

Parol Testimony

by

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Parol testimony or verbal testimony is an important source of information for retracing boundaries. Few surveyors would ignore a landowner who describes how to find the corner monument or the elderly resident who shows where the corner tree once stood. Yet, not all parol testimony should be considered. There are four hurdles to be considered before relying on parol testimony.

Useful

The first hurdle is that the parol testimony be useful. The testimony should advance the surveyor's efforts.

Of course, there is often parol information that is not useful. All surveyors are familiar with landowners who want to talk but do not provide useful information. Most surveyors have experienced a landowner who tags along with the survey crew and maintains a constant flow of questions and gossip about the neighborhood. This later parol testimony is not useful and not helpful.

Acceptable

The second hurdle is that the parol testimony be acceptable. The parol testimony must be of a source and circumstance that the testimony would more likely than not be used by other competent surveyors in the same or similar situation. This hurdle is codified in the Federal and many state rules of evidence as the following sample illustrates:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. (Underline mine) Federal Rules of Evidence, Rule 703.

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It is important for the surveyor to understand that the standard for acceptance is measured against what other reasonable surveyors would do, not what one particular surveyor would do. Put in other words, if most surveyors would readily use the testimony, it is acceptable to use. If only a few (minority) of surveyors would use the testimony, it is not acceptable to use under the rules of evidence.

Admissible

As the last part in the underline portion of the quote states, not all parol testimony the surveyor finds useful and acceptable to aid in retracing a boundary will be admissible in court (nor does it need to be). However, parol testimony that is not admissible yet forms the basis of the surveyor's opinion could place the surveyor in a difficult position – the surveyor has an opinion but can't disclose how the opinion was reached. The result is the surveyor can provide an opinion but the foundation of the opinion is deemed inadmissible and therefore the surveyor's opinion is suspect.

As a general rule, parol testimony will not be admissible where parol testimony will contradict, vary or change the written terms of the contract, agreement, or deed (known as the parol evidence rule). Conversely, parol testimony is generally admissible to aid in the construction, clarification, or interpretation of an ambiguity in the deed or when a deed description is applied to the site. Parol testimony may be used to explain that which is not clear or a latent ambiguity such as the meaning of words and site conditions at the time of conveyance.

For example, parol testimony is not admissible to prove the corner tree is a maple contrary to the deed description that cites an oak to be a monument to the corner. On the other hand, parol testimony is acceptable to show which of two oaks is the one intended by the deed to mark the corner.

Therefore, parol testimony is generally admissible to identify the monument cited in the deed, explain its disappearance, show its former location, and show a replacement is in the position of the original, to name a few applications of parol testimony. Also, parol testimony can be used to show elements of equitable claims or defenses such as acquiescence, practical location, and adverse possession.

Credible

The final hurdle is that the parol testimony be credible. Credibility does not prevent the information from being accepted as evidence. The credibility affects how the information is perceived by the judge, jury, arbiter, etc.

The lack of credibility, I believe, is the most common deficiency of parol testimony used by surveyors. Many surveyors claim not to be an advocate for their client, yet accept, rely, and adopt parol statements from the client or the client's witnesses that lack credibility. Therefore the surveyor becomes an extension of the advocacy of their client or client's attorney.

There are three elements involved in determining the credibility of parole statements: 1) The person making a statement would be unaffected by the outcome of the decision. 2) The person would or has some basis for the knowledge sufficient to “sear” the knowledge into memory. 3) When the memory of the witness was formed or the memory recounted there was no actual or an appearance of bias.

Unaffected: The first element of credibility requires that the person making a statement be unaffected by the outcome of the decision. This element would generally make any statements by the client or neighboring property owner suspect. Both the client and neighbor stand to gain if their statements were accepted and relied upon. Even prior owners are suspect if they gave a warranty deed and may be called upon to defend their warranty should the boundaries not reside where they claim the boundaries reside.

There is one exception to this element of credibility. The exception is when the statement of the witness is against the interest of the witness. For example, if the client were to agree with the neighbor’s assertions regarding the former location of a boundary stone, the client’s testimony regarding the stone’s location would be judged credible since it is a statement against their interest.

Basis for Knowledge: The second element affecting the credibility of a parole statement requires the witness have some basis for their knowledge sufficient to “burn the knowledge” into their memory. The basis for the knowledge must be such that logic and experience would compel a reasonable person to believe the witness would remember the facts they testify about. Was there something unique or noteworthy that would cause the witness to remember or retain the knowledge in their memory? In the instance of a corner location, it is often insufficient for a witness to merely state they remember there was a corner pin at a certain location. The witness must be able to relate their memory gained in the past to an existing location on the ground in a manner that is logical, reasonable, and trustworthy.

“The pin was right at the top of the ditch and the ditch hasn’t moved.” “I watched my dad put a stone right on the old stump and after the stump decayed that stone is still there.”

Consider an 83 year old witness who insists that she remembers the location of a pin she saw in her cousin’s yard when she was 12 years old. That statement without some other supporting information is not credible because logic and experience suggest that 12 year old children have trouble remembering to feed the dog that day, let alone the location of a corner pin the elderly witness saw 70 years earlier. However, it is believable that the 85 year old witness can remember the location of the corner pin if she recounts that the pin was under a tree branch she fell out of when playing in the tree at age 12 and the corner pin injured her very badly when she landed on it. The tree and severe injury is something that a reasonable person would believe someone could remember many decades later. Since the tree and the

branch the witness climbed on still stands, the witness is able to accurately place where the pin stood 70 years previously.

Of course knowledge gained last week does not need the same intensity of experience (if any) in order to accurately recount the knowledge. While knowledge gained a decade ago would require some extraordinary experience to retain a credible memory.

Impartial: The disposition, temperament, or bias of the person when the memory was created or the statement is made also forms an element of credibility. Statements by close friends and family of the client or neighbor are suspect. Also, witnesses who were angry or emotional to the extent their judgment may be impartial or biased against or for a party may hurt the credibility of the witness.

Documenting parol testimony such as the preparation of an affidavit should also incorporate the criteria that was set forth previously.

Affidavit of Leroy Cameron

My name is Leroy F. Cameron. I am 62 years old. I reside at 3049 Ames Lane in the town of Lincolnville.

From the age of 9 until I was 18 years old and went into the service, I lived at what is known as the Wooster farm. The Wooster farm was owned by my grandparents during the time I lived there.

At the southeast corner of the farm there was a large oak tree with three blazes. I spent hours sitting in a tree stand that I built in this tree to hunt deer. I spent countless hours in this tree and shot several deer that came to eat acorns at this tree. From this tree I could see down a woods lane in one direction and along a fence-row in another direction.

Recently, I returned to the location of the oak tree. From the alignment of the woods lane and remains of a fence-row, I was able to determine the former location of the oak tree. A month ago, I placed a pile of six to 12 inch diameter stones at the location of the oak and indicated this location to Sarah Kener, a surveyor.

While I have often met the person who owns the Wooster farm and the neighboring property, I am not related or know them outside this occasional meeting that occurs while hunting. I continue to hunt on this farm and the neighboring property.

Dated the 3rd day of August 2010.

Leroy Cameron
Leroy Cameron

This article has focused on parol testimony, yet many of the criteria would also apply to other forms of extrinsic evidence. The age, loss of information over time,

and unreliability of the surviving information often do not allow the surveyor to be very discriminating as to the information the surveyor uses. Yet, where there is conflicting information, including parol testimony, the surveyor must be prepared to critically examine the parol testimony before relying on it or making it superior to other possibly more reliable evidence.