cal.4th at p. 772.) *Sargon* holds that expert opinion testimony is inadmissible when it is: “(1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative.” (*Id.* at pp. 771–772.)

“[I]t certainly doesn't aid the jury in understanding an issue if all an expert says is that it's possible. That doesn't meet the standard for expert opinion.” (*Waller v. FCA US LLC* (2020) 48

Cal.App.5th 888, 895 [applying *Sargon*].) “[P]ossibilities are irrelevant, because anything is possible.” (*Ibid.*) And “circular reasoning is not a basis for an admissible expert opinion.” (*Id.* at p. 896.)

Although *Sargon* did not change California law on the admissibility of expert testimony, it has become an important weapon in halting experts' attempts to proffer unsupported, speculative expert opinions.

Trial judges often refuse litigants' initial requests for gatekeeper hearings, instead preferring to either judge the testimony in context or even let juries decide whether the underlying support for the opinion is credible. So, litigants sometimes need to remind trial courts about their gatekeeper duty under *Sargon*. (See *Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* (2021) 71 Cal.App.5th 323, 346 [“*Sargon* requires” courts to act “as a gatekeeper to ensure that the trier of fact is not presented with expert testimony based on logically unsupported methodologies”].) *Sargon* itself calls trial courts' gatekeeping duty “substantial.” (55 Cal.4th at p. 769.)

When filing a motion in limine seeking to exclude an expert's speculative opinion, litigants should ask, alternatively, for the court to hold a gatekeeper hearing outside the jury's presence under Evidence Code sections 402 and 802 and *Sargon* to determine whether the expert's opinions are supported by facts or just speculation and conjecture. “[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it.” (*Rosen v. Ciba-Geigy Corp.* (7th Cir. 1996) 78 F.3d 316, 319 [Posner, C. J.].)

***Sanchez*—The Rule Against Repeating Case-Specific Hearsay**

Under Evidence Code section 802, experts are permitted to describe the reasons and matter upon which their ultimate opinions are based.

Before *People v. Sanchez, supra*, 63 Cal.4th 665, courts interpreted section 802 broadly, permitting experts to repeat out-of-court hearsay statements if they were part of the “reasons” and “matter” relied on in forming the expert opinion, subject to limiting instructions and the trial court's discretion. (*Id.* at pp. 678–679.) But litigants regularly employed experts as conduits for bringing hearsay before the jury, and the supposed safeguards that courts

imposed were suspect:

- Limiting instructions: “The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” (*Krulewitch v. U.S.* (1949) 336 U.S. 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] (conc. opn. of Jackson, J).)
- Trial court’s discretion to prevent experts from repeating “unreliable” hearsay: The abuse of discretion standard of review is not much of a safeguard because courts will reverse only if “the trial court exceeded the bounds of reason.” (*Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 349.)

Sanchez “expressly changed the law.” (*People v. Perez* (2020) 9 Cal.5th 1, 9.) Post-*Sanchez*, an expert “may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms*” that he or she did so, but the expert cannot 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, supra*, 63 Cal.4th at pp. 685–686, original italics.)

The distinction between case-specific facts and background information is crucial—the former may be excluded as hearsay under the *Sanchez* rule, the latter may not. “Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) Whereas, background information refers to the general, non-case-specific knowledge that experts learn by virtue of being experts in a specialized area. (*Ibid.*)

The California Supreme Court Clarifies The *Sanchez* Rule

In two recent cases, the California Supreme Court discussed *Sanchez* in detail and clarified its holding.

First came *People v. Veamatahau* (2020) 9 Cal.5th 16. It re-emphasized that “the relevant hearsay analysis under *Sanchez* is whether the expert is relating general or case-specific out-of-court statements. The focus of the inquiry is on the information conveyed by the expert’s testimony, not how the expert came to learn of such information. Thus, regardless of whether an expert

testified to certain facts based on composite knowledge ‘acquired from sources too numerous to distinguish and quantify’ or if the expert simply looked up the facts in a specific reference as part of his or her duties in a particular case, the facts remain the same. The background or case-specific character of the information does not change because of the source from which an expert acquired his or her knowledge.” (*Id.* at p. 30.)

Then *People v. Valencia* (2021) 11 Cal.5th 818 further expounded upon both *Sanchez* and *Veamatahau* in explaining the difference between general background information and case-specific facts: “Hallmarks 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.)

While *Veamatahau* illustrates the latitude experts are still given post-*Sanchez* to testify to background information relied upon in the formation of their opinions, *Valencia* shows how the *Sanchez* rule barring case-specific hearsay places limits on that practice.

Both *Sargon* And *Sanchez* Apply During Summary Judgment Proceedings

Even more recently, in *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796 (*Strobel*), the Court of Appeal for the First District addressed the *Sargon* and *Sanchez* limiting rules in the context of a summary judgment.

In *Strobel*, plaintiffs sued Johnson & Johnson (J&J) for products liability, negligence, and fraud, alleging that continuous exposure to asbestos in J&J’s Baby Powder was a substantial contributing cause of the plaintiff husband’s mesothelioma and the wife’s loss of consortium.

J&J moved for summary judgment. The trial court sustained J&J’s hearsay objections to much of plaintiffs’ proffered expert testimony under *Sanchez* and granted J&J’s motion, concluding that plaintiffs failed to present evidence creating a triable issue of legal causation.

Plaintiffs appealed. Applying the *Sanchez* rule, *Strobel* held that the trial court correctly excluded one of plaintiffs' expert's opinions as case-specific hearsay to the extent that he related the specifics of another expert's testing data and results. But that did not end the court's inquiry. Even without the case-specific facts from the first expert, the Court of Appeal was satisfied that a second plaintiff's expert had formulated his opinions based upon principles generally accepted in his area of expertise and that he applied those principles upon a proper evidentiary foundation.

The Court of Appeal also held that the second expert's testimony did not violate *Sargon* because there was no “analytical gap between the data and the opinion [he] proffered” that was too large to be admissible. (*Strobel, supra*, 70 Cal.App.5th at p. 826; see *San Francisco Print Media Co. v. The Hearst Corp.* (2020) 44 Cal.App.5th 952, 962 [courts may apply *Sargon*'s “analytical gap” analysis in connection with motions for summary judgment and adjudication].)

Accordingly, the Court of Appeal reversed. Although it agreed that the case-specific hearsay from the first expert was inadmissible and the other experts could not rely on it, that was not enough to warrant summary judgment in light of plaintiffs' other admissible expert testimony. (*Strobel, supra*, 70 Cal.App.5th at pp. 810, 821–823.)

Remember To Preserve And Reraise Your *Sanchez* and *Sargon* Objections

Sargon, *Sanchez*, and their progeny provide strong ammunition against junky or prepaid expert opinions or those attempting to bring in damaging hearsay. But they can't help you if you don't object. Even the most obvious *Sargon* and *Sanchez* violations will not matter—and the arguments will be forfeited on appeal—if you don't make a clear record of your objections to the experts' impermissible testimony. (See, e.g., *David v. Hernandez* (2017) 13 Cal.App.5th 692, 704 [“Appellant forfeited the *Sanchez* hearsay argument because he never made a hearsay objection”].)

And, even if your motion in limine is unsuccessful in excluding an expert's opinion, don't forget to reraise the same objections when the expert testifies. Since you will already have teed up the issue in your pretrial motion, your contemporaneous objection, when viewed later in the context of the trial testimony, might be better received by the trial court and sustained.

It's important to keep the CSI Effect in mind when you're deciding whether to have experts testify at trial to support your client's case. Many jurors are hoping to see experts testify so they can feel like CSI investigators. But that doesn't mean you need to call one. Sometimes your best move is to try to persuade the trial judge to exclude the other side's expert or significantly limit his or her opinion. A detailed motion in limine targeted at a specific expert can be a useful tool for limiting a major part of the other side's case before trial or, at a minimum, educating the court so that it is more receptive to your contemporaneous trial objection to the expert's testimony.

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