THE COUNSELOR AS EXPERT WITNESS: HAZARDS, PITFALLS AND DEFENSES

by William N. Kinnard, Jr., CRE

There is a rich and varied literature on the topic of How To Be An Effective Expert Witness. In the real estate field, most of the material appears in professional journal articles, papers or monographs which focus on real estate appraisers and the handling of valuation issues. There is an even richer and fuller literature in law journals and texts that deals with *How to Handle Expert Witnesses*, obviously addressed to attorneys specializing in litigation.

Real estate litigators regularly publish articles addressed to real estate professionals (again, mostly appraisers), with checklists of Dos and Don'ts for the real estate expert whose opinions will be given in court or before any hearing board or tribunal. These checklists tend to have two important features in common. First, they generally cover the same content, although organized differently and frequently using different words. Second, they are always presented from the point of view of the attorney, to ease the professional burden on the attorney. Few if any of these written statements by attorneys appear to be aimed at easing the burden or pain of the expert real estate witness.

Real estate counseling is different from appraisal, and The Counselors of Real Estate are different from professional real estate appraisers. Yet there admittedly is considerable overlap between the two disciplines and their practitioners. This might help explain why almost nothing has been published on the particular needs and requirements of real estate *counselors* when they are called upon to give expert testimony in their capacity as real estate *counselors*.

This article is specifically directed toward four issues that are likely to confront any Counselor of Real Estate (CRE) called upon to give expert testimony in his capacity as a counselor.

Review Of General Rules And Admonitions For Expert Witnesses

The published lists of Dos and Don'ts for expert witnesses generally, for real estate appraisers, for real estate academics and for other real estate professionals can serve well as an appropriate starting point for any CRE about to give expert testimony. Participating in a deposition is every bit as important as providing formal court testimony. Indeed, a deposition is simply one type of formal testimony in a different format: It consists almost exclusively of

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questioning of the expert witness, in an adversarial mode, by the attorney(s) for the opposing side.

Whether involved in direct testimony, cross-examination, rebuttal testimony, deposition or simply serving as an informed observer of the testimony of others (when permitted by the rules of the particular jurisdiction), the CRE serving as an expert witness needs to follow certain general rules and guidelines. The literature on expert testimony is full of long checklists for expert witnesses to follow. There are very few short lists.

A good rule for memorization of facts, including checklists, is: Don't do it. When one memorizes, one typically gets the materials *almost* right. In court proceedings, "almost right" is not good enough for the counselor serving as an expert witness.

Nevertheless, there are a few points that need to be emphasized as "rules to live by" for CREs serving as expert witnesses.

1. *Tell the truth.* Remember, a witness has sworn to "tell the truth, the whole truth, and nothing but the truth."
2. *Be prepared.* Indeed, be over-prepared (hyperprepared).
3. *Be skeptical.* Don't believe anything that is presented during deposition or trial proceedings as *fact.* Always treat the *facts* presented by anyone else as assumed conditions in a hypothetical case.
4. *Answer only the question asked.* Don't embellish. Above all, do not volunteer information beyond the direct answer to the question asked. (This can be particularly difficult, especially when it is manifestly clear to the CRE that he knows so much more about the topic than the examining attorney does.)
5. *When a question is asked, think first,* pause (take a deep breath), answer fully and honestly, then shut up.
6. To the extent possible, try to *keep answers straightforward and understandable* to the court: the judge(s) and/or the jury. It is not necessary for opposing counsel to understand your answers. (Indeed, he will feign confusion or lack of understanding on many occasions.) However, it *is* necessary for members of the jury or any tribunal to understand you.
7. To the extent possible, *address answers to the jury, the judge or the tribunal.*
8. *Keep answers short.* Remember that the vast majority of questions can be answered "Yes," "No," "I don't know," "I don't remember," or "I don't understand; please rephrase the question." If a question can be answered that way, it should be.
9. *Keep to the point.* Try not to stray. Once again, do not volunteer information.
10. Difficult as it may be, work hard *never* to *become visibly upset.* Do not treat negative comments or implications about oneself as personal assaults or affronts. Always strive to be polite and courteous, no matter what the provocation.
11. *Avoid making assumptions or drawing inferences from questions asked.* Accept any assumptions provided in the statement of a question, and be sure to label them as "assumptions" in your response. Also, recognize that the answer to any question that begins "Isn't it true that . . ." is probably "No."
12. In the courtroom, the hearing room, the deposition room and nearby, *maintain an outward appearance of independence, objectivity, even aloofness.*
13. *Be prepared* and *tell the truth.*

Within the framework of these general guidelines, four (4) major concerns require particular attention by real estate counselors who serve as expert witnesses.

Professional And Ethical Standards

Real estate counseling is not as widely recognized or as carefully delineated a discipline as are, for example, real estate appraisal, real estate management and real estate brokerage. Indeed, the necessarily broad, sometimes comprehensive, nature of counseling means that it is perceived and interpreted differently by clients, observers and practitioners alike. It may appear somewhat as the elephant did to the blind men in the fable. For Counselors of Real Estate, both the CRE Code of Ethics and the Code of Ethics of the National Association of Realtors (NAR) are applicable to their behavior in the preparation and presentation of testimony as an expert witness.

Many attorneys are unfamiliar with the Codes of Ethics and Standards of Professional Practice applicable to the work of the CRE. It is the obligation and responsibility of CRE members to make attorneys with whom they are working aware of the contents and implications of applicable professional standards and ethical codes.

The situation of the individual CRE may be more involved if the individual is professionally designated in any other organization(s) that also has a Code of Ethics and Standards of Professional Practice. This is particularly true if the CRE is a professionally designated appraiser in an organization that subscribes to the *Uniform Standards of Professional Appraisal Practice (USPAP),* which are listed in the "Suggested Readings" at the end of this article.

The reason for this particular concern is that, within *USPAP,* Standards IV and V deal specifically with "Real Estate Consulting." *USPAP* establishes requirements and specifications for the conduct of a "Real Estate Consulting" assignment and for reporting the results of that assignment. Offering testimony in a trial, a hearing or a deposition as an expert witness constitutes reporting the results of a real estate consulting assignment, within the framework of *USPAP.*

The situation is further complicated by the fact that real estate appraisers must be licensed or certified in every state, the District of Columbia and Puerto Rico as a result of Section XI of the federal

Financial Institutions Reform, Recovery and Enforcement Act of 1989. In many states, it is a misdemeanor (or worse) to practice real estate appraisal without a license or certification. Moreover, some states define "real estate appraisal" so broadly that it encompasses many activities that would ordinarily be regarded as real estate counseling. Examples include feasibility analysis, market analysis, marketability analysis, investment analysis, and highest and best use analysis, to cite a few. In those states, it is necessary to become licensed or certified as a real estate appraiser in order to carry out such counseling activities for a fee. That includes testifying about them in court or at hearings.

In addition, a handful of states include real estate counseling as an activity that requires a real estate broker's (or salesperson's) license.

It is therefore critically necessary for a CRE contemplating an assignment that is expected to require expert witness testimony in a state in which the CRE is not currently licensed or certified as a real estate broker or real estate appraiser, to investigate carefully the requirements of that state. Licensing and certification can be a time-consuming and expensive process. The client and the client's attorney should be aware of any time and expense required for licensing or certification, and, from the outset, that should be included in the counseling fee agreement.

One implication of having *USPAP* apply to the real estate counseling assignment is that CREs would be required to develop and maintain a written record of the data, notes and analyses. That written file must be made available in any court proceedings (including depositions). The expert often cannot legally respond positively to an instruction not to put anything in writing. This is simply one example of the concerns that may confront a CRE serving as an expert witness, as well as the attorney(s) with whom he is working.

Hyperpreparation

It is axiomatic that expert witnesses should be thoroughly and fully prepared. For the real estate counselor, this means more than simply reviewing any factual information, notes of meetings or field inspections and reports prepared by others. Particularly if no written report (as opposed to the *USPAP* required written file) is to be prepared, and therefore referred to during the course of deposition or trial testimony, the counselors and the attorneys with whom they are working must thoroughly understand not only the problem and its proposed solution, but each other's mindset and approach to that problem.

Depending on the experience and knowledge of the attorney with the particular topic at issue, it may be necessary for the CRE to instruct the attorney in the technical and analytical aspects of the problem, at least to the extent that the work and testimony of the CRE impinge on the resolution of that problem. This takes time which needs to be built into the original proposal and budget.

An important rule in dealing with clients and attorneys in litigation is: "No surprises." Therefore, the CRE has a responsibility to identify the apparent level of expertise and technical understanding that the attorney possesses. This needs to be done at an early meeting before the final work schedule and budget are completed.

Ample time must be budgeted to cover any necessary education of the attorney, review of the counselor's own deposition, review and discussion of technical reports of others, and preparation for the counselor's testimony. When reports of others are to be reviewed, it is imperative to make sure that complete copies of the reports, including *all* appendix or addendum materials, are received for review. The text alone is rarely enough. Failure to review everything that is presented in the reports of others, as well as the complete transcript of any depositions of other experts or participants in the proceeding, can lead to embarrassment at least and impeachment of the counselor's position and testimony at worst.

If the counselor is to provide independent, objective, technical, professional opinion testimony, then he should not simultaneously serve as an advocate for the client and the client's attorney. The objectivity and credibility of excellent testimony can be undermined quickly if the counselor is seen passing notes to the client's attorney or conferring with the attorney while the trial is in progress. This is particularly true if it occurs while experts for the opposing side are being examined or cross-examined.

It is perfectly acceptable and appropriate under any standards to serve as an advocate for the client's interest. This should be done openly from the outset and not in conflict with an initial appearance of disinterested objectivity and independence.

Hyperpreparation in advance of testimony can pay substantial dividends when the counselor testifies, both on direct and cross-examination. If the CRE takes the witness stand with no notes or documents in his possession, the impression of thorough knowledge and understanding of both the counselor's field of expertise and the facts of the case is greatly enhanced. Any materials that need to be consulted can be provided by the attorney for the client, or even by the opposing counsel.

In the first instance, the importance of thorough advance preparation is underscored. If the attorney with whom the counselor is working has all the documents needed to support and sustain the counselor's direct testimony readily at hand and is thoroughly familiar with their use and application in the presentation, there is no need for the counselor to have any extra notes in his possession (especially since they are all discoverable). Everything required for reference will be available through the client's attorney.

On cross-examination, it is always permissible for the witness to request a document to which the cross-examining attorney is referring or from which that attorney is reading. That request will not always be granted, but the overall result is that a

well-prepared expert witness need not have any document with him unless it is provided by one of the attorneys involved.

Maintain Focus

No one individual is an expert in everything. Moreover, the scope of the problem which is the source of the litigation, coupled with the scope of the counselor's assignment, sets the limits of expertise and knowledge that a qualified professional counselor can and should claim in any proceeding. If unchallenged or allowed questions on cross-examination go beyond the scope of the assignment, especially if they go beyond the scope of the counselor's factual knowledge, then the best response is simply "I don't know." Assuming knowledge beyond one's level, stretching the limits of one's actual experiences or claiming expertise in areas where one is *not* a *bona fide* expert, almost inevitably leads to discomfort, lost credibility and disaster.

There is a natural tendency to want to accommodate a questioner, and, of course, not to admit one's own limitations in public. Nevertheless, sharp and clear limits to the claimed expertise, knowledge and opinions of the real estate counselor need to be set. This is part of the hyperpreparation already discussed. It is the responsibility of CREs alone, however, when they are on the witness stand being cross-examined.

This sharp and narrow focus is especially important when the cross-examining attorney presents hypothetical situations based on assumed facts and fails to identify them as hypothetical conditions or assumptions. Recognizing this potential hazard takes experience and continuous alertness on the part of the CRE being cross-examined. An important part of one's education to become an expert witness is to be a spectator at trials relating to problems in which the counselor is not personally or professionally involved. Also, participating in a deposition frequently gives important clues to the approach, technique and mind set of the opposing counsel. This can be an important learning experience for the expert witness CRE, prior to cross-examination before a judge and possibly a jury as well.

Maintain Poise And Objectivity

The real purpose of cross-examination is to discredit the expert witnesses and their opinions. In addition to eliciting facts and information, the cross-examining attorney will frequently call into question the counselor's skill and training, experience, objectivity and integrity. If CREs have given expert witness testimony previously in similar cases, excerpts from the transcript of that testimony, often read out of context, may be used in an attempt to impeach the counselors with their own words. Worse still, if the CRE has published articles in journals or books, similar excerpts out of context may well be read to try to demonstrate inconsistency and therefore untoward advocacy on the part of the counselor.

This tactic by opposing counsel requires the counselor to be particularly alert and to focus on the precise wording of every question. This is particularly the case when the question is a lengthy oral essay with a rising inflection or "Isn't that right?" at the end. The longer and more involved the question, the greater the probability that it makes sense for the counselor to ask that the question be reread, repeated or rephrased.

Also, it is quite important to be aware that the attorney with whom the counselor is working may (and undoubtedly will) raise objections to questions, or statements disguised as questions, posed by the cross-examining attorney. This is yet another reason why it is important to develop the habit of pausing before answering *any* question and to do so regularly and consistently. Once an objection is raised, the counselor should remain silent until instructed to proceed. If the argument over any objection is prolonged and distracting, it is both proper and wise to ask to have the question reread or rephrased.

One particular hazard in cross-examination is to permit the cross-examining attorney to misuse or adapt technical terminology without challenge to suit the purposes of the question. The CRE as expert witness must be sensitive to this and, before responding to the substance of the question, correct any such misuse or abuse of technical real estate terminology.

Similarly, opposing counsel may misstate facts on the record or mischaracterize previous testimony, both of the CRE expert witness or of others. To the extent that the counselor has knowledge that a misstatement or mischaracterization has been made, any such error should be corrected before the question is answered. If the counselor does not have such knowledge, or is not sure, then response to the question should be prefaced with "On the assumption that the assertions that you have made are correct . . ."

Counselors should never take any attempts to impugn their testimony, opinions, skill, experience, objectivity or integrity as personal attacks. This may well be difficult in some circumstances, but as expert witnesses on the stand, they should never show upset, annoyance or aggravation. That is easier to say than to do, but it is important. The objective must always be to appear calm, in control, thoughtful, objective, courteous and totally believable.

Knowledge, skill and hyperpreparation can lead to this posture. One should try to emulate Tennyson's Sir Galahad: "My strength is as the strength of ten, because my heart is pure."

Conclusions

Whether for the first or fiftieth time, CREs called upon to serve as expert witnesses, to present their professional opinion, should first identify whether they are qualified to accept the assignment. In this instance, qualification includes identifying whether some form of license or certification is required in the state in which the testimony is to be given. If the CRE decide to go ahead with the assignment, then

the necessity for hyperpreparation must be recognized from the outset in preliminary discussions and budgetary allocations with the client and the client's attorney. CREs should study their favorite list of Dos and Don'ts as a refresher.

As an objective, independent expert, the CRE must create and maintain an aura of impeccable integrity, skill and expertise based on experience in order to develop and maintain credibility.

Continuing alertness and care in responding to *all* questions (especially under cross-examination) should be the unflagging approach to serving as an expert witness. Moreover, as an independent, objective expert, the counselor serving as an expert witness is literally alone. One may be employed by a party, but such employment does not mean that the counselor has been "bought." Rather, the counselor's knowledge, experience and expertise have only been rented for the duration of the case. Consistency of thought, of oral presentation and of conclusions in similar circumstances is an absolute necessity.

None of this is easy, but if it were, the demand for really capable counselor expert witnesses would not be as great, nor would the rewards and satisfactions. There is, in all probability, no better opportunity for the CRE to expand knowledge, sharpen analytical skills and gain experience in such an intensive, concentrated fashion.

Throughout the entire process of preparation and participation in litigation requiring expert witness testimony by a CRE, the words of Polonius to Laertes in *Hamlet* can serve the counselor well: "This above all: To thine own self be true, and it must follow, as the night the day, thou canst not then be false to any man."

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