

The role and challenges of real estate expert witnesses

by Dr. Thomas A. Musil

Real estate expert witnesses play a variety of critical roles when they testify in court, prepare reports for attorneys on valuation, damages, professional standards of care, and real estate industry practices. Real estate disclosure, agent practices, economic damages, business interruption, and valuation disputes are areas frequently in need of qualified experts. It is important for real estate expert witnesses to understand that the legal rules and procedures are complex and that the role and work product of the expert has to meet the rigorous standards of the court. There are many misconceptions about the role of experts and how experts can assist attorneys and courts in understanding the facts surrounding disputes and how the contributions of experts can influence the outcome of a case. These misconceptions stem from generalizations as to the role of expert witnesses in television shows with the focus only on testimony. While in fact the greatest amount of time spent on a case by expert witnesses is involved with reading reports, contracts, and deposition testimony.

Expert witnesses include practitioners with extensive practical knowledge and skills in areas of business such as real estate appraisal, analysis and brokerage. Expert opinions are needed in litigation testimony or litigation consulting. The first is in pre-trial conference when the attorney needs expert advice in evaluating the nature of the dispute and whether to pursue the case. Second, experts provide testimony in deposition hearings. The deposition testimony is recorded



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and the expert's role is to answer questions asked by the opposing attorney. It is important to understand that the deposition is for the assistance of the opposing attorney. Depositions are taken in the discovery phase of the case and have two purposes: first, to inform the opposing attorney of the expert's opinion and second to use the expert's testimony for impeachment purposes at trial. The final place of expert testimony is in the actual court trial where either a judge or a jury will decide the outcome of the case.

Real estate, economic, and finance experts provide analysis and testimony, however the responsibilities of an expert, can take on a much more challenging form. While the primary goal of an expert witness is to assist an attorney or the court in understanding the facts that could not otherwise be scrutinized without the assistance and insight of the expert, many experts also provide litigation

support to assist the attorney in understanding the events of the case and formulating effective arguments. In the case of the latter, the expert is retained as a consulting-expert and works behind the scenes assisting the attorney and reviewing the work of opposing experts.

Expert testimony usually is linked to a report or analysis completed by the expert witness. For property or business valuation disputes (taxation, condemnation, divorce), the attorneys will obtain appraisal reports, for business interruption or business damages the attorneys will have a financial analysis or economic loss report documenting the events and measuring the damages. For cases involving disclosure or agent standards of care, attorneys will obtain an expert's report evaluating the events of the case. The experts retained to prepare these reports must meet several criteria. The expert must have both the requisite education, knowledge, and experience to prepare a report and the ability to articulately convey the conclusions of the report to a judge and jury. In essence, the true client for the expert is the expert's conclusions reached on the matter or issues evaluated. The duty of the expert is objectivity and rigorous examination and analysis of the events of the case. The methodology used in expert reports must follow accepted scientific or industry analysis standards and criteria. Courts have increasingly raised the bar on what is acceptable as a basis for analysis used in a report. Consequently, the analysis an expert employs must be grounded on a solid foundation of previous research and/or relevant body of knowledge. If the analysis fails to meet

these standards, the work falls into the category of "junk science" and the court will not accept the expert's work as valid.

There is an abundance of articles on how to be an effective expert witness. Because real estate appraisers frequently testify on valuation matters ranging from property tax appeals and condemnation cases to divorce cases, much of the literature can be found in professional appraisal publications. These articles contain helpful information on court procedures, rules of evidence, testimony, and surviving cross examination. The nuggets of advice in these articles include always telling the truth, being very prepared, answering only the question asked, keeping the answer short and to the point and directing the answer to the judge, arbitrator, jury, or commission. The articles advise that experts not get into a contest of matching wits and arguing with the opposing attorney--doing so will usually lead to the demise of the expert's opinion and credibility. Expert witnesses are advised to maintain a demeanor of self assurance, control, composure, and above all else, maintain their perspective of objectivity concern-

ing the events of the case. I can recall one occasion where an expert witness referred to "our side" in describing his analysis of damages. Comments that reflect the expert as an advocate, undermine an expert's credibility and objectivity in analyzing the facts of a case and will likely discredit or minimize the value of any expert testimony.

Many professional associations provide courses on how to be an effective expert witness, preparing reports, court procedures and working with attorneys. It is critical that the expert witness recognize the following fundamental rules:

- Never accept an assignment that you are not qualified to perform.
- Never entirely rely on the documents and depositions supplied by the attorney that has retained you. Obtain all relevant information that will assist you in preparing a complete and objective analysis.
- Be an advocate for your own opinion and your analysis---not for the position of the party that has hired you as an expert.
- Recognize that courts are "gatekeepers" of expert testimony and that experts must not only be qualified by

experience and education, but the expert's findings must be based on current accepted and reliable methodology and analysis.

- Experts must be able to communicate their report in a clear way minimizing industry jargon or technical complexity so that the judge and/or jury will be able to understand the testimony in plain English.

- Upgrade your skills and knowledge on a continual basis by following developments in the field, attending high quality professional education and participating in industry professional associations.

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