

I29 Tele-Testimony to Overcome Testimonial Hearsay in Civil Commitment Hearings

Ferdows Z. Ather, MD*, University of Southern California Institute of Psychiatry, Law, and Behavioral Science, Los Angeles, CA 90086-0125

Learning Overview: After attending this presentation, attendees will understand: (1) the evidence required for civil commitment in California; (2) the problems caused by a recent California Supreme Court ruling on hearsay evidence on a variety of legal issues; and (3) how tele-testimony can provide a solution to some of these problems.

Impact on the Forensic Science Community: This presentation will impact the forensic science community by raising awareness about a solution to the challenge of testimonial hearsay, which extends beyond mental health cases.

The civil commitment (conservatorship) process in California requires a testifying psychiatrist or psychologist to offer proof beyond a reasonable doubt that the proposed conservatee, as a result of mental disorder, is “gravely disabled.” Grave disability is defined as a person being “unable to provide for his or her basic personal needs for food, clothing, or shelter.”¹ Generally, the testifying expert not only evaluates the patient, but also considers sources such as: hospital records, observations made by other team members such as nurses and recreation therapists, and discussions with outpatient providers, outreach teams, and family members. These sources provide information that the expert could not directly observe, such as the patient’s behaviors outside of a locked hospital unit.

In the California landmark case, *People v. Sanchez*, a gang expert used collateral information to opine that Sanchez was a gang member that led to the finding of gang enhancements on multiple felonies.² Sanchez appealed, contending the expert’s testimony was hearsay. The California Supreme Court reversed his gang enhancement charges holding that “when 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 (p.24).”

As testifying mental health experts generally use significant amounts of hearsay data in forming their opinion, the inadmissibility of such data after *Sanchez* rendered proving grave disability beyond a reasonable doubt extremely difficult to overcome. Collateral sources such as nurses, outpatient providers, and treatment staff from prior hospitalizations would have to testify physically at court for their testimony to be admitted, which places significant burdens on clinical staffing. Many facilities contract testimony to outside psychiatrists/psychologists, allowing the treating clinician to remain in the facility and continue to provide care. Typically, these outside psychiatrists/psychologists evaluate the patient once and use collateral information primarily when testifying. Following the *Sanchez* decision, without the use of collateral data, the evaluator may be especially challenged in that sufficient proof of grave disability is rarely obtained from one interview.

Tele-testimony (testifying remotely by videoconferencing or telephone) offers a practical solution to the testimonial hearsay challenges resulting from *Sanchez* and similar cases across the county. For the conservatorship issue, if the treating psychiatrist or psychologist does not have sufficient evidence of grave disability from their own observations, then clinical support staff can provide collateral testimony remotely without being burdened by traveling to and waiting at the court house for their case to be called.³ Thus, they can remain at their facility providing care, freeing the facility from having to find covering staff. Moreover, the treating clinician can also testify in the same manner, obviating the need for contracting outside evaluators. Additional collateral sources such as family, teachers, and employers can testify without the inconveniences of going to court.

Currently, jurisdictions have varying rules regarding tele-testimony. In *United States v. Gigante*, the Second Circuit allowed video testimony from a witness in the Federal Witness Protection Program because he was fatally ill.^{4,5} However, in *United States v. Yates*, the Eleventh Circuit denied the use of video testimony from witnesses in Australia who were only willing to testify via video.⁶ The court stated that alternative forms of testimony can be used only “to further an important public policy.”

In 2018, the Los Angeles County Department of Mental Health proposed integrating tele-testimony into the Mental Health Court to alleviate the backlog of grave disability conservatorship cases.⁷ Despite technological infrastructure already existing and used for specific cases (primarily state hospital patients, often hundreds of miles away from the court), prior to the COVID-19 pandemic of 2020, tele-testimony for local conservatorship cases was still not performed. Since then the pandemic has required the use of tele-testimony for some local cases such as patients who are COVID-19 positive.

In light of *Sanchez* and health limitations caused by the COVID-19, pandemic courts throughout the country are contending with how to admit testimonial evidence. Video and telephone services have been found to be a useful adjunct or replacement in non-forensic settings such as in medical care. Tele-testimony can be valuable in ensuring necessary information be admitted so that the court can make the most informed decisions while adhering to the hearsay rule.

Reference(s):

1. Welfare and Institutions Code, Section 5008.
2. *People v. Sanchez*, 63 Cal.4th 665 (2016).
3. Bari S., Arora P., Gupta A.K., Singh M., Aggarwal A.K. Tele-evidence: A videoconferencing tool as a viable alternative to physical appearance of doctors for the judicial summons. *J Postgrad Med.* 2018;64(4):206-211.
4. Garofano, A. Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials. *56 Catholic University Law Review.* 683 (2007).
5. *United States v. Gigante*, 166 F.3d 75, 81-82 (2d Cir. 1999).
6. *United States v. Yates*, 438 F.3d 1307, 1311 (11th Cir. 2006).
7. Sherin, J.E. *Expanding Conservatorship Capacity*. County of Los Angeles Department of Mental Health, 10 Jul. 2018. <http://file.lacounty.gov/SDSInter/bos/supdocs/116143.pdf>. Accessed 29 July 2020.

Hearsay, Tele-Testimony, Mental Health Issues

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*Presenting Author