

Surviving and thriving under *Sanchez*: A how-to guide for first-time trial attorneys

By Bethany M. Hill

Numerous articles have been written on the implications of *People v. Sanchez* (2016) 63 Cal.4th 665, which changed the admissibility of case-specific hearsay that experts may recount to the trier-of-fact.¹ In short, *Sanchez* holds that experts may rely on hearsay in the formation of their opinions. Period. However, they may not recount as true case-specific facts (as opposed to background facts) unless those case-specific facts are independently proven by competent evidence or covered by a hearsay exception.

In a series of blog posts on *Sanchez*, my colleague Duffy J. Magilligan has noted that *Sanchez* favors the prepared. He is correct. I would add that a well-prepared *Sanchez* examination has the potential to heighten the credibility of an expert's testimony, to underscore the skill and preparation of the examining attorney, and to remind the court of key facts that assist your case.

The purpose of this article is to offer a concrete example of how you can use

Sanchez to bolster your examination, even if it is your very first trial. It happened to me.

Background

When I joined Cotchett, Pitre and McCarthy in August 2020, taking on my first litigation role, I was staffed on a complex coordinated action involving the collapse of the main spillway at the Oroville Dam. I was added to the Oroville trial team and was in trial within one year of being hired. The partners at CPM believe in giving young lawyers trial opportunities.

You may recall the basic facts of the case from the news. Understanding them will help elucidate what is at stake in surviving and thriving in a *Sanchez* examination.

On February 7, 2017, the main spillway at the Oroville Dam broke apart. This set both a literal and proverbial cascade of negative consequences into motion. The State's Department of Water Resources (DWR) stopped releases of water down the spillway for repair efforts. The Dam's reservoir began to fill to dangerous levels. Water overtopped the dam's emergency spillway, sending water flowing over an earthen hill adjacent to the dam. The hill began to erode. The erosion headed back up the hill toward the dam, threatening the dam's ability to retain water. As leaders feared a collapse of the dam, and a catastrophic release of water and mass death, 180,000 people were evacuated from the area.

Under normal conditions, the dam would steadily release water throughout

the winter and slow down or stop releasing water in spring. But since water could not be released in its normal pattern while repair efforts were underway, regulators were forced to release much larger volumes of water in greater spurts through spring, summer and fall. In fact, DWR's own records show that it released an extra *one million acre feet* of water into the Feather River than would have happened without the spillway incident. That is an extra 32 football fields stacked to the height of Mount Everest.

This extra million acre feet of water gushed its way onto the properties of farmers, including walnut orchards adjacent to the Feather and Sacramento Rivers south of the dam.

Walnut trees are like bears; they have a hibernation period during the winter. During their hibernation, or dormancy, walnut trees can handle large volumes of water at their roots. It's a survival mechanism to take them through long winters. But come April and May, when they begin to sprout, too much water will lead to water-logging damage, which can result in decreases in the quality or quantity of the tree's walnuts, or even total death of the tree.

As DWR continued to dump excess water in spring, summer and fall, walnut trees found themselves inundated past what they could handle. In many cases, they shriveled up and died. Some looked healthy from the outside, but their roots had rotted, and they simply blew over with the wind.

Walnut farmers were devastated. Not only did they lose hundreds of acres of



Bethany Hill is a senior associate at Cotchett, Pitre & McCarthy, LLP in Burlingame. She practices in a wide range of civil litigation areas, including qui tam whistleblower actions, complex commercial litigation, employment disputes involving discrimination and harassment, and elder abuse. www.cpmlegal.com



When I qualified Hasey to offer opinion testimony under CCP 801, I spent considerable time on her qualifications. ... No matter the *Sanchez* strictures confining her speech, there could be no doubt that this woman knew her walnuts.

trees, but they often had to let go of entire workforces, and in some cases, sell their land or file for bankruptcy.

Walnut farmers filed an inverse condemnation action against DWR. Inverse condemnation is a sub-species of an eminent domain claim, where the government must pay for property that it damaged. Our firm represented nearly 30 of these farmers, eight of which had their cases heard in an initial seven-week bench trial.

A Forensic Expert with Small Walnuts and a Big *Sanchez* Problem

We needed a crop expert to explain how these walnut trees died. I found Janine Hasey, a veteran walnut crop scholar and Professor Emeritus at UC Davis who had been working in the region with walnut farmers for nearly four decades. In 2017, well before our case began, she had record calls from walnut crop farmers claiming small or shriveled walnuts and rampant tree damage and death. “The volume of damage that I saw in 2017 was far more extensive and over a much wider area than what I had experienced in previous high-water years,” she said.

Hasey agreed to provide her expertise. Her task was forensic—to find out what happened to these walnut trees.

For every plaintiff in the initial trial, Ms. Hasey conducted an on-site visit. She interviewed witnesses and examined a variety of plaintiff records, from photos of the fields before and after the incident, to production records, business records,

emails, letters, pest control advisor reports, and many other documents. Her conclusion was clear. Given the extent of the damage, plaintiffs’ trees died from water-logging. There was no disease or alternate cause which could explain the level of damage she observed.

Hasey’s testimony was crucial, but there was one major problem. *Sanchez* loomed large. Most of her report was replete with case-specific hearsay.

Defense filed a motion in limine based on *Sanchez*. “Ms. Hasey relies on ... written statements by the plaintiffs or photos taken by plaintiffs—as a substitute for independent proof. ... The Supreme Court squarely condemned this practice in *Sanchez*,” it said. Actually, this is not *Sanchez*’s holding. Experts are still allowed to rely on case-specific hearsay in the formation of their opinions.

Fortunately, the court understood *Sanchez*’s contours, noting that Ms. Hasey was only precluded from recounting as true any facts that had not previously come into evidence or were otherwise subject to a hearsay exception. The court refused to rule on Ms. Hasey’s testimony until it heard the evidence that had come into the record before she testified.

The road we had to traverse was rocky but clear. Every case-specific fact, including photographs and production records, had to come into evidence before Hasey testified. We had to backwards map the case for her.

These are the steps we took to survive and thrive in her *Sanchez* examination.

How to Prepare for a *Sanchez* Examination

Carefully review the expert’s report

I analyzed every sentence of Ms. Hasey’s report to determine if it contained one or more case-specific facts. Note that sometimes case-specific facts can be highly general in a report, and these must be particularized for trial. For example, Hasey wrote, “I reviewed photographs and business records.” Her report did not identify by Bates number the photographs and business records that were material to her opinion. For each plaintiff, we had dozens, if not hundreds of photographs. We had years’ worth of business records. Beating a *Sanchez* objection meant unpacking sentences to identify every photograph or business record which Hasey reviewed. Then, given the overwhelming volume of documents, we determined which of those were most crucial to explaining her opinion to the court.

Identify the witness who can get the case-specific fact into evidence

For each case-specific fact or record Hasey planned to introduce, we had to tailor the outline of the witness who could get that fact or record into evidence. Although I was not the attorney putting up any of the plaintiffs, I worked closely with other attorneys to develop questions that would elicit the testimony I needed for Hasey.

Confine your expert’s testimony based on what actually came into evidence

You’re doing so well—you put everyone

on the stand who had a case-specific fact material to your expert's opinion before you called your expert. But there's a small problem. The facts were not presented at trial exactly the same way they appear in the expert's report. For example, my expert's report took a granular approach to losses. Some plaintiffs owned multiple walnut fields, and losses could be calculated on a field-by-field basis. However, a certain plaintiff may have only testified about losses on an aggregate level. Those granular losses are now subject to a *Sanchez* objection, because those facts never came into court. In order to avoid a *Sanchez* objection, I needed to request that my expert only recount the aggregate numbers, and to stay away from granular numbers.

In a complex coordinated action, figuring out which of your expert's anticipated statements may draw a *Sanchez* objection can be a Herculean task. It involves going back through days or weeks of trial transcripts to verify exactly what was said by each witness, and to keep the specifics of the expert examination confined to that scope.

Write two outlines

The first outline is your examination outline—the questions you intend to ask your expert. If you're like me, and you want to do well, and this is your first trial, this will take you close to forever.

But you have a second outline to write. *This is the most crucial weapon in your Sanchez examination.* For every question, you have an anticipated set of answers. For example, you might ask your expert to recount what she was told by a plaintiff about the property before and after the incident, or which photos she relied upon in the formation of her opinion. Each of these facts are subject to a *Sanchez* objection. For every fact you expect to elicit, you need a reference to where that fact appears in the record. You need daily transcript citations and trial exhibit numbers ready at the drop of a hat. This is where the magic will happen.

You may be wondering why you don't combine both outlines into one. Perhaps you can. But I found it helpful to have two. You will likely want to copy and paste whole chunks of trial transcript into the outline so that it is easy to read back to the court which facts had come into evidence.

But large chunks of trial transcript in an outline can make it unwieldy and difficult to follow your own examination.

Alternatively, you can put citations to the record in your examination outline. If you do that, you will need binders of trial transcripts, and you will need to be able to quickly (very quickly) identify the exact text in the trial transcript at issue. Delay during trial is not your friend.

It is helpful to have two outline sets—a clean one with just your questions, and another with transcript excerpts to reference as necessary. However you choose to do it, make sure you have your full citations ready.

Spend a hearty amount of time qualifying your expert

Your expert will be limited in what can be recounted, based on what came into the record. To combat any tendency of the fact-finder to discount the expert's opinion based on generalities, don't be afraid to spend a good deal of time highlighting the details of your expert's expertise. When I qualified Hasey to offer opinion testimony under CCP 801, I spent considerable time on her qualifications, from the most impressive forty-year tenure performing field work and researching walnuts in the region, to her keynote addresses at international walnut symposia, to awards received from entities as well known as the California Legislature to entities as specialized as walnut societies. No matter the *Sanchez* strictures confining her speech, there could be no doubt that this woman knew her walnuts.

Game Day: Sanchez Objections Overruled

Ms. Hasey was sworn in. After a lengthy qualification, her examination began.

Ms. Hasey testified generally that one plaintiff's production was halved from 2016 to 2017.

Opposing counsel said, "I move to strike that as hearsay, case-specific hearsay, that has not been introduced yet."

"You're Honor," I replied, "I have a citation to the record for where this was introduced."

"All right. Let's hear it," the court replied.

I cited to the page and line, noting that the plaintiff testified that his production

was roughly 180,000 pounds in 2016 and 92,000 pounds in 2017, and that his decreases continued through 2020.

The court immediately overruled the objection. Note that not only were we able to overcome the *Sanchez* objection, but we had reminded the court of additional facts that had come into the record—specific declines in production and the years over which those declines had persisted.

Now, the defense was on notice. We were prepared, which raised a problem. How often would the defense run the risk of objecting on *Sanchez*, only to highlight our preparation? When the defense objected, they made us look better. The defense paused on objecting on hearsay grounds.

But Ms. Hasey had a many-hour examination, and eventually the defense circled back to *Sanchez*. Ms. Hasey spoke about remedial measures certain plaintiffs put in place to mitigate the large volumes of water in their fields. We began discussions of a mitigation ditch in one plaintiff's orchard.

The defense objected, but with careful language. "Your Honor, I move to strike this last bit unless counsel can tell me that it is not hearsay, but rather something that was in the record. Because I have to tell you, I don't recall it. I am not saying it wasn't, but I don't recall testimony concerning the overrunning of these mitigation ditches."

"Maybe counsel can help us out," the court said, curious as to whether I had this fact ready at my fingertips.

I had a problem. I was well into my main examination outline, but I had lost my place in my *Sanchez* outline.

"One moment, Your Honor," I said, flipping through pages.

Jeanette Sanchez, a paralegal in the firm with no relationship to the *Sanchez* case, came to the rescue. She ran up with her own copy of the *Sanchez* outline and pointed me to the exact place in the transcript where it had been discussed.

I cited to the page and line numbers, noting that a witness testified about the ditches and canals in their field, that they were normally effective, that they were inundated, and that they were not effective in moving water off the property in 2017.

Defense withdrew their objection. Once again, not only did we establish that a mitigation ditch had been brought into evidence, but we reminded the court of

nuances in the prior testimony. This bolstered the credibility of our expert witness and highlighted our team's preparation.

There were no more *Sanchez* objections during my examination. The evidence came in smoothly. The effect of our hard work was clear. We were prepared. And in court, that's a good look.

Other *Sanchez* objections and responses

While *Sanchez* loomed largest with Hasey, who relied on the testimony of others in order to give her own, *Sanchez* also arose in other contexts. For example, we hired an expert to discuss the permeability of soils at the plaintiffs' properties. Our soil expert used data from the USDA, which publishes data about the soil composition for more than 95% of counties in the United States. (Feel free to check out the composition of the soil in your area at <https://websoilsurvey.nrcs.usda.gov>).

Defense argued *Sanchez*—that these publications were case-specific hearsay, and nobody had given prior testimony

about the case-specific facts asserted therein.

We could not get over these *Sanchez* objections with prior testimony. However, a *Sanchez* hearsay objection can be overruled in more than one way. We could argue that soil content was not a case-specific fact but background information. We could also argue that the soil sample surveys were covered by a different hearsay exception in the evidence code.

We had success on both fronts. The court ruled that soil composition was not specific to the case, but general background information. Additionally, we had success with Evidence Code Section 1340, the "Commercial, Scientific, and Similar Publications" exception. This is a mighty exception which says, "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."

Our expert testified that the USDA's soil publications were generally used and relied upon as accurate in the course of his business. Without defense evidence to the contrary, that was enough to clear the bar. Courts have used this exception to allow in all sorts of publications, from lists of phone numbers, to descriptors of pharmaceutical drugs, and now, to soil sample surveys.

Lessons Learned

- *Sanchez* can be a powerful ally, highlighting your preparation.
- Frontload witness testimony with all facts needed in the record before you get to your expert examination.
- Write two outlines—your primary expert examination outline, and your *Sanchez* outline to respond to any objections.
- After you readily defeat a *Sanchez* objection, opposing counsel will have to make calculated risks about how often to object without upsetting the court or making themselves look like they weren't paying attention to prior testimony.
- Have backup. It is invaluable to have someone following along in the *Sanchez* outline to help you out if you get lost.
- Remember that a *Sanchez* objection can also be defeated in other ways. For example, it will be overruled if the fact at issue is not a case-specific fact, but the type of background information upon which experts readily rely. It will also be defeated if another hearsay exception applies, so keep your evidence code handy.
- If you are prepared, you will rock it! Congratulate yourself and your incredible team. ■

¹ On August 17, 2021, Division 7 of the 2nd District Court of Appeal issued its decision in *Zuniga v. Alexandria Care Center, LLC*, 2021 DJDAR 8346 (Aug. 12, 2021), modified 2021 DJDAR 8439 (Aug. 13, 2021), which also holds, in a complimentary ruling to *Sanchez*, that experts may rely on case-specific hearsay where the evidence is of the type on which experts reasonably rely. *Zuniga* was not precedent at the time of the events discussed in this article, and therefore was not raised by plaintiffs in response to the defense's objections. Had it been, we likely would have raised *Zuniga* to the court. I encourage you to read *Zuniga* in conjunction with *Sanchez* in the preparation of their examinations.