

THE EXPERT WITNESS IN REAL ESTATE LITIGATION - A USER'S GUIDE*

By Lawrence H. Jacobson**

INTRODUCTION

Although many articles have been written about the use of the expert witness in litigation, almost all are written by lawyers and rarely by the expert witness. Having practiced law since 1968 in the area of real estate and business transactions with a real estate broker's license since

1978, I have testified frequently as an expert witness in litigation involving the interpretation of real estate documents, the standard of care of real estate brokers, and in legal malpractice actions involving real estate and business transactions. As such, I thought it would be helpful to litigators handling real estate litigation matters to have the perspective of an expert witness on issues affecting the choice, usage and cross-examination of an expert witness in such litigation.

SELECTION OF EXPERT

Unlike other forms of litigation in which an expert witness may be used, real estate litigation is unique in that there is a crossover in expertise between the attorney and the expert. Both lawyers and real estate brokers are qualified as a matter of law to negotiate and document real estate transactions. To the extent that a lawyer uses another lawyer as a witness, he is utilizing a professional who in many respects does the same thing he does. This factor should be taken in consideration in making the decision of whether to use a lawyer or a real estate broker as the expert.

The selection of an expert in a real estate transaction involves weighing three elements: expertise, credibility and expense. In any given case one of these factors may become more important than the others, therefore they must be analyzed separately.

Expertise

The field of real estate is extremely broad with numerous sub specialties. Therefore, a lawyer handling a matter involving a real estate dispute should focus on the nature of the dispute and only retain an expert who has expertise in that particular area of real estate. Much like a lawyer handling a medical malpractice action involving heart surgery would retain an expert in cardiology, not a neurosurgeon or an orthopedist, it is just as inappropriate to use a real estate broker whose expertise is limited to the purchase and sale of single-family residences in a dispute involving commercial real estate. Do not retain a lawyer whose expertise is limited to

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1. See "Broker or Lawyer?", *infra* at page 2.

large commercial transactions as an expert witness in a case involving the standard of care of a real estate broker in the purchase and sale of a single-family residence.

When selecting an expert witness in a legal malpractice action, it is imperative that the expert understands the nature and practice of that particular defendant. While a senior partner from a large metropolitan law firm may have great credibility with the jury, if his expertise in real estate transactions consists solely of negotiating the purchase and sale of high rise office buildings and shopping centers, he will be vulnerable on cross-examination because his expertise does not include the standard of care expected of sole practitioners in outlying suburban communities. It must be remembered that in a legal malpractice case the standard expected is that of members of the profession in the same or similar locality under similar circumstances, so select the expert with this in mind.

The initial threshold to qualify as an expert witness is not difficult to meet, bearing in mind that the definition of an expert is only that they be someone who has “special” knowledge, skill, experience, training or education in a particular subject. This broad definition allows basically any lawyer to testify as an expert in a legal malpractice case or real estate dispute, and virtually any real estate broker to testify in a dispute involving the interpretation of real estate documents or the standard of care of a broker. However, failure to select an expert with specific qualifications renders that expert weak on cross-examination, especially if the other side’s expert has qualifications in those areas. The jury will be instructed to consider those qualifications. If your expert does not measure up to your opponent’s, your client will suffer.

Broker or Lawyer

One of the first decisions in a real estate litigation matter is to determine whether the expert should be a lawyer or a real estate broker since both are qualified to testify. This decision is often influenced by the available pool of experts. If the lawyer has a dispute involving a residential real estate matter, and his choice of experts is between an attorney with expertise in non-residential real estate matters, or a real estate broker with expertise in residential real estate matters, the real estate broker may provide more valuable insight than the attorney expert. The broker may be able to provide the attorney with practical insights that the lawyer-expert may not. Assuming, however, that their level of experience is substantially the same, the issue of choosing between a broker and a lawyer will then turn more on issues of credibility and expense, as discussed below.

Practicing Professional or Practicing Witness

Among lawyers you find many different types of expert witnesses. There are practicing

2. Wright v. Williams 47 Cal.App.3d 736, 121 Cal.Rptr 194 (1975)

3. CA BAJI 2.40: “A witness who has special knowledge, skill, expertise, training or education in a particular subject has testified to certain opinions. This type of witness is referred to as an expert witness. In determining what weight to give any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. An opinion is only as good as the facts and reasons on which it is based. If you find that any such fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.”

4. Id.

5. See “Use of the Expert as a Consultant, *infra* at page 7.

lawyers who occasionally testify as expert witnesses in areas of their specialization; lawyers who testify virtually on a full-time basis as expert witnesses; lawyers who are teachers (e.g. judges); and those who are professional expert witnesses spending virtually all of their time testifying as such. Likewise, there are real estate brokers who are primarily engaged in their profession as real estate brokers and occasionally testify as expert witnesses, and those who are effectively professional witnesses and devote substantially all of their time to testifying as experts. Each category has its positives and negatives.

A well-recognized authority in an area may have great credibility as an expert, but if he rarely testifies then he may not have gone through the litigation wars enough to know how to handle himself in a deposition or while testifying on the stand. Likewise, his lack of familiarity with the litigation process may limit his ability to assist as a consultant to the lawyer trying the case. On the other hand, a lawyer or broker who spends substantially all of their time testifying as an expert is at risk for losing touch with current developments and current standards. A real estate broker who has not sold a house for ten years may not be in a position to testify effectively as to the standard of care concerning the duty of disclosure regarding toxic mold. If you are considering the use of a “professional” expert you must ascertain what the expert has done to stay up to date with the current standards and practices of their field.

Timing the Selection

My general experience is that I receive the telephone call, seeking to retain me, twenty- four hours before the expert designation deadline. While designating an expert earlier than that may result in paying a retainer fee for an expert who is ultimately not needed, it should be remembered that the purpose of designating the expert is to declare to the court that you have an expert who is up to speed and ready-to testify. Twenty-four hour notice is clearly not enough time for any expert to become this familiar with a new case. Therefore, once it becomes clear that you are going to need an expert witness, a modest retainer early in the litigation not only avoids the last minute stress of trying to find an appropriate expert but also gives you the ability to utilize the expert’s services during the course of the litigation, not to mention giving the expert adequate time to review the necessary materials to prepare for their own deposition and testimony at trial. Also, since you are acting early, you have time to negotiate the expert’s retainer and fees. This freedom is preferable to the desperation of having to acquiesce to whatever amount the expert demands simply because you have no time to shop around.

CREDIBILITY

The credibility of experts is greatly predicated on their professional experience. However, experience will not matter if the jury does not believe the expert’s testimony. The majority of cases I have experienced involve the plaintiff’s real estate expert testifying that the defendant has never done anything right in his life, followed by the defendant’s expert testifying that the defendant is a paragon of virtue and wisdom. I believe this to be a serious error. With two diametrically opposed views of the defendant’s conduct, the jury will ultimately be swayed by which expert was more believable. Two elements come into play when determining that

6. See Don’t Go Overboard: Framing the Opinion,” *infra* at page 5

credibility: the qualifications of the expert and the reasonableness of the position that he has taken.

A key factor affecting the credibility of the expert is their specific expertise in the area in question. The prestigious lawyer with no real experience in the purchase or sale of residential property will have less expertise than a sole-practitioner real estate broker with twenty years of experience in buying and selling single-family residences in the community where the defendant is located. An expert who is a “professional” expert witness may be viewed as a hired gun who will simply testify as to whatever his lawyer wants him to or an ivory tower idealist with no real practice experience. On the other hand, the occasional expert may be so awkward in his testimony as to impact his believability.

It has been my experience that in a case in which you have a real estate broker and an attorney with equal expertise in the area in dispute the jury will tend to view the lawyer as the more credible expert witness. I believe they do this for two reasons. First, the jury believes the lawyer has a more extensive education and is more professional. Since this perception is often incorrect, it is important for the lawyer utilizing the real estate broker to emphasize the extent of the broker’s past and continuing education. The attorney must focus on the broker’s real life experience in order to diminish the perceived edge that the lawyer/expert may project in the minds of the jury.

The second reason why juries tend to view the attorney expert witness as a more credible witness than a broker is that the jury sees the broker as having a vested interest. If the broker is testifying for the defense, he is “protecting one of his own”, and if he is testifying for the plaintiff, he is just a jealous competitor. Therefore, it is important that the broker’s testimony be inherently more believable than the lawyer/expert’s testimony. It is my belief that an expert witness, whether they be a lawyer or a broker, should not go overboard in defending or attacking a defendant since it will just impact their credibility.

The perceived credibility of opposing counsel’s expert will also weigh heavily upon your choice of expert. If the plaintiff retains a real estate broker and his credentials are not extraordinary, then defense counsel may find that selecting another real estate broker with better credentials is sufficient to offset credibility in his client’s favor. For example, a broker who is or has been President of the California Association of Realtors has more credibility than a broker who has merely been a president of the local board, who in turn has more credibility than a broker who has never held this position. In this regard, the selection of an expert is like a game of bridge where the attorney seeks to trump the opponent’s expert by out credentialing him. In one case in which I acted as an expert witness, the significant factor that led to my engagement was that the other side’s expert was a former president of the California Association of Realtors. Since I am a lawyer, a broker and a former-Vice President of Legal Affairs of the California Association of Realtors, the lawyer who retained me was comfortable that I would not be “out trumped” in the minds of the jury.

EXPENSE

While every lawyer wants his client to retain the best expert possible, in reality the expert

selected is usually the best expert that the client can afford. The choice of the expert has to be tempered by the size of the dispute and the client's ability to pay. However, it is a slippery-slope to over-emphasize the economic issue and select an expert who is more affordable rather than an expert who is significantly more qualified. The lawyer must carefully document his file that the client understands the impact that selecting the less effective, but less costly, expert may have on the ultimate disposition of the case.

DON'T GO OVERBOARD: FRAMING THE OPINION

As noted above, there is a tendency for plaintiff-retained experts to try to convince the jury that the defendant in professional malpractice cases is completely incompetent. Likewise there is a tendency on the part of the defendant's expert to testify that the defendant's conduct was exemplary. I believe that both approaches are ineffective at best, and seriously impact the credibility of the expert witness at worst. The expert who testifies that the broker has done nothing right loses all credibility if the jury perceives that the standard set by the expert is unreasonably high. Real estate transactions are extraordinarily complicated and it has been my experience that it is the rare case in which the defendant has fouled it up from beginning to end. Usually the defendant has done virtually everything right but simply missed one piece in a very large puzzle. You will risk losing the case if you try to force the jury to conclude that the defendant did absolutely nothing right when the evidence is to the contrary.

It should be noted that it is not necessary to show the defendant was incompetent, only that he made the mistake in this particular transaction that caused the damage. It is far easier to convince the jury that you are responsible for the damages caused by your mistake, no matter how good you are. This is also a more credible position to take. An expert witness in a legal malpractice case in which the defendant is a well-regarded large law firm has the virtually impossible task of convincing the jury that the law firm was not competent. Instead, it is much easier to acknowledge its overall competency and say the act of malpractice is the rare mistake for which its firm is responsible. The example I occasionally use is that if I am a very careful driver without a car accident in twenty-five years, but I am thinking about my testimony while driving home from court, and I run through a stop sign and hit a car, I cannot excuse my conduct by saying that I am always a safe driver and I only made this one mistake. I am responsible for that mistake and I must pay for it.

In legal malpractice cases involving real estate, it has been my experience that an act of malpractice is more likely to incur in complex transactions than in simple transactions. Large law firms usually handle more complex transactions because they have a reputation and expertise for this, as opposed to a smaller firm that may handle only a few of these transactions. The approach I take when testifying is to acknowledge that defendant is a well-regarded law firm, and it was retained because the firm had the expertise to handle the matter. The jury will see that defendant's expertise and reputation is why plaintiff paid a premium for their services, that it was reasonable for plaintiff to expect defendant to do the job correctly, and defendant must pay for the mistake.

When testifying as an expert for the defense, the expert must be careful not to go overboard in praising the defendant. A lawyer or broker of limited skills or intelligence is more likely to make a mistake in the transaction than someone with more experience. When the client is a sole practitioner attorney or broker with limited experience, the overall handling of the

transaction may be poor. Trying to convince the jury that the defendant did a good job, when there is evidence that the defendant made one mistake after another, is fraught with risk and highly inappropriate. The expert should not lose sight of the threshold at which malpractice is established. The defendant does not have to be the best broker or lawyer or even an average broker or lawyer. In order to win the case the attorney need only convince the jury that the broker or lawyer's conduct did not fall below the standard of care. To put it in terms the jury might more easily understand, it is not necessary that the defendant received an A on the transaction to win. It is not necessary he received a B or even a gentlemen's C. It is only necessary that he received a D, which is to say that as long as the defendant did not get an F, he wins the case. The approach I use is to tell the jury that this may not be a professional who you would want to use in your transaction and there may be others who are much better, but that is not the issue. The issue is simply whether the defendant's conduct has fallen below the standard of care. The expert for the defense must focus on that limited issue.

The plaintiff's expert must to be careful not to hold the defendant to an unreasonably high standard. I have testified in legal malpractice cases on behalf of the defense in which the plaintiff's expert, a partner from a large law firm, was describing the appropriate conduct of a lawyer at the closing of a business acquisition. His description of the conduct was what one would expect from a senior partner at a large law firm in a multi-million dollar transaction, which had little or no relevance to the sole practitioner from El Monte, California, who was the defendant.

Hypothetical or Specific

There are two ways to go about framing the question to be asked of the expert in regard to the defendant's conduct. One approach is to have the expert review substantially all of the pleadings and depositions in the case that specifically relate to the standard of care issues and to ask the expert to give an opinion as to whether this specific defendant's conduct in this specific case fell below the standard of care. This approach is obviously very expensive given the time that the expert must spend immersing himself in the material. It also exposes the expert to attack on cross-examination because the opposing lawyer can ask questions from literally hundreds of pages of documents to try and trip up the expert. The expert may lose credibility with the jury if he or she does not remember or misstates what was said on page 39 of Volume 3 of a third-party's deposition

Another approach is to limit the expert's review of case material and instead frame the expert's opinion in the form of a hypothetical question based on specifically assumed facts. This severely limits the opponent's ability to cross-examine since they cannot use any material not contained within the assumed facts. On the other hand, it runs the risk that the jury fails to agree with any of the facts, leading the jury to disregard the testimony. 8 Or, the judge may determine

8. CA BAJI 2.42, Hypothetical Questions: "In examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts, and to give an opinion based on that assumption. In permitting this type of question, the court does not rule, and does not necessarily find that all the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumed facts."

that the evidence entered is insufficient to establish the assumed facts, and the judge may not allow it altogether.

Custom and Practice

Care should also be taken in framing the opinion to avoid the trap of trying to give an opinion of the law rather than just the standard of care. Whether a broker has a duty to disclose is a matter of law, and the expert cannot testify on this topic. However, the custom and practice of what constitutes meeting that duty is something the expert can testify about. The line between law and custom is constantly changing as new appellate decisions come down. Several years ago I was retained to testify regarding the obligation under a broker's standard of care to investigate off-site filings that affect the subject property. Several months into the case the decision of Assilzadeh came down which held as a matter of law there was no duty to do so. This rendered my opinion not only unnecessary but also inadmissible. This is why expert witnesses need to keep up to date with current developments that may impact their opinion, and why they should re-evaluate the appropriateness of their opinion if such developments occur after their engagement but before trial.

USE OF THE EXPERT AS A CONSULTANT

The extent to which the lawyer utilizes his expert as a consultant in a case depends on the lawyer's expertise. It also forces the lawyer and the expert to be careful that ethical boundaries are not crossed when the expert acts as a consultant, as this would taint the expert's testimony.

An experienced commercial litigator who has never handled a real estate broker standard of care case may find an experienced expert witness invaluable in helping him understand the case--in particular his side's strengths and the other side's weakness. I have been retained as an expert/consultant in this situation. Although the attorney was a very experienced litigator, he had limited knowledge in the area of real estate broker standard of care. When I met with the lawyer to prepare for my deposition, I was able to help frame the opinions to put his client's case in a more positive light. After reviewing the deposition of the principals, I was able to help the lawyer focus on what specific duties the broker had violated, and what I would or would not be able to testify to at trial. More important I was able to assist in recommending the questions that should be asked of the opponent's expert at their deposition.

This case involved the mishandling of trust funds. The two issues were whether the funds in question were trust funds and, if so, were they handled properly. The line of inquiry I suggested for the deposition was designed to pin down their expert's position that the defendant's conduct was only justifiable if the funds were not trust funds. Once the jury was convinced that these were trust funds, the second issue as to whether they were handled appropriately was already disposed in testimony by defendant's own expert in deposition. The expert testified if they were trust funds, then trust fund requirements were not adhered to. This approach also allowed the jury to hear testimony as to why the trust fund requirements are in place. It also helped influence the jury in reaching the conclusion that the funds in question should have been treated as trust funds.

9. Assilzadeh V. California Federal Bank, FSB 82 Cal.App.4 399, 98 Cal.Rptr.2d 176 (2000).

The expert, especially if it is a lawyer, can help the litigating attorney evaluate the case to determine whether it should be settled or litigated. It is my practice to get a thumbnail sketch of the case as soon as an attorney seeks to engage my services. On several occasions I have told lawyers that their description of the case leads me to believe that I would not be able to give a favorable opinion. This usually leads to settlement of cases that simply should not go forward.

Again, the lawyer should be sure that the expert is utilized as a consultant only on those issues affecting the standard of care and evaluation of the strengths and weaknesses of the case. The expert should avoid engaging in strategy and analysis that crosses the line. The expert should always remember that he is not the lawyer, but is a non-involved third party expert who has no financial stake in the outcome.

CROSS-EXAMINATION

It has been my experience that a lawyer's cross-examination of expert witness' focus only on their analysis of the case. Seldom, if ever, does the attorney challenge their credibility as an expert witness. The fact that it is easy to qualify as an expert witness does not mean that the credentials of the expert become irrelevant. The credentials impact greatly on the witness's credibility in the eyes of the jury. Ultimately you must give the jury a reason to believe your expert rather than the other side's expert. The two best ways of doing that are by distinguishing credentials and showing that the expert has set an unreasonably high or unreasonably low standards.

Many lawyers do not want to go into the expert's credentials because they believe it merely reaffirms in the minds of the jury their opponent's expert is in fact an expert in their field. While occasionally this may have some merit, more often than not the lawyer is missing a great opportunity to discredit the expert in the eyes of the jury. A lawyer should, whenever possible, try and turn an expert's strengths into weaknesses. A professional expert who has done nothing but testify as an expert witness for five years must be carefully examined on his real life experience. Academics testifying as expert are extremely vulnerable on issues of practical experience versus ivory tower idealism. The senior partner of a large law firm who is the preeminent authority on a topic can have that turned against him by showing his opinion has set an unreasonably high standard that would effectively exclude virtually every lawyer in the State who is not a senior partner in a large law firm from his definition of "competent". Also, expert witnesses or lawyers with degrees from unaccredited or smaller, less prestigious law schools can be vulnerable if the other side's expert has a degree from a more prestigious law school.

Real estate brokers who have done nothing but testify as expert witnesses for the last ten years are vulnerable as having lost touch with current developments. Since the successful real estate brokers generally find it more lucrative to be practicing brokers rather than witnesses, the lawyer should explore in deposition how the broker became a full-time expert. It is frequently the result of having been unable to maintain an economically viable brokerage practice. The impact of starting the cross-examination with "so you started testifying as an expert witness shortly after the bankruptcy of your real estate brokerage practice" can obviously be devastating.

10. Of course, the first step is to get the names of the parties for a conflict check.

CONCLUSION

The selection of an expert witness in real estate litigation is an important element of the case and one that all too frequently lawyers put off until the last minute, or simply do not give it adequate thought. Selecting an expert should involve more than picking up the directory of experts, thumbing through the appropriate section and picking an expert at random. The lawyer must leave sufficient time to evaluate what type of expert is needed, what qualifications that expert should have to provide effective assistance in the case, and then whether a given expert has those credentials. The selection and utilization of an expert is too important a decision to be made in a haphazard and last minute manner. It is a serious decision that requires care and evaluation. I hope that the above suggestions will be of value in making that decision.