

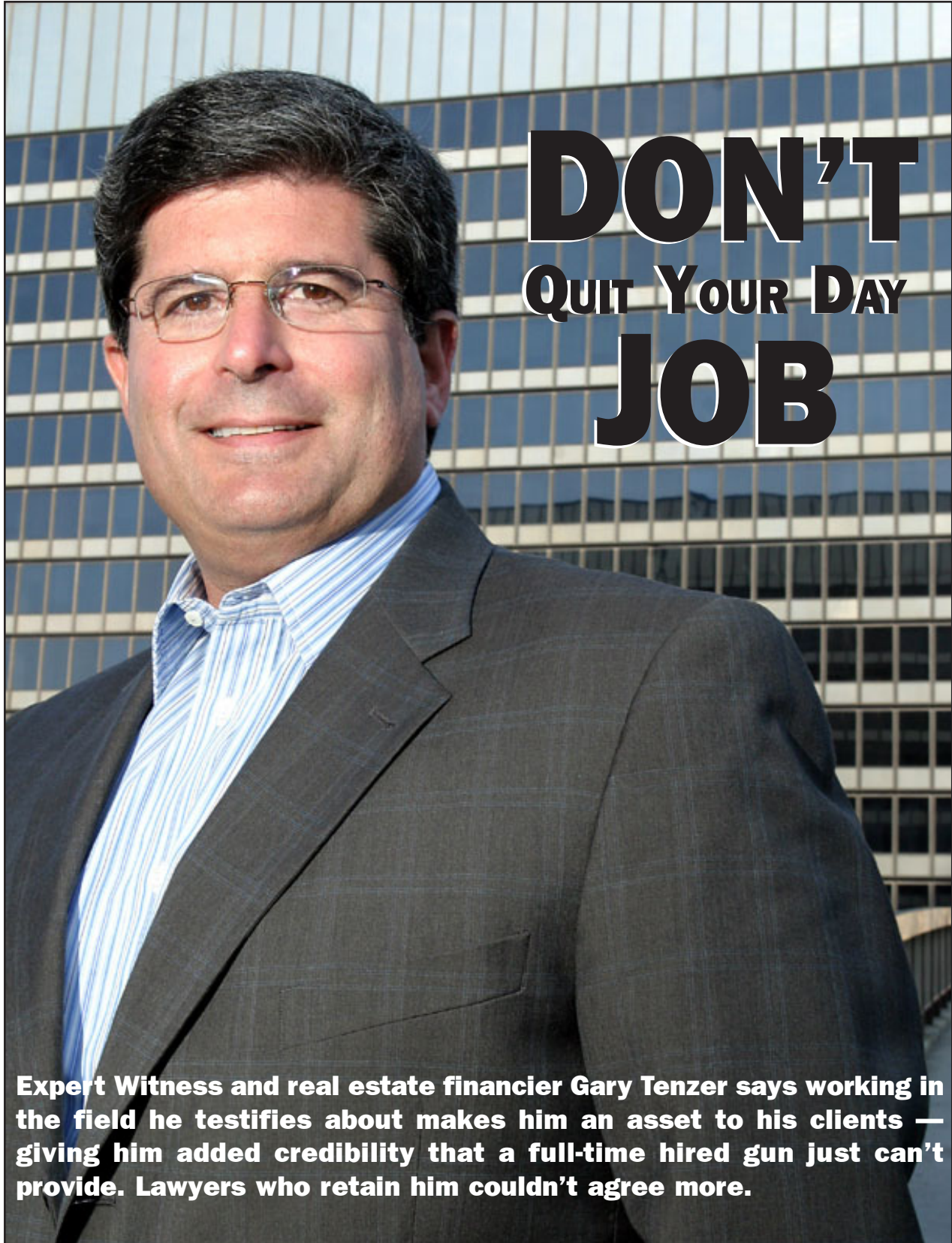
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Expert Witness and real estate financier Gary Tenzer says working in the field he testifies about makes him an asset to his clients — giving him added credibility that a full-time hired gun just can't provide. Lawyers who retain him couldn't agree more.

PHOTO BY HUGH WILLIAMS

Reliable Witness

When lawyers call Gary Tenzer to the stand, they know they're getting more than just an expert in real estate financing. Tenzer's familiarity with the field helps him deliver testimony that makes sense to juries.

By Draeger Martinez

When an expert witness takes the stand, the lawyer who called him is banking on more than just his expertise in a certain area. A highly effective witness also bring to the table a human touch that helps juries understand and relate to the expert's testimony, whether his field is forensic science, medical malpractice or even real estate finance.

Banks and other lenders often turn to expert witnesses to explain their field in court during bankruptcies, breach-of-contract lawsuits and other matters. One such witness, Century City-based Gary M. Tenzer, draws on his extensive day-to-day experience in real estate finance to make his points persuasively during trials.

Tenzer, executive vice president of real estate finance firm George Smith Partners, has handled real estate deals worth \$3.5 billion and has served as an expert witness in 60 lawsuits in his 26-year real estate career. He holds master's degrees in finance and real estate finance, both from the University of Southern California.

"My primary business is financing, and my firm mostly does real estate investment banking, where we represent developers and other borrowers before the lending community," Tenzer says. "It's not like a residential loan, where you look at the sheet saying today's rates are this or that.

"You have to tailor a loan that works for each client. Each one is different, and once you know what the borrower wants, you can start to craft your pitch to the lenders."

Tenzer says that he often starts work on

cases as a business consultant, then progresses into being an expert witness. Tenzer says he has been involved in 40 legal cases as a consultant providing advice about finance trends and concepts, in addition to his expert-witness cases.

"Sometimes, I get calls by attorneys from both sides, usually partnership disputes, and I'll typically go with the side that contacts me first," Tenzer says. "I have turned cases down if I find that I can't make arguments that will bear out the case. I will point out approaches that I think lack merit, and suggest alternates that I think have merit."

Tenzer considers himself a rarity in the field of real estate finance witnesses, since few other finance practitioners testify, for fear of offending prospective real estate clients.

But Ben F. Tunnell III, chairman of BTI Appraisal in downtown Los Angeles, says witnesses working full time in the real estate field are hardly unique. Tunnell says hundreds of successful appraisers in the state have experience testifying in court.

"The larger or more diverse the appraiser's practice, the more experience they're likely to have," says Tunnell, who has worked in real estate for 30 years. "Where [Tenzer] may testify about the financing available, I would testify about the buildings' values and negative issues such as use of toxic materials, earthquake damage or reductions in rents."

Tunnell asserts that most real estate witnesses provide testimony if called, regardless of what it could mean to their future real estate business.

"If someone were afraid, I think they would not be considered an expert, but a

partisan witness," Tunnell says.

Tenzer says that he gets most of his legal work through referrals and word of mouth. His firm also hosts 25 informational conferences with law firms each year, which provide continuing-education credit for the attorneys and future business for George Smith Partners. The firm, founded in 1992, comprises Tenzer and six other principals, plus 25 additional staff members.

"[Attorneys] become aware of the real estate market and aware that I offer these services," Tenzer says. "I could meet an attorney today, and he might not have a case that would match my services for 10 years. But we do rely heavily on referrals, including inside-the-firm referrals within big firms."

Tenzer says that, on occasion, attorneys cold-call the firm seeking testimony for a case. He's the only financier in the firm that provides testimony, so all such calls get referred to him.

"I'm listed in the L.A. County Bar registry of expert witnesses, but I don't think that has ever led to a client," Tenzer says.

Several attorneys who have retained Tenzer to testify in lawsuits say his real-world finance credentials set him far ahead of many other experts in the field.

"What I look for in an expert witness is their ability to teach the jury about their area of expertise and to provide an opinion that's well-supported that forwards my client's perspective," says Joel Feuer, a litigation partner in the Century City office of Gibson, Dunn & Crutcher.

"In the last case where I engaged Gary, he performed wonderfully. It was a court

trial with a judge only, and it focused on taking loans and putting them into a pool, then issuing securities based on that,” Feuer says. “We won the case, and as I recall, the judge reflected on Gary’s testimony favorably. He’s a very intelligent man with a strong finance background, and he can explain it easily to people who are not as knowledgeable.”

Jeff Costell, a co-founder of Santa Monica’s Costell & Cornelius, says his firm has retained Tenzer numerous times and that he has recommended him to other firms, as well.

“Gary’s a tremendous witness who follows what’s going on, and he holds up well under cross-examination by opposing counsel,” says Costell, whose firm handles mainly real estate, commercial litigation and bankruptcy cases. “Gary is not a full-time ‘hired gun,’ because he’s in the marketplace daily, and judges respect that. They give greater credibility to people who are active in real-world practice, more than people who are semiretired or stuck up in an ivory tower.”

Bennett Silverman, also of Gibson Dunn, adds that Tenzer’s finance background allows him to update his testimony to reflect changing markets.

“Gary not only understands financial arrangements but understands how these relationships change over time because they’re all subject to the to-and-fro of the finance market,” says Silverman, a business-restructuring partner in the firm’s Los Angeles office. “Gary’s very good at looking at interest-rate mixes and calculating blended return rates to figure the overall debt load’s value.”

Chris Adelman, owner of Adelman Appraisals in Sherman Oaks, has appraised property for 15 years and has provided expert testimony for seven years. Like Tenzer, Adelman considers himself a working real estate professional who does testimony on the side, and he says that hurts his getting expert-witness assignments as much as it helps.

“I’ve never understood how a witness-only person could understand the field. If they never go out on an open house, then how would they really appraise a property well?” Adelman says. “There have to be dozens of such witnesses in California alone.

“They get jobs because their résumés say they’re in court all the time, but I think they’re easier to manipulate because they’re not doing real-world jobs. They’re not there to provide value; they’re mainly there just

to make some money.”

Tenzer, who says his company has handled \$3 billion in real estate deals this year alone, agrees that his “day job” has proved immeasurably helpful in his courtroom appearances.

Tenzer’s finance portfolio includes commercial, retail and industrial sites, plus single-family and multifamily residential sites. One of his large recent transactions brought together offshore investors and an offshore credit bank to finance a \$150 million joint venture to build a 515-home active-adult community.

“The way I prepare my testimony is to survey lenders about what the current rates are for borrowers, namely borrowers similar to the one in that case,” Tenzer says. “I’ll do separate surveys for each case, but I also rely on being plugged into the markets every day.”

Tenzer says that, during an average year, he spends 10-to-15 percent of his time working as a legal consultant or expert

say what’s the ultimate success of expert testimony,” Tenzer says. “I am very good on the witness stand and at withstanding cross-examination because I’ve been trained by a jury consultant about how to testify for a case where I personally was the plaintiff.”

Costell scoffs at the notion of conducting a trial without expert witnesses such as Tenzer, calling them key weapons in his courtroom arsenal.

“Depending on the case, an expert witness could mean the difference between winning and losing,” Costell says. “Even in cases where you can win without a good expert witness, they often can make the difference between winning and winning big.”

Costell adds that many of his cases hinge on percipient witnesses, namely people perceived as a witness through their expertise or their familiarity with the case’s transactions.

“They’re the only ones that can provide

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—Jeff Costell,
Costell & Cornelius

witness. But that portion of his time tends to follow a “feast or famine” pattern: Some weeks, he’ll spend much of his time doing legal work, but most weeks, he’ll spend little or no time.

“In a recent case, I got called three days before an arbitration hearing, and I put in about eight hours before they wound up settling the case without my testimony,” Tenzer says. “I try to be judicious with my time, but then again, when I have a big deposition to read or a box of documents, I have to read them closely. When it gets very close to a trial or hearing, I go into ‘final exam’ mode and start devoting all my working hours on the case.”

Tenzer says he generally works on a retainer basis and bills his clients monthly. He charges \$550 per hour for legal consulting, trial research and preparing his testimony; if he makes it to the witness stand, his rate goes up to \$650 per hour.

Tenzer says another secret to his success is his lengthy training in providing effective testimony.

“I don’t think I ever have been impeached, where they showed weaknesses in my argument, though I think it’s hard to

that testimony,” Costell says. “If you try to get expert testimony from a layman, their testimony will be thrown out. And the more expertise that an expert can claim, the more important their testimony becomes.”

Tenzer says he began his career as an expert witness in 1992, the same year George Smith Partners started business. He began testifying in single-asset bankruptcies, where borrowers owe more on a loan than their building is worth, to fill a legal need among some of the firm’s finance clients.

“We saw a lot of this in the early ’90s, where lenders would not renew their loans and borrowers were paying their interest but the future looked dim in terms of repaying the principal,” Tenzer says. “Lenders were selling pools of notes on nonproductive or marginally productive loans, and third parties were buying these defaulted notes at a discount. Then, the third parties would try to double-dip by foreclosing on the buildings cheap.”

Tenzer adds that often lenders want borrowers to sell the underlying buildings to them under provisions that their loans would be renewed. But such plans

sometimes can go awry.

"You'll see opportunity funds or 'vulture funds' swoop in and try to foreclose, and developers will declare bankruptcy to try and protect their equity," Tenzer says. "I had no problem taking on cases representing debtors facing an opportunity fund like that."

Tenzer says that, in his early years as a consultant and witness, he handled mainly real estate bankruptcy cases, usually on the lenders' side, though he has not handled any bankruptcy cases in at least five years.

He adds that he sometimes represents borrowers if he considers the lender to have acted capriciously, though he could not recall the names of any borrowers he has represented.

Tenzer emphasizes that he takes great pains to preserve his reputation and avoid conflicts of interest.

"I won't take a case for a borrower facing off against a bank or commercial lender," he says. "But if an investor has bought the debt from a lender, I can work with the borrower against the investor. I have to be cognizant of the overall relationship my company has with the lenders, so I cannot take an adversarial position against them if we do business with them or hope to do so in the future."

Tenzer and Costell both say that most other bankruptcy witnesses rely on esoteric economic theories, not industry contacts, to determine what they consider equitable interest rates.

Tunnel and Adelman say that, when they prepare to testify, they rely on both everyday knowledge of the field and specific information from the case at hand.

"We would review all of the deposition transcripts taken by both sides, as well as all previous expert witnesses and their reports, data, opinions or letters," Tunnell says.

He says he testifies for defendants 75 percent of the time.

"To the extent that we could personally interview them, we would," Tunnell says. "Then we would look at the lost profits or lost property value that resulted from the alleged complaints."

Adelman, who says he testifies for plaintiffs as often as for defendants, explains that he keeps an eye on the property's history in addition to current property values.

"Even though I might not introduce it in court, I will definitely look at the past three-to-five years to see what the property's

percentage growth has been," Adelman says. "And I basically follow what the attorney tells me to do, whether to get more aggressive [or] less aggressive."

Tenzer says that, although judges usually listen to expert testimony carefully in bankruptcy cases, sometimes other factors intrude. He points to a recent case he dealt with involving a Japanese company that owns dozens of properties in Southern California, in which a local manager was accused of converting company assets to his own use for 20 years.

"The parent company sued him for embezzlement," Tenzer says, "and I had to evaluate 25 properties to determine their value, because this guy had been using the company's creditworthiness to finance real estate deals for his own separate company.

"I was shocked to find out, a few weeks after my testimony, and thinking my side had a slam-dunk win, that the parent company did in fact know he had been doing this. So my side lost, and the company was found to have suffered no damage."

Tenzer compares providing this kind of testimony to being one of the proverbial "blind men describing an elephant."

"I'm focused in tight on one aspect, but I'm not seeing the big picture. In fact it's not my job to see it," he says. "I did my job right, and I provided good, solid numbers, but it was moot."

Specialized or not, Tenzer's testimony makes his clients' work easier, Feuer says.

"An expert witness serves to explain their world in a fairly compressed way, in Gary's case the world of real estate finance," Feuer says. "A good expert witness could differentiate between what practices are merely acceptable versus which ones are exemplary or best practices."

Tenzer estimates that 25 percent of the cases he has worked have been bankruptcies, though that segment has fallen off in recent years since parties are finding other ways to resolve their problems.

Another 25 percent to 30 percent of Tenzer's cases are partnership disputes and employer/employee matters, with the rest consisting of cases involving due diligence, municipal governments and nonbankruptcy borrower/lender matters.

"In partnership disputes, my testimony may involve the financial aspects of the case, such as quantifying damages," Tenzer says. "Sometimes, one partner will say another partner was supposed to finance a deal but didn't, and the partnership was

damaged because the deal didn't go forward or they had to get alternate financing at less advantageous rates."

Tenzer says that, in two cases, he has testified about whether a real estate deal was financially viable or not.

"I'm on a case right now where a project hinged on a city granting a ground lease, and the city wasted a lot of time before passing on the deal because they claimed the developer didn't prove financing was available," Tenzer says. "The developer did provide proof, but the city claimed that this wasn't really proof. I testified that it was indeed valid proof of financing."

Costell is also involved in a municipal-government case, for which he anticipates Tenzer will testify by mid-February.

"The city of Santa Monica basically destroyed a developer's project by preventing the project from going forward even though they had an obligation to let it go, and we're suing for lost profits," Costell says. "One of the city's arguments is that the developer could never have financed the project, anyway, and Gary will testify that they could have, if the city had not killed it, and the financing would be available."

Some of Tenzer's cases draw more on his knowledge of finance in general, without any real estate considerations. He cited an employment case he handled that dealt with a real estate executive who had suffered cerebral hemorrhaging, on behalf of a client concerned about how to value the executive's ruined career.

"He went to a hospital about his headaches, and the hospital sent him home with aspirin. He had sued the hospital for rendering him incapacitated and for lost business success because he suffered brain damage," says Tenzer, who represented the defendants, namely the regents of the University of California, which ran the hospital.

"My clients didn't want to settle based on what this guy claimed would be 25 years of successful real estate investments, which could come to \$25 million or more," Tenzer says. "That case settled before I provided my testimony, and I don't know how that turned it out, but I was prepared to testify as to how his investments would have compounded."

"You just lay out your economic assumptions, maybe best-case, worst-case and middle-case models. If your assumptions are solid, your testimony should prove persuasive."