

The Surveyor As An Expert Witness

by

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A surveyor is often involved in litigation in the capacity of an expert witness. In the capacity of an expert witness, the surveyor performs three functions. First, the surveyor identifies, introduces, and authenticates documents and other information relevant to the disputed boundary. Second, the surveyor explains the relevancy of certain information and how the information is used to fix the position of the boundary. Third, the surveyor gives a conclusion — an ultimate opinion on the location of boundaries and other related matters. If the surveyor performs the first two functions with competence, the surveyor will establish their credibility with the court. A surveyor that appears credible will have their opinion accepted and relied upon by the judge or jury without necessarily a clear understanding or comprehension of the underlying facts and basis for the surveyor's opinion.

The client is well served by the attorney that spends some time evaluating the surveyor in their role as an expert. There are several facets of a surveyor and the services performed by the surveyor that the attorney should examine.

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One facet to be examined is the surveyor's ability to handle stress. Some surveyors do not make good experts because of their inability to handle stress. There are numerous surveyors who are competent and respected practitioners, yet do not portray confidence and sagacity in stressful situations. The terror of sitting in the witness chair coupled with the seemingly hostile attention of the attorney and judge often leave these surveyors struggling for simple thoughts, stumbling over words, grasping for answers, spitting out nonsensical responses, shaking uncontrollably, and sweating profusely. Many are the attorneys who left a courthouse convinced not only that the surveyor had botched the survey and testimony but must have committed all the unsolved crimes in the area given their demeanor on the stand. Given the technical nature of surveying and the difficulty in explaining technical testimony, a good demeanor is an important factor to cultivate. In complex and technical testimony such as required for boundary litigation, it is not uncommon for an incompetent surveyor to be judged a more

credible witness because of their superior and calm demeanor rather than the content of their testimony.

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An evaluation of the scope and depth of the surveyor's work should also be performed by the attorney. The root of many deficiencies in professional services can be traced to cost conscious clients coupled with surveyors willing to restrict their services based on a price the client is willing to pay. The purpose stated for the services also plays a role in the quality of the surveying service provided. The mortgage loan inspection used to obtain financing is a markedly different service than the boundary retracement survey used to prepare a description or erect improvements. In this regard surveyors are no different than attorneys. What attorney could honestly admit that they provide the same level of estate planning to the blue-collar worker with \$5,000 life savings as compared to the billionaire? What attorney spends the same time on a deed for a \$100,000 house as they spend on preparing a complaint starting a \$1,000,000 lawsuit? The point is that a survey performed for a timber harvest may not be sufficient to base an opinion regarding a \$60,000 encroachment lawsuit that occurs many years later.

Also to be discovered by the attorney are surveyors who have arrived at an opinion without complete information or information that is not reliable, credible, or cannot be offered into evidence. An opinion formed without gathering or looking at all relevant information is usually determined to be untrustworthy and susceptible to impeachment. This situation is cause for the surprise of many experienced attorneys when they realize that the surveyor did not perform a complete search or limited the measurements to certain corner monuments that were convenient and failed to use others monuments more credible but less convenient.

For the surveyor to have had all the information but use it improperly is no less embarrassing for the attorney attempting to build a case on the testimony of the surveyor. There are numerous cases where the surveyor has testified at some length to the care and accuracy of their research and measurements only to admit they began their services at an unverified point indicated to the surveyor by the client. Equally problematic are the situations where the surveyor has relied entirely upon private records that clearly contradict the valid deeds recorded in the public records. In a few cases, surveyors have relied on procedures or priorities that do

not conform to the rules of construction or priority of control established by the courts.

These problems oftentimes arise by oversight or mistake made by otherwise competent surveyors. In a few cases, the surveyor is simply not competent. Few attorneys are aware that licensing surveyors is a relatively recent event in many states and certainly was not foolproof in insuring competence of the individual before licensure. There are numerous surveyors practicing that have never had to take a test or prove their competency in order to obtain their surveyor's license. When licensing of surveyors began, persons that applied and could show sufficient experience or education were given a license to survey without testing or further verification of qualifications.

Before continuing, it must be stressed that not all surveyors who were licensed without examination or other proof of competency are incompetent surveyors. On the contrary, some of the finest surveyors practicing were licensed in this manner.

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There is also wide diversity in surveyor qualifications. These qualifications must also be examined and evaluated for the impact the qualifications may have upon the perceived credibility of the surveyor. While there are many examples to the contrary, the presumption will always be that the more education a person has, the more knowledgeable they will be. There are no mandated formal education standards for surveyors in many states. Experience prior to licensing also varies. Some surveyors have no college education while a few have a Ph.D. Between the two extremes are numerous surveyors with two, four-year, and various graduate degrees. Among surveyors with a college education there is a wide variety of degrees ranging from fine arts to engineering.

Compliance with mandatory standards should not be overlooked in analyzing the surveyor's services. In many states, surveyors have had to perform according to mandated standards or expressly except all or parts of those standards by agreement with the client. Some surveyors have ignored the standards. Other surveyors have misinterpreted the standards. A few have not understood the standards. Several surveyors were unaware standards existed for many years. Some surveyors have ignored or excepted certain parts of the standards that could prove critical in formulating a correct opinion or communicating a credible opinion.

In defense of the surveyors who have not studiously adhered to the standards or taken exception to certain parts, adherence to all parts of the standards is to substantially increase the cost of surveying services without necessarily affecting the accuracy of the surveyor's opinion. For example, the preparation of a complete report alone will often add hundreds of dollars to a typical retracement survey yet may have no effect on the location of the boundaries that were re-established.

The attorney must not only check that the surveyor is competent but must sometimes check those persons that the surveyor relied upon are also competent. Few surveyors do all the work required for a boundary retracement, instead relying on employees to do some or most of the mundane technical aspects of the work. In this regard, surveyors and lawyers share a common weakness as more and more work is delegated to non-professional employees within a firm. Untrained or minimally trained personnel often overlook important information or fail to catch and correct omissions. Compounding the problem is the large number of personnel and projects supervised by some surveyors. As the work-load increases for the licensed individual, review and checks becomes cursory or omitted on many projects. Proper supervision declines. Important pieces of information are undiscovered or the significance overlooked. The result is that in some cases the surveyor whose seal and signature appear on the plan had little to do with the services that the plan represent. As a consequence, the surveyor cannot always say why information was omitted or mistakes not detected.

Finally, the mindset of the surveyor should be explored. The attitude or mindset of a surveyor often has a major impact on the quality of the surveying services and the credibility of the surveyor as an expert. The attitude or mindset refers to what the surveyor understands a surveyor's responsibility to the client should be and the ethical limitations of professional practice. For example, there are a few surveyors that look upon themselves as technicians. (E.g., "You tell me where to put the corner and I'll make the measurements between the corner locations you selected.") At the other end are a few surveyors who believe they have the power and right to determine all matters pertaining to boundaries including title issues. These surveyors feel qualified and authorized to determine boundaries based on acquiescence, estoppel, adverse possession, and other equitable doctrines. (E.g., "The stone wall has been there for 20 years so your boundary is now the wall despite what your records say.")

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In discussing the surveyor and survey services, it would not be fair for the surveyor's competency as an expert to ride entirely upon the surveyor's ability, background, and care. More times than good conscience should allow, attorneys have encouraged litigation to begin or continue where the costs of litigation far exceed the value of the area disputed. Similarly, attorneys will attempt to build "castles on sand." For example, it is not unusual for the extent of the dispute to exceed the ability of evidence to support the claim. Such would be the case where two neighbors are arguing over half a foot (the location of the old oak tree) when the nearest monuments that can be used are the center of a road and a four foot wide rock wall several hundred feet away.

In other cases, the technical complexity or reliability of the evidence exceeds any reasonable ability for the typical jurist or jury to understand. The fact is that a vast majority of boundary disputes should and could be handled through mediation by a knowledgeable mediator or presented before a real estate attorney or surveyor acting in the capacity as an arbitrator.

In some boundary disputes that go to litigation, adequate preparation and investigation by the attorney is often lacking. Many surveyors share the experience where they receive a call from an attorney seeking services as an expert a short time before trial. There are also numerous times when the client's attorney has never attempted to speak to the surveyor until shortly before trial or, in some cases, the day of trial. Also of some frequency are situations where a boundary dispute goes to trial where each side is equally burdened by incompetence be it the surveyor or attorney. Many decisions by courts are based on the lesser of two evils rather than a clear presentation and analysis of the evidence by the so-called experts and attorneys employed by each side.

The attorney should make a great effort to prepare an expert on how to communicate their opinion.

A common problem that frequently arises for the surveyor who is sought as an expert is the attorney who seeks a "hired gun" or advocate for the client's position. Ethically, a surveyor is obligated to perform an unbiased analysis to arrive at an opinion on the location of the boundary by a fair and reasonable interpretation of the operative conveyances guided if need be by a proper application of the rules of construction as established by appellate court decisions. Consequently, the surveyor's responsibility in retracing a boundary should be independent of the client's needs, wishes, or best interests. The attorney should not

influence an expert witness in formulating an opinion (i.e., what to say). The attorney may and should, however, make a great effort to prepare an expert on how to communicate their opinion. This is an important distinction lost among some attorneys. If the surveyor has been allowed to arrive at an unbiased opinion on the location of a boundary, the surveyor is cautioned that a diligent effort is expected from the surveyor to defend that position — to become an advocate for their opinion.

A court appointed surveyor should be considered in all boundary litigation cases.

In closing a discussion about employing surveyors in litigation, one option that is often ignored by attorneys is to seek the appointment of a surveyor through the court to locate disputed boundaries – a court appointed surveyor. This option will be discussed in another article.

In closing, it is my experience that most surveyors would rather earn a fee in some other manner than as an expert witness. While successfully educating the judge or jury can be a rewarding experience, the process is often fraught with stress and difficulties. Explaining a complex and technical analysis within a limited time frame is difficult enough. However, within the confines of a courtroom, the explanation must be done with frequent interruptions brought about by objections, trick questions, poorly worded questions, and under the ministrations of at least one hostile attorney who is trying very hard to make the surveyor or the surveyor's testimony appear faulty, biased, incomplete, and irrelevant.

Nevertheless, the role of a surveyor as an expert is an important one that must be approached with a motivation to educate, a willingness to communicate effectively, and an acceptance of the difficulty that attenuates the process of giving testimony in litigation.