The Impact of *Melendez-Diaz* on Health Care Providers — Testimony or Treatment?

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U.S. Supreme Court Justice Anthony M. Kennedy, in his dissenting opinion in the court's 5-4 decision in *Melendez-Diaz v. Massachusetts*, painted a grim picture for laboratory technicians, analysts and other health care providers whose reports could be deemed testimonial under the majority ruling, thereby requiring live testimony at trial:

> An analyst cannot hope to be the trial court's top priority in scheduling. The analyst must instead face the prospect of waiting for days in a hallway outside the courtroom before being called to offer testimony that will consist of little more than a rote recital of the written report.[1]

In the wake of *Melendez-Diaz*, health care facilities and providers in the Commonwealth of Virginia grew increasingly concerned that their employees and staff would, as Justice Kennedy forewarned, spend more of their time providing testimony than treatment. The Supreme Court of Virginia in its recent opinion in *Sanders v. Commonwealth*[2] lessened those concerns, holding that lab reports and other medical record documentation prepared for treatment purposes are non-testimonial, and therefore, not subject to the live appearance requirements of *Melendez-Diaz*. Post-*Sanders*, the question remains for health care providers — under what circumstances does treatment become testimonial?

The Confrontation Clause

The Confrontation Clause, part of the Sixth Amendment, "provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[3] The U.S. Supreme Court in *Crawford v. Washington* clarified that under the Confrontation Clause a criminal defendant's right to confront witnesses is not limited merely to confronting witnesses who testify at trial or in court, but the Confrontation Clause also affords the defendant a right to confront and cross-examine certain out-of-court "testimonial" statements offered against the defendant.[4] The U.S. Supreme Court described "testimonial" evidence that the Confrontation Clause addresses, stating:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition — for example, *ex parte* testimony at a preliminary hearing.[5]

While the U.S. Supreme Court provided a rather lengthy list of types of "testimonial" evidence subject to the Confrontation Clause, the Court declined to offer a bright-line rule, explaining at the end of the *Crawford* opinion that the Court "leave[s] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[6]

Melendez-Diaz: An Expanded Definition of "Testimonial"

In 2009, the U.S. Supreme Court had another opportunity to analyze the parameters of the Confrontation Clause in *Melendez-Diaz*. Defendant Melendez-Diaz and two other men were arrested by the police. In transit to the police station in the police cruiser the officers noticed the three suspects fidgeting. Police searched the cruiser upon arrival at the station, finding a large bag containing nineteen smaller bags hidden between the front and the back seat. These bags were sent to a state forensic lab for analysis, which revealed that the bags contained cocaine. The primary issue before the Court was whether affidavits from the state forensic lab reporting the results of the tests were "testimonial" such that the Confrontation Clause was implicated.[7]

In a 5–4 decision, authored by Justice Antonin Scalia for the majority, the Court held that these affidavits were testimonial, thus the Confrontation Clause required the prosecution to subpoena the analyst to appear in court or, if the analyst was unavailable, the defendant must have had a prior opportunity to cross-examine the witness.[8]

The majority also took the opportunity in *Melendez-Diaz* to address "the relationship between the business-and-official-records hearsay exception and the Confrontation Clause." Specifically, the Court clarified:

> business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because — having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial — they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here — prepared specifically for use at petitioner's trial — were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[9]

Records that are created as part of an entity's usual course of business, provided the entity's business is not to generate documents for use at trial, are by nature non-testimonial and not subject to the Confrontation Clause.[10] Of some comfort to health care providers, the Court's majority opinion included a footnote, addressing the claims of the dissent, that explicitly stated "medical reports created for treatment purposes" are not testimonial, and thereby, not subject to Confrontation Clause requirements.[11]

Following *Melendez-Diaz*, the U.S. Supreme Court remanded two cases to the Supreme Court of Virginia — *Cypress v. Commonwealth* and *Briscoe v. Commonwealth*.[12] In a consolidated opinion, the Supreme Court of Virginia held, consistent with *Melendez-Diaz*, that certificates of analysis generated by and attested to by state forensic analysts were testimonial in nature. While this decision set the basic parameters to consider when determining whether a lab report is testimonial such that the analyst or technician that prepared the report will be required to appear at a criminal trial, its applicability was limited to reports prepared by state forensic labs.

***Sanders v. Commonwealth*: Testimony or Treatment?**

In June 2011, the Supreme Court of Virginia had the opportunity in *Sanders v. Commonwealth* to offer guidance on the impact of *Melendez-Diaz* on health care facilities and private labs. Minor "CL" was examined at the Children's Hospital of the King's Daughters in Norfolk (CHKD) by a child abuse pediatrician after CL reported that she had been sexually abused by Sanders, her father. Consistent with the pediatrician's usual practice, she took urine samples and vaginal swabs to test for sexually transmitted diseases. The samples were sent to Quest Diagnostics (Quest), an independent lab in California, and were analyzed by a Quest technician who prepared a report with results positive for chlamydia. Relying on the report and her examination findings, the child abuse pediatrician at CHKD diagnosed CL with chlamydia.[13] Subsequent to the initial examination of CL and the collection of the samples, Sanders spontaneously reported to a child protective services worker that he had chlamydia.[14]

The primary issue before the Court was whether affidavits from the state forensic lab reporting the results of the tests were "testimonial" such that the Confrontation Clause was implicated.

The prosecution offered the child abuse pediatrician as an expert at Sanders' trial but did not subpoena or otherwise make available the Quest lab technician who interpreted the samples and prepared the report. Sanders was convicted of multiple counts of sodomy, rape and taking indecent liberties with a child and sentenced to multi-

ple sentences of life imprisonment.[15] Sanders contended at trial, and on appeal, that the Quest report was no different than the certificates of analysis deemed to be testimonial in *Melendez-Diaz*, rendering inadmissible the lab report of the results positive for chlamydia and testimony by the child abuse pediatrician relying on such report, absent an opportunity to confront the Quest technician.[16]

Records that are created as part of an entity's usual course of business, provided the entity's business is not to generate documents for use at trial, are by nature non-testimonial and not subject to the Confrontation Clause.

The Supreme Court of Virginia, in an opinion written by Senior Justice Lawrence L. Koontz Jr., held that the Quest lab report was not testimonial, but a statement made for medical treatment purposes specifically excluded by the U.S. Supreme Court from the reach of *Melendez-Diaz* and the Confrontation Clause. The Court first detailed the evolution of the Confrontation Clause in *Crawford* and *Melendez-Diaz* and then narrowed the analysis to whether the Quest lab report was created for a treatment or a testimonial purpose. In the course of this analysis, the Court provided several criteria, or indicia of treatment, useful to both criminal attorneys and health care law attorneys in determining if a document or report prepared by a health care provider is subject to the requirements of *Melendez-Diaz*.

The Court acknowledged that the duties of the child abuse pediatrician most certainly had "a forensic aspect" but concluded, based on the following five indicia of treatment, that the primary purpose in ordering the analysis of the samples for sexually transmitted disease was for medical treatment:

1. The pediatrician provided medical evaluation and diagnosis to her patient.
2. The tests for sexually transmitted diseases were ordered as a routine matter, based on certain symptoms, not requested by law enforcement.
3. The pediatrician was not looking for a specific medical condition as it was unknown to her at the time the samples were taken that Sanders had chlamydia.
4. The analysis performed by Quest did not uncover any information regarding the source of the infection. In discussing this factor, the Court specifically distinguished DNA testing. (See further discussion below.)
5. The pediatrician actually treated CL for chlamydia once she diagnosed the infection and effected a cure.[17]

Frame of Mind of the Declarant

Regardless of the perspective of the physician ordering the test, the determinative question pursuant to *Crawford* is whether "all of the relevant circumstances" would lead the declarant of the statement, the Quest lab technician, to reasonably believe that his statement was being made or taken for use at a trial.[18] The Supreme Court of Virginia in *Sanders* offered two criteria in undertaking this inquiry:

1. Are there non-prosecutorial reasons for the declarant lab technician to perform the requested test?

The Court explained, again distinguishing DNA testing, that there are reasons to test urine and vaginal discharge samples for infections that are entirely unrelated to criminal prosecution, including consensual encounters and non-sexual exposure to infection.[19] Practically, there are few tests performed at a health care facility or at the request of a health care provider that have a solely prosecutorial purpose. Analysis performed on a Physical Evidence Recovery Kit (PERK) taken from a rape victim including DNA testing of specimens, as an example, may reasonably be deemed to fall in this category.

2. Is there any basis in the record to conclude that the declarant lab technician had reason to believe his report might be used at a criminal trial?

In *Sanders*, the record was devoid of evidence to suggest that the Quest technician in California had any basis to believe that the testing of the samples for sexually transmitted disease was intended for use at trial. On the other hand, if a physician indicates in the requisition or order that a specific test was requested by law enforcement or notes that the purpose of the test is to correlate to an alleged assailant, the declarant analyst might be fully aware of the potential testimonial nature of his report.

One More Lesson from *Sanders*

While the Supreme Court of Virginia's opinion in *Sanders* reduces considerably the risk that health care providers will be subpoenaed for criminal trials because of Confrontation Clause considera-

tions, the Court's brief discussion of the trial court's mistaken application of Va. Code § 8.01-401.1 to this criminal matter may raise some issues for health care providers in the future. The Commonwealth asserted at trial, and the trial court agreed, that even if the Quest report was inadmissible hearsay, the pediatrician could testify at trial regarding the basis for her opinions and diagnosis of the patient relying on the statement contained in the report that the samples were positive for chlamydia. In a detailed footnote, the Supreme Court of Virginia explained that the Court had declined to expand Va. Code § 8.01-401.1, the authority permitting an expert to rely on inadmissible hearsay, to criminal trials.[20] If other trial courts are similarly misinterpreting this statute, there may be increased frequency of subpoenas issued to health care providers to provide the requisite foundation for admissibility of a medical record on which a witness at a criminal trial will rely.

Future Development of *Melendez-Diaz*

It likely is not coincidental that the Supreme Court of Virginia twice distinguished DNA testing from its holding that the lab report in *Sanders* was non-testimonial. The U.S. Supreme Court is scheduled to hear arguments on December 6, 2011 in *Williams v. Illinois*, an appeal by a criminal defendant convicted of sexual assault in part because of DNA analysis performed by an independent lab similar to the lab in *Sanders*, rather than a state forensics lab as was involved in *Melendez-Diaz.*

The victim in *Williams* was treated at a hospital in Chicago at which vaginal swabs were taken as part of a sexual assault kit. The swabs then were sent to an independent lab, Cellmark Diagnostics in Germantown, Maryland, for DNA analysis. Cellmark analyzed the semen on the swabs and derived a DNA profile, which was sent to the Illinois State Police Crime Lab. At trial the prosecution did not call the Cellmark technicians who created the DNA profile but, instead, offered expert testimony from a DNA analyst who worked at the Illinois State Police Crime Lab. The Illinois Supreme Court affirmed Williams' conviction on non-Confrontation Clause grounds, holding that the DNA profile report from Cellmark was not hearsay as it was not offered for the truth of the matter asserted but merely as underlying data to explain the opinions of the state's expert witness.[21]

It remains to be seen whether the U.S. Supreme Court will use *Williams v. Illinois* to expand or to pull back from *Melendez-Diaz* or, like the Illinois Supreme Court, decide the case on a basis other than the Confrontation Clause. So far, *Melendez-Diaz* has not resulted in health care providers waiting for days in courthouse hallways rather than providing treatment. But *Williams* may be worth watching.

Endnotes:

1 *Melendez-Diaz v. Massachusetts*, 557 U.S. __, __, 129 S. Ct. 2527, 2549 (2009).
2 *Sanders v. Commonwealth*, 282 Va. 154, 711 S.E.2d 213 (2011)
3 *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing the Sixth Amendment).
4 *Id.* at 51-52.
5 *Id.* (citations omitted).
6 *Id.* at 68.
7 *Melendez-Diaz*, 557 U.S. at __, 129 S. Ct. at 2530-31.
8 *Id.* at __, 129 S. Ct. at 2532. (The Court also discussed that a proper state notice-and-demand statute could be utilized under these circumstances. However, the Virginia notice-and-demand statute, Va. Code § 19.2-187.1, pertains to certificates of analysis which almost exclusively are prepared by government forensic labs and not private health care providers. Therefore, the topic of notice-and-demand statutes is beyond the scope of this article.)
9 *Id.* at __, 129 S. Ct. at 2539-40.
10 *See generally Id.*
11 *Id.* at __ n.2, 129 S. Ct. at 2533 n.2.
12 *Cypress v. Commonwealth; Briscoe v. Commonwealth*, 280 Va. 305, 699 S.E.2d 206 (2010).
13 *Sanders*, 282 Va. at 157-58, 711 S.E.2d at 214.
14 *Id.* at 161-62, 711 S.E.2d at 216.
15 *Id.*
16 *Id.* at 158, 161-62, 711 S.E.2d at 214, 216.
17 *Id.* at 165-66, 711 S.E.2d at 219.
18 *Id.* at 166-67, 711 S.E. 2d at 219 *quoting Michigan v. Bryant*, ___ U.S. ___, 131 S.Ct. 1143, 1161-62 (2011).
19 *Id.* at 167, 711 S.E.2d at 219-20.
20 *Id.* at 159-59 n.1, 711 S.E.2d at 214-15 n.1.
21 *People v. Williams*, 939 N.E.2d 268 (Ill. 2010)