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LEGAL SERVICES

When real estate transactions go sour, the drama is often played out in a court of law, and the complicated nature of the documents can call for an expert, someone versed in both law and the science of real estate. Lawrence H. Jacobson, Los Angeles-based attorney, licensed real estate broker, expert witness, litigation consultant, and president of the Beverly Hills Bar Association, spoke to Bloomberg BNA's Kevin Lambert on how an expert witness is selected, the standard of care and legal malpractice involving real estate, and what a witness has to watch out for.

An Expert Witness Can Help a Jury Understand Complex Points of Real Estate

Bloomberg BNA: What is an expert witness and what does an expert witness do?



Lawrence H. Jacobson

Jacobson: An expert witness is someone who by virtue of their training or experience is qualified to testify in areas that are beyond the common experience of a typical member of a jury. The way our legal system is set up, the jury consists of people who are considered reasonable men and women. The standard for most things in our law is what a reasonable person would do. That means the jury is more than capable of deciding

for themselves what is or is not an appropriate course of conduct, unless of course it involves the course of conduct of someone who has special training. It could be a lawyer, a doctor, or a plumber, but it is someone whose training is something that the person on the jury might not understand. They need someone who has experience in that area to explain to them what a reasonably competent lawyer or doctor or . . . plumber would do under the circumstances. An expert is someone who . . . understands what that is.

For example, I testify as an expert witness in legal malpractice areas involving business and real estate disputes. I have been practicing law for 42 years and that practice has been focused on handling real estate

and business matters. So, by virtue of my experience, I can testify as to what a reasonably competent lawyer would do in a circumstance which a jury might not otherwise know. If it [concerned] a lay person, the jury doesn't need my help, because, by definition, it is what a reasonable person would do.

Bloomberg BNA: In what areas are you qualified to testify?

Jacobson: I offer testimony as an expert witness in three areas. One of them is, of course, legal malpractice involving business and real estate disputes. The other is based on my experience in real estate brokerage as a lawyer representing clients in the real estate brokerage area. I was [formerly] the vice president of legal affairs of the California Association of Realtors. I have represented several boards of realtors. I was California counsel for a national real estate firm and I lecture and write a lot in the area, so by virtue of that I have a pretty good handle on what real estate agents do or don't do in any particular transaction. So I testify as an expert witness in real estate agent standard of care matters. I also testify as to the interpretation of standard real estate documents.

California is somewhat unique in that lawyers don't usually get involved in drafting real estate contracts, certainly not for single-family residences and quite frequently even for commercial properties. Real estate agents are allowed to complete standardized form agreements such as those prepared by the California Association of Realtors and the Association of Industrial Realtors, and those can be somewhat complex and

confusing forms, so I sometimes testify as to how they are interpreted.

Bloomberg BNA: How does an expert witness get engaged?

Jacobson: Marketing one's services is significantly different than marketing [one's services] as an attorney. I have never been a big fan of lawyer advertising—although there is nothing inappropriate about it—but it is just not something I do. But you do have to market as an expert witness because it is a different kind of business development.

Unlike a lawyer who markets to the ultimate client, an expert witness is really targeting the lawyer who represents that client. It is the lawyer who makes the decision that they need the expert witness, and it is the lawyer who needs to evaluate the credentials of the expert. My marketing is directed at lawyers. For example, the Los Angeles Bar Association has a directory of experts and consultants, and my name is in there. I usually have advertisements in the state bar journals and the local bar journals, things that are directed to lawyers, as opposed to the general public. I also have a website because the usual way a lawyer seeks out an expert witness is [to] turn to their legal assistant or paralegal . . . [who] will go on the Internet, and with any luck my site will pop up and they will contact me.

But when I am initially contacted, the first question I ask is always who the parties are, because I have to do a conflict check. There are ethics rules that apply to me as a lawyer. Once I ascertain that there is no conflict, I get an overall description of what the case is and what the issues are, and I will usually say at that point, assuming that it is something I am comfortable with, "Based on what you told me, I can probably give you a favorable opinion, if the documents that you provide me are consistent with what you have said." That will usually result in my being engaged and I will get the documents. If there is a glitch or problems I will discuss [that] with counsel, but assuming that they are consistent I will proceed to formalize my opinions.

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I have virtually no contact with the client. By design. The state bar rules of professional conduct prohibit a lawyer communicating with a client represented by another lawyer. The second reason is I don't want the client to be confused into thinking that I'm their lawyer. I'm not. I'm their expert witness.

Bloomberg BNA: Do you, like doctors and police sometimes do, find it difficult to testify against other lawyers?

Jacobson: Occasionally you get the feeling that there but for the grace of God go I, where the lawyer makes an innocent mistake. And whether the mistake is innocent or not, it causes damage and the lawyer has to compensate the client for it.

Usually though, at least the cases I have been getting . . . more recently involve lawyers whose conducts is really unsettling. This morning I was discussing an engagement in a matter involving a lawyer who had been retained by a client homeowner where—not atypically these days—they were in financial trouble. The home was in danger of foreclosure. They engaged the lawyer to negotiate a loan modification and save their house from foreclosure. The lawyer took a retainer of several thousand dollars and then didn't do anything. There was a kind of a scandal last year in California about a handful of lawyers who basically were running loan modification mills. They were collecting money and not doing anything. [This] resulted in several disbarments and other action taken. In those circumstances I really feel that this is someone who is an embarrassment to the legal profession. As president of the Beverly Hills Bar Association I am particular sensitive to the image of lawyers.

Bloomberg BNA: What are some of the common legal troubles real estate professionals can get into?

Jacobson: In cases involving the real estate lawyers' standard of care you have got the innocent mistake. You've got the real estate agent who just makes a mistake in drafting the document and just inadvertently prepares an unenforceable document. Then, you've got the person who is really engaged in extensive self-dealing and non-disclosure and hidden profits, side deals, things like that.

My practice is not limited to being exclusively on the plaintiff side. I do a lot of defense work as well. [There] you have circumstances where the client has an unreasonable expectation of what he thinks the lawyer is doing and an unreasonable expectation of the scope of what the real estate agent does. I should preface this by saying that expert witnesses do not testify to the jury what the facts are; that is the jury's job. Nor do we testify to the jury what the law is, that's the judge's job. We testify to what [is] called custom and practice, which is, what does a reasonably competent lawyer or real estate agent or whatever do in order to meet his duty?

An expert witness, when he gives an opinion, has to work on a set of assumed facts. Basically, what does the plaintiff intend to prove at trial, and you will assume that he successfully proves it. If he doesn't, then he obviously is not going to win the case. But you give the opinion based on assumed facts. On a set of assumed facts I can only give one opinion.

The single most important thing to be a successful expert witness is you have to have credibility with the jury. The jury has to want to believe you. And there are two things that go into that. One of them is your expertise, what your background is, your (curriculum vitae). What experience have you had that qualifies you to give an opinion? And the more experience that you have had, the more persuasive you can be.

But in my experience, the single most [important] factor that goes into credibility is the reasonableness of the opinion. You are not coming in saying, if you're the plaintiff's expert, that the defendant did . . . absolutely nothing right. All you are testifying to [are] those areas where he didn't get it right. You don't have to tar him with a brush. I have seen some experts whose standard of care for a real estate agent is that he has to be the equivalent of a lawyer, an accountant, a contractor, and a structural pest inspector. They don't have to be at that level.

On the other hand, if you are a defense expert, you don't have to take the position that your guy did a perfect job. He doesn't have to do a perfect job. He just has to do the minimum necessary to meet the standard. For purposes of malpractice, you don't have to do a good job, you just have to do the minimum job that a reasonably competent person of like training would do.

So you have to be reasonable when you frame the opinion. If you give four or five opinions in a case and two of them are really rock solid, based on the facts and are eminently believable, and you give three that are completely off the wall, you affect your credibility on the two that have merit. I have seen some experts who [are] just incapable of considering any possibility that the party to whom they are giving testimony for could have done anything wrong. That is not reality. The jury understands that no one is perfect.

Bloomberg BNA: Are there a lot of different types of expert witnesses?

Jacobson: There are really two types of expert witnesses. There are standard of care experts, which is what I am. And then there is another kind of witness which I will refer to as a *Daubert* expert—named after a case. Those are your technical experts, the guys who will [testify], “I measured the skid mark and it was 43 feet long from when he applied the brakes and based on the condition of the time and the weather I have calculated that the speed at the time of impact was . . .” That's not what I do.

Bloomberg BNA: Do you have troubling cross examinations, perhaps where they throw curve balls at you?

Jacobson: The thing to understand is that for commercial real estate agent cases, as opposed to residential, you have somewhat different standards. For one, the transactions are usually much more sophisticated and much more likely that there will be a lawyer involved. And that changes the playing field.

If you have a transaction where a real estate agent and a lawyer is also involved the scope of the real estate agent's responsibility is somewhat reduced. If the real estate agent produces an agreement and the lawyer reviews it and there's a mistake in the agreement, it can, to some degree, work as a get-out-of-jail card for the agent, because he has deferred to the professional who has the greater expertise in the area.

Also, in California at least, the scope of due diligence in commercial is different than it is in residential. For better or worse, the legislature and the courts in residential assume that the typical seller or buyer is relatively unsophisticated and needs a lot of help, whereas in a commercial transaction [the parties concerned] have a better handle on what they are doing. So for that reason a real estate agent in a residential case has much greater duties in terms of disclosure documents, due diligence, inspections, [and] somewhat less in a commercial.

On the commercial side you are usually going to end up with much more sophisticated issues because in a commercial transaction you are not merely looking at the purchase of a piece of real estate. You are also looking at the purchase of a business. If you are buying a single-family residence, you are not really concerned about cash flow and issues related to that. When you are buying an apartment house, to a large extent it is the monetary concerns that are involved and the role of the agent is significantly different in what they have to do.

In a commercial transaction there are a lot more things that can go wrong, like finding out a tenant who you thought had a long-term lease doesn't because the real estate agent didn't check out the leases or request estoppel certificates from the tenants. Or the cash flow is somehow different than what was represented.

Bloomberg BNA: Is there one mistake that stands out, and reoccurs a lot?

Jacobson: I think a typical problem is where the real estate agent merely fills out the purchaser's agreement and really isn't advising the client in terms of what needs to be done in the transaction. That's why one of the critical factors is, is there another professional involved? I had a matter where I was engaged as a defense expert and they had asserted that the real estate agency really didn't do a financial analysis of the financial information that was provided, that they didn't do a lot of things that a reasonably competent real estate agent would have done. In my testimony I agreed, there were lots of things they could have done. But they didn't have to, because in this transaction there was a financial adviser that the purchaser/plaintiff had been using for years and there was testimony from the purchaser that he wouldn't make a move without the approval of his financial adviser. There were communications in the file in which the real estate agent said, “I have not reviewed this financial information. I am forwarding them along to your financial adviser now, who is going to do the financial review.”

Bloomberg BNA: Do you turn a lot of cases down?

Jacobson: Normally I am contacted by a lawyer who has already done the evaluation, so the number of times where I say, “There's no case,” is relatively limited because they have already pre-screened it. That's one of the reasons I don't talk to the client, because it hasn't been pre-screened. It is a rare circumstance where I look at it and say, “I can't agree with you.”

Once in a while I get a very unpleasant surprise. I start looking at the documents and find out that the lawyer left out a very relevant fact.

**If I were the all-knowing master of time, space,
and dimension, like Doctor Who, I'd want to take
his bar license and burn it on the courthouse
steps.**

Bloomberg BNA: Inadvertently or intentionally?

Jacobson: Some lawyers do it intentionally because they want to retain the expert and they are afraid of scaring the expert off, which is absolutely the wrong way to go about it. In California, when an expert is designated, it is a representation to the court and the other side that you are sufficiently familiar with the facts of the case to give competent testimony at deposition or trial.

Bloomberg BNA: What sort of tricks have opposing counsel tried on you, to discredit your testimony?

Jacobson: Generally speaking, cross examination falls under two categories. Those lawyers who understand that I am also a professional and I don't have a dog in the fight, and it is a courteous professional ex-

amination that discusses real issues. And there are some who want to take an adversarial approach, which I think is a mistake because it doesn't play well with the jury.

In terms of qualifying as an expert witness, in the area of legal malpractice, that is usually not an issue. I have been in practice for 42 years and my background qualifies me to testify. What I testify to are things that I do on a regular basis. Now, in the area of real estate agent standards of care, although I have a brokers license, I don't use it a lot. My experience in the area comes from having represented real estate brokers, having represented boards of realtors, being active in organized real estate. Sometimes counsel will try and make a big deal, [saying], "You haven't negotiated that many real estate purchase contracts." I'll say no, not as a broker, but I have been co-counsel with brokers in hundreds of them.

Bloomberg BNA: Did you get your brokers license to better prepare yourself to do the work that you do?

Jacobson: Actually I got my real estate brokers license long before I even thought about being an expert witness. Because I did so much work in real estate and because in California there's a real estate brokers license and a real estate sales license. You need no experience to get a sales license; you just take the exam. For the brokers license you actually have to have experience as a real estate salesman. There is an exemption for lawyers, by virtue of the fact that we get more training than a real estate agent does. And because of that . . . I thought this might be a good thing to have. I have used it occasionally over the years, but I have been too busy as a practicing lawyer ever to consider spending significant time actually doing work as a real estate broker. It certainly helps in terms of the qualification but to a large extent I don't rely on what I have done as a real estate broker for my experience to testify in that area. I rely on my experience as a lawyer practising with real estate brokers advising real estate brokers and teaching real estate brokers.

Bloomberg BNA: How difficult are the cross examinations? Do they come down hard on you?

Jacobson: Cross examination falls into two categories: those who think they can make a big deal out of it, and all they do is give me an opportunity to discuss at length all of my qualifications. Then there are those who regularly do defense who will not even go there, they will stipulate, because they don't want the jury to hear it.

Bloomberg BNA: What do you see in the future for the profession of expert witness?

Jacobson: Certainly California is a litigious state, so there is always going to be a lot of litigation. Giving what is going on the real estate market, I have probably seen more real estate agent expert matters in the last few years than I typically have, simply because of the crash of the real estate market. When you buy a piece of property for \$500,000 and six months later you find that the roof is leaking . . . but six months later your house is worth \$650,000, and all you have to do is refinance and pay for it, you are not as concerned as when you buy a house for half a million dollars and you find out six months later you have \$10,000 in roof repairs and your house is only worth \$400,000. Then you really have to write the check. Under those circumstances you are more likely to look for someone to blame, because it's costing you real money. And because of the decline of the real estate market, problems with the property that people might have lived with, they now want to use as an excuse to get out. When you can't sell it and you can't walk away from it . . . [these problems] are more aggravating than they might otherwise be.

Bloomberg BNA: What is the worst behavior that you have come across?

Jacobson: Probably the worst thing I have ever seen—just in terms of my gut reaction—was the lawyer who undertook the representation to get the loan modification to forestall the foreclosure and did absolutely nothing, literally stole the money. If I were the all-knowing master of time, space, and dimension, like Doctor Who, I'd want to take his bar license and burn it on the courthouse steps.

In the area of real estate, when they make a mistake in the drafting or they make a good-faith error and so on, you almost feel badly for them. The ones I have an issue with are the ones who are doing self-dealing, the ones who have the deals on the side that they are not disclosing, the ones that have hidden profits.

Bloomberg BNA: Did the economic meltdown cause more of that sort of behavior?

Jacobson: It's hard for me to say across the board, although based on the real estate programs I'm going to, there is lot of fraud in the short sale area going on. And there are a lot of real estate agents who are absolutely dishonest. Now I have to say, we're talking about a small percentage. The overwhelming number of real estate agents and the overwhelming number of lawyers are competent, ethical, and professional. They're the ones who don't usually get sued.

In my expert witness practice I see the bad part. In my activities involved with organized real estate and the organized bar, I get to see the good lawyers and the good real estate agents, of which there are many.