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How to be an effective witness in real estate litigation

August 14, 2014 - Connecticut

Anyone involved with significant commercial or residential real estate may eventually end up as a witness in a deposition or in court, in cases ranging from a real estate tax assessment appeal, landlord/tenant dispute, condemnation case or foreclosure to litigation over a construction defect, a broker's commission or otherwise. Hopefully, you will have the benefit of strong legal representation as you prepare to testify, but there are certain general rules of thumb that will help you be an effective witness.

Expert Witnesses

Most expert witnesses have made an affirmative effort to build up their credentials and look forward to testifying in contested litigation. Sometimes, however, an individual with a wealth of experience may find himself or herself in the position of being qualified as an expert in a given case without having given it much thought before that given case. Regardless of which category you fall into, here are some practical tips that will help make you an effective expert witness:

1. Review any material and/or analyses upon which you are expected to testify in detail and in advance.
2. Be prepared to address questions as to your professional qualifications and competency to serve as an expert.
3. Discuss potential areas of inquiry with counsel beforehand.
4. Review with counsel the use of exhibits, including charts, photographs, maps or other visual aids.
5. Know the weaknesses in your analyses and conclusions and be prepared to address them head-on. Don't gloss over them as they are likely to be focused on by the cross-examining attorney.

Fact Witnesses

Virtually anyone with personal knowledge about the nature of the dispute at the heart of the case may be called as a fact witness. Sometimes, even those on the periphery may find themselves in the crosshair sights of a zealous attorney, especially during the discovery and deposition process. If you find yourself in that position, keep in mind the following:

1. Be prepared. Although you may not be an expert witness in the matter, you should have a good working knowledge of the issues at hand.
2. Testify as to the facts in the case only and avoid offering your opinions or conclusions.
3. Understand that your credibility may be challenged by cross-examining counsel. Maintain a calm demeanor and do not take it personally.

All Witnesses

Finally, there are certain basic rules that every witness should follow:

1. Always arrive on time and dress neatly and professionally.
2. When asked a question, if you don't remember, say so. It's always better to refer to a document or your file to give a correct answer, instead of guessing wrong.

3. Answer only the question asked. Do not fall prey to the temptation to keep speaking during long, awkward pauses in questioning. Speak clearly and concisely.
4. If you do not understand a question, or it is vague, ask for a clarification.
5. Pause and think before answering. In a deposition, the transcript will not reflect a long pause before your answer.
6. Remember that it is the job of the cross-examining attorney to try to rattle you and impugn your credibility. Do not take it personally.
7. Maintain a calm and professional demeanor. Be cognizant of your body language.
8. Avoid the temptation to play "gotcha!" with the cross-examining attorney during questioning. It's not your role to spar with counsel. At best, it will impact your credibility as a witness, and at worst it may backfire on you.
9. Always tell the truth.

These are just a few of the basics to keep in mind should you find yourself testifying as a witness in a real estate matter.

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