



Wagenseller Law Firm

Real Estate Development and Law Newsletter



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Wagenseller Law Firm

- Full Service Business and Real Estate Law Firm
- Excellent Service in an efficient and cost-effective way
- Proven trial experience
- Results oriented
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Expert Witnesses: Striking a Late Designation

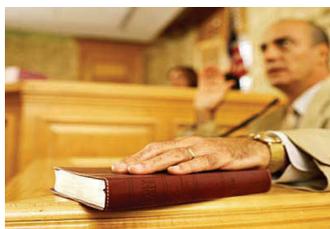
“When it comes to issues that both sides anticipate will be disputed at trial, a party cannot merely ‘reserve its right’ to designate experts in the initial exchange, wait to see what experts are designated by the opposition, and then name its experts only as purported ‘rebuttal’ witnesses. ...The trial court erred by acquiescing in it.”

Section 2034.260 of the Code of Civil Procedure requires that all parties exchange information concerning expert witnesses on or before the date set for the exchange.

Except for certain exceptions, the Code states that the trial court **shall exclude** from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to list that witness as an expert under Section 2034.260.

In *Fairfax v. Lords*, the Court of Appeal expressly rejected the idea of a party ‘gaming the sys-

tem’ by not identifying any expert witnesses in the first go around, waiting to see who the other party designates, and then identifying ‘supplemental’ rebuttal witnesses.



The Court of Appeal opened its opinion by stating “In this case, we conclude that ‘simultaneous’ means ‘occurring at the same time.’ In this case the defendant (Lords) exchanged a “First Designation of Expert Witnesses” in which he did not designate any experts but stated that he reserved the right to designate rebuttal experts.

After receiving the plaintiff’s designation, the defendant submitted a “Second Designa-

tion of Expert Witnesses” in which he now designated purported ‘rebuttal’ witnesses.

The Plaintiff moved for an order striking the supplemental designation, which the trial court denied. Plaintiff thereafter brought a motion in limine on the same issue. Defense counsel argued that since he had made the original exchange, he was guaranteed “the right to identify any retained experts he chose to hire as ‘rebuttal’ experts.”

Defense counsel also argued it is simply prudent litigation defense practice to minimize the cost of litigation by allowing plaintiff to declare the issues he intends to retain experts for, and for the defense to then offer appropriate rebuttal experts. It would also be poor litigation strategy for the defendant to designate an expert prior to knowing what type of expert plaintiff has chosen. (continued p. 2)



Are You Working *On* Your Business?

“If you want to work in a business, get a job in somebody else’s business! But don’t go to work in your own. Because while you’re working, while you’re answering the telephone, while you’re baking pies, while you’re cleaning the windows and the floors, while you’re doing it, doing it, doing it, there’s something much more important that isn’t getting done. And it’s the work you’re not doing, the strategic

work, the entrepreneurial work, that will lead your business forward, that will give you the life you’ve not yet known.”

“Don’t you see? **If your business depends on you, you don’t own a business—you have a job.** And it’s the worst job in the world because you’re working for a lunatic!”

So says Michael Gerber in his book **The E-Myth Revisited**.

The E-Myth Revisited talks about creating models and processes that will govern your business, no matter who is doing the work, so that you deliver a consistently outstanding product over and over again. Think McDonalds and its global franchise.

Mr. Gerber sets forth the rules to follow in creating a model:

1. The model will provide consistent value to your customers, employees, suppliers, and lend-



Leases: Top 5 Questions When Leasing Commercial Space

How much space am I really getting? Your usable space is often less than the actual space. If your space is described as ‘rentable square feet’ or ‘gross leasable area’, ask your landlord what the ‘load factor’ is. The load factor refers to the amount of space you are paying for that you do not actually have (because it includes lobbies, hallways, restrooms, etc.)

Who will build out (and pay to build out) the space? Who performs the work—the landlord or you? If it is the landlord, when must he complete the work? What happens if the space is not

ready by then? Will you still have to pay rent even if your space is not ready?

What if I need to break my lease? What costs will you be responsible for? Typically the landlord will want to recoup the brokerage commission, attorneys fees, tenant improvements, and costs to restore the premises.

How much money will I have to pay every month? On top of rent a tenant must consider the Common Area Maintenance (CAM) charges. Review the building’s CAM charges for the last 3 years. Make sure you are only paying

for legitimate CAM charges and build in a right to audit the charges if you believe they are padded. In full service gross leases, make sure that you define your Base Year.

Who is responsible for maintaining the building? The landlord will typically try to make the tenant responsible for everything while the tenant wants just the opposite. If it is unclear, spell it out in the lease.

Feel free to call me at (213) 996-8341 with any questions about your lease.

Michelle



Expert Witnesses: Striking a Late Designation (cont’d)

The Court of Appeal rejected this approach.

“There are two significant problems with Lords’ reasoning. First, he seems to be assuming there is no way for defendant to determine what claims are at issue in a particular case until plaintiff reveals his expert witness list. That is simply untrue. “The complaint itself is a rich source for determining what claims are at issue.” Moreover, ordinary discovery is also available.

“The second, and more fundamental problem with Lords’ argument is that it is sim-

ply inconsistent with the clear statutory requirement of a ‘simultaneous’ exchange. Even if we agreed that defendants’ interests would be better served by a system which allowed them to designate experts only *after* seeing plaintiffs’ list (and it would be difficult to dispute the point), that is simply not an appropriate basis for ignoring the requirements of the statute.”

“Our system requires that defendants participate in the litigation essentially simultaneously with plaintiff. Section 2034 expressly requires it with respect to expert designations. If Lords would like

to see that requirement changed, his remedy is with the Legislature, not the courts.”

“We therefore conclude the court erred in denying Fairfax’s motion to strike Lords’ ‘second designation’ of expert witnesses. The motion should have been granted, as Lords had no right to simply delay his designation of retained experts until after he had the opportunity to view the designation timely served by Fairfax.”

As the California Supreme Court noted, “Late disclosure of experts ... frustrates the very purposes of the discovery statutes.”



...Or Are You Working In Your Business? (cont’d)

ers, beyond what they might expect.

2. The model could even be operated by people with the lowest possible level of skill.

3. The model will stand out as a place of impeccable order.

4. All work in the model will be documented in an Operations Manual.

5. The model will provide a uniformly predictable service to the

customer.

The E-Myth Revisited asks a business owner to figure out “How can I systematize my business in such a way that it could be replicated 5,000 times, so the 5,000th unit would run as smoothly as the first?”

Mr. Gerber stresses the importance of an Operations Manual in which every employee activity is

set forth in detail, the key being to create a turn-key operation in which employees have little or no discretion. Each activity is set forth in a check list that employees can follow.

The manual and checklists lead to a consistency that customers come to appreciate and rely on. Take a moment to work on your business.

Message from Laine Wagenseller...

Michael Gerber's book *The E-Myth Revisited* talks about giving your customer a sense that your business is a special place, created by special people, doing what they do in the best possible way.

We are blessed at WLF to have great attorneys and assistants who really believe that they are working for special people—our clients, and doing so in the best possible way.

Mr. Gerber also talks about the importance of a work place with **"integrity, intention, commitment, vision and excellence."**

As we grow as a law firm, I have spoken with each of our employees on the importance of integrity. While I believe in fighting aggressively for our clients, there is nothing for which we would (or should) sacrifice our integrity.

We also bring an intention and commitment to our work that helps us focus on reaching solutions and solving problems.

Lastly, we have set a high standard for excellence. We believe that everything we do should reach these high standards constantly and consistently.

Laine



In The Works: Cases We Are Working On

LITIGATION

- A **shopping center owner** has hired us to pursue an ex-tenant who abandoned the premises in the middle of the lease and left the property damaged. We have filed similar lawsuits on behalf of two separate industrial warehouse owners against their former tenants.
- We are handling a lawsuit by our client, a general contractor, against a developer relating to the construction of a **townhome development** in Pasadena. The

developer has counter sued for damages.

- We continue to handle a lawsuit by a Korean national against our client relating to the manufacture of custom wheels in Korea.
- We were successful in getting a lawsuit by **dissident LLC members** in a real estate development project dismissed voluntarily. The lawsuit alleged mismanagement by the developer and construction problems by the general contractor.

- A **real estate investor** has retained us to defend a lawsuit by his erstwhile partner, who alleges that he defrauded her out of the property.

TRANSACTIONS

- We assisted a mid-Wilshire landlord with a **building façade advertising lease**.
- A consulting firm hired WLF to assist with **contract review** and drafting relating to several consulting projects.

Our Vision:

To be the preeminent boutique real estate law firm in Los Angeles

Tell A Good Story: How To Win A Trial

We all love a good story, and jurors are no exception. To hold their attention, you must present your case in the form of a story. Organize your facts as if they were a work of fiction. Put together a narrative that builds to a climax and features clearly defined characters. Construct your story around an overarching moral or theme. For inspiration, think about the great themes in literature—good v. evil, justice v. injustice, pride v.

humility, greed v. generosity.



They have held up for centuries because they tap into our com-

mon human experience.

The right theme also makes the legal issues more accessible. For example, fraud is a concept far removed from the daily lives of jurors. However, at the heart of every fraud case is a betrayal of trust. That is a concept everyone can understand and identify with, because we have all experienced it.

-The Trial Lawyer: What It Takes To Win by David Berg





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News and Happenings...

- Welcome to **Morgan Malek**, who has joined us as an attorney. Ms. Malek has conducted over 20 trials and looks forward to helping out our clients with their litigation needs.

- Laine Wagenseller will be speaking in Long Beach at a seminar entitled "**Real Estate Development in California**" on September 23, 2008. See our website for more information.

- Mr. Wagenseller travelled to Las Vegas to watch the U.S. **Men's National Basketball team** (led by Duke's Coach K) play Canada before heading to Beijing for the Olympics.

- Laine Wagenseller chaired and attended his **15th law school reunion** at the Gould School of Law at University of Southern California.

- **Justice Ming W. Chin**, an associate justice of the California Supreme Court, spoke to a Federalist Society luncheon which Mr. Wagenseller attended.

- Michelle Strassburg attended the **Consumer Attorney's annual convention** in Las Vegas in which she participated in a number of trial skills workshops.

- "**Actions by Dissident LLC Members**", an article by Laine Wagenseller on dealing with lawsuits by members in a

development LLC, was published by Stewart Title in their **Commercial Property Update** for August 2008

- Joining 93,000 others, Mr. Wagenseller watched **USC trounce Ohio State 35-3** at the Coliseum. (What was the UCLA score that day?)

- Mr. Wagenseller appeared in a panel discussion on "**Capitalizing on Commercial Real Estate**" at the Los Angeles Venture Association's annual Investment Capital Conference at the Biltmore Hotel in downtown Los Angeles.

• Congratulations to **Michelle Strassburg** who was victorious in a trial on behalf of our client against a mortgage brokerage for unpaid invoices. Michelle won everything that we asked for.

- **USC's Marshall Partners** have held a number of events which Mr. Wagenseller attended: a leadership symposium, an event at the Ketel One Vodka facility in Aliso Viejo, and a leadership dinner honoring Marshall volunteers at the Jonathon Club.

- Mr. Wagenseller attended a scholarship event for **Duke University** at the home of Bruce Karsh of Oaktree Capital.

