

Using Your Designation to Promote a Career as an Expert Witness



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By Kurt A. Dreibholz, Esq. and Kenneth L. Simpson, SIOR

If you have ever worked as an expert witness, you know your membership in SIOR can be a top credential, as the stringent requirements to become an SIOR ensure your expertise, ability, and market knowledge. If you have never been an expert witness, you may want to consider that your career in commercial real estate could be enhanced—providing substantial remuneration and the opportunity to help others resolve their disputes—all because of your proven expertise by virtue of your SIOR designation.

For a litigator, hiring an SIOR can make a big difference in a case. The background and experience of an SIOR member adds expertise and business acumen only gained by years of experience in the specialty areas of industrial, office, and commercial real estate.

Your credential as an SIOR member and your day-to-day, long-term experience are the foundations you need to become a recognized expert witness. Your knowledge of property values, contracts, zoning, use of property,

construction, marketing, and your geographical area of coverage is valuable information. Likewise, experience gained while acting as an expert witness can make you even more competent in your day-to-day transactional business.

During a deposition, as an expert witness, you will be asked, under oath, for your opinion about issues in a case. Your opinion on subjects such as “Standard of Care” or the “Custom and Practice,” in addition to moral and ethical questions that might arise in a case, can lead you to a renewed appreciation of the complex elements to consider when making appropriate ethical and moral decisions in future transactions.

All expert witnesses are required to work forensically, to be unbiased, and to be non-advocates. The co-authors worked together in a recent case where numerous and substantial inaccuracies in data gathering techniques, tabulation of results, and interpretation appeared in the Plaintiff’s experts’ work product

and thus in the Plaintiff's damage calculations. The benefit of having significant market knowledge helped this expert witness and the defendant's attorney to recognize these inaccuracies. Discovering bias and advocacy on the other side was disturbing, but also provided significant motivation to correct the inaccuracies.

The Case

This particular lawsuit was between the developer of a three-story public storage facility ("the building") and his two architects. The developer believed there was a delay in the completion of construction of the building that damaged him financially. His damage claim was based on the theory that other competing buildings were completed while his construction was delayed by the architects and the contractor.

The Plaintiff (the developer) maintained that he lost his "marketing window of opportunity" to lease his space. He believed there was a lower vacancy rate prior to completion of his space than I (Simpson), as an expert witness, felt existed. In his deposition, the Plaintiff claimed that he was unaware of competing buildings, although his expert's market feasibility analysis and his lender's appraisal included competing buildings in their reports since building permits had already been issued for them. However, during deposition the Plaintiff's expert attempted to prove that the Plaintiff could not have been aware of the other competing properties and that there really was an undersupply in the market. The Plaintiff's expert did this by using the dates the certificates of occupancy were issued for the competing buildings instead of the dates the building permits were issued.

The Plaintiff's expert ignored his client's lender appraisal and his client's feasibility study and market analysis that specifically referenced the other competing buildings, all of which were under construction at the time and were known to the Plaintiff.

Collection of Public Records

Representing two of the defendants at his deposition, (Author) Simpson presented documentation concerning building permits and certificates of occupancy. These documents were obtained from public records at the Department of Building and

Safety and questioned the benchmark dates used by the opposing expert in his date-sensitive analysis.

What was the gross total available square footage as of a certain date? These documents demonstrated that the data was "plugged in" and that the Plaintiff's expert had used the dates the building permits were issued, instead of the certificate of occupancy issue dates. This was apparently an attempt to show that if the building had been completed on time, the Plaintiff could have taken advantage of a better market, which would have led to the faster absorption of his space.

Comparables

Other inaccuracies appeared in the testimony of another expert on the Plaintiff's side. This concerned the total gross amount of available square footage as of a certain date. Because the report of that expert was not complete and failed to include a substantial amount of vacant comparable buildings' square footages, the summary overstated the rate of absorption. To support a claim for damages, they had slanted their data, first to fit a theory about when the building was available, then to show how competing buildings had beaten the Plaintiff's for tenants.

Financials

Financial analysis of the Plaintiff's balance sheets and income statements showed that there was neither an advertising budget nor an advertising expense until nearly six months after the space became available. A review of standards in publications specializing in the successful leasing of public storage buildings indicated that delayed advertising and a low advertising budget—not the competition—was a contributing factor to the facility's slow leasing.

Econometrics

A demand analysis by one of the Plaintiff's experts used an econometric model for determining the demand for the same type of space as supplied by the subject building. Using demographics and Census Bureau data, they manipulated their econometric model enough to serve as a basis for their case. When analyzing their regression analysis, we noticed that, instead of using the Census Bureau population figure for 2000, they used the projected

2005 estimate. By using the estimated population number instead of the accurate 2000 census population number, the opposing expert pushed the interpretation of the data in favor of the Plaintiff's assumption.

Furthermore, the same expert used the mean household income for the neighborhood surrounding the building—instead of the more reliable median household income—to add support for an over-inflated estimate of what demand for square footage would have been had the building been completed earlier.

The Facts Win

Just prior to trial, the Plaintiff's lawyers filed a Motion in Limine in an attempt to preclude (Author) Simpson's "expert appraisal-related opinion testimony," which clearly identified the mistakes found in the Plaintiff's experts' reports.

Simpson's background was challenged as being unsuitable for this case. This attempt to take the focus away from the mistakes and errors contained in the reports of the Plaintiff's experts did not work.

Uncovering those errors would not only have embarrassed the Plaintiff's experts, it would have irrefutably damaged the Plaintiff's case. Those experts would have had difficulty explaining why, on their charts showing total amount of space and total vacancy, they switched back and forth between the issue date on the building permit and the date on the certificate of occupancy. And they would have had difficulty explaining the erroneous sizes of their comparables. The fact that they searched the public records for zoning and use codes showed they also knew the correct total square footage of all mini-storage facilities, but they did not use the correct building square footages in their report. Their conclusions—based on false assumptions, incorrect dates, and incorrect sizes—were difficult to uncover. However, with the authors' backgrounds as an SIOR and an attorney, they were able to help unravel the manipulation of data and the resulting presentation of data that the plaintiff's experts created to make the assumptions appear true.

After such careful analysis of the documentation in this case, it became more and more apparent that the Plaintiff's experts' reports were not comprehensive, internally consistent, or accurate.

They only promoted faulty information in this lawsuit. We do admit that we looked forward to trial so the reports could be challenged and their experts obligated to answer questions about contents.

However, for different reasons, the expert witnesses on both sides allowed the case to settle out of court.

Preparing as an Expert Witness

While much of this account may sound rudimentary to some SIOR members, it cannot be overstated how most attorneys lack the ability to gather pertinent data, analyze it, and render an opinion. Even if they could, they are probably not "qualified" as experts to do so. This example shows just how valuable the SIOR member is to the attorney. Of course, the quality of the minds involved will dictate the quality of the relationship and of the results that can be achieved.

The attorney must recognize that passing information runs in two directions. The quality of the SIOR member's work product and opinions in the case will depend largely on the quantity and quality of information the attorney provides. Some attorneys, by chance or by design, pass on too little information to their experts, so the expert is constrained. This frequently encourages the deposing attorney to ask such questions as whether the expert's opinion would change in light of this or that new tidbit of information. Occasionally, the result can be that the expert is disqualified from the case or dropped by the attorney. It is important for the SIOR member to generate accurate and professional reports that are unbiased and do not advocate a position. Be sure you are supplied with all of the information you require or that you believe you require before undertaking an assignment as an expert witness.

Working as an expert witness can enhance your career as an SIOR and simultaneously build stronger relationships within the real estate legal community in your area.

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