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APPLYING *PEOPLE V. SANCHEZ* TO EXPERTS IN FAMILY LAW CASES

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In 2016, the California Supreme Court reinstated a traditional hearsay rule applicable to expert testimony and triggered a tsunami: experts would no longer be able to relate to the trier of fact inadmissible hearsay that had formed a basis for an opinion. Because *Sanchez* interpreted the hearsay rule, the ruling applied not only to criminal cases, but across the board. After a discussion in Part I of the legal context in which *Sanchez* arose, we will analyze the primary takeaways from that case as well as areas of uncertainty created by it in Part II and then conclude in Part III with an application of *Sanchez* to family law matters that commonly arise.

Sanchez represents a paradigm shift for all family law attorneys, and wise counsel will devote himself or herself to understanding *Sanchez* and planning his/her case with its requirements in mind. The days of the expert serving as the conduit for the facts, under the guise that the expert testimony is only relating information not offered for the truth of the matter stated are over. As *Sanchez* recognizes, *if the information is not offered for its truth, then why should the court listen to it?* Family law attorneys should prepare their cases consistent with the principles of *Sanchez.* Finally, family law lawyers can no longer ignore evidence rulings contained in criminal law cases. As *Marriage of Davenport*[1] teaches us, the Evidence Code applies in family law.

Part I: The Legal Context

A. Qualifying Experts

Evidence Code section 720, subdivision (a) sets out the main criteria utilized to establish an expert's qualifications:

> (a) 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. Against the objection of a party, such special knowledge, skill, experience, training or education must be shown before the witness may testify as an expert.

Commonly, the proponent of the expert will begin the examination of the expert by developing the witness's qualifications. In addition to the factors set out in section 720, the proponent will introduce testimony regarding the prior occasions when the witness has been permitted to testify as an expert on the same subject. In the family law arena, the most commonly used experts are child custody evaluators, and financial experts such as forensic accountants, business opportunities experts, and experts on reasonable compensation. Family law cases frequently require the use of real

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estate appraisers and appraisers for personal property. In addition, experts present testimony about stock options and other forms of deferred compensation, including retirement benefits. In support cases, vocational evaluators provide opinions regarding earning capacity. Less frequently, family law cases will involve medical experts testifying about the condition of the children or the parties, or an expert may testify about child development and education, or an expert may opine about risk assessment for violence. With the emerging use of technology in society, forensic experts may be called upon to discuss the metadata associated with electronically stored information. This list is hardly exhaustive.

Simply because the expert has never previously qualified is not an automatic basis for exclusion.[2] In the family law area, experts may testify concerning the marketability of classic automobiles, equipment in manufacturing concerns, or the value of inventory. Often, the most knowledgeable person in these areas is one who has never testified as an expert but possesses the most expertise. The opponent of this testimony will be permitted to *voir dir*e the expert on his/her qualifications before any opinion is rendered or may reserve questions on expertise for cross examination following the expert's full testimony on direct examination. The proponent must state the precise area of expertise and then demonstrate that the expert's qualifications relate to that particular subject.[3] Once the witness's expertise is established, "questions as to the degree of his or her expertise go to weight not admissibility."[4]

B. Establishing a Proper Basis for an Expert's Opinion

Evidence Code section 801 sets forth the general rule for the permissible bases upon which expert opinion may rest:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) 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 of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Three different tests are contained in this rule:

1. The expert witness must know the facts of the particular case either by personal perception, assumption, or from another;
2. Such matter must be of a type that reasonably may be relied on by experts in that area of expertise in forming an opinion;
3. An expert may not base an opinion on any matter that is declared by constitutional, statutory, or case law to be an improper basis for an opinion. However, simply because a piece of evidence is inadmissible does not mean that it may not be relied on by an expert.[5]

Where an opinion is based in whole or in significant part on matter that is not a proper basis for such an opinion, upon objection the court shall exclude it. However, the expert may, if there remains a proper basis for the opinion, state the opinion after excluding from consideration the matter determined to be improper.[6]

In *Sargon Enterprises, Inc. v. U.S.C.*,[7] the California Supreme Court clarified that, in its role as a gatekeeper, the trial court was not limited to evaluating whether the data and other information relied on by the expert as basis evidence is appropriate matter for the expert to rely on. In addition, the trial court must evaluate whether

the reasons for the opinion are supported by that matter and whether those reasons are speculative.[8] The Supreme Court explained the trial court was required to look beyond the objective facts relied upon by the expert and consider the logic behind the expert's analysis in reasoning from the data to the subject matter of the proffered opinion.[9]

As the gatekeeper, the trial court must be cautious: "The trial court's gatekeeping role does not involve choosing between competing expert opinions. . . . [T]he trial court's task is not to choose the most reliable of the offered opinions and exclude the others. . . . Rather it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' "[10]

C. Expert Testimony on Direct Relating the Basis Evidence

Evidence Code section 802 provides:

> A witness testifying in the form of an opinion may state on direct examination the reasons for [the] opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training or education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion….

Because it is not uncommon for an expert to rely on inadmissible matter, frequently hearsay, we are faced with a dilemma: to what extent are we prepared to expose the trier of fact to inadmissible hearsay to inform it fully of the expert's reasoning process? Prior to *Sanchez*, the answer to that question seemed to be, "Quite a bit." The general rule permitted the expert to state in general terms the matters relied on, but "he may not under the guise of reasons bring before the jury incompetent, hearsay evidence."[11] *People v. Coleman*, however, recognized a significant workaround to this rule. By informing the trier of fact that the out-of-court statement was not coming in for its truth, but only to assist in the evaluation of the opinion rendered, the statement was no longer inadmissible hearsay.[12] Numerous appellate cases, including most significantly *People v. Gardeley*[13] adopted this rationale. *Gardeley* and these other cases have now been overruled by *Sanchez*.

D. Cross-Examining the Expert

Evidence Code section 721, subdivision (a) provides:

> [A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

A "broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion."[14] The expert's credibility may be attacked by raising material relevant to the opinion that the expert was unaware of or did not consider, including inadmissible hearsay, to determine "'whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion.'"[15]

E. Custody Evaluation Reports

There is controversy and potential for confusion regarding child custody evaluations in a family law case in the post-*Sanchez* era. Initially we must distinguish custody evaluations from social study reports prepared in dependency proceedings. For the latter there is specific, current, statutory authority for the social study to be received into evidence in a dependency proceeding, including hearsay contained in the report.[16]

Well-respected, undeniably skilled, and clearly talented legal scholars argue that *In re Malinda S.*[17] and other earlier cases and statutes govern the admissibility of child custody reports under Family Code section 3111 or create something akin to a *family law hearsay exception* for child custody evaluations and testimony by custody evaluators. This segment will explore that hypothesis.

First, *Malinda S.* is a dependency court case construing a social study report.[18] Dependency court cases are often instructive on matters about child welfare, parental appropriateness, best interest of the child, and the developmental needs of a child. But dependency court cases operate under an entirely different statutory framework geared toward protecting children by advancing society's interest in removing children from abusive or neglectful parents. Welfare and Institution Code sections 281 and 358 are express legislative provisions balancing the societal need for child protection against the due process rights of parents; and these two sections create a special hearsay exception for dependency cases. As the Supreme Court acknowledges in many decisions, it is unwise for the courts to re-write the statutes and extend them to an entirely different set of cases, family law cases, before the legislature chooses to do so.

J.H. v. Superior Court[19] extensively considered *Sanchez* and the difference between dependency proceedings and other types of cases. *J.H.* recognized the Welfare and Institutions Code created exceptions to the hearsay rule in dependency proceedings. The opinion differentiates dependency proceedings from criminal proceedings, and civil proceedings, such as family law actions. Parents in dependency proceedings are not similarly situated to parents in family law proceedings.

Elkins v. Superior Court[20] unequivocally observes "**pursuant to state law, marital dissolution trials proceed under the same general rules of procedure that govern other civil trials.**"[21] *Elkins* flatly rejected the concept that a family court could implement procedures that ignored the rules governing civil proceedings, including the Evidence Code. Family law child custody proceedings are civil proceedings under the Family Code operating under a civil framework where the principles of the Family Law Act, the Code of Civil Procedure, the Evidence Code, and the

structures created under California Rules of Court, Title 5, apply.[22]

Elkins eliminated the widespread use of court mandated hearsay declarations in family law trials. In pretrial and post judgment Request for Order proceedings, the use of hearsay declarations is being challenged and redefined. *Marriage of Swain* and *Marriage of Binette* discuss the impact of *Elkins* and Family Code 217 that require evidentiary hearings (rather than relying on hearsay declarations) in family law proceedings.[23] *Swain* focused on the importance of a witness being available for testimony where a timely objection is made rather than permitting a declaration (or a report) to serve as a substitute for a full, fair, and complete hearing. Finally, there is a specific statutory framework governing the admissibility of child custody evaluation reports into evidence in family law cases.

Family Code section 3111 governs the admissibility of child custody evaluations. Under section 3111, subdivision (a), a court may consider a custody evaluation report if it is conducted consistently with the rules governing evaluations implemented by other provisions of the Family Code and the California Rules of Court. Admittedly, the phrase that permits a court to *consider* a custody evaluation may be vague. However, under normal principles of statutory construction, section 3111, subdivision (a) must be read with the language contained in section 3111, subdivision (c), that a child custody evaluation is admissible in evidence only by stipulation of the parties.

Read together, subdivision (a) permits a judge to *consider* such a report but does not permit the judge to treat it as admissible evidence. Subdivision (c) reserves that status for reports the parties stipulate to admit. One reading of the *consider* provision of section 3111, subdivision (a) would preclude the court from basing its decision on the report since all court decisions must be based on substantial evidence, which plainly means admitted or admissible evidence. Another reading of section 3111, subdivision (a)'s *consider* provision examines the exclusions of child custody reports contained in the post-*Winternitz* amendments to section 3111.[24]

In response to the holding in *Marriage of Winternitz,*[25] section 3111 was amended.[26] *Winternitz* had held a family law court did not abuse its discretion by refusing to strike a custody evaluator's expert report. While the evaluator's report did not comply with the requirements of the Family Code, and the evaluator did not follow all the mandates of California Rule of Court, rule 5.220, the court held that based on the totality of the circumstances, it was permissible for the court to *consider* the report and allow the evidence presented by the evaluator during his testimony.[27] In response, the Legislature amended section 3111. As amended, section 3111 expressly prohibits the court from considering reports that do not follow the mandates of the Family Code and the operative California Rules of Court. As amended, section 3111 states:

> A child custody evaluation, investigation, or assessment, and any resulting report, **may be considered by the court only if** it is conducted in accordance with the requirements set forth in the standards adopted by the Judicial Council pursuant to Section 3117; however, this does not preclude the consideration of a child custody evaluation report that contains non-substantive or inconsequential errors or both.[28]

This amendment clarifies that the court's authority to "*consider*" the report depends on the evaluator's compliance with the *requirements* of the Family Code and the governing Rules of Court. Thus, a court's ability to consider a custody evaluation is limited if there is a failure to properly conduct the evaluation.

Based on these observations, there are certain conclusions worthy of consideration:

- *Malinda S.* is a dependency court case governed by an entirely separate statutory framework fundamentally different from family law proceedings.[29]
- The rules governing dependency proceedings are unique to those state-initiated actions.
- Family law proceedings are civil actions, as clearly stated by *Elkins.*
- Earlier legislative history is best considered as describing the context of the enactment of a specific piece of legislation. While legislative history is useful for understanding how we arrived at our current statute, section 3111 must be read as written.
- Even if there is ambiguity in section 3111, the words permitting consideration of a report do not license a court to rest its decision on a report not:
  - Properly prepared under the Family Code and Rules of Court; and
  - Stipulated into evidence under Family Code, section 3111, subdivision (c).

As explained, there can be no justification for construing section 3111 to create a hearsay exception for custody evaluation reports. Counsel in family law proceedings must:

- Secure a stipulation under section 3111, subdivision (c);
- Arrange for the evaluator to testify based on personal observations:
  - Subject to the requirements of section 3111, subdivision (a);
  - Concerning a matter governed by Evidence Code section 801, subdivision (b);
  - Who relays only admissible hearsay even if relying on inadmissible hearsay.
- Be prepared that a court will strike the testimony of an evaluator where the evaluator is the conduit for otherwise inadmissible hearsay;
- Secure the presence and testimony of any witness or the admissibility of any document relied upon by an expert that is case-specific, and ask for an evidentiary hearing based on *Swain* and *Binette*.[30]

Part II: The *Sanchez* Decision

In a murder prosecution, the District Attorney introduced evidence from a gang expert to prove certain elements of the charges and enhancements against the defendant,

Sanchez. Based on information contained in police reports, field identification forms and other documents in the police department files, the expert opined, among other things, that the defendant was a member of a criminal street gang. On direct examination, in response to questioning by the prosecutor, the expert related to the jury both the source of this basis evidence, and the details contained in the documents.

The California Supreme Court granted review to determine if relating to the jury the specifics of the information from the police documents relied on by the expert violated the confrontation clause contained in the 6th Amendment to the federal constitution. It is certainly easy to understand why this grant triggered no alarm bells for family law lawyers or the associations that represent them. In its decision, however, our high court not only decided that the challenged testimony violated the 6th Amendment, but that it violated the California hearsay rule.

Evidence Code, section 1200, subdivision (a) provides: "Hearsay evidence" is 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. After some initial resistance, the family law bar recognized that *Sanchez*,[31] a criminal case, would have a significant impact on the testimony of expert witnesses in family law cases.

A. The Five Primary Takeaways from *Sanchez*

1. *Sanchez* reaffirmed the traditional distinction between the expert relating out-of-court statements "regarding his knowledge and expertise and premises generally accepted in his [her] field"[32] and expert testimony regarding case-specific information that is presented to the jury as true. Case-specific facts are those pertaining to the specific persons or incidents involved in the case being tried.[33]
2. *Sanchez* then analyzed the impact of the hearsay rule on each of these categories of out-of-court statements. The former, general background information that establishes the expertise of the witness, though technically hearsay, has traditionally been admitted without establishing a hearsay exception.[34] However, expert testimony presenting case-specific hearsay as true is subject to the hearsay rule.[35]
3. The court then provided several examples of testimony in each category to clarify the distinction. Two are worth repeating. An expert relies on information provided at seminars attended and in books read to testify that a blue diamond tattoo is a symbol adopted by a particular street gang. In addition, the expert testifies that an associate of the defendant had such a tattoo. The first statement is general background information and, though hearsay, is admissible without establishing a hearsay exception and without the admission of independent competent evidence of that fact. The second statement, relating to the particular person or event that is the subject of the case, is case-specific, and, if admitted for its truth, must be established by independent, competent evidence. Without such evidence, the expert may not testify to it.[36] A second example provided by the court concerned a medical expert who testifies that the presence of certain physical symptoms reflects a particular cause, and a named individual had those symptoms. Again, the first statement is general background information, and the expert may testify to it without independent, competent evidence, while the second statement is case-specific and may not be related by the expert to the trier of fact.[37]
4. *Sanchez* distinguishes "relying" on case-specific hearsay and "relating" that hearsay to the trier of fact. An "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. . . . Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. There is a distinction to be made 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 fall under a statutory exception."[38]
5. As discussed above in Part I.C., *Coleman* and *Gardeley* had developed a workaround to the general rule barring an expert from relating case-specific hearsay: the testimony was admitted not for its truth but only to assist the trier of fact's evaluation of the opinion. Thus, the testimony was not hearsay at all.[39] *Sanchez* rejected this, concluding "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the contents of those statements as true and accurate to support the expert's opinion, the statements are hearsay."[40] Such a statement may only be admitted if a hearsay exception for it exists or it is proved independently with competent evidence. The logic behind *Sanchez's* rejection of *Gardeley* is unassailable.

B. Two Post-*Sanchez* California Appellate Decisions Defining Hearsay and Discussing a Hearsay Exception

Sanchez puts a premium on understanding how to define hearsay and how to apply the hearsay exceptions created by the Evidence Code. If certain data relied on by the expert is not hearsay or is admissible hearsay, then *Sanchez* does not bar the expert from relating it to the jury.

1. Defining hearsay

People v. Perez and *People v. Garton* remind us that not all words expressed in writing or verbally are hearsay.[41] Hearsay evidence is a "statement" and "statement" is defined in Evidence Code section 225 as "oral or written verbal expression or . . . nonverbal conduct of a *person*."[42] The "speaker" of the out-of-court statement is called the "declarant" or "hearsay declarant," and Evidence Code section 135 defines "declarant" as "a person who makes a statement." Though "person" is broadly defined, it does not include a machine. Therefore, information generated by a machine

is not a statement. For example, the time shown by a clock is not a statement and may be related by a person without triggering the hearsay rule. In addition, photographs and x-rays are not hearsay, and an expert doctor or pathologist may not only rely on them but show them to the trier of fact to buttress an independent opinion, even if the expert is not the original treating physician or original pathologist who performed the autopsy.[43] Importantly, electronically stored information consists of both human-generated information (like e-mails) and computer-generated information ("CGI") like metadata.[44] CGI is not hearsay and may be admitted for its truth.[45]

2. The hearsay exception for published compilations

Evidence Code section 1340, enacted as part of the original Evidence Code in 1965, may grow exponentially. This provision states, "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 section 1270."

In *People v. Franzen*, an officer testified he employed a database maintained by an internet website used by his department to ascertain the defendant owned a phone number linked to drug purchases.[46] The court reversed the trial court's determination that the published compilation exception permitted the officer to testify to the ownership information provided on the website. The court determined that the exception should be narrowly applied.[47] As to section 1340, "exceptional 'trustworthiness' is said to derive from the 'the fact that *the business community* generally uses and relies upon the compilation and by the fact that *its author knows the work will have no commercial value* unless it is accurate. [Citations.]'" "The history, language and rationale of section 1340 suggests that the exception contemplates an organized, edited presentation of a finite quantity of information that, if not printed on paper, has been recorded and circulated in some fixed form analogous to printing. Nothing . . . suggests that this was the case with the database information here."[48] "To treat a database as a published compilation merely because it is accessible through a website would [be inappropriate.] . . . [T]he Internet[] provides ready access to information of all shades and degrees of accuracy. . . ."[49]

In *People v. Mooring* (2017) 15 Cal.App.5th 928, the court applied *Franzen* to conclude that the Ident-A-Drug website qualified as a published compilation permitting a criminalist to testify that the pills possessed by the defendant contained a specific illegal substance. The Ident-A-Drug website is a searchable database, into which the criminalist entered details of the shape, coloring, and markings on the subject pills to determine the identity of illegal substances in the pills.

C. Areas of Uncertainty

1. Drawing the line between general background information and case specific facts

In many, but not all situations, the discussion and examples set out in *Sanchez* should clarify the distinction between general background and case-specific information for counsel and the trial court. One significant area seems particularly ripe for confusion. The internet is filled with searchable databases providing information for users. Two examples help illustrate the uncertainty created by them. The Ident-A-Drug website is discussed in Part II.B.2 above.

In *People v. Stamps* and *People v. Mooring*, the courts concluded that under *Sanchez* the information obtained from the website was case-specific.[50] Subsequently, in *People v. Veamatahau*, the court disagreed: the website-provided information regarding what pills containing certain chemicals look like, and was an aspect of the special knowledge possessed by expert criminalists.[51] *Veamatahau*'s decision that only the testimony regarding the appearance of the pills seized from the defendant was case-specific[52] seems correct. As *Veamatahau* notes, experts like doctors have relied on texts to identify a patient's medical condition. If a doctor observed symptoms that suggested a particular illness and went to a text to confirm it, that information would seem to fall naturally into the sort of specialized knowledge that *Sanchez* admits without a hearsay exception. (Under the grant of review, *Veamatahau* may still be cited.)

A similar result should occur when appraisers search a database for comparables to use in establishing a valuation for real estate. As part of this expert's specialized knowledge, he or she would normally be generally aware of market trends, including the price range of similar properties sold recently near the subject property. If the expert employs a database to reach a conclusion, the results obtained from the search still constitute the expert's special knowledge. Of course, the expert will have to establish the reliability of any database searched, including that it is "of a type that reasonably may be relied upon by an expert in forming" this opinion.[53]

2. Drawing the line between rely and relate

If a child custody evaluator testifies about the results of a psychological test administered to Dad by an absent psychologist, may the evaluator tell the court that one source relied on was the report prepared by the absent psychologist? *Sanchez* allows the expert to identify the sources of case-specific facts, so long as the facts themselves are not disclosed. *People v. Garton*[54] clarifies that the expert may not expressly *or impliedly* relate to the trier of fact case-specific hearsay. The difficulty arises in determining when the reference to a source impliedly reveals the case-specific information. For example, may the evaluator tell the court that she based her opinion on "findings" in

the absent psychologist's report? *Garton* appears to approve this because the testifying expert "was exercising her own independent judgment to arrive at her conclusions."[55]

3. Must the testifying expert relate some reasons to the trier of fact supporting the proffered opinion for it to be admissible?

Evidence Code section 801, subdivision (b) clearly contemplates that an expert may rely on matters supporting an opinion that may not be relayed to the jury. In *People v. McVey,* the court faced a situation where none of the reasons relied on were admissible and concluded that an opinion unsupported by reasons was irrelevant.[56] It would follow from *McVey* that even if some of the reasons relied on by the expert were admissible and were related to the jury, that would not automatically render the opinion relevant. If true, against what standard would we measure the reasons admitted? Though no published case has yet addressed this issue, one likely standard would require the reasons provided to constitute substantial evidence in support of the opinion.

4. Impeaching and rehabilitating the expert

The *Sanchez* rule barring an expert from relating case-specific hearsay should not be understood to bar cross-examination that seeks to undermine an expert's opinion by showing the facts relied upon are suspect or that facts inconsistent with the opinion were ignored. Such cross-examination is permissible, subject to Evidence Code section 352, because the underlying details are introduced to impeach the expert's opinion and not for their truth.[57]

In *People v. Henriquez,* the trial court ruled that if a defense expert testified that the defendant's killing of his wife and daughter were an unplanned product of "intimate rage" rather than premeditated murder, the expert could be impeached with evidence of a separate murder in the course of a robbery committed by the defendant.[58] The Supreme Court agreed: "the credibility of an expert witness may be challenged based on the sources of information the expert relied on to form his or her opinion."[59]

The distinction between admitting the out-of-court statements introduced by the cross-examiner for their truth or simply to impeach the expert may have been ignored in *People v. Malik.*[60] *Malik* reversed a conviction, concluding the prosecutor improperly cross-examined the defense expert about the details of police reports that the expert had read even though those details were inconsistent with the opinion rendered. "Indeed, if [the challenged statements in the reports] were not true, the statements would have no impeaching value."[61] This seems incorrect: whether true or not, the statements undermine the opinion unless the expert can explain why she ignored them.

Though no post-*Sanchez* case has so held, it would seem that the same rule should apply to evidence introduced solely to rehabilitate the expert.

Sanchez and *Sargon* require counsel to prepare his/her case guided by these core questions:

- Does this person qualify as an expert?
- What is the basis for the expert's opinion?
  - Direct observation
  - Review of admissible and admitted records
  - Interviews of individuals who have testified
  - Interviews of individuals who have not testified where no hearsay exception applies
  - Information customarily relied upon by experts in this field; for example:
    - Compensation studies
    - Comparable sales
    - Published rates of return
    - Developmental stages of a child
    - Medical and psychological publications
- Is the theoretical basis for the expert's opinion based on:
  - A common sense, logical, and rational approach to the question;
  - Theories which are peer tested and generally accepted by other similarly qualified experts while adjusting for new theories that are grounded in logic and common sense;
  - Unsubstantiated speculation lacking any evidentiary foundation?
- Is there substantial admissible evidence supporting the foundation for the opinions expressed?

Part III: Applying *Sargon and Sanchez* in Family Law

A. Introduction

There is a synergy between *Sargon* and *Sanchez* because the two cases define the court's gatekeeping function as to expert opinions.[62] *Sargon* discusses reliability in terms of the factual foundation for the opinion and the logical basis for it. *Sanchez* shifts the paradigm away from allowing experts to be the conduit of inadmissible hearsay, and its progeny have refined our understanding of the distinct concepts of relying on inadmissible hearsay and relaying inadmissible hearsay. This section explores *Sargon* and *Sanchez* as applied to family law. Finally, the examples provided are not exclusive. Counsel should apply these methods as best suited for his/her individual case.

B. Applying *Sargon*

Simply because there is a difference between the opinions of experts presented by the opposing parties, the court should not exclude an otherwise defensible method of analysis. For instance if the experts both agree on the gross sales, but use different methods for the calculation of gross profit of an entity because one expert used actual operational costs, while the other expert inferred gross profit by using the percentage of operational costs for similarly situated companies, the court should not exclude the opinion of the second expert simply because the theory applied by the first expert appears more rational.

Sargon did not create a winner take all process where the court may exclude opinions it finds less compelling. Both opinions in the above example would be admissible.[63] Dueling experts with different opinions may both be permitted to testify. The exclusion of evidence must be based on defects in the methodology of the expert, not simply on the existence of a conflict in the evidence or opinions.[64]

Marriage of Brandes and *Marriage of Honer* are instructive on the proper consideration of expert testimony in family law business valuation cases.[65] The court in both cases followed the *Sargon* paradigm.

In *Brandes*, the trial court permitted expert testimony to support Wife's claim that the character of Husband's business had transformed from a separate property asset into a community property asset based on the growth of the business. Husband's expert testified to a recognized but as yet unapproved method for valuing the business using a combination of a *Pereira* and a *Van Camp* valuation for different periods of valuation. The expert used the *Pereira* method for the earlier years and the *Van Camp* method for the later years of the marriage. Ample evidence was presented by both sides in *Brandes, and* each expert supported his opinion with an analysis of the facts utilized by prior business valuation cases. The court did not exclude Wife's expert opinion, it simply adopted Husband's expert's analysis. This result is consistent with *Sargon*.

In *Honer*, Husband's expert testified to the fair value of the businesses (sometimes using the phrase "marital value") and rested his opinions on the principles established in *Marriage of Hewittson*,[66] which incorporates IRS Revenue Ruling 59-60 into the valuation methodology for family law cases involving small or closely held companies. Wife's expert testified that the only way to determine the market value of the businesses was to order them sold. Resorting to the market to determine value to maximize the community estate did not offend the gatekeeping principles established by *Sargon.* The court accepted both opinions, but adopted Husband's expert's theory with some modification in the ultimate valuation numbers.

Sargon as applied to family law does not eschew the development of new theories for valuation. Avoid assuming that because a case approves one method for valuation, you are precluded from presenting an alternate theory. *Marriage of Kilbourne* affirmed the trial court in adopting a time rule valuation for the community property interest in a personal injury law practice.[67] *Kilbourne* specifically stated that in affirming this time rule method, it was not foreclosing the use of other methodologies for valuation.

It is important that counsel probe the expert for the basis of his or her alternate theory to assure that it follows existing case law and recognized methods.[68] Expert opinion cannot be based on assumptions of fact without evidentiary support or based on factors that are speculative or conjecture. Further, experts may not present opinions based on assumed facts, with no foundation in the record for concluding those assumed facts exist. For example, if an expert testified that the value of a fast food restaurant business should be reduced because a competitor *might open a store,* this opinion should be excluded if there is no evidence of the assumed fact. Conversely, if there was evidence that a competitor chain had secured a land lease and sought city permission to open a store, then the expert should be permitted to provide the opinion. Alternatively, the expert may testify based on a hypothetical containing assumed facts so long as those facts are established through admissible evidence.

Vocational evaluators and compensation experts frequently rely on compensation studies and job postings as the foundation for the opinions expressed. Family law cases support the use of compensation studies as the basis for an expert's opinion.[69] *Rosen* and *Ackerman* both address the speculative nature of an expert's opinion, and *Sargon* buttresses the importance of those cases.[70] In addition, experts cannot present a relevant opinion about the reasonable compensation of an individual unless the opinion is founded on the compensation of persons similarly situated. If this *similarly situated* test is met, then an expert may rely (Evidence Code section 801) upon published compensation studies and authenticated, reliable compilations. Evidence Code section 1340 should overcome any hearsay objection.[71] Further, it would seem that under *People v. Veamatahau*, discussed in Part II.C.1. above, these compensation studies and job postings should not be treated as case-specific hearsay. Instead they are an aspect of the general background that constitutes an expert's expertise.

What if an expert claims he or she is subject to a nondisclosure agreement prohibiting him or her from disclosing the identity of an unnamed, unknown, purportedly similarly situated individual, whose compensation serves as a basis for an opinion on a party's reasonable compensation? In addition to other challenges previously discussed, such an opinion may also be challenged on the basis that the expert refuses to be fully cross-examined by the other party or the court. "*Trust me, I'm an expert*" is not contained in the Evidence Code.

The speculative nature of an expert's opinion was addressed in *Licudine v. Cedars-Sinai*,[72] which was a medical malpractice action where the plaintiff was awarded damages for lost earning capacity as a lawyer. Prior to her injury, plaintiff was planning on attending law school. The verdict was reversed because the expert opinion supporting plaintiff's damage award was speculative: there was insufficient evidence of the likelihood she would graduate from law school, pass the Bar, or obtain a job as a lawyer. The *Licudine* panel cited both *Rosen* and *Ackerman.*[73] *Licudine* is instructive on the often speculative bases of opinions rendered by vocational evaluators on earning capacity in spousal support cases under Family Code section 4331. There is no meaningful distinction between expert testimony on earning capacity in a personal injury case and earning capacity in a spousal support case. Absent evidentiary support, such opinions are subject to challenge under *Sargon.*[74]

Whether a person was under the influence of alcohol, marijuana, or a controlled substance, including prescription medication, often surfaces in child custody proceedings where drug testing is sought under Family Code section 3041.5. The question of actual impairment as compared with prior use is frequently contested. In *Heidi S. v. David H.*,[75] the court conditioned mother's custodial access upon her compliance with a drug testing regimen. A separate and more discrete issue is whether a parent who tests positive for substances is under the influence of that substance at a specific time. In *David v. Hernandez*,[76] the court determined under *Sargon* it was speculation for an expert to opine that because a person had used marijuana at an earlier time, he was under the influence of the marijuana at the time of a truck/auto accident. Why? While there was evidence of use, there was no expert evidence that the driver was under the influence several hours later. Under *Sargon,* there was no rational link between the established fact and the speculative conclusion.

It is common in domestic violence cases for experts to testify about risk of lethality. One consideration is whether such testimony results in the undue consumption of time under Evidence Code section 352. But more importantly, counsel must present evidence establishing the foundation for the opinion of the expert anchored in facts. Otherwise, the opinion may be speculative under *Sargon*. Finally, there is some question about the helpfulness of testimony about patterns of domestic violence that are not tethered to the facts of the pending case.

C. Applying *Sanchez*

Sanchez represents a paradigm shift for all cases involving expert witnesses. Historically, experts served as the conduit for otherwise inadmissible hearsay in all areas of the law, including family law. In approaching family law cases involving experts, counsel must develop a strategy for assuring there is an evidentiary basis for the expert's opinion (*Sanchez*) and protect against the exclusion of an otherwise proper opinion because it is speculative (*Sargon*).

In determining goodwill where a party is using a buildup method to determine a capitalization rate, counsel should differentiate between the various capitalization rates for determining goodwill. For instance, a published rate of return for a risk-free bond rate is a published rate and the type of hearsay financial experts regularly rely upon; an equity risk premium fits in this same category; a size premium is also likely ascertainable through published studies. Such information would appear to be the sort of general background knowledge possessed by an appraiser in this area.[77] However, the company specific risk rate requires reference to company specific, therefore, case-specific information. When the determination of value is based upon case-specific information, there must be admissible evidence to support the facts underlying this conclusion, and the expert may not simply be the conduit for company specific information absent other admissible evidence or a hearsay exception covering the evidence conveyed by the expert.

Valuation of real estate often calls upon experts to consider non-case specific hearsay information about comparable properties. No case addresses this issue post-*Sanchez*. One appealing argument is that the published comparables are compilations under Evidence Code section 1340.[78] Alternatively, the published comparables could be treated as general background information possessed by the expert and not as case specific hearsay.[79]

The opinion of a child custody expert is discussed extensively above. Another consideration in a family law custody case is the use of an expert to challenge the custody evaluation under Evidence Code section 733. As with any other expert, counsel should ask *what is the evidentiary basis for the testimony of the Section 733 expert?* For instance, if the sole basis for the expert's challenge is a custody report not in evidence there may be a problem. However, subpoenaing the records of the evaluator under Evidence Code sections 1560 and 1561 and securing their admission into evidence under the business records exception (Evidence Code section 1271) will permit use of the records to challenge the opinions. Of course, if you put the report into evidence, it may be considered by the court for all purposes. Questions may be asked on cross-examination that utilize information in the report that helps impeach the original evaluator.[80]

For instance, assume the custody evaluator reports what the soccer coach said as a basis for the opinion, and the section 733 expert opines that the coach's statement would not be a proper basis for drawing the conclusion the original evaluator expressed in his or her report. In that circumstance, the statement of the soccer coach is relevant, whether true or false, because the evaluator's reliance on it undermines the validity of the opinion. Stated differently, the statement was an improper basis for this conclusion if it was true, and it was an improper basis for this conclusion if it was false. Most significantly, you must have an answer when the court asks (as it is likely to do), "*Counsel if the statement is false, why is it still relevant?*" Responding by saying, "*I need this for my case*" is not an adequate response. Finally, as to the Evidence Code section 733 expert, be sure he or she is qualified to express the opinion.

You must be sure that your 733 expert is an expert in the specialized area on which he or she will opine. Here are common examples: (a) the needs of a child on the autistic spectrum, where the 733 expert is not qualified in this area; (b) the need for a particular medication for a parent where the 733 expert is not a psychiatrist—a qualified psychologist may say this person appears to be depressed and would benefit from a medical or psychiatric consultation to determine the suitability of antidepressant medication; (c) the quality of a particular school where the expert is not qualified as an educational expert; and (d) whether an IEP for a child is appropriate where the expert has no training or skill in developing protocols for an IEP.

Conclusion

Wise counsel will evaluate the strength of the expert opinions to be presented at a hearing only after considering

the interplay between *Sargon* and *Sanchez.* This is equally true whether you or the opposing party employs the expert. Here are considerations:

- Is the expert testifying to matters of more generalized background information or case specific-facts (*Sanchez* and *Meraz*)?
- Is the expert witness's opinion supported by the admissible opinion of another expert or is the witness taking as true the opinion of another which is not in evidence (*Perez)*?
- If the case-specific hearsay cannot be presented, can you demonstrate there is still a sufficient basis in the admissible evidence for the expert's opinion? (*McVey*)
  - What facts in evidence support the expert's opinion?
  - What facts are not in evidence that are case-specific that the expert relied upon in expressing his or her opinion?
  - Is there still an adequate evidentiary basis for the expert's opinion if the inadmissible hearsay is not accepted by the court?
- Is additional discovery necessary to secure admissible evidence to support the foundation for the expert's opinion?

After identifying any hearsay that serves as the foundation for an expert's opinion, have you considered:

- Is there an exception that covers the hearsay evidence?
  - Party statement [Evidence Code section 1220]
  - Adoptive admission [Evidence Code section 1221]
  - Published compilation exception [Evidence Code section 1340]
- Have you subpoenaed any necessary records under the business records exception [Evidence Code sections 1271, 1560 and 1561]?
- Are you prepared to use the published compilation hearsay exception in section 1340?
  - Does the business community generally use and rely on the compilation?
  - Is it reasonable to conclude the author believes that the compilation will have no commercial value unless it is accurate?
  - Are you familiar with the *Franzen* and *Mooring* cases discussed in Part II.B.2?
- Do you have a plan to address the question of multiple hearsay in the documents [Evidence Code section 1201]?

- What is the risk that the court will determine there is no evidentiary basis for the expert's opinion, resulting in exclusion under *McVey*?
- Am I attempting to use the construct "*the expert relied on this inadmissible hearsay*" as a cover for not having actually secured the evidence through subpoena?

The grant of review in *Veamatatau,* including the scope and application of the doctrines established in *Sanchez* and its progeny, will continue to inform our understanding of experts and the use of hearsay. That said, be sure to read the criminal cases construing the Evidence Code. It is the same code that applies to family law.

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Judge Lewis is the Supervising Judge for the Los Angeles County Family Law Division overseeing the operations of the sixty-eight family law departments in the county. From 2014 to 2016 he served in a long cause family law trial department in Los Angeles; he was Assistant Supervising Judge of the Family Law Division from 2011 to 2014. Judge Lewis became a Certified Family Law Specialist in 1985. In 2014, he became the first emeritus member of the Association of Certified Family Law Specialists. In 2017, he received the San Fernando Valley Bar Association, Stanley Mosk Legacy of Justice Award. In 2018, he received the California Lawyer's Association Family Law Judge of the Year Award.

1 *Marriage of Davenport* (2011) 194 Cal.App.4th 1507.
2 *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059, 1066.
3 See cases collected in Simons, California Evidence Manual (West Publishing, 2018) section 4:1 (Evidence Manual).
4 *Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 653.
5 Examples of matters properly relied upon by experts are collected in Evidence Manual, section 4:23. Examples of matters improperly relied on by an expert are collected at Evidence Manual, section 4:25.
6 Evid. Code, § 803; see Evidence Manual, § 4:26.
7 *Sargon Enterprises, Inc. v. U.S.C.* (2012) 55 Cal.4th 747.
8 *Id.* at pp. 771-772.
9 *Id.* at p. 771 ["A court may conclude that there is simply too great an analytical gap between the data and the opinion offered."].
10 *Id.* at p. 772. Cases requiring the trial court to admit competing expert opinions based on competing theories in appropriate cases are collected in Evidence Manual, section 4:22.
11 *People v. Coleman* (1985) 38 Cal.3d 69, 92; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 413-416.
12 *People v. Coleman, supra,* 38 Cal.3d at p. 92.
13 *People v. Gardeley* (1996) 14 Cal.4th 605, 619.
14 *People v. Fields* (2009) 175 Cal.App.4th 1001, 1017.
15 *People v. Townsel* (2016) 63 Cal.4th 25, 55-56.
16 Welf. & Inst. Code, §§ 281, 358.
17 *In re Malinda S.* (1990) 51 Cal.3d 368.
18 Over 60 negative citing references to *Malinda S.* observe that its holding was superseded by statute. Indeed, the California Supreme Court observed that *Malinda S.* was superseded by the enactment of Welfare and Institutions Code section 355, which created a dependency and due process exception.
19 *J.H. v. Superior Court* (2018) 20 Cal.App.5th 530.
20 *Elkins v. Superior Court* (2007) 41 Cal.4th 1337.
21 *Id.* at p. 1345 [emphasis added].
22 California Rules of Court, Title 5 sets forth the Family and Juvenile rules.
23 *Marriage of Swain* (2018) 21 Cal.App.5th 830; *Marriage of Binette* (2018) 24 Cal.App.5th 1119.
24 *Marriage of Winternitz* (2015) 235 Cal.App.4th 644.
25 *Winternitz* was published in part because of the efforts of the Association of Certified Family Law Specialists.
26 *Id.*
27 *Winternitz* does not expressly state the parties stipulated the report would be received into evidence, but the language of the decision makes it clear the court both considered it, and the report was part of the evidentiary landscape for the trial court's decision along with the testimony of the evaluator regarding his compliance with the requirements of Family Code section 3117 and the California Rules of Court governing the preparation of reports.
28 FC, § 3111 [emphasis added].
29 See *People v. Bona* (2017) 15 Cal.App.5th 511, specifically observing dependency proceedings are fundamentally different than other types of cases such as criminal cases.
30 *Marriage of Swain, supra,* 21 Cal.App.5th 830; *Marriage of Binette, supra,* 24 Cal.App.5th 1119.
31 *People v. Sanchez* (2016) 63 Cal.4th 665.
32 *Sanchez, supra,* 63 Cal.4th at p. 685.
33 *Id.* at p. 676.
34 *Id.* at p. 676.
35 *Id.* at pp. 684-685.
36 *Id.* at p. 677.
37 *Id.*
38 *Id.* at pp. 685–686.
39 *People v. Coleman* (1985) 38 Cal.3d 69; *People v. Gardeley* (1996) 14 Cal.4th 605.
40 *Sanchez, supra,* 63 Cal.4th at p. 686.
41 *People v. Perez* (2018) 4 Cal.5th 421, 454-457; *People v. Garton* (2018) 4 Cal.5th 485, 504-507.
42 Evid. Code, § 225 [emphasis added].
43 *Garton, supra,* 4 Cal.5th at 506-507; *Perez, supra,* 4 Cal.5th at p. 457.
44 *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450.
45 For a general discussion on how the nature of the speaker is critical to defining hearsay, see Evid. Manual, § 2:2.
46 *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1204-1205.
47 *Id.* at p. 1208.
48 *Id.* at pp. 1209, 1210 [internal citations omitted].
49 *Id.* at 1211.
50 *People v. Stamps* (2016) 3 Cal.App.5th 988; *People v. Mooring* (2017) 15 Cal.App.5th 928.
51 *People v. Veamatahau* (2018) 24 Cal.App.5th 68, 73-75, rev. granted, Sept. 12, 2018.
52 *Id.* at p. 74.
53 Evid. Code, § 801, subd. (b).
54 *Garton, supra,* 4 Cal.5th at 506.
55 *Id.*
56 *People v. McVey* (2018) 24 Cal.App.5th 405.
57 See *People v. Townsel* (2016) 63 Cal.4th 25, 55–56, ["'It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored.'"].
58 *People v. Henriquez* (2017) 4 Cal.5th 1, 26.
59 *Id.*
60 *People v. Malik* (2017) 16 Cal.App.5th 587, 597.
61 *Id.* at p. 597.
62 *Sargon, supra,* 55 Cal.4th 747; *Sanchez, supra,* 63 Cal.4th 665.
63 *Cooper v. Takeda Parma.* (2015) 239 Cal.App.4th 555 [reviewing court reversed trial court for excluding expert opinion as speculative].
64 *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173.
65 *Marriage of Brandes* (2015) 239 Cal.App.4th 1461; *Marriage of Honer* (2015) 236 Cal.App.4th 687.
66 *Marriage of Hewittson* (1983) 142 Cal.App.3d 874.
67 *Marriage of Kilbourne* (1991) 232 Cal.App.3d 1518.
68 *Marriage of Iredale & Cates* (2004) 121 Cal.App.4th 321 [improper to value interest in large law firm using a goodwill method when the terms of ownership precluded a shareholder from having goodwill in the entity, citing *Marriage of Slivka* (1986) 183 Cal.App.3d 159 [improper to find goodwill in Kaiser Permanente medical partnership]; *Marriage of McTiernan &*

Dubrow (2005) 133 Cal.App.4th 1090 [no goodwill in earn out corporation of Hollywood director]].

69 *Marriage of Rosen* (2002) 105 Cal.App.4th 808; *Marriage of Ackerman* (2006) 146 Cal.App.4th 191.

70 *Marriage of Rosen, supra,* 105 Cal.App.4th 808; *Marriage of Ackerman*, *supra,* 146 Cal.App.4th 191; *Sargon, supra,* 55 Cal.4th 747.

71 See the discussion of *Mooring, supra,* 15 Cal.App.5th 928, in Part II.B.2.

72 *Licudine v. Cedars-Sinai* (2016) 3 Cal.App.5th 881.

73 *Rosen, supra,* 105 Cal.App.4th 808; *Ackerman, supra,* 146 Cal. App.4th 191.

74 *Sargon, supra,* 55 Cal.4th 747.

75 *Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150.

76 *David v. Hernandez* (2017) 13 Cal.App.4th 692.

77 See the discussion of *Veamatahau, supra,* 24 Cal.App.5th 68, discussed in Part II.C.1.

78 *Mooring, supra,* 15 Cal.App.5th 928, discussed in Part II.B.2.

79 *Veamatatau, supra,* 24 Cal.App.5th 68, discussed in Part II.C.1.

80 See the discussion in Part I.D.

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