

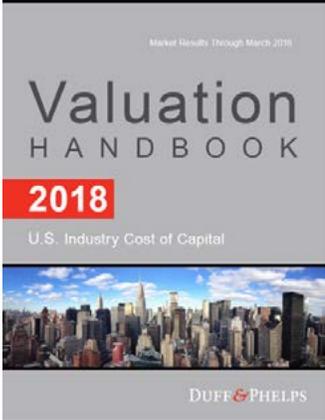
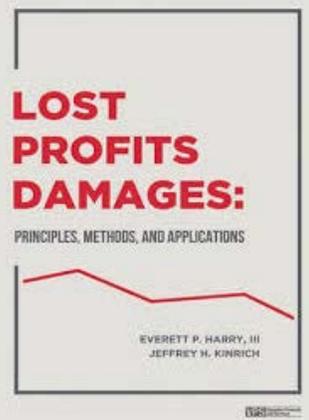
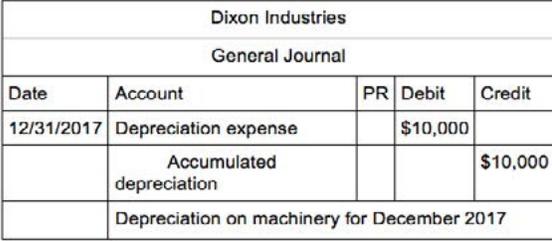
# TRIAL TESTIMONY BY FINANCIAL EXPERTS IN CALIFORNIA COURT: A REFERENCE GUIDE TO HEARSAY EVIDENCE OBJECTIONS

## INTRODUCTION

Financial experts base their opinions on evidence. Evidence may take many forms (*e.g.*, emails, contracts, documents, professional treatises, business records, *etc.*). The fact that an expert is provided with evidence from counsel or directly by the client does not make that evidence unassailable. Experts that testify at trial in California need to be aware of the legal implications of the terms “admissible” and “reliable.”

Since the enactment of the Evidence Code (EC) in 1965, experts have generally been allowed to rely on and relate hearsay evidence while testifying at trial (*see more about Hearsay below*). The thought process was that experts used such evidence to support opinions offered rather than to establish the truth of the evidence.

*People Vs. Sanchez* 63 Cal. 4<sup>th</sup> 665 (*Sanchez*) is a 2016 California Supreme Court ruling that re-examined the admissibility of hearsay evidence. Briefly, *Sanchez* clarified that an expert may not testify as to *case-specific* facts (as opposed to *general* facts) unless those facts have been admitted into evidence (*Exceptions to the Hearsay Rule*). The table below provides examples of each type of evidence:

EXAMPLES: GENERAL EVIDENCE	EXAMPLES: CASE-SPECIFIC EVIDENCE
 	
	 

The objective of this reference guide is to increase awareness of the potential hearsay evidentiary objection and *provide strategies for financial experts* to work with legal counsel to preserve the evidence and thereby their opinions.

## WHAT IS HEARSAY AND WHY DOES IT MATTER?

In California, expert testimony is addressed in EC §§ 801 and 802. Often, a central aspect of the evidence relied upon by an expert is “hearsay” in nature (*see* EC § 1200.(a) stating “Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.”). Critically, EC § 1200.(b) states “Except as provided by law, hearsay evidence is inadmissible.”

## THE SANCHEZ RULING

While *Sanchez* was a criminal case, subsequent appellate rulings have made it clear that the ruling also applies to civil cases. The *Sanchez* case has had significant ramifications for expert testimony. Today, more steps are required to ensure that evidence underlying the testimony has been admitted. That is, the expert will need to work with counsel to evaluate the nature of the underlying evidence to evaluate whether it is general or case-specific. As a practical matter, case-specific evidence is often produced to the expert by counsel, whereas general evidence is accessible to the expert and usable in multiple cases. These types of evidence are summarized in the following table:

EVIDENCE TYPE	EXAMPLES	SANCHEZ IMPLICATIONS
General	Textbooks or treatises, actuarial tables, inflation and cost of capital statistics.	Expert may rely on and communicate this evidence to the jury.
Case-Specific	Bank or brokerage statements, cancelled checks, interview statements of management, board minutes, financial statements and general ledgers.	Expert may rely on the evidence to formulate an opinion but may not communicate the evidence to the jury before it is admitted into evidence.

These issues were illustrated in *People v. Stamps* (2016) 3 Cal.App.5th 996 (*Stamps*) (“If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it.”). As an example, an expert may rely on an email from the Chief Financial Officer describing the purpose of an accounting adjustment in formulating an opinion. But, at trial, the expert is unlikely to be able to testify about that email before the CFO (or another custodian) authenticates the email.

## HEARSAY EXCEPTIONS

As seen in *Stamps*, there are exceptions to the hearsay rule. For financial experts, one of the most common is for business records. Business records are described in EC § 1271 as follows, “Evidence of a writing made as a record of an act, condition, or event... when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of business [as opposed to created for litigation];
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

As can be seen above, this exception requires that a qualified witness testify about the business record(s). This issue was addressed in *Universal-Products v. Omega Products* 2017 Cal. LEXIS 5143, which involved expert testimony on lost profits. The appellate court described the basis for its conclusion that the expert’s testimony was properly based on evidence that met the business records exception:

*As required by Evidence Code section 1271, Corley of Universal testified to all these elements. She testified she is Universal’s treasurer, responsible for Universal’s financial recordkeeping; that the subject financial records were prepared and kept in the ordinary course of Universal’s business; and that the underlying data was entered into Universal’s computer system. She testified the documents from which the entered data was derived—checks received and invoices paid—demonstrated the trustworthiness of the records. Finally, she testified that the trial exhibits were true and correct printouts of the information stored on the computer system. Corley properly testified she had knowledge of the record’s mode of preparation. Any objection was properly overruled and Kahrs’s opinion, based upon review of Universal’s records, was properly submitted to the jury...*

Another common exception is for commercial publications. For example, evidence of interest rates from the Federal Reserve is “contained in a tabulation, list, directory, register, or other published compilation” and is not hearsay because the compilation is generally used and relied upon as accurate (*see* EC § 1340). Other exceptions exist. For example, in *People v. Selivanov* (2016) 5 Cal.App.5th 726, a forensic accountant’s testimony based on QuickBooks financial reports was admitted because it met the “authorized statements” exception. *See* Supplemental Materials referenced below for more information.

## STRATEGIES FOR THE EXPERT

To be clear, the admissibility of evidence is a legal issue. An experienced expert, however, is knowledgeable about this issue and will work with counsel proactively to preserve the credibility of the opinions anticipated for trial. Consequently, the expert should identify to counsel the evidence essential to the opinion(s). One strategy is to assemble a specific list of such evidence and provide the list to counsel. Here, it may be useful to understand the trial scheduling, including when the trial exhibit list is to be identified, to ensure such evidence is included. In this way, the attorney can plan the witness(es) required to authenticate evidence the expert intends to rely upon. In fact, the attorney can use the list as a checklist to ensure the evidence is admitted prior to the expert's testimony. An alternative strategy is to propose a stipulation that will allow a specified body of evidence to be admitted. This strategy can be effective if an opposing expert seeks to rely on the same or overlapping body of documents (*see* example stipulation referenced in the supplemental material).

## TAKEAWAYS

Many subsequent cases explore *Sanchez*-related implications and much has been written analyzing these issues. Future cases will assuredly continue to examine these issues. It is simply not possible to address all implications of this issue here. Rather, the goal is to advise experts of the issues impacting reliance on hearsay evidence putting experts in a position to work with counsel to ensure evidence is admitted. Ultimately, it is advisable for the expert to communicate with counsel as early as practical (and frequently update) regarding the evidence upon which the opinion(s) will be based so that counsel may formulate strategies for getting the evidence admitted.

## SUPPLEMENTAL MATERIAL

[Overcoming Foundational Problems When Introducing Documents](#) by Stephen J. Wagner, CFLS

[Example Stipulation Regarding Admissibility of Financial Records](#)

[SANCHEZ Hearsay-Scenarios-Strategies for admission - PostConference-Final](#)

[UNIVERSAL-PRODUCTS INTERNATIONAL, LLC v. OMEGA PRODUCTSINTERNATIONAL, INC.,  
Cal Court of Appeal, 4th Appellate Dist., 2nd Div. 2017 - Google Scholar](#)