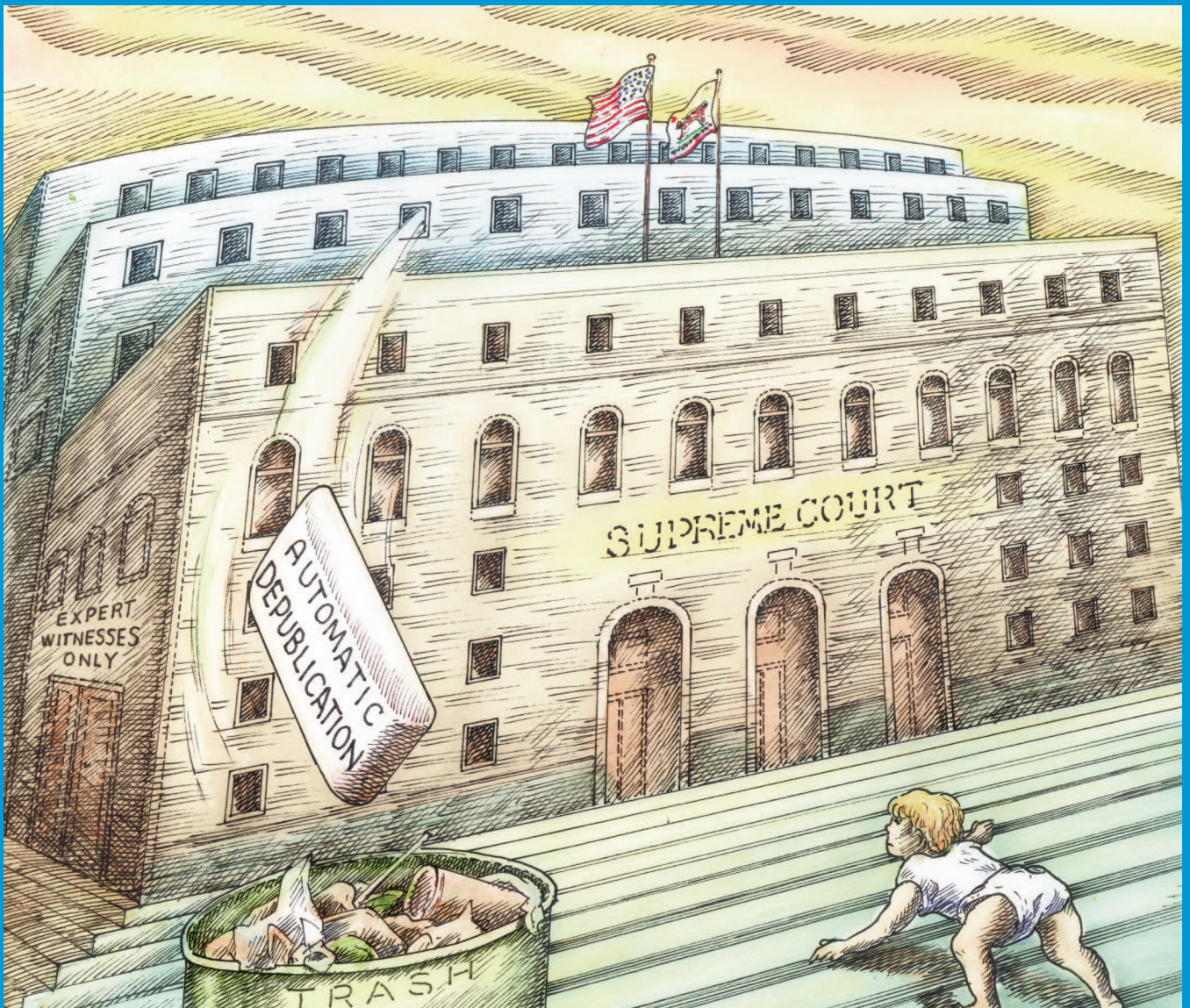


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Thinking Beyond the Assignment:

Selection and Management of Expert Witnesses

By Philip Simmons

If you're not getting the right answers, you're probably not asking the right questions — Edward Hodnett



Philip Simmons

The Special Relationship Between Experts and Counsel

Selecting an expert witness requires a thorough understanding of the issues in the case, as well as the type of experts that may be required to provide clarity of the issues for the finder of fact. Some

areas of practice, such as land use and real property litigation, often involve added dimensions of complexity in evaluating and

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planning for expert testimony. Litigation varies widely from case to case, but the attorney's challenge remains the same: putting together expert testimony to clearly articulate the relevant facts and the conclusions that should be drawn from the facts. Considerations that go into properly evaluating the need for expert testimony, including selecting and managing the experts, can be among the most critical aspects of successful trial preparation.

The nuanced assessment of litigation issues provided by experts is something that is often given short shrift in the early stages of case evaluation or litigation preparation. There may be straightforward legal issues identified in the cases, but the vast number of unique issues that play into virtually every case requiring expert testimony calls for a somewhat different and expanded relationship between the attorney and the experts.

In the world of business, effective management of complex subjects generally requires a team of consultants. In real estate, land use, and development, for example, the management team requires legal, marketing, finance, environmental, entitlement, architectural, traffic, community relations, political, geotechnical, civil engineering, sustainability, and construction expertise. In all complex matters, whether in business, medicine, engineering, or virtually any other field, it is advisable to have an executive project manager to select and coordinate the activities of each required consultant team member. To be maximally effective, litigators should ideally act in the capacity of an executive project manager. Unfortunately, few attorneys are capable of evaluating all the necessary diverse areas of expertise involved in complex litigation, or understand which of these areas may be relevant to the issues of a case. While specific detailed technical expertise is often clearly called for in litigation, there are often relevant factors upon which the outcome of the case can turn that may not be readily apparent.

In complex cases, it can be tremendously valuable to have a generalist expert who is familiar with all the disparate aspects of the litigation. This expert can assist the attorney as executive manager of the expert witness team. Treating litigation like a business project can help identify and piece together elements of a case that are not immediately evident. Unfortunately, not all cases have sufficient damages to justify a comprehensive expert team. But when the litigation and client can support the cost, there is no better way to help ensure an outcome that reflects all available avenues of analysis. The following case study will illustrate how valuable expanded involvement by an expert can be to a case.

— Thinking Outside the Box —

A lawsuit filed in Los Angeles Superior Court in 2012 involved a contract/fraud claim in a real estate syndication. The plaintiff alleged misrepresentations by the defendant, the investment's syndicator, in packaging the investment in the offering prospectus. All of the attorneys and experts resided in Los Angeles, although the syndicated apartment properties at issue were located in Sacramento. The attorneys on both sides, as well as the expert retained by plaintiff's counsel, focused solely on the documentary history of the transaction. While the case did not require a team of experts, it was important for both sides to have an expert with brokerage, investment, and general real estate expertise.

The defendant's expert witness felt that it was important to go to Sacramento to view the properties and interview the property managers, to become knowledgeable about the specifics of the particular properties and the Sacramento market. Having broad-based expertise in all aspects of real estate investment, the expert understood that firsthand observation and investigation of real estate transactions often discloses factors that could not be uncovered any other way. To really

understand the real property assets involved in the case, he felt it was important to deeply understand the myriad factors that are involved in making wise real estate decisions. Whenever real estate market dynamics are involved, it is unlikely that anyone can get a complete picture without a firsthand experience of the assets.

Questioning the value of the trip, the defendant's attorneys were initially reluctant to incur the travel expense. But the expert explained the importance of the broadest possible understanding of the issues involved, and how the defendant's apparent lack of performing industry-standard due diligence might not have been the cause of the plaintiff's losses. The attorneys finally conceded and authorized the trip. During the expert's tour of the area, including interviews with the property managers and local police, the expert discovered something that ultimately won the case for the defendant. The plaintiff's case was based on the allegation 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 as it turned out the cause could not possibly have been anticipated by the defendant.

The expert discovered through his investigation that the neighborhoods in question had seen a remarkable upturn in valuation immediately before the syndication because the police department had assigned a special gang task force to the area. Consequently, the crime rate dropped precipitously, the area began gentrifying, and rents increased. Shortly after the syndication closed, the 2008 recession began, causing housing values everywhere 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 police to make budget cuts. These budget cuts, in turn, led them to disband the task force that regularly patrolled the area. As a

consequence, crime rates 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 settled. This case and

‘It is always appropriate for an expert to adopt a dispassionate professional posture, and it is certainly acceptable to simply answer the questions asked by the expert’s retaining counsel.’

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 depth, thoroughness and accuracy of the expert's opinions.

It is always appropriate for an expert to adopt a dispassionate professional posture, and it is certainly acceptable to simply answer the questions asked by the expert's retaining counsel. But there is much more value that a well-informed and well-managed expert can provide. To ensure the best possible outcome, it is essential that attorneys allow experts to maintain a flexible awareness of all the facts, make a concerted effort to deeply understand the opponent's point of view, and offer experience-based assistance in evaluating the issues. This not only adds to the value of the experts, but also helps enhance the effectiveness of the attorneys.

Thoughtful and engaged expert witnesses regularly struggle with the desire to offer ideas or information beyond the scope of the matters on which they are asked to opine. With specialized experience and unique perspectives, an expert witness will often bring levels of understanding of the complex and multidimensional issues of a case that go well beyond that of the attorney. Some lawyers welcome the broader view the experts can offer, and some actually craft their case around expert opinions. But many seek to limit the expert to answering narrowly defined questions. The role of an expert witness is to advocate for his or her expert opinion, not to advocate for a specific outcome of the litigation. Nonetheless, the value of experts is enhanced when they can provide information that helps support or show the weaknesses in the case.

— The Responsibilities of the Expert —

The expert's *raison d'être* is to assist the trier of fact in understanding aspects of the evidence that may require specialized skill or knowledge, and help them grasp various dimensions of technical elements or standards of practice that might not be readily apparent. But litigation is generally based on

conflicting facts, and experts are frequently the best way for attorneys to investigate, identify, interpret, validate, or determine the relevance of various facts. The numerous dimensions of interrelated technical or operational issues involved in complex litigation usually go far beyond the lay understanding of the trier of fact — and often the attorneys as well. According to one commentator, “[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.” Litigation regularly involves circumstances beyond lay experience and knowledge, making the role of the expert even more vital. While mutually exclusive expert positions regularly satisfy the court's test for reliability, the more in-depth the background and research underpinning an expert's opinion, methodology, or competence, the more credible the opinion will be to the trier of fact.

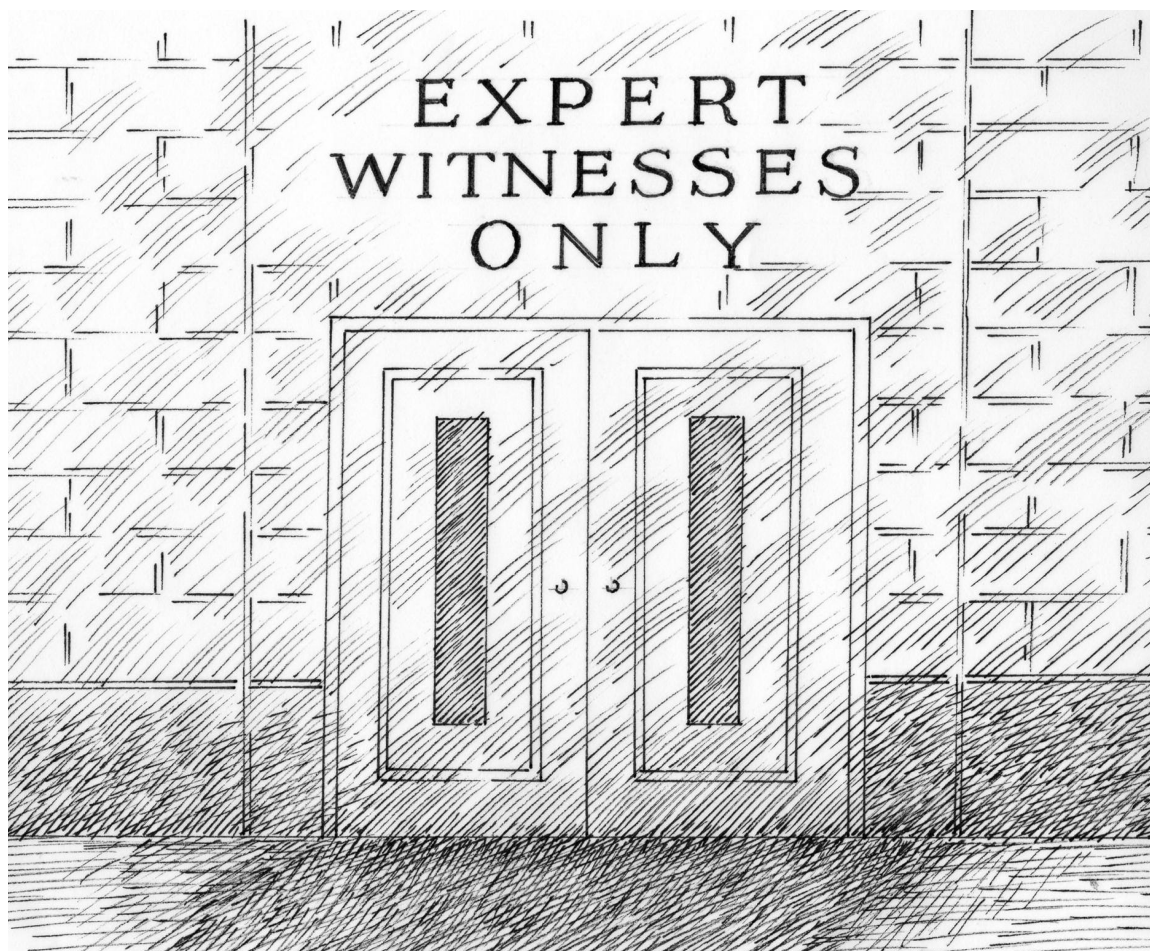
All experts should understand the concern many lawyers have about accepting an expanded scope of expert review, analysis, or testimony. Some attorneys do not want to risk further complicating the issues, some fear that the expert may tread into areas that could compromise the case, some fear that doors may be opened to a line of inquiry that could jeopardize their client's position, and some just don't want to incur the extra fees. But diligent and experienced experts have an obligation to at least think outside the box and raise the possibility of lines of inquiry that they feel are warranted. Then they should step back and let the attorney decide whether it is something worth pursuing. In many cases, expert analysis can alert the attorney to potential issues that should be addressed or at least considered in structuring the case.

It is the expert's responsibility, at the outset, to get to know the character of the attor-

neys (on both sides, if possible), and to assess the extent to which the retaining attorney desires the expert to add expertise to the case. Not all attorneys are aware of this added value that experts can provide,

simple enough so the attorney can directly and effectively manage the required experts. In those instances, the attorney should consider the following factors:

- The expert's training and experience



and not all attorneys are open to it. But attorneys should realize that experts frequently have knowledge and experience beyond the scope of their intended testimony, and artificial limits placed on the information the expert is able to provide can potentially compromise the outcome of the case.

— Selecting the Expert —

Many cases involve legal issues that are

must reflect an appropriate level of expertise in the subject matter.

- The expert should display an ability to apply constant analysis and flexible awareness to the relationship between the technical matters and the legal issues.
- The expert must be capable of understanding the nuanced communication of those providing the facts for the expert to evaluate (whether attorney instructions, con-

flicting opinions, investigative reports, or issues raised by other experts on the litigation team).

- The expert must be able to communicate clearly, effectively, and persuasively to outside parties (e.g., in deposition or trial testimony). Communication skills are often difficult for the attorney to evaluate, since communication styles vary greatly. The line between persuasive communication, compromised credibility, and perceived bias can easily be blurred.

- The expert should have confidence, personality and style that elicits trust on the part of the trier of fact.

- The expert should demonstrate a cognitive style that does not become flustered, and can respond quickly to changes in tactics on the part of retaining or opposing counsel.

In addition to selecting the best expert, the expert's fees must be consistent with the scope and damages of the case. This can be one of the most difficult issues for the retaining counsel to balance. In general, the most effective experts will also be the most costly — often more than the client or case can justify. Whether the benefits that a higher-quality expert brings to the case justify the cost is a business decision that the attorney and client need to make as early in the litigation as possible.

In general, when evaluating a potential expert's curriculum vitae, it is important for the attorney to evaluate the expertise sought based on the current status of the case. However, the attorney also needs to think beyond the obvious issues of the case to determine whether the expert will be able to respond and adapt to the myriad changes that often occur as the case progresses. While a broader base of expertise may not seem necessary in the early stages of litigation, the opposition will undoubtedly seek to take the case beyond the capabilities of the designated experts. If the opposition is successful in doing so, it places strategic, logistical and financial burdens on the retaining

counsel. If last-minute additional expertise is required, the retaining counsel will be challenged to bring the new expert up to speed, and possibly will even need to restructure the strategy of the case. While beginning a case with a broad-based expert team might initially cost more, it could save money and result in a better outcome in the long run.

Most experienced litigators understand the value of properly selected and managed expert witnesses. Unfortunately, many delay bringing the experts on board until later in the litigation, which may not be ideal for maximizing the value that the experts bring to the case. Expert witnesses technically are not involved in shaping the strategy of a case, but early knowledge of the expert's opinions will give the retaining counsel a tremendous advantage in understanding the issues that will likely be confronted as the case progresses.

The most successful litigators have established relationships with experts who are retained early in the case. If there are financial or strategic reasons for holding off retaining a testifying expert, the retaining counsel can retain the expert solely as a consultant (or "non-testifying expert"). In the capacity of a consultant, the attorney can glean tremendous value early on. The consultant's opinions can be shielded from discovery under attorney work product, and the scope of the consultant expert's work can be limited to reviewing documents or helping to educate counsel. The consultant expert can also help counsel deal with complex technical issues or respond to opposing experts. If the case later calls for the expert to testify, the expert can switch roles and become a designated expert.

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Philip Simmons is a real estate and land use attorney, licensed real estate broker, a real estate development consultant, and an expert witness with decades of experience in land use, acquisition, entitlement, development, contracts, syndications, finance, marketing and disposition.