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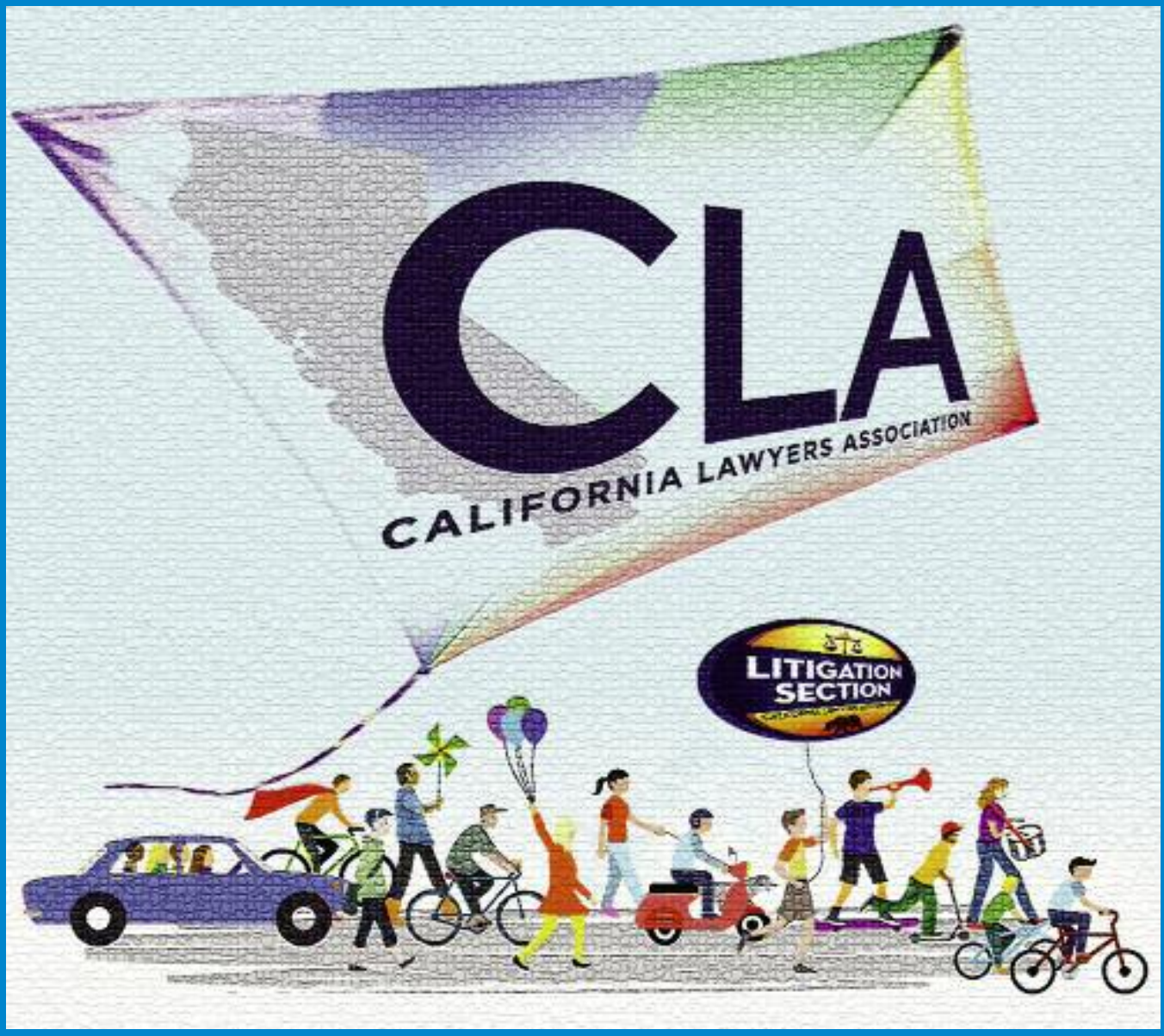
California Litigation

THE JOURNAL OF THE LITIGATION SECTION OF THE CLA



From the Section Chair

By Megan A. Rowe

Megan A. Rowe

I am pleased to report that our new bar association, the California Lawyers Association ("CLA"), is off to a wonderful start! The CLA leadership has been working hard to spread the word about the CLA and the transition away from the State Bar of California. CLA has begun its marketing campaign to reach California lawyers, the State and Federal judicial bench, and the American Bar Association. However, even though CLA was formed January 1st of this year, many still do not know about our new bar association. CLA is a member-driven organization dedicated to advancing California attorneys in their legal profession. Please do your part by spreading the word about CLA! CLA's website (calawyers.org) is a good resource of helpful information about the CLA, the Sections' news and events, as well an online catalog of MCLE programs.

The Litigation Section, among many other Sections, has been helping with the CLA transition and also continuing to do business as normal. The Litigation Section and the California Women Lawyers held the **So, You Want to be A Judge?™**

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Inside

California Litigation is pleased to review original articles submitted for publication. Articles should be 1,000-2,000 words. Please submit proposed articles – and Letters to the Editor – to Benjamin G. Shatz, at Bshatz@Manatt.com.

To subscribe:

California Litigation is mailed free to all members of the Litigation Section of the CLA. To join the Litigation Section, send your name, address and telephone number to Litigation Section, CLA, 180 Howard Street, San Francisco, CA 94105-1639. Section dues are $95 per year and should be enclosed with the enrollment information.

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Editor's Foreword:

Spring into Summer

By Benjamin G. Shatz, Editor-in-Chief

Benjamin G. Shatz

For the past 30 years, the Litigation Section's premiere publication has been this journal, California Litigation, which has published three issues a year, Spring, Summer, and Fall (sometimes slipping into Winter.) You are now reading the Spring 2018 issue, even though it is now Summer 2018. This may trouble you. Allow me to explain.

To begin, as a child growing up in perennially sunny Southern California, I never really understood "seasons." Despite having heard of Princess Summerfall Winterspring, it was not until college that I came to concretely recognize seasons—and that was solely because classes were scheduled on a quarter system.

Not buying it? Ok, look, we fell behind schedule a bit, starting last year when the Bar and the Sections divorced, giving rise to the CLA. Despite the administrative and technical challenges and hassles posed, you the reader deserve great content—not excuses. All we can say is that we will try to get back on track, and even attempt to publish twice more this year.

Speaking of great content, here's what's in store in the ensuing pages. (Litigation pun; sorry.) First, a trio of appellate luminaries—Don Willenburg, Gary Watt and John Taylor—kicks things off with an article about *People v. Sanchez*. If you're not familiar with *Sanchez* already, you really need to read this article. Next Jan Frankel Schau explores the value of pre-litigation mediation.

Turning to legal aspects of pressing social issues, Laura Foggan and Michael Huggins cover emerging insurance coverage issues arising from America's opioid epidemic. Then Thomas Madruga addresses police officers on trial.

Branching into overlapping realms of litigation and history, Peter Afrasiabi provides some lessons on judicial disqualification from the Harry Bridges Cold War trials. Marc Alexander reviews American Prophet, a biography of Louis Brandeis (not Joseph Smith!) by Jeffrey Rosen. The illustration on page 37 of Brandeis's autograph is from Marc's personal collection of famous legal John Hancocks—a truly essential must-have for any American lawyer-philographer.

To help plan your next vacation across the pond, allow Larry Biegel to entice you with his Lawyer's Love Affair with a Week In Legal London (the WILL program). Everyone who goes on one of these trips really does love it. Will you sign up for WILL 2019? We hope you will!

We close with another great submission from legal historian James Attridge. You certainly read *Yick Wo v. Hopkins* in law school. But you probably never gave serious thought to the life and litigation of this regular Joe who stood up to make America what America should be. James will set you straight, and makes a worthwhile proposal as well. (He also mentions that there are no known records of Yick Wo's signature. Sorry, Marc!)

Benjamin G. Shatz, Editor-in-Chief of this journal, is a certified Specialist in Appellate Law and Co-chairs the Appellate Practice Group of Manatt, Phelps & Phillips, LLP, in Los Angeles. BShatz@Manatt.com.

People v. Sanchez,
Hearsay, and Expert Testimony

By Don Willenburg, Gary A. Watt, and John A. Taylor, Jr.

Don Willenburg

Gary A. Watt

John A. Taylor, Jr.

A recent California Supreme Court decision in a criminal case "clarified" the rules regarding hearsay and expert witness testimony, and is making waves in civil practice. *People v. Sanchez* (2016) 63 Cal.4th 665 involved a gang expert, but its holding and rationale apply across the board to expert testimony generally. What counsel does not know about *Sanchez* could gut the testimony of an expert witness—and lose a case.

How *Sanchez* "Clarified" Expert Witnesses and Hearsay

Experts can base their opinions on matters "whether or not admissible," including hearsay. (Evid. Code, § 801.) And experts have to explain their reasoning, or else their opinions will be ineffectual or even inadmissible. (E.g., *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1120-1121.) Before *Sanchez*, courts regularly allowed experts to recount any and all hearsay bases for their opinions, accompanied by a limiting instruction to the jury that hearsay evidence relied on by the expert " 'should not be considered for [its] truth.' " (*Sanchez, supra*, 63 Cal.4th at p. 670.) "We'll get it in through our expert" has been a common refrain for lawyers facing hearsay problems with a critical piece of evidence.

No more. When it comes to case-specific facts, *Sanchez* recognized the logical fallacy of such a limiting instruction. "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth." (*Sanchez, supra*, 63 Cal.4th at p. 682.) "[H]earsay ... problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its 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." (*Id.* at p. 684.) "[T]he validity of [the expert's] opinion ultimately turn[s] on the truth" of the hearsay statement. "If the hearsay that the expert relies on and treats as true is not true, an important basis for the opinion is lacking." (*Id.* at pp. 682-683.)

Justice Brian Hoffstadt has likened this insight to an "Emperor's New Clothes" moment: "[T]he California Supreme Court in *Sanchez* held that case-specific facts forming the basis for an expert's opinion are, in fact, admitted for their truth." (Hoffstadt, *Tailoring the Emperor's New Clothes*, Daily J. (Aug. 14, 2017.)

Sanchez distinguished "background information" from "case-specific facts." (*Sanchez, supra*, 63 Cal.4th at p. 676.) "Background" hearsay testimony remains acceptable. (*Id.* at pp. 676, 685.) "[E]xperts 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." (*Id.* at p. 675, emphasis added.) The Court illustrated with a quoteworthy 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." (*Ibid.*) This is apparently a rule born more of practical necessity than of any statutory or doctrinal hearsay exception. (No one knows that Caesar conquered Gaul, or that Napoleon died on Elba, except via hearsay.)

But "case-specific" facts are different. While "[a]t common law, the treatment of an expert's testimony as to general background information and case-specific hearsay differed significantly ... the line between the two has now become blurred." (*Sanchez, supra*, 63 Cal.4th at p. 678.) Courts had come to allow some case-specific hearsay, while giving a limiting instruction to the jury that it is not to be considered "for its truth." *Sanchez* held that "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion must be

considered for its truth." (*Id.* at p. 679.) "Indeed, the jury here was given a standard instruction that it 'must decide whether information on which the expert relied was true and accurate.' ([CALJIC] No. 332 [Expert Witness Testimony].) Without independent competent proof of those case-specific facts, the jury simply had no basis from which to draw such a conclusion." (*Id.* at p. 684.)

Thus, *Sanchez* established the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true ... the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*Sanchez, supra*, 63 Cal.4th at p. 686.) After *Sanchez*, an expert can no longer "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*." (*Ibid.*, emphases added.)

Sanchez helpfully explained the role hearsay still plays in expert testimony. "Any expert may still rely on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez, supra*, 63 Cal.4th at pp. 685-686.) The key distinction is "between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id.* at p. 686.)

Practical Issues Arising From *Sanchez*

In application, it may not always be clear what facts are mere background and what facts are case-specific for expert testimony purposes. In *Sanchez*, the witness was an expert on criminal street gangs. (*Sanchez, supra*, 63 Cal.4th at p. 671.) As is (or was) apparently a widespread practice among such experts, his opinion that the crime at issue was for the benefit of a gang was based in part on "STEP notices" (warnings given by police to individuals reported to have associated with known gang members), and "FI" cards (officers' written record of contacts with an individual). (*Id.* at p. 672.) The Court held that "the gang expert testified to case-specific facts based upon out-of-court

'It is important to anticipate and resolve Sanchez issues during discovery, because often an expert's testimony is crucial to a case, and an expert opinion that is not based on any admissible evidence can be disregarded...'

statements" and therefore was improperly "reciting hearsay." (*Id.* at p. 685.)

In other contexts the background/ case-specific distinction may not be so clear. In a products liability case, for example, what a defendant "should have known" about risks at some time in the past is typically addressed by experts based on what was known generally in the industry at the time. Is such "general industry knowledge" a mere background fact, or does it involve a case-specific fact about this defendant

Other practical questions likely to arise in civil cases include the following hearsay issues:

• In a case involving physical injury, a medical expert can rely on hospital or other medical records authored by someone else, but absent a cure for hearsay problems, can the expert testify about the content of those records?

• In the same kind of case, can a forensic economist offer opinions and forecasts based on a report authored by a life care planner, that in turn was based on statements made by a doctor? (See *David v. Hernandez* (2017) 13 Cal.App.5th 692, 704 [issue waived by failure to object].)

• Real estate valuation experts commonly rely on "comparable" sales information, gleaned from listing prices and other records that are compiled by others. If they do not personally visit the properties or are not involved in the comparable transaction, is their testimony about comparable sales inadmissible under *Sanchez*, or are comparable sales noncase-specific facts the expert can relate to the jury?

It is important to anticipate and resolve *Sanchez* issues during discovery, because often an expert's testimony is crucial to a case, and an expert opinion that is not based on any admissible evidence can be disregarded. (E.g., *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 737, 742 [rejecting medical expert witness's opinion where the records relied on were not admitted in evidence, because "there were no facts before the court on which the expert medical witness could rely to form his opinion," so the witness's testimony "had no evidentiary basis," and "no evidentiary value"].) "[W]hen the proposed expert testimony rests on an assumption without any support in the trial evidence, the court does abuse its discretion in admitting it. Such testimony has little or no probative value, bears the potential to mislead the jury into accepting the unsupported assumption and drawing from it unwarranted conclusions, and thus cannot significantly 'help the trier of fact evaluate the issues it must decide.' " (*People v. Moore* (2011) 51 Cal.4th 386, 406.) So an attorney should stipulate regarding the materials on which the expert relied, get the authors of the documents to testify, or face exclusion of the evidence.

Sanchez itself identified two ways to satisfy the "new" rule. First, if the evidence has already come in independently under an exception to the hearsay rule, the expert can testify about it. (*Sanchez, supra*, 63 Cal.4th at pp. 685-686.) Second, a method more generally within the control of counsel, is to ask hypothetical questions. (*Id.* at p. 684.) "[T]he evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Ibid.*) However, it is improper, and perhaps even sanctionably unethical, "to ask an expert witness a hypothetical question which assumes facts not in evidence or assumes ... facts inconsistent *with those in evidence." (Am-Cal Invest. Co. v. Sharlyn Estates, Inc.* (1967) 255

Cal.App.2d 526, 544.) And of course, the hypothetical question's answer is only as good as the evidence that ultimately gets in—so curing the hearsay problem is still critical."

— Three Comparisons —

Three sets of decisions illustrate what *Sanchez* does and does not prohibit.

— Ident-A-Drug —

Both *People v. Stamps* (2016) 3 Cal.App.5th 988 and *People v. Mooring* (2017) 15 Cal.App.5th 928 were unlawful drug possession cases decided by the First District. Both involved the same expert who relied on the same "Ident-a-Drug" website to identify seized pills as illegal based on their shape, color, and markings. (*Stamps,* at p. 992; *Mooring*, at pp. 933-934.)

Stamps rejected the expert's testimony as case-specific hearsay under *Sanchez*, and also as generally unreliable because the Internet " 'is inherently untrustworthy.' " (*Stamps, supra*, at pp. 996-997, citation omitted.) But by the time of trial in Mooring, the prosecution had developed a better strategy, leading to the opposite result on appeal. The prosecution argued that the "Ident-a-Drug" website fell under the "published compilation" exception to the hearsay rule. (*Mooring, supra*, 15 Cal.App.5th at p. 937.) "Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in [Evidence Code] Section 1270." (Evid. Code, § 1340.) In *Mooring*, the criminalist testified as to the factual basis for this compilation exception, explaining that the site was available to law enforcement only, that special expertise was required to use it, and that she and other criminalists regularly relied on it. (*Mooring*, at pp. 938-941.) *Stamps* had not considered "whether a published drug reference guide accessible through a subscription Internet service is a published compilation within the meaning of Evidence Code section 1340." (*Id.* at p. 940.)

'What you don't know about Sanchez *could sink your otherwise carefully prepared case. And what you do know about* Sanchez *can be used to sink your less-informed opponent's case'*

Presumably there are many similar "published compilations" in other fields on which experts may rely, and the contents of which

they can relate even under *Sanchez*. The more general lesson from *Mooring* and *Stamps* is that an attorney must be intimately familiar with the Evidence Code and other statutory hearsay exceptions. If a hearsay exception applies, the expert is free to relate case-specific facts to the jury without the need to independently prove them.

__ Gang Experts Rejected, __ and Accepted

A second comparison of decisions illustrating what *Sanchez* does and does not prohibit arises in the same context as *Sanchez*: the use of police reports written by someone other than the testifying expert to establish gang ativity.

Predictably, most decisions in this area follow *Sanchez*, with the result of excluding expert testimony regarding the content of police reports and related materials. (E.g., *People v. Martinez* (2018) 19 Cal.App.5th 853, 858 ["The People concede *Sanchez* was violated by Officer Chinnis's [expert] testimony"]; *People v. Pettie* (2017) 16 Cal.App.5th 23, 63 ["This evidence is indistinguishable from the type of expert testimony found to be inadmissible in *Sanchez*"]; *People v. Lara* (2017) 9 Cal.App.5th 296, 337 [expert "testified from police reports generated by other officers during official investigations of completed crimes"]; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 ["[W]hen Corporal Kindorf testified various persons admitted to being members of the [gang], he related hearsay to prove case-specific facts. Under *Sanchez*, in the absence of a valid exception, the testimony was inadmissible as a matter of state hearsay law," but the error was harmless in light of other evidence of a "pattern of criminal gang activity."].)

At least one other reported decision, however, has been more lenient toward a gang expert's testimony. *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, review granted March 22, 2017, S239442, allowed testimony about one gang, its rivalry with another, and its pattern of criminal activity, reasoning that even if it were based on hearsay sources like gang members and gang officers, "nothing in the record suggests [the expert] obtained any of this information 'primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.' " (Quoting *Sanchez, supra*, 63 Cal.4th at p. 689.) The court also distinguished the expert's case-specific testimony from similar testimony in *Sanchez*: "[U]nlike the hearsay documents in *Sanchez*, [the expert's] testimony was not barred under state or federal law because [he] was present during these contacts, had personal knowledge of the facts, and was subject to cross-examination at trial." (*Meraz*, at p. 1176; cf. *People v. Huynh* (2018) 19 Cal.App.5th 680, 698 [no prejudicial error where detective personally familiar with defendant].) The Supreme Court granted review in *Meraz* on other issues, and "the opinion ... remains precedential. (See Cal. Rules of Court, rule 8.1115(e)(3).)" (3/22/17 Order, *Docket* (*Register of Actions*).)

__ Sexually Violent __ Predator Cases

Both *People v. Roa* (2017) 11 Cal.App.5th 428, 446 and *People v. Burroughs* (2016) 6 Cal.App.5th 378, 408 involved evidence about "qualifying offenses" that was not within the personal knowledge of the testifying expert. In *Burroughs*, this meant the testimony was inadmissible: "In this case, the People's experts related extensive and case-specific facts they gleaned from documents such as police reports, probation reports, and hospital records. The sole reason the trial

court gave for admitting this testimony was that it served as the basis of their opinions. Under *Sanchez*, admission of expert testimony about case-specific facts was error—unless the documentary evidence the experts relied upon was independently admissible." (*Burroughs*, at p. 407, footnote omitted.)

In *Roa*, by contrast, "the facts underlying Roa's qualifying offenses were independently proven by documentary evidence such as preliminary hearing transcripts and probation and sentencing reports .... Because the facts were independently proven, the experts were permitted to relate those facts to the jury as the basis for their opinions." (*Roa, supra*, 11 Cal.App.5th at p. 450, citing *Sanchez, supra*, 63 Cal.4th at p. 684.)

A Final Thought — *Sanchez* May — Also Bar Cross-Examination — Using Case-Specific Hearsay

Generally, "a witness testifying as an expert ... may be fully cross-examined as to ... the matter upon which his or her opinion is based and the reasons for his or her opinion" (Evid. Code, § 721, subd. (a)), and "[t]he scope of cross-examination of an expert witness is especially broad," including even "[e]vidence that is inadmissible on direct examination" (*People v. Gonzales* (2011) 51 Cal.4th 894, 923). As one treatise explains, while "an expert who relies on inadmissible hearsay in forming an opinion may be precluded from testifying on direct examination as to the details," on cross-examination "a broader range of evidence may be used and ... the witness can be examined on the details of otherwise inadmissible evidence." (Simons, Cal. Evidence Manual (2018) Expert and Other Opinion Testimony, § 4:33, p. 355.)

But *Sanchez* may limit that broad scope. In *People v. Malik* (2017) 16 Cal.App.5th 587, 597, case-specific hearsay was introduced "through cross-examination of the defense expert," who for impeachment purposes was "asked whether she considered that information in forming her conclusion defendant suffered from PTSD." The court held that "this case arguably represents the flip side of *Sanchez*," and concluded that "the reasoning of *Sanchez* applies equally in these circumstances." (*Id.* at pp. 597-598.) The court ultimately found the error harmless, however, because the issue in the case was credibility, not defendant's PTSD diagnosis. (*Id.* at pp. 598-600.)

— Conclusion —

What you don't know about *Sanchez* could sink your otherwise carefully prepared case. And what you *do* know about *Sanchez* can be used to sink your less-informed opponent's case. In any event, when armed with an intimate understanding of *Sanchez*, you'll be better attuned to the new demands this "clarification" of expert witness law imposes, and be prepared to deal with those demands in your cases.

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