

# **Developing Vocational and Life Care Plan Opinions After *The People v. Marcos Arturo Sanchez* (2016) that do not Rely on Hearsay Evidence: A Recommended Approach**

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The hearsay rule was strictly enforced for expert witnesses related to case-specific statements in *The People v. Marcos Arturo Sanchez* (2016). This California Supreme Court decision has required vocational experts and life care planning experts to change how they conduct evaluations, develop opinions, and provide testimony in a deposition or trial. Alternative ways to develop opinions regarding employability and life care planning issues are provided.

## **History of the Problem**

Traditionally, the opinions that vocational experts and life care planning experts have offered at trial have been exempt from the hearsay rule. These experts have routinely been permitted to rely on verbal and written case-specific statements made by others to support their opinions at trial. However, this longstanding method used by experts for developing opinions as the basis of trial testimony has changed since *The People v. Marcos Arturo Sanchez* (*Sanchez*) (2016), a case decided by the California Supreme Court.

Many vocational and life care planning experts initially expected that *Sanchez* (2016), a criminal case, would not apply in civil courts, which is where vocational and life care planning experts typically testify. However, starting in 2018, vocational and life care planning experts in California have experienced challenges to their opinions based on the application of the hearsay rule in *Sanchez* (2016) (J. Bruno, personal communication, November 12, 2018; M. Remas, personal communication, November 13, 2018). Vocational experts in family law cases have faced similar challenges (R. Cottle, personal communication, February 26, 2019). Related to this, Simons and Lewis (2019) described in detail in a recent article in the *Journal of the California Association of Certified Family Law Specialists* the impact of *Sanchez* (2016) on the testimony of expert witnesses in family law matters. As a result, experts have begun to modify their methods for collecting data to use as the basis for developing their opinions for trial testimony.

The authors of this article are unaware of any similar challenges to the opinions of vocational experts in California workers' compensation matters. But, they may be anticipated because of the impact of these recent challenges to the methods of vocational experts in civil matters. Section 5708 of the *Workers' Compensation Laws of California* (Melchoir, 2018) indicates that California workers' compensation matters are governed by rules adopted by the Workers' Compensation Appeals Board. However, experienced vocational experts know that at times attorneys attempt to apply civil rules or court decisions to workers' compensation matters. This suggests that it would be wise for vocational experts to develop opinions in workers' compensation cases in a manner that will withstand a *Sanchez* (2016) challenge regarding hearsay testimony.

### ***Sanchez (2016)***

*Sanchez (2016)* considered the degree to which an expert witness is limited from relating case-specific hearsay content in explaining the basis for his or her opinions at trial. In this case, the California Supreme Court concluded, as follows:

We hold that the case-specific statements related by the prosecution expert (a gang expert) concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. (p. 1)

Police reports, notices to individuals associating with known gang members, and field identification cards that record an officer's contact with an individual were described as case-specific statements concerning the defendant's gang affiliations and as such were not admitted since they were deemed hearsay statements and thus inadmissible. These written statements were considered testimonial statements,

which are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial. (p. 28)

Hearsay is defined in *Sanchez (2016)*, as follows:

Hearsay may be briefly understood as an out-of-court statement offered for the truth of its content. Evidence Code section 1200, subdivision (a) formally defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." A "statement" is "oral or written verbal expression" or the "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) Senate committee comments to Evidence Code section 1200 explain that a statement "offered for some purpose other than to prove the fact stated therein is not hearsay." (Sen. Com. on Judiciary com., 29B pt. 4 West's Ann. Evid. Code (2015 ed.) foll. § 1200, p. 3; see *People v. Davis* (2005) 36 Cal.4th 510, 535–536.) Thus, a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b).) Nothing in our opinion today changes the basic understanding of the definition of hearsay.

Documents like letters, reports, and memoranda are often hearsay because they are prepared by a person outside the courtroom and are usually offered to prove the truth of the information they contain. Documents may also contain multiple levels of hearsay. An emergency room report, for example, may record the observations made by the writer, along with statements made by the patient. If offered for its truth, the report itself is a hearsay statement made by the person who wrote it. Statements of others, related by the report writer, are a second level of hearsay. Multiple hearsay may not be admitted unless there is an exception for each level. (*People v. Riccardi* (2012) 54 Cal.4th 758, 831 (*Riccardi*).) For example, in the case of the emergency room document, the report itself may be a business record (Evid. Code, § 1270 et seq.), while the patient's statement may qualify as a statement of the patient's existing mental or physical state (Evid. Code, § 1250, subd. (a)). (pp. 6–7)

The court distinguished between background information accepted in the expert's field of expertise and case-specific facts based on testimonial hearsay statements, as follows:

Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does

not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts.

The Attorney General relies on "practical considerations" to support a contrary conclusion. The argument misses the mark. The Attorney General urges that excluding the content of testimonial hearsay would greatly hamper experts from giving opinions about gangs. The argument sweeps too broadly. Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception. What they cannot do is present, as facts, the content of testimonial hearsay statements. . . (pp. 22–23)

The court concluded its decision on the proper admission of expert testimony by stating:

What an expert cannot do is 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. . . .

In sum, we adopt 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 and accurate to support the expert's opinion, the statements are hearsay. . . (p. 24)

The above rule regarding hearsay indicates that vocational and life care planning experts may need to modify traditional evaluation and data collection methods used to develop opinions for trial in civil cases and possibly in workers' compensation cases as well. The need for vocational and life care planning experts to reconsider their traditional evaluation and data collection methods is supported by the recent article by Simons and Lewis (2019) in which they analyze the impact of *Sanchez* (2016) on the evaluation methods and testimony of experts in family law cases. Justice Mark Simons is an Associate Justice for the First District Court of Appeal in California. Judge Thomas Trent Lewis is the Supervising Judge for the Los Angeles County Family Law Division.

Simons and Lewis began their article by stating:

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* teaches us, the Evidence Code applies in family law.

The introductory remarks are followed by a detailed analysis and discussion of *Sanchez* (2016) in relation to other court decisions that impact the evaluation methods and writing of reports in family law cases. Among other things, the authors explained that "the family law bar recognized that *Sanchez* (2016), a criminal case, would have a significant impact on the testimony of expert witnesses in family law cases" (Simons and Lewis, 2019, p. 5).

Simons and Lewis (2019) emphasized the findings in *Sargon* (2012) in relation to the hearsay rule in *Sanchez* (2016) by stating:

In *Sargon Enterprises, Inc. v. U.S.C.*,<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.'"<sup>10</sup> (pp. 2–3)

Simons and Lewis (2019) then introduced a discussion regarding how to apply *Sargon* (2012) and *Sanchez* (2016) in family law matters by stating:

There is a synergy between *Sargon* and *Sanchez* because the two cases define the court's gatekeeping function as to expert opinions.<sup>62</sup> *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. . . (p. 7)

Simons and Lewis (2019) concluded their article by stating, "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* (pp. 9–10). They closed their article with a number of considerations for family law attorneys regarding the admissibility of expert opinion.

The remainder of this article will address some examples of alternative evaluation and data collection methods that vocational and life care planning experts may want to consider in light of the hearsay rule in *Sanchez* (2016).

### Impact of *Sanchez* (2016) on Expert Evaluations

The hearsay rule in *Sanchez* (2016) can have implications for vocational experts and life care planners in the manner in which they conduct an evaluation to develop opinions for deposition or trial testimony. For example, some vocational experts arrange for an assistant or other staff member to complete the interview portion of the evaluation. The interview notes prepared by the assistant or other staff member may be considered a case-specific statement and rejected under the hearsay rule in *Sanchez* (2016). The simplest and safest remedy would be for the expert to conduct the entire interview and write the report.

Some vocational experts arrange for an assistant or another staff member to conduct the testing portion of the vocational evaluation. Test notes and observations may be subject to challenge as case-specific statements under the hearsay rule in *Sanchez* (2016). While one could argue that the results of standardized tests would be the same or similar regardless of who is the test administrator, if properly trained and qualified, any challenge to testing observations would be more difficult to defend. The safest remedy would be for the vocational expert to administer and score the tests, interpret the results, and report the findings.

Some vocational experts arrange for an assistant or other staff member to review and summarize medical, vocational, deposition, and other records. Record review summaries are then read by the vocational expert to develop opinions for deposition and trial testimony. These record review summaries would likely be viewed as case-specific statements and subject to challenge under the hearsay rule in



*Sanchez* (2016). Again, the simplest and safest remedy is for the vocational expert to review the records and create the record review summary.

Another component of a vocational evaluation that may be subject to challenge under the hearsay rule in *Sanchez* (2016) is labor market research since it is often conducted to develop or support case-specific opinions for deposition or trial testimony. By its nature, a labor market survey is often based on case-specific oral statements that are used to generate written case-specific statements. Therefore, such statements may be subject to challenge under the hearsay rule in *Sanchez* (2016). A vocational expert calling employers to obtain information about the suitability of an advertised job opening for an applicant or plaintiff is case-specific, and would likely be viewed as hearsay in *Sanchez* (2016). Asking another staff member to conduct the labor market survey would create a second level of hearsay in collecting case-specific data to be used by the vocational expert for deposition or trial testimony. The same concerns would be apparent for life care planners in conducting research on the cost of various items in a life care plan, whether the cost research is conducted by the life care planner or an associate. If the research is conducted by the vocational expert or life care planner, they can argue that the results of the research will be compared with and considered with the expert's generalized training, knowledge, and experience to formulate opinions for deposition or trial testimony.

A more sound approach would be for the vocational expert to review and apply data and other information that is not case-specific from government, university, industry, and professional publications to develop opinions regarding employability, earning capacity, and related issues for deposition or trial testimony. In a similar way, a life care planner can rely on government, university, industry, and professional publications to develop opinions regarding the availability and cost of various components in a life care plan. Data collected in this manner by the vocational expert and life care planner should be compliant with the hearsay rule regarding case-specific statements in *Sanchez* (2016) since the underlying data in those publications was not collected for case-specific reasons. The next 2 sections of this article will present several examples of government, university, industry, and professional sources of vocational and life care planning data and other information that can be used to develop opinions that are compliant with the hearsay rule in *Sanchez* (2016).

## Labor Market Opportunity Analysis

Traditionally, labor market surveys conducted by vocational experts primarily or exclusively have included telephone calls to employers or placement agencies to obtain information about job openings, physical and other demands, entrance requirements, wages, and related factors. The surveys were conducted for case-specific reasons to develop opinions for deposition or trial testimony. Labor market surveys conducted in this manner would likely not comply with the hearsay rule in *Sanchez* (2016).

A labor market opportunity analysis is proposed as an alternative method to collect labor market information that does not rely on case-specific statements. Like a traditional labor market survey, a labor market opportunity analysis is designed to help assess issues related to placeability and sustainability, in other words whether an applicant or plaintiff can be expected to obtain and maintain employment. It relies on published data (databases) from government, university, industry, professional, and other sources that are general in nature and relied on by multiple users for a variety of reasons. Therefore, this type of analysis should comply with the hearsay rule in *Sanchez* (2016). Some examples of government, industry, professional, and other sources of data that can be used in completing a labor market opportunity analysis will be described below.

While relying on government, industry, professional, and other sources of data, it is important that the vocational expert insure the data sources are compliant with Evidence Code section 1340 (Bae, 2008), as follows:

### **§1340. Published Compilations-Lists-Directories-Registers.**

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 compila-

tion is generally used and relied upon as accurate in the course of a business as defined in Section 1270. **Leg.H.** 1965 ch. 299, operative January 1, 1967. (p. 84)

A business is defined in Evidence Code section 1270 (Bae, 2008), as follows:

**§1270. “Business” Defined.**

As used in this article, “a business” includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

**Leg.H.** 1965 ch. 299, operative January 1, 1967. (p. 79)

Additionally, the use of an internet reference source by an expert witness was admitted in *The People v. Darrell Ellis Mooring, Jr., et al. (Mooring)* (2017) and in *The People vs. Jose Antonio Espinoza (Espinoza)* (2018). In these cases, Ident-A-Drug was considered a compilation under Evidence Code section 1340 and, therefore, represented a published compilation exception to the hearsay rule.

## I. Government Data

Examples of government data sources will be described first. Of all types of data, government data are most likely to be compliant with the hearsay rule in *Sanchez* (2016). Examples of the most commonly relied upon government sources of occupation and wage data are as follows:

U.S. Department of Labor, Bureau of Labor Statistics. (2017). Occupational Employment Statistics Query System, *Occupational employment statistics* (May 2017) for San Francisco-Oakland-Hayward, California. Retrieved from <http://data.bls.gov/oes>

California Employment Development Department. (2018). Labor Market Information Division, *Occupational employment (May 2017) and wage (2018 – 1<sup>st</sup> Quarter) data* for Alameda and Contra Costa Counties. *Occupational employment statistics (OES survey results)* for Alameda and Contra Costa Counties. Sacramento, CA. Retrieved from <http://www.labormarketinfo.edd.ca.gov/?pageid=1039>

These publications from the U.S. Department of Labor and the California Employment Development Department provide wage information by occupation for a specific county or groups of contiguous counties. Both reports provide employment estimates. The U.S. Department of Labor report provides a percentage of relative standard error for employment estimates and wages. Both reports provide a solid formulation of the size of the labor market by occupation in a specific geographic area. The above reports provide employment and wage data for some counties in the San Francisco Bay Area. Similar data can be obtained for other counties and states should such data be necessary in conducting a vocational evaluation. For example, an applicant or plaintiff may relocate to another state after an injury.

Another government source of data for a labor market opportunity analysis is the unemployment rate in a particular geographic area. Among other things, the unemployment rate provides information about employment trends and likely job availability. The following source provides the unemployment rate by county in California and for the State of California:

California Employment Development Department. (2018, December 21). Labor Market Information Division, *Monthly labor force data for counties*, November 2018-Preliminary. Retrieved from <http://www.labormarketinfo.edd.ca.gov>

Two additional reports from the California Employment Development Department provide information about occupations with the most job openings and the fastest growing occupations. This information regarding labor market trends for specific occupations can be useful to a vocational expert in developing opinions regarding placeability and sustainability for deposition or trial testimony. Similar reports from other states can be obtained by a vocational expert, if necessary. The sample reports are as follows:

California Employment Development Department. (2016, November). Labor Market Information Division. *2014-2024 Fastest growing occupations*, for Alameda and Contra Costa Counties. Sacramento, CA. Retrieved from <http://www.labormarketinfo.edd.ca.gov/?pageid=145>

California Employment Development Department. (2016, November). Labor Market Information Division. *2014-2024 Occupations with the most job openings*, Alameda and Contra Costa Counties. Sacramento, CA. Retrieved from <http://www.labormarketinfo.edd.ca.gov/?pageid=145>

The Bureau of Labor Statistics provides data regarding job openings and labor turnover in the following report. This is another source of labor market trends that can be used in a labor market opportunity analysis. Tables attached to the report provide information about hires, total separations, quits, layoffs and discharges, and other separations by industry and geographic region.

U.S. Department of Labor, Bureau of Labor Statistics. (2018, November 6). *Job openings and labor turnover – September 2018*. Retrieved from [www.bls.gov/news.release/archives/jolts\\_11062018.htm](http://www.bls.gov/news.release/archives/jolts_11062018.htm)

The Bureau of Labor Statistics provides additional reports regarding the number of workers who are employed part-time, who work a flexible schedule, and who work from home. These reports provide information that can be used by a vocational expert to develop labor market opportunity opinions for an applicant or plaintiff in reference to specific work restrictions. The reports are as follows:

U.S. Department of Labor, Bureau of Labor Statistics. (2018, January 19). Labor Force Statistics from the Current Population Survey. *Employed persons by sex, occupation, class of worker, and full- or part-time status, and race*. Retrieved from <http://www.bls.gov/cps/cpsaat12.htm>

U.S. Department of Labor, Bureau of Labor Statistics. (2005, July 1). Economic News Release. *Flexible schedules: Full-time wage and salary workers by selected characteristics, May 2004*. Retrieved from <https://www.bls.gov/news.release/flex.t01.htm>

U.S. Department of Labor, Bureau of Labor Statistics. (2018, June 28). Economic News Release. *Employed persons working at home, workplace, and time spent working at each location by full- and part-time status and sex, jobholding status, and educational attainment, 2017 annual averages*. Retrieved from <https://www.bls.gov/news.release/atus.t06.htm>

The Bureau of Labor Statistics reports useful information on the duration of unemployment by age, sex, and other factors, as follows:

U.S. Department of Labor, Bureau of Labor Statistics. (2017). Labor Force Statistics from the Current Population Survey. *Unemployed persons by age, sex, race, Hispanic or Latino ethnicity, marital status, and duration of unemployment*. Retrieved from <http://www.bls.gov/cps/cpsaat31.pdf>

The U.S. Census Bureau at the U.S. Department of Commerce reports information about the unemployment rate of individuals with a disability, such as those who use a cane, crutches, or walker, and those who use a wheelchair, as follows:

Brault, M. W. (2012, July). *Americans with disabilities: 2010, household economic studies, current population reports*. Washington, DC: U.S. Department of Commerce, Bureau of the Census.

Another useful report by the Bureau of Labor Statistics describes wages by level of education. The report is as follows:

U.S. Department of Labor, Bureau of Labor Statistics Employment Projections. (2013, December 19). *Employment by summary education and training assignment, 2012 and projected 2022*. Retrieved from <https://www.bls.gov/news.release/ecopro.t07.htm>

Customized reports and analyses of labor market data can be requested for a fee from consultants at the California Employment Development Department. These services can be requested as follows:

California Employment Development Department, Labor Market Information Resources and Data. (2019, April 19). *Labor Market Information (LMI) Customized Data Services*. Retrieved from <https://www.labormarketinfo.edd.ca.gov/resources/lmi-custom-data-services.html>

## II. Industry Data

Various sources of industry data can be used in conducting a labor market opportunity analysis to develop opinions regarding an applicant's or plaintiff's placeability and sustainability for jobs in the open labor market. A few examples of sources of industry data will be presented now.

The size of the labor market for occupations being considered for an applicant or plaintiff can have an impact on job openings and job turnover, and in turn placeability and sustainability. One source of industry data is the *Occupational Employment Quarterly*, which is based on government data about occupations and is published by U.S. Publishing in Kansas City, Kansas. For example, the *Occupational Employment Quarterly* (U.S. Publishing, 2017) provides information about the number of workers who are employed by occupation, physical demand, and skill level in Alameda and Contra Costa Counties. This type of report is available for all states. Among other things, the report provides the total employment for these 2 counties as 1,351,764. The report notes that 531 unskilled ushers, lobby attendants, and ticket takers are employed at the light level of physical demand, 5,416 semi-skilled cashiers are employed at the sedentary level, and 509 unskilled parking lot attendants are employed at the light level. The vocational expert can use this report for assistance in determining the expectation that an applicant or plaintiff can obtain and maintain employment for occupations that appear to be medically and vocationally suitable.

Computerized transferable skills analysis programs such as the *McCroskey Vocational Quotient System (MVQS)* (McCroskey, 2016) and *SkillTRAN* (Truthan, 2019) are additional sources of industry data that can be used in assessing placeability and sustainability for an applicant or plaintiff. For example, users of *MVQS* (McCroskey, 2016) can select a database for conducting a transferable skills analysis that is comprised of occupations with frequent turnover in a specific geographic area. The results of the transferable skills analysis provide useful information in accessing placeability and sustainability. Various components of *SkillTRAN* (Truthan, 2019) provide a wealth of occupational data, including business listings, job openings, and wages for multiple geographic areas, such as county, state, and zip code.

Job search engines such as CareerBuilder (2019, January 20), Craigslist (2019, January 20), and Indeed (2019, January 20) are commonly used by job seekers as their primary source of information on job openings. Information regarding job openings is typically maintained on the websites of job search engines for 30-60 days. This archived data on job openings can be used by vocational experts in developing opinions regarding placeability and sustainability. In using these and the data banks of job and wage information described below, it is important for the vocational expert to explain how the published data is used in the context of the education, training, and experience of the vocational expert.

The vocational expert can create a long-term computerized bank of job opening information by saving the posted job openings from job search engines. Another method for creating an archive of internal job openings is to collect and save published and on-line job announcements in local newspapers. The archived job opening information can be retrieved in the future when conducting a vocational evaluation.

Private labor market research firms collect, organize, and sell job market data for a variety of customers for multiple uses. One such firm is Burning Glass Technologies (2019), which is based in Boston, Massachusetts. It claims that it captures 2.5 million job postings daily for more than 200,000 hiring companies. Through a subscription service, the firm provides information on job openings for displaced workers, based on their transferable skills. By using data analytics, this firm can create an archival job market report for specific occupations in a selected geographic area.

Another source of private labor market data is Forensic JobStats (2019), which is based in Ann Arbor, Michigan. It was formerly known as WANTED Analytics. Forensic JobStats has a 10-year database of help wanted ads from over 15,000 sources that is updated daily. Vocational experts have used its data for employment law cases since a data search can provide information for a specific job, geographic area, and time period. This source of archival help wanted data was described in a peer-reviewed, published journal article by Cohen, Steiner, and Thorpe (2016).



There are many industry sources of wage data. For example, Salary.com (2019, March 16), ERI Economics Research Institute (2019, March 16), Indeed.com (2019, March 16), and PayScale.com (2019, March 16) provide wage data by occupation in a web based format.

### III. Professional Body of Knowledge

The vocational expert profession has developed a body of knowledge that can be relied upon by an individual vocational expert in developing opinions that comply with the hearsay rule in *Sanchez* (2016). This body of knowledge has developed over several decades and is represented by national associations, major certifications and the training, skills, and knowledge required to obtain and maintain them, professional journals, texts, and ongoing training of vocational experts at annual seminars. A vocational expert can present this information in his or her written report and testify to it at trial for foundational purposes. Examples of significant certifications of vocational experts include certification of rehabilitation counselors through the Commission on Rehabilitation Counselor Certification (2019) and certification of vocational experts through the American Board of Vocational Experts (2019b).

Examples of professional associations that are significant to vocational experts include the American Board of Vocational Experts (2019a), the International Association of Rehabilitation Professionals (2019a), and the American Rehabilitation Economics Association (2019b). Examples of texts that describe the work of rehabilitation counselors and vocational experts are:

Weed, R. O., & Field, T. F. (2012). *Rehabilitation consultant's handbook* (4th ed.). Athens, GA: Elliott & Fitzpatrick.

Robinson, R. H. (Ed.). (2014). *Foundations of forensic vocational rehabilitation*. New York, NY: Springer.

Significant professional journals that publish peer-reviewed articles related to vocational expert issues are the *Journal of Forensic Vocational Analysis* by the American Board of Vocational Experts (2019c), *The Rehabilitation Professional* by the International Association of Rehabilitation Professionals (2019b), and *The Earnings Analyst* by the American Rehabilitation Economics Association (2019a).

Peer-reviewed, published professional journal articles provide another source of information about labor market opportunities for applicants and plaintiffs that is not case-specific. Articles that are relied upon by a vocational expert should relate to literature that is commonly relied on by vocational rehabilitation counselors and vocational experts. Journal articles that describe information about jobs performed with a sit/stand option, jobs performed with one arm, acceptable monthly absenteeism allowances, and off task and lost worker productivity are as follows:

Marini, I., Payan, S., Miller, R. J., Rodriguez, V. J., & Preston, B. (2008). Employer validation of jobs performed with a sit/stand option. *The Rehabilitation Professional*, 16(3), 171–178.

Marini, I., Rodriguez, V. J., Preston, B., Miller R. J., & Payan, S. (2008). Employer validation of jobs performed with one arm. *Journal of Forensic Vocational Analysis*, 11(2), 37–46.

Marini, I., Palacios, E., Del Castillo, A., & Miller, R. (2012). Employer validation of acceptable monthly absenteeism allowances. *Journal of Forensic Vocational Analysis*, 14(1), 15–19.

Marini, I., Preston, B., Pinon, R. M., & Antol, D. (2018). Off task and lost work productivity: Why, how much, and implications for vocational expert testimony. *The Rehabilitation Professional*, 26(12), 101–108.

The results of the research described in these peer-reviewed and published journal articles can be used by the vocational expert in developing opinions regarding labor market opportunities for applicants and plaintiffs with various medical conditions requiring a job that allows a sit/stand option or one that can be performed with one arm. Similarly, the above articles can be used in assessing issues related to absenteeism and being off task. A search can be conducted for other journal articles that address additional work restrictions and functional limitations for a particular case.

## IV. Court Decisions

Court decisions sometimes provide findings that can be used in conducting a labor market opportunity analysis for an applicant or plaintiff. One example is *Kilby* (2016), a California Supreme Court case regarding a customer service representative who worked for a pharmacy. A consolidated case involved 4 bank tellers. The customer service representative and bank tellers asked to be allowed to sit at work if the job description allowed seated work. The court concluded that the employees should be provided suitable seats if the nature of the work reasonably permits seated work. A search can be conducted for related court decisions in other states.

## V. Job Accommodation Network

The Job Accommodation Network (2019) provides information on job accommodations to job applicants, employees, employers, various professionals, educators, and others. The Job Accommodation Network is funded by the U.S. Department of Labor's Office of Disability Employment Policy (ODEP). It was developed by the collaborative efforts of ODEP, West Virginia University, and private industry. Information about reasonable accommodations for a particular injury or illness can be useful to a vocational expert in conducting a labor market opportunity analysis to develop opinions regarding an applicant's or plaintiff's ability to obtain and maintain employment. Information on accommodations from the Job Accommodation Network is detailed and comprehensive and summarized in written reports and through telephone consultation. Suggestions are provided on various types of equipment that can be used by a job seeker or employee with a specific injury as well as suggestions on modifying the job duties for an occupation being considered.

This concludes our discussion of various ways to conduct a labor market opportunity analysis to develop opinions regarding placeability and sustainability that will comply with the hearsay rule in *Sanchez* (2016). The labor market opportunity analysis can be used as an alternative to a labor market survey in the Employability Analysis Process (EA Process) described by Van de Bittner (2015). The labor market opportunity analysis would be incorporated into this method, as follows:

- A. Review of medical records
- B. Review of school, employment, and vocational rehabilitation records
- C. Review of deposition transcripts and videotapes
- D. Interview and test the applicant or plaintiff
- E. Evaluate self-initiated return-to-work efforts
- F. Complete a transferable skills analysis
- G. Determine vocational feasibility and amenability to rehabilitation
- H. Analyze employability
  1. Labor market access
    - a. Medical labor market access
    - b. Vocational labor market access, placeability, and sustainability
  2. Labor market opportunity analysis
- I. Analyze apportionment of employability
- J. Reporting

The next section will address ways to conduct life care planning research while complying with the hearsay rule in *Sanchez* (2016).

## Life Care Planning Research

A life care plan that relies exclusively or primarily on telephone calls to hospitals, medical providers, pharmacies, home care agencies, equipment providers, and other sources for cost data may be subject to challenge with respect to the hearsay rule in *Sanchez* (2016). While a life care planner can argue that the results of research through this method will be considered in the context of the life care planner's training, skills, and experience, a safer approach would be to rely on published sources of cost data that are not case-specific. As with the discussion above for vocational experts, life care planning experts should insure that any data sources relied upon are consistent with Evidence Code section 1340 (Bae, 2008) and explain how information in these data sources are used in the context of the life care planner's education, training, skills, and experience. Some examples of published cost sources will be described below.

### I. Past Treatment and Billing Records

Life care planning experts typically request billing and payment records and review them carefully in developing opinions for deposition or trial testimony. The actual records that show what medical providers, facilities, and suppliers have billed provide a good source of cost data for a life care plan that should be compliant with *Sanchez* (2016). Requesting a complete printout of amounts billed, adjustments accepted by providers, and any outstanding charges to the applicant or plaintiff can provide the basis for an analysis of the reasonableness of past charges. Any life care planning opinions that rely on this information alone would probably not be admitted under *Sanchez* (2016). The treating physician, surgeon or other health care provider would likely need to testify to confirm the treatment provided, the amount billed, and the amount paid. The life care planning expert would then need to testify regarding whether this information is consistent with the overall life care planning analysis and his or her education, training, skills, and experience.

### II. Government Data

One source of government data that a life care planner can rely on is published data on costs from the Veterans Administration (VA) (2019, January 20). The VA provides cost data for inpatient and outpatient facility charges as well as for professional or clinician charges.

Another source of government data is *Occupational Employment Statistics*, which is published by the U.S. Department of Labor (2017) and the California Employment Development Department (2018, June). Wage data in this report can be used in developing an opinion on the cost of home health care at the personal care aide, licensed vocational nurse, and registered nurse levels through the private hire method. The basic wage can be adjusted upward by a percentage to allow for the additional costs associated with the private hire method, such as those described by Thomas and Kitchen (1997). This government data source can also be used in combination with the Thomas and Kitchen (1997) article in developing an opinion on reasonable amounts to include in a life care plan for home health care provided by an agency. The wage that agencies pay for personal care aides is typically about half of the agency fee.

The *Occupational Employment Statistics* (U.S. Department of Labor, 2017; California Employment Development Department, 2018, June) wage data can also be used as a starting point for an opinion on medical provider fees. The life care planner can begin with the wage of various medical and dental specialists and then add a multiplier to arrive at an opinion for clinical charges. This figure can then be compared with any advertised charges by the medical or dental provider.

### III. Industry Data

As discussed above for vocational experts, it is important that life care planners insure that any use of government, industry, professional, and other sources of data are in compliance with the exception to the hearsay rule in Evidence Code section 1340. One example of published industry data is posted

hospital costs. For many years, hospitals in California have been required to post the cost of their most common procedures. As of January 1, 2019, the federal government has required all U.S. hospitals to post their price lists on their websites (Woolfolk and Bartley, 2019, January 6). The posted charges provide a life care planner one source of hospital costs that is not case-specific and, therefore, should be compliant with *Sanchez* (2016).

There are several medical cost guides that life care planners can use as sources of cost data that are not case-specific. Among other things, these medical cost guides provide information on inpatient and outpatient facility charges, fees for medical professionals and other healthcare providers, and the cost of medications. Some examples are as follows:

American Hospital Directory, Inc. (2019, January 20). American hospital directory. Retrieved from <https://www.ahd.com>

CareScout. (2018, June). Genworth cost of care survey 2018. Retrieved from <https://www.genworth.com/aging-and-you/finances/cost-of-care.html>

Davis, J. B. (2016). *CPT ? PLUS, A comprehensive guide to current procedural terminology*. Los Angeles, CA: Practice Management Information Corporation.

FAIR Health, Inc. (2019, January 20). Fair health benchmarks. Retrieved from <https://www.fairhealth.org/benchmark-data-products/bechmark-modules>

GoodRx. (2019, January 21). *What is GoodRx?* Retrieved from <https://support.goodrx.com>

Mistretta, T. (2019). *2019 physician's fee & coding guide*. Atlanta, GA: InHealth.

Practice Management Information Corporation (PMIC). (2019). *Medical fees: A comprehensive listing of current UCR and Medicare fees with relative value units*. Los Angeles, CA: Author.

#### IV. Professional Body of Knowledge

Like the vocational expert profession, the life care planning profession has developed a body of knowledge that can be relied upon by an individual life care planner in developing opinions that comply with the hearsay rule in *Sanchez* (2016). As with vocational experts, the body of knowledge for life care planners has been developed over several decades and is represented by national associations, major certifications and the training, skills, and knowledge required to obtain and maintain them, professional journals, texts, and ongoing learning of life care planners at annual seminars. Like vocational experts, life care planning experts can present this information in their written reports and testify to it at trial for foundational purposes. Examples of significant certifications for life care planners include certification of rehabilitation counselors by the Commission on Rehabilitation Counselor Certification (2019), the certification of rehabilitation registered nurses by the Rehabilitation Registered Nursing Certification Board (2019), and the certification of life care planners by the International Commission on Health Care Certification (2019).

Examples of professional associations that are significant for life care planners include the International Academy of Life Care Planning (International Association of Rehabilitation Professionals, 2019c) and the International Association of Rehabilitation Professionals (2019a). Representative examples of texts and other publications related to life care planning are described below. Significant professional journals that publish peer-reviewed articles related to life care planning issues are the *Journal of Life Care Planning* and *The Rehabilitation Professional* by the International Association of Rehabilitation Professionals (2019b) and *Rehabilitation Nursing Journal* by the Association of Rehabilitation Nurses (2019).

Hundreds of peer-reviewed journal articles and related publications describe the nature and extent of life care needs for a particular medical condition. Life care planners often consider this source of data as a complement to the opinions of treating physicians and medical experts in developing opinions for a life care plan. Peer-reviewed journal articles and related publications represent another source of data and related information that is not case-specific. One example is a special issue of the *Journal of Life Care Planning* (Johnson, C., 2018) that summarized Life Care Planning Summit Proceedings



from 2000 to 2018. Another example is an article by Woodard, Kattman, and Spencer (2017) regarding hospital pricing and surgery pricing.

Another good source of non-case-specific data for life care planners is university research centers. One example is the National Spinal Cord Injury Center (2018) at the University of Alabama at Birmingham, Alabama, which provides the results of research on spinal cord injuries. Another is Cornell University, which provides a wide array of reports on disability research; for example, the *2016 Disability Status Report: United States* (Erickson, W., Lee, C., & von Schrader, S., 2018).

Examples of books related to life care planning and related issues that life care planners sometimes consult in developing a life care plan include the following:

Weed, R. O. (Ed.). (2009). *Life care planning and case management handbook*. (3rd ed.). Boca Raton, FL: CRC Press

Riddick-Grishan, S., & Deming, L. M. (Eds.). (2011). *Pediatric life care planning and case management* (2nd ed.). Boca Raton, FL: CRC Press.

Expectancy Data. (2006). *The dollar value of a day: 2005 dollar valuation*. Shawnee Mission, KS: Author.

### A Successful Response to a Sanchez (2016) Challenge

Daniel W. Dunbar (2019), a plaintiff's attorney at Panish Shea & Boyle LLP in Irvine, California, described the factors that resulted in a successful outcome to a Sanchez (2016) challenge to the plaintiff's life care planning expert at a California Superior Court trial in 2018. According to Dunbar (2019), an expert witness and the retaining attorney need to communicate effectively both during trial preparation and during trial testimony. The expert should be cognizant of when items in a report may be subject to challenge and insure the retaining attorney understands what is at stake and is prepared to address the challenge.

To overcome a Sanchez (2016) hearsay rule challenge, health care providers will need to testify to verify the medical needs, work restrictions, and related factors to establish a solid medical foundation. The life care planning expert will then need to establish a foundation for opinions based on his or her education, training, skills, and experience including current and past related experience. The attorney will need to overcome the use of database objections by referencing Evidence Code Sections 1270 and 1340 (Bae, 2008) as discussed earlier. *Mooring* (2017) and *Espinoza* (2018) can be used to explain how the use of databases has been admitted in prior cases. The person most knowledgeable at the database service may need to be deposed to lay a foundation to establish the accuracy and reliability of the data. The attorney can introduce the life care planning expert's actual experience to support the expert's opinions, such as how the life care planning expert's education, training, knowledge, and experience confirm the accuracy of using the cost of an item at the 75<sup>th</sup> percentile or for a vocational expert using the 25<sup>th</sup> percentile as the starting wage for a post-injury occupation. It is helpful if experts can testify that professionals in their field rely on the same source of data in the normal course of business.

Should a life care planning expert contact providers and facilities for cost data, the attorney must insure that the health care providers are available to testify at trial regarding what they told the expert specifically regarding the cost of treatment items, for example. Relying on prior charges in the case needs to be based on the life care planner's education, training, and experience, such as professional experience or personal knowledge from life care planning or case management experience.

For vocational experts, if a traditional labor market survey was completed, each employer and placement agency that was contacted will need to be prepared to testify at trial. If another professional conducted the labor market survey, interviewed the plaintiff, administered vocational tests, or performed other activities, that professional will need to be available to testify at trial.

Bruno (personal communication, 2019, April 3) provided a life care planning and vocational expert's perspective on the information and suggestions by Dunbar (2019, March). Jeff Bruno, MA, OTR/L, PVE, VRC, CFCE is the president of the California Chapter of the International Association of Rehabilitation Professionals. Under *Sanchez* (2016), he views the expert witness as the steward of the data relied upon from various databases and other sources and considers the expert witness to be the person best qualified to testify at trial regarding the congruence of the data with the expert's analysis of the evaluatee based on the expert's education, training, skills, and experience. The expert's use of the data is consistent with Evidence Code sections 1270 and 1340 (Bae, 2008), *Mooring* (2017), and *Espinoza* (2018).

## Summary

This article has described the California Supreme Court's *Sanchez* (2016) decision and its implications regarding hearsay evidence for vocational experts and life care planners in developing opinions for deposition and trial testimony. Various methods were described for developing expert opinions that do not rely on case-specific facts. Suggestions for expert witnesses were provided by a plaintiff's attorney who overcame a *Sanchez* (2016) challenge.

The issues discussed in this article are germane to California cases at this time. But, they may impact vocational experts and life care planners in other states should court decisions similar to *Sanchez* (2016) be issued there.

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