THE CLEAN SHOES SYNDROME & OTHER PITFALLS IN REAL ESTATE LITIGATION

Alan A. Herd, CRE

Trial attorneys know there are unwritten protocols and customs in the use of expert witnesses: protocols and customs outside of codes and rulings. Not the easy ones, like hiring the expert early[1] or reading his resume before interviewing, but the more arcane: protocols recognizable in operation, but ones which can't be tagged with any kind of precise description or legal term.

Over time, however, these unwritten rules have acquired descriptive names. Medical cases, securities cases, product liability cases—even dog bite cases: each area has developed its own customs and conventions which, in turn, have acquired buzz words, aphorisms and slang. Real estate terms are among the most colorful.

Used or abused, their application and observance can be winning gambits or Achilles heels, making or breaking the effectiveness of expert testimony and changing the outcome of lawsuits. Knowledge of how and why they operate can provide valuable insights to trial attorneys.

The author has drawn on his own background and has surveyed a number of his fellow real estate expert witnesses for examples. Here are a few.

The Clean Shoes Syndrome

Too often both the attorney and real estate expert overlook a fundamental rule: to be a credible witness, the expert should first walk the land before he attempts to opine what happened on it.

The omission of a property inspection early in the engagement flies in the face of a fundamental truth: you can't safely or authoritatively opine on negotiations, representations, or omissions without actually looking at the subject of them—the property.

Further, without looking at the property how can you opine on what the deal's terms were about, let alone if they were appropriate or relevant? Many times the expert will find an omission, new theory, or an actual absurdity in the paper trail or in the structuring of the transaction simply by walking the scene of the transaction and comparing what can be seen versus what's in the paper trail.

> ***Example:*** A commercial tenant abandons the premises with four years left on a lease. The landlord is obligated to mitigate lost rent by attempting to re-rent, but turns down a new lease because the prospective tenant wants five spaces

Alan A. Herd, CRE, *Los Angeles, has been an elected officer and director of three boards of Realtors. He has taught real estate subjects at UCLA Extension since 1963. Another version of the article presented here has appeared in Verdict, the magazine of the Association of Southern California Defense Counsel.*

[1] "The Clean Shoes Syndrome & Other Common Pitfalls For Expert Witnesses And Attorneys In Real Estate Litigation" will be included in a forthcoming book on litigation support written by Mr. Herd.

more parking than the landlord has available. The expert visits the property and finds 75 weekday spaces open at a church four doors away. This new find, inserted into negotiations, ultimately gives the original tenant a more favorable settlement.

The Clean Shoes Syndrome occurs (and gets its name) from the tendency of both the expert and attorney to regard the expert's activity as "forensic," the case issues as "legal" (as opposed to "practical" or "custom and usage"), and the expert's role as something more appropriately carried out in the comfort of an air-conditioned office reviewing paperwork. Hence, the expression originates in the reluctance not to get one's shoes dirty by leaving the office and walking the land.

The attorney should request an inspection and the expert should show up at the first meeting having walked the property and prepared to discuss it.

The Shotgun Engagement Letter

Facts and issues have a way of transmogrifying themselves in the discovery process. An emphasis on one set of facts in a case can give way to another.

Example: An expert is hired to give testimony in an industrial real estate transaction. In witness disclosure the expert is described as qualified to testify on standard of care in *industrial real estate transactions*. As discovery progresses, issues of commission or omission in the negotiation of the transaction somehow become dependent on standard of care in previous property management activities. On the stand, the expert, even though a distinguished marketing agent, is challenged on his qualifications to testify on common aspects of property management of industrial property because he was not so designated.

Experts engaged to give testimony in one area, such as industrial real estate or, say, an agent's standard of care in a transaction, should not be excluded from giving testimony on subjects ancillary to his main testimony—subjects which are part of most experts' everyday work background, such as marketing, office administration, escrows, title insurance, basic property management, financing and mortgage loan practices. If the expert has a broad transactional background, the experience in related activities follows.

Both the engagement letter and witness disclosure should list a broad scope of ancillary activities as potential areas of expert testimony.

Example: An expert's description of the assignment in an engagement letter might be ". . . will testify as an expert witness in matters concerning real estate agents' conduct, responsibilities and standard of care in industrial real estate transactions and activities directly related thereto, such as, but not limited to, transactional documentation, escrow practices, marketing practices, common property management practices, landlord and tenant practices, lease documentation, title insurance, loan underwriting and escrow.

In the witness disclosure statement, the attorney simply lifts the language from the engagement letter. Let the opposing counsel worry about challenging the expert's qualifications and/or sorting out all the areas of expertise.

This broad scope should be considered early by the attorney in selecting a witness. An in-depth analysis of the expert's transaction experience should be one of the first objectives in the engagement interview. Also, as part of the process, the expert should be warned of potential challenges to his credentials in any of these ancillary expertises.

The Engagement Letter Bug-out Clause

The tactic of designating experts at the last possible moment and the difference between "consultant" and "expert" and its effect on discovery are well known to trial attorneys, but anticipating the sequence in the expert's engagement letter is often overlooked. The assignment letter should be "staged" as to employment, with the consultant/expert hired as a "consultant" initially and then as an "expert witness if necessary and subsequently so engaged." The device is not only for the paper trail, but to reconfirm to the expert his status and responsibilities. This gives the consultant latitude in forming his opinions: a chance to review and discuss the case even-handedly with the attorney and then make a clean getaway if his findings are negative to the client. For practical purposes, the negative communications will not be discovered.

Mushrooming The Expert

How much do you give the expert to review? "Mushrooming" refers to inadequate preparation of a witness. Often the attorney will give the expert only selected and self-serving pleadings and discovery. The reasons (or excuses) vary; sometimes the attorney is trying to save the client money, other times the facts are not entirely on the client's side. Frequently the attorney is simply trying to micromanage the expert's testimony—a practice directly opposed to the proper way to work with an expert.[2] As a result, the expert is then unprepared and blind to both the actual facts and the subtleties of cleverly-phrased hypotheticals on cross-examination.

Too many attorneys prepare the expert for testimony on favorable issues and slight the logic of the other side's case. They forget that the expert's real exposure in testimony comes more from opposing counsel's hard-edged questions in deposition and cross-examination than from the expert's own meticulously-prepared presentation of the client's assertions. A good expert can not only handle both sides of a tough issue, but often can find the flaws in the other side's arguments and offer suggestions to exploit them. *But he at least deserves to be prepared for ambush based on facts and theory supporting the opposition's point of view.*

The biggest contribution of an expert, particularly in a difficult case, is what he finds in the paper trail that the attorney hasn't recognized. Even in anticipation of limited testimony, the expert should be prepared with the facts in the transaction and made aware of the opposing side's theory. If it is a "standard of care" matter, the expert should be aware of everything impacting on the conduct and actions of both the agents and principals. Further, in almost every instance it is better that the expert extract this information directly from reading discovery than second hand from the attorney.

The expert should be furnished with pertinent pleadings and discovery, especially relevant depositions and motions. The expert needs an overview to (a) become familiar with the case, (b) inventory strong points to support the client's case, (c) prepare defenses and rebuttals to key opposition issues both in direct and cross-examination, and (d) offer his own informed opinion to the attorney which often can add something significant to the way the attorney sees the case.

Boutiqueing The Expert

"Boutiqueing" is somewhat similar to "mushrooming" but the motivation is different, sometimes even subliminal, in that the attorney presents his best theories to the expert and asks the expert to support them (even parts of them), regardless of context, as if they were to be presented in a vacuum instead of in open court with opposing counsel trying to shoot holes in them with hypotheticals. Boutiqueing asks the expert to support and testify on selected theory like an idiot savant. Limiting an expert's testimony to a few narrowly defined issues to orchestrate an intricate lawsuit is okay—boutiqueing is not. Experts deserve combat pay for enduring this technique.

In the process, the attorney commits nearly the same sin as in mushrooming—asking the expert to testify effectively without knowledge of the context and the full facts in the case. Again, the expert becomes hostage to lack of information. Denied a full set of facts, the expert suffers the same potentially lethal exposure to opposing counsel's questions in deposition and cross-examination while the jury watches him sweat through testimony.

The "Fat Cat" Or "Hired Gun" Ambush

"How much are you being paid to testify here today?" An ugly question, sometimes more so when asked of a real estate agent. Fairly or unfairly, real estate agents are typically regarded by the public as making too much money for what they do. Put on the stand to testify and receive high hourly fees, their compensation is an issue that can create culture shock with most juries.

In a jury trial, every attorney should pre-empt the question before the other attorney has the chance to ask it—"de-sleazing" the issue before leaving opposing counsel to ask the question and run amok with it. If opposing counsel then wants to re-ask (and "re-sleaze") it on cross, at least he suffers the disadvantage of looking redundant. Asked twice, the question loses much of its impact.

In one actual instance, an attorney made the following recovery after opposing counsel flabbergasted the novice witness with the hired gun accusation:

Attorney: You've served on numerous arbitration and ethical standards committees, have you not?
Witness: Yes.
Attorney: And the same with holding offices in your local board and the state board of Realtors?
Witness: Yes.
Attorney: How many hours do you estimate you spent serving on these committees and offices?
Witness: Hundreds. Probably thousands.
Attorney: How much were you paid for serving on these committees?
Witness: Nothing.

But for the most part, in dealing with the "hired gun" question there is no foolproof way to finesse it. Every expert runs the risk of being painted a hired gun. Consequently the expert should be prepared to answer the question honestly, completely, quickly and matter-of-factly. If inexperienced, the expert should be briefed before the question is asked in order to think through and become comfortable with his answer. The attorney should consider integrity as part of the expert's credentials in order to harden the target always presented by the ambush's potential.

The Andy Hardy Witness

In the old Andy Hardy movies one of Andy's friends would get an expensive-to-cure disease and Andy (Mickey Rooney) would ask Judy Garland what to do. Judy would inevitably reply: "Hey, kids! Let's put on a show!"

They would then put on an amateur musical with production values to make Busby Berkeley envious, a converted barn full of cheering people would appear, the necessary money would be raised and the cure would be found by the closing scene. Some attorneys try the same approach in selecting their expert witnesses.

An Andy Hardy witness is one hired primarily because he will work cheaply. ("Why not call that nice lady who sold you your house? She's a broker!") The results are often unpredictable. On the other hand, many untried experts exist who can testify credibly in court if properly prepared and given the chance.

Nevertheless, it's a good rule to let the other attorney break them in first.

Stonewall Versus Artichoke Appraisals

Conventional appraisal formats don't always work best in court. The typical appraisal gives a value based on comparable sales adjusted to the subject property. The appraiser's position: "I looked, I compared, I valued!" Factors such as size of improvements, lot size, quality of construction and amenities are not given specific values. Instead they are

lumped together and simply "taken into account in determining value." The appraiser "stonewalls" his premises.

An artichoke appraisal can be described as a stonewall appraisal with an attitude (or vice versa). It takes the conventional appraisal a step further by assigning a specific amount in dollars or by a percentage to each of the components making up value, e.g., the front part of the lot is worth $500,000, the back part $400,000 because you can use it differently, etc., the improvements $400,000, etc. The conclusions are presented to the court in this form.

Why is this important in litigation? The argument is somewhat circuitous. Take two premises:

Premise #1. Every attorney believes (1) he has the best appraiser, (2) his appraiser's report and supporting information are unimpeachable, (3) the other side's appraiser is a charlatan who not only greatly exaggerates, but dresses funny and therefore will make a bad impression on the jury.

Premise #2. No other profession offers a greater opportunity for two professionals appraising the same property to arrive at widely differing estimates of value, with both being technically correct—Appraiser Jones uses comparable sales #1, #3, #5 and #7; Appraiser Smith uses comparable sales #2, #4, #6 and #8—they are both correct (on the premises given). And unless one of them fails to show up in court to testify, the jury will have to make a decision as to which appraiser is right (or wrong) and by how much.

Why the artichoke appraisal? It has to do with taking away one leaf and having several more left underneath. If one component fails, the others are still intact. Consider the following:

> ***Example.*** The litigation concerns a lot size negligently misrepresented to a buyer by a real estate agent. The buyer discovers this, sues and an appraisal is made to determine damages at the time of purchase. The buyer brings in an appraisal done by his expert which is far less than the buyer paid. The seller brings in an appraisal done by his expert which is much more than the buyer paid—the seller's attorney takes the position that there are no damages. Or are there?
>
> What if the seller's appraisal is right and the buyer paid less than the property was actually worth, but not according to law? *Will the jury buy the seller's appraisal? More appropriately, will they buy all of it, particularly the part about the lot size not making a big difference?* Highly unlikely. Even if the actual value was greater (here we're granting that the seller's expert is right) and the correct size was discovered, say, during escrow, wouldn't the buyer have been given an opportunity to back out of escrow, thus having a strong bargaining position to ask for a better price, sue or withdraw?

Here the artichoke approach is a defense in-depth, compartmentalizing the lot-size question to a relatively small portion of total value. Then if the seller's general assertion of value fails, the jury has a method by which to recompute a part. A recomputation limited only to the part in question, rather than being faced with validating (or even recomputing) all the other elements of value, is a tough job with an uncertain outcome. The jury, offered an easy way to solve a contentious dilemma, usually appreciates and responds to the help.

"They All Look The Same To Me" Mistake

What does it mean to be a real estate expert. All real estate experts are not alike in their activity, protocols, clientele and standard of care. These distinctions are obvious to counselors, but not always to attorneys. In court the differences can be perilous.

Real estate is actually about two dozen or more different business activities. The variety of subcategories and specialties is analogous to medicine and engineering. Real estate activities can vary according to property type—land, homes, apartments, office and industrial; and according to function—brokerage, appraisal, property management, syndication and lending. And that's just the variation among licensed agents. Bring in title people, surveyors, zoning consultants, contractors, developers and more, and you begin to get the idea of the great diversity.

The implications of this variety present a convenient target for expert witness impeachment on credentials.

> ***Example.*** Commercial real estate agents obviously should not testify about residential property. More subtle is the protocol that commercial (and most other) real estate agents should not testify on nearly most aspects of valuation, even if opining on the value of commercial property, *unless they are formally qualified as appraisers.* Standards of care—particularly presumption of sophistication—can vary between residential and industrial agents. The differences are subtle, but unsupported by the appropriate credentials they can be case killers in testimony.

Given all of the above, add to the mix other relatively new areas such as affirmative action in office administration and environmental due diligence in transactions—all of which require the expert to have additional hands-on experience in each area to be credible.

Then there's the "damned if they do, damned if they don't" corollary. In another dimension of potential challenges, every witness who is a specialist is subject, in some degree, to impeachment by virtue of not being a generalist. Conversely, generalists (particularly many teachers) are subject to impeachment for not being streetwise in a given specialty. This attack is usually rebuttable, but best accomplished when the expert and attorney have considered their response beforehand.

Most experienced experts will not take a case if they know that their qualifications in a particular specialty area are shaky. Most will refer to another

expert or simply pass. The test and the testing, however, are up to the trial attorney. Pat solutions rarely exist in selecting experts—the choices are usually a trade-off in available qualifications.

The attorney should be familiar with the differences in specialties and subject areas, make sure the expert is warned of this kind of challenge and insure that preparations are made to defend his credentials across the widest possible spectrum. However, if the attorney doesn't recognize the potential implications, the counselor should bring it to his attention.

Experts And Attorneys Are In This Together

How these customs and protocols can be avoided or used to the attorney's advantage and the counselor's obligation to explain them at the appropriate place in the assignment are self-evident. For the most part the lessons are not unique to real estate experts.

Aside from giving the expert the tools to do the job, there is one other element that can work greatly to the attorney's advantage. Experts want to feel part of a team and the trial attorney sets the tone that provides for this. Whether for communication ability with the expert, for examination skills in bringing out the expert's testimony or simply for old-fashioned courtesy and consideration during the case's progress, attorneys can increase the expert's effectiveness by making him feel part of a team effort.

Properly applied, as the expert proceeds into the deposition and court testimony stages, the rules—in their observance or avoidance—can produce gratifying results.

NOTES

1. Three real estate experts, including the author, surveyed their most recent cases—45 in all. In 22 instances, the experts were hired within ten days of mandatory exchange of witnesses.
2. A correlation exists between "mushrooming" and inexperienced witnesses. The experts surveyed (by definition "experienced") typically request and are allowed a full review of case materials. In short, they can see the mushrooming happening and act to limit it. In only three of the 45 cases previously cited was available information significantly limited by counsel. On the other hand, incidence of *opposing* experts being given limited information was observed in at least 15 of the cases.