

Thinking Beyond the Assignment – Behind the Scenes Advocacy The Experts that Help Make Attorneys Better

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Philip Simmons is a real estate and land use attorney and licensed California real estate broker, as well as being an expert witness and real estate development consultant. Philip offers over 30 years of experience managing major real estate developments and development organizations – including serving as Vice President of Development for Archstone-Smith, and Division President for John Laing Homes. His unique combination of executive management, legal, and brokerage skills gives him broad expertise in land use, acquisition, entitlement, development, contracts, syndications, finance, marketing and disposition. His clear and thoughtful analysis and communication style has contributed to the successful outcome of numerous cases.

***If you're not getting the right answers you're probably not asking the right questions ~
Edward Hodnett***

Any thoughtful expert regularly struggles with the desire to offer our hiring attorneys ideas or information that go beyond the scope of the matters on which we were asked to opine. As experts in our field, we often bring a perspective and understanding of the complex and multi-dimensional issues that go well beyond that of our retaining attorneys. Some lawyers welcome the broader view we can offer, some actually craft their case around our positions, but some just want to limit us to answering the questions we were asked. Technically our job, after all, is to advocate for our expert opinion – not to advocate for a specific outcome of the litigation. That said, our value to our retaining attorneys is enhanced when we can provide information that helps support or show the weaknesses in their case.

As an attorney myself, I deeply understand the concern many lawyers have over asking the experts expand the scope of expert review, analysis, or testimony. Some don't wish to risk further complicating the case, some fear that we may tread into areas that could compromise the case, and some just don't want to incur the extra fees. But I believe we have an obligation to at least open the door to lines of inquiry that we feel might be warranted, and then step back and let the attorney decide if it's something he/she wishes to pursue.

To illustrate how valuable this can be to our cases, I would like to share a brief case study. A few years ago I was hired by the defense on a contract/fraud case involving the alleged misrepresentations of a real estate syndicator. The case was being heard in Los Angeles where both attorneys and all the experts resided. The syndicated properties at issue were located in Sacramento. The attorneys on both sides, as well as the expert retained by the other counsel, focused solely on the documentary history of the transaction.

As a real estate attorney/broker expert, I felt that it was important for me to go to Sacramento to view the properties and interview the property managers. When I was a young developer, my mentor – Ray Watt – once told me that he would never approve a development project without first “holding the dirt in my hands.” His point was that to really understand a real property asset you needed to deeply understand the hundreds of factors that are involved in making wise real estate decisions. Whenever real estate or market dynamics are involved, I

personally don't think anyone can get the whole picture without getting a first-hand experience of the asset.

The attorney was initially reluctant to incur the cost of my trip, and he really didn't see the point. But I explained the importance of the broadest possible understanding of the issues involved, and ultimately won out. During my tour of the area, and my interviews with the property managers, I discovered something that ultimately won the case for our client. The plaintiff claimed that the defendant should have known about the declining markets in which the syndicated apartment projects were located. The markets certainly did decline shortly after the plaintiff subscribed to the syndication agreement, but it turned out that the cause could not have possibly been anticipated by the defendant client.

As it turned out, the neighborhoods in question had seen a remarkable upturn in valuation immediately prior to the syndication because the Sacramento police department had assigned a special gang task force to the area. Consequently, the crime rates dropped precipitously, the area began gentrifying, and rents began to increase. Shortly after the syndication closed, the recession set in, causing all housing values to decline. To compound the broad market decline, and what ended up being dispositive in the case, the reduced tax revenues from the recession caused the Sacramento police to endure budget cuts. These budget cuts, in turn, led them to terminate the task force that regularly patrolled the area. As a consequence, crime rates once again increased and housing values dropped as quickly as they had risen. There was no way the defendant could have predicted this sequence of events. Once this information was disclosed to the plaintiff, the case was settled.

This case, and many others like it, illustrate the value of maintaining a creative attitude, being open to expanding the scope of representation, engaging in constant analysis and always looking for ways to improve the thoroughness and accuracy of the expert's opinions. It is always appropriate to adopt a dispassionate professional posture, and certainly acceptable to simply answer the questions we are asked, but there is much more we as experts can offer. It is vital that we maintain a flexible awareness of all the facts, make a concerted effort to deeply understand the opponents' point of view and claimed relevant facts, and offer experience-based assistance to evaluating the issues of the case. This not only adds to our value as experts, but also helps enhance the effectiveness of our retaining attorneys. At the outset of every case it is important to get to know the character of the attorneys (on both sides, if possible), and to assess the extent to which our client attorneys desire to add all of their expertise to the management of the case. Not all attorneys are aware of this added value that their experts can provide, and not all attorneys are open to it. Attorneys need to realize that limiting the expert's involvement to the narrow scope of the desired testimony often does a disservice to their clients and potentially compromises the desired outcome of the case.