# THE SURVEYOR IN BOUNDARY DISPUTE LITIGATION

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# Trial Preparation and Discovery

**Mandatory disclosures.**

As an expert witness, your opinions and the facts upon which they are based, as well as your reports, are subject to mandatory disclosure under Rule 26(a)(2) of the Colorado Rules of Civil Procedure, which requires that each side voluntarily provide certain information to the other side by a particular date. The penalty for non-compliance, in the case of an expert, is to preclude the expert from testifying. The dates for these disclosures vary from district to district, from judge to judge, and even from case to case. However, they are always due at least 120 days before trial. Surveyors should always keep these disclosure limits in mind when performing the survey and preparing the report and exhibits.

In order to comply with these disclosure requirements, the following must be disclosed:

1) The identity of the expert, including his name, address and telephone number.

2) A statement of all opinions he is to express at trial.

3) The basis and reasons for each such opinion.

4) The data and information considered in forming each opinion.

5) A list and copies of all exhibits prepared by the expert for use at trial.

6) A list and copies of all exhibits or considered by the expert in forming his opinion.

7) A statement of the expert's qualifications, including:

    a) All publications authored in the last 10 years.

    b) The charge for the investigation.

c) The payment for testifying.

d) All cases in which the he has testified at trial in the past four years.

e) All cases in which he has testified at deposition in the last four years.

This must presented to both the Court and the opposing counsel at least 120 days before trial. A good trial attorney will make sure the surveyor understands the deadlines and their importance before giving the surveyor the commission. Even more importantly, the surveyor who is used to testifying as an expert will himself be aware of these disclosure requirements and will inquire as to the relevant dates at the very onset of his commission. All such inquiries to the attorney should be made in writing.

As a expert, the surveyor should be prepared to deliver the required information in a timely fashion. To aid in this endeavor, the surveyor should consider keeping an up to date resume, or curriculum vitae, on hand as a computer file. This should include the following:

1) A list of all publications authored in the last 10 years.

2) A list of all cases in which he has testified at trial in the past four years.

3) A list of all cases in which he has testified at deposition in the last four years.

4) A summary of his educational background, beginning at high school

5) A list of all professional courses and workshops he has attended.

6) A list of states in which he holds a professional license and the license numbers.

7) A list of all professional courses or seminars he has taught.

8) A list of all professional societies to which he belongs.

9) A list of all offices he has held in any such professional societies.

10) Cases in which he served as a commissioner with the case number and court name.

11) Whether he has been an investigator or mentor for the Board of Registration.

12) His employment history in the field of land surveying.

13) His ownership of any land surveying businesses, either past or present.

**The Report.**

Typically, surveyors want to use the land survey plat of their work as their report. However, this is really insufficient to satisfy the requirements of Rule 26(a)(2) and is also inadequate to properly inform attorney in the preparation of his case. A good report can also assist the attorney in settling the case before trial. Finally, it is a valuable tool to prepare the surveyor himself for his appearance in court. I recommend the following format for the surveyor's report:

**REPORT OF PLAINTIFF'S EXPERT, HARLEY DAVIDSON**

Harley Davidson, having been retained by Plaintiff as an expert land surveyor, now submits the within Report.

**I COMMISSION**

The undersigned was retained by Plaintiff to perform all necessary studies and investigations and to render an opinion as to whether the location of the easement described in that certain Notice of Claim of Easement attached as Exhibit A.

**II PROCEDURES**

In conducting the study and investigation necessary to arrive at the conclusions herein stated, I first examined the documents set forth in Section III. I then viewed the property described in Exhibit A on May 19, 2015, and examined the subject ditch. At that time, I also observed both 26th Avenue and Colorado Highway No. 17 in the vicinity of the property. Next, I conducted a field survey as described in Section V, below. I then reviewed Colorado case law concerning the establishment and location of easements, including those cases listed in subsection III(2) of this report.

(This section should contain a description, not necessarily brief, of the procedures which the expert followed in conducting his investigation, including any documents or records he examined, any monument records or field notes he obtained, the nature and purpose of any field work and a description of any problems or ambiguities he encountered.)

**III DATA CONSIDERED**

In forming the opinions set forth herein I relied upon the following data:

1. The following documents were reviewed:

    a. Plaintiffs' Complaint.

    b. Defendants' Answer and Counterclaim.

    c. Response to Plaintiffs' Request for Admissions.

    d. Brief in Support of Motion for Summary Judgment.

    e. Response to Motion for Summary Judgment.

    f. Reply in Support of Motion for Summary Judgment.

    g. Reporter's transcript of hearing had on January 21, 2014.

    h. The preliminary plat of Pukin Patch Farms.

    i. All monument records relating to the Northwest corner of Section 30, T4S, R68W of the $6^{th}$ PM.

    j. All monument records relating to the West quarter corner of Sec 30, T4S, R68W of the $6^{th}$ PM.

    k. Aerial photos of the above quarter Section dated 1929.

    l. Aerial photos of the above quarter Section dated 1972.

    m. Copies of the original notes of the BLM survey of the above Section dated 1860.

2. The following Colorado Court decisions were reviewed:

    a. <u>Ericksen v Whitescarver</u>, 142 P. 413 (Colo. 1914)

    b. <u>White v Evans,</u> 208 P.2d 922 (Colo. 1949)

    c. <u>Moddelmog v Cook</u>, 330 P.2d 1113 (Colo. 1958)

    d. <u>Sullivan v Transamerica</u>, 2 P.2d 56 (Colo 1975)

3. I spoke to the following witnesses at the time of the survey:

a. **Gregory Peck**, 7880 Umatilla St. Westminster, CO 80621, telephone # 807-262 4756, who told me he knew where the original corner stone for the West quarter corner was located but was never going to tell me and threw me off his property.

b. **Jerry Seinfeld**, 7890 Umatilla St. Westminster, CO 80621, telephone # 807-262 7890, who told me he worked on the survey crew that slope staked the Rocky Mountains for God and knew exactly where the quarter was located, but couldn't remember right then. I discounted his testimony.

4. I personally inspected the property described in Exhibit A, the ditch itself, 268th Avenue in the vicinity of the ditch, and Colorado Highway 17 in the vicinity of the subject ditch. The observation was made on May 19, 2014 and, at the same time I observed the topography and vegetation in the area.

5. I personally conducted a land survey of the property described in Exhibit A, locating both this description and the ditch itself from the local public land survey monuments as described in Section V, below. I was present at all times during this survey and personally directed its conduct.

6. I also relied upon my general knowledge and experience in land surveying.

## IV THE SURVEY

Here, you should insert a detailed description of the survey you performed, including the dates, times weather and crew members. Talk about every hole you dug, every monument or other piece of evidence you found, every fence or building you located and how it influenced your survey. The more detailed you make this section, the more convincing your report, survey and testimony will be. This is your chance to paper the file. You can put literally anything and everything in here that may influence the judge.

## V EVALUATION

Here you should inset a discussion of your evaluation of the evidence you discovered. Why did you accept a particular monument? Why did you reject another monument? Why did you reject Mister Seinfeld's testimony? How much import did you give the old fence you found just .2 feet to the north of the ditch and why? What does all of the evidence taken together mean?

## VI CONCLUSIONS AND OPINIONS

Having performed the above procedures and considered the above data, I have reached the following conclusions and opinions concerning the location of the ditch easement claimed in the Notice of Claim of Easement:

1. The Notice of Claim of Easement attached as Exhibit A was filed of record in Adams County on October 27, 1998 in Book 101 at Page 26.

2. Exhibit A sets forth a claim for an easement over a described portion of the property set forth in Exhibit B.

3. The description of the easement in Exhibit A encompasses approximately .91 acres of the property described in Exhibit B.

4. The easement claimed in Exhibit A is located as shown in the accompanying land survey plat.

5. The easement is adequately and precisely described in Exhibit and the description therein is not so vague that it cannot be located upon the ground by a competent land surveyor.

**VII BASIS OF CONCLUSIONS AND OPINION**

The conclusions stated in Section VI are based upon the procedures, data and survey described herein, upon my personal observation of the property and the ditch in question, and upon my personal knowledge, training and experience in the fields of land surveying.

**VIII EXHIBITS**

1. The land survey plat attached hereto as Exhibit D will be used as a summary of the opinions herein set forth.

2. Those exhibits attached hereto as Exhibits A, B, C, D, E, F, H, Q and L will be used in support of the opinions herein expressed.

**IX COMPENSATION**

1. The payment received for the investigation and the basis thereof.

2. The payment to be received for testimony at trial and the basis thereof.

**X APPENDIXES**

1. Copies of all documents used or obtained by the surveyor in the course of his investigation, including plats, surveys, monument records, BLM notes, aerial photos, witness statements, other surveyors notes and any other documents.

2. All documents produced by the surveyor in the course of his investigation, including plats, field notes, monument records, photos or demonstrative exhibits for use at trial.

## Depositions.

A deposition is an examination on oral questions, given under oath and before certified shorthand reporter. It's a lot like a preview of your testimony at trial. Usually, the opposition will depose all experts for the other side, so any time you are engaged as an expert you should expect to be deposed and should prepare accordingly. Depositions are usually held in one of the attorney's offices. The opposing attorney asks the witness questions which the witness must answer under oath. There is little limit to what can be asked, as questions objectionable at trial are allowed in deposition. The reporter takes down all that is said, word for word. Later, the

reporter creates a typewritten transcript of the proceedings. The main purpose of a deposition is to discover the experts opinions and the basis therefor. It Also serves to lock the expert into one opinion. Finally, it can be used to discredit the expert at trial.

Ultimately, the reporter types up her shorthand notes and binds them into a written transcript. The witness then gets a chance to read and correct his testimony. ***When the transcript is ready, go over it with the attorney who hired you***. You are entitled to correct any errors in the transcript. This includes not only errors made by the reporter, but your own errors made during the stress of the deposition. It is very important to read and correct the transcript! You've got to live with it at trial.

**Preparation of trial testimony.**

It is important to prepare your testimony with the attorney who will try the case. You need to know what questions he is going to ask and he needs to know what answers you are going to give. This does not mean that you can allow the attorney to give you the answers he wants to hear. It does mean, however, that the two of you may agree on what questions will and will not be asked and what information you will not volunteer. This is not a script. It is just an outline so that there are no surprises on direct examination.

During this discussion, the expert should take care to educate the attorney as to the technical aspects of the surveyors testimony. The attorney must become at least basically acquainted with what the surveyor did, why he did it, what conclusions he reached and why they are correct.

Finally, the surveyor must prepare the attorney to cross examine the opposing expert. Thus, the surveyor must read the opposing expert's report and his deposition and compose a rebuttal. Be prepared to show your attorney where the opposing expert's weaknesses are and to explain why he is weak on these points. Also, be prepared to explain to the attorney how to develop these weaknesses. You need to educate the attorney so that he really understands how and why the opposing expert is wrong and you are right. It doesn't matter how right you are of your attorney can't explain it to the judge.

## Trial

### General

Everyone who makes a living in a courtroom eventually realizes that a trial is essentially just a formalized theatrical production. The judge or jury are the audience and the attorneys and witnesses, both lay and expert, are the players. As attorneys, we like to think of ourselves as the stars of the show. However, that title often more appropriately belongs to our expert witnesses. Consider that while the attorney may ask what questions he wishes within the bounds of the rules of evidence and procedure, it is the expert's knowledge and investigation that really determine what questions should be asked and which should be avoided. Moreover, whether on direct or cross, it is the expert who sets the pace and timing, not the attorney. A good expert can save a case for an inept or unprepared attorney but, no matter how experienced and how well prepared he is, the attorney cannot save his case from destruction by an inept or unprepared expert. In large measure, therefore, you as the expert surveyor are the star of the action. Do a good, professional job and it will be very difficult indeed for the opposition to prevail. The key word here is professional. Professionalism should regulate your investigation, preparation and presentation. What follows is all about professionalism in the courtroom.

### Appearance.

Professionalism begins with your dress and appearance in the court. Dress neatly and professionally for all of your court appearances. A suit and tie is absolutely required! You're getting paid for this, so act like it. Earn your fee by appearing in court looking like someone who makes his living doing this and is competent and trustworthy. This is very important. Appearance and demeanor on the stand are a large part of how jurors and judges form their opinion of your credibility and your credibility is central to your client's chances of success. Therefore, don't come to court in shorts or dirty jeans. This may be appropriate field attire but dressed this way in court, you'll look like a clown. People enjoy clowns but they don't believe a word they say, particularly on complex technical issues which they don't understand themselves.

**Demeanor**

Your demeanor on the stand is, if anything, even more important than your dress. By demeanor, I refer to your language, your movements and physical presence, your tone of voice and your general composure. You must project a sense of quiet confidence about your theories, investigations, procedures and conclusions. After all, if you haven't convinced yourself, why should other people be convinced?

Speak clearly and loudly but speak evenly and *don't preach*. A courtroom is a big place. If you can't be heard, you cannot convince the judge or jury that you're right. You don't need to yell, but you do need to speak up. Take your time and speak at a reasonable pace. Remember that its not the fastest expert who wins, it's the expert who can make the judge understand a complex technical problem and accept his theory as to the resolution thereof.

No jokes. This is serious business and it deserves a serious approach.

It is important not to use professional jargon or technical terms without explaining them. The only person in court who will understand such jargon is the other expert and you're not trying to convince him, he's on the other side. Again, the whole point is to be understood by the lay people who are going to ultimately determine the case. So its okay to use technical terms but you must be sure to explain them in lay terms.

Be aware that you can't write out your testimony and read it into the record. In fact, I don't like to see an expert use notes from which to testify. If you've spent enough time to have a trustworthy opinion on the problem, you should be able to testify as to the basic facts from memory. Beyond the basic facts, come armed with exhibits you have prepared in advance and properly disclosed. You can use these exhibits not only to better illustrate your point, but as a handy reference to jog your memory as to specific data that may be voluminous or difficult to remember.

Look at the questioner as he asks his question, but give your answer to the judge. The lawyer you work for knows what you're going to say and who cares what he thinks anyway.

**Exhibits**

As an expert, a major aid to your presentation are explanatory and illustrative exhibits. These may consist of both exhibits which you prepare and exhibits prepared by others but used by you in your investigation, such as deeds and plats. Keep in mind, however, that your exhibits are subject to the rules of evidence discussed below. In addition, there are a few cautions you should consider when preparing you exhibits.

First of all, don't rely on presentation machinery like computers unless you know it well and can run it without a glitch. Even then, older courts often don't have the electrical power necessary to run this equipment or are otherwise unable to support it.

Secondly, make BIG exhibits. These things have to be seen from across a very large room. Don't include any small details. They just won't be seen. Use several exhibits at gradually larger scales instead. Provide smaller copies of each exhibit for both lawyers and for the judge.

Use lots of photos. Take photos of everything, but remember to blow them up very large. All photos should be in color and you should always provide a scale in the photo, such as a ruler.

**Direct testimony.**

At trial, direct examination occurs first. This is conducted by the attorney who hired you. The first stage of this examination is to qualify you as an expert as set forth above. Once qualified, this part of the testimony is really your show. It is your chance to establish a relationship of trust and confidence with the judge and jury and to describe the situation from a surveyor's point of view. This is also your opportunity to impress the judge with the thoroughness of your investigation, present the facts as you found them to be and to explain your theory of the survey and the factual and legal basis for it. This part of your testimony should have been discussed with your attorney beforehand and should go smoothly and without any surprises.

However, even though the examining attorney is on your side, you must maintain your independence and testify only to facts you know to be true and to opinions you believe are justified

by these facts. Importantly, limit yourself to answering the questions presented and do not volunteer information or opinions damaging to your side unless failing to do so would leave a false impression and amount to deceit on your part.

**Cross examination**.

Cross examination follows direct examination as is conducted by the opposing attorney. It's the opposition's chance to discredit you, your investigation, your theories and conclusions and your professional competence. Don't help the opposition attorneydo this! Listen carefully to the question and answer only what is asked. *Don't volunteer anything on cross examination.* It cannot help and may well hurt. Your side will get another crack at you and any mistaken impressions created in cross can be taken care of then.

On cross examination, leading questions are allowed, so you must be careful you are not led to agree with a statement you believe is incorrect. This most often occurs when a leading question contains a number of points, all but one of which is true. In this instance, the rule to follow is that if any part of the question is incorrect, the answer is "no".

Realize that if opposing counsel can cause you to loose your composure or worse, your temper, he has accomplished a great deal toward discrediting you. Don't respond to sarcasm or ridicule in like fashion or with an angry retort. Understand that this is exactly the attorney's purpose. He's just baiting you. Instead, maintain your professional demeanor and answer his questions politely, if with just a hint of condescension, like one humoring a wayward child.

## Evidentiary Rules and Procedures

**The Rules of Evidence**

The introduction of evidence in Colorado is governed by The Colorado Rules of Evidence, cited as "CRE." The following are excerpts from the Colorado Rules of Evidence which pertain to the presentation of evidence in general and to expert survey evidence in particular.

**Relevance**

Rule 401, CRE, *Definition of relevant evidence*, provides as follows:

*"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.*

Thus, if a particular fact matters to a determination of any issue in the case, then any evidence which may make that fact more or less likely is relevant. But so what? Well, Rule 402, CRE, provides that:

*All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Colorado, by these rules, or by other rules prescribed by the Supreme Court, or by the statutes of the State of Colorado. Evidence which is not relevant is not admissible.*

Thus, once evidence is determined to be relevant, it s presumed to be admissible unless the opponent can show a rule to preclude it. In short, relevant evidence is generally admitted.

**Exclusion for lack of foundation.**

Even relevant evidence may be precluded on other grounds. Rule 602, CRE, for example, provides that:

*A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. <u>This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses</u>.*

In other words, if you want someone to testify to some relevant fact, you first have to show that he knows something about what he's going to say. You must show why we should believe him. In the case of lay witnesses, this means showing that the witness himself saw, heard, smelled, touched or tasted something that we need to know about. Without that showing, his testimony will be excluded. However, note the exception for expert witnesses.

**Exclusion as hearsay.**

Relevant evidence may also be excluded if it amounts to hearsay. Rule 801, CRE, defines hearsay as follows:

*...A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by him to be communicative...*

*A "declarant" is a person who makes a statement....*

*"Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted....*

Thus, any oral or written statement is hearsay if it is offered to show that the facts set forth in the statement are true and the statement is made by anyone when he is not in court testifying under oath. This includes written statements, even those which are notarized.

According to Rule 802, CRE, hearsay is generally not admissible. However, the hearsay rule is subject to many exceptions. Rule 803, CRE, lists many of these exceptions to the hearsay rule, including the following of interest to surveyor expert witnesses:

*(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation... of acts, events, conditions, opinions... made at or near the time by... a person with knowledge, if kept in the course of a regularly conducted business activity...*

*(8) Public Records and Reports. ...records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report....*

*(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original*

*recorded or filed document and its execution and delivery... if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.*

*(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document....*

(*16) Statements in Ancient Documents. Statements in a document in existence twenty years or more the authenticity of which is established....*

*(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of... science or art, established as a reliable authority by the testimony... of the witness or by other expert testimony....*

*(20) Reputation Concerning Boundaries.... Reputation in a community, arising before the controversy, as to boundaries of... lands in the community....*

All of the items described in the above portions of Rule 803 are hearsay, but they are admitted into evidence as exceptions to the hearsay rule based upon their perceived reliability.

Section 803(6) allows the admission of properly authenticated field notes and data collections prepared during the course of the field work. Note also the exceptions for public records such as recorded deeds (803(8)), and statements in documents affecting real property (803(15)), or in certain documents over 20 years old (803(16)). Under 803(14), the *mere record* that a document affecting real property existed may be received as evidence of the content of the original document and its execution and delivery. Most surprisingly perhaps, Rule 803(20) allows admission *community reputation* as evidence of the actual location of a boundary, thus making written statements of lay witnesses an important part of the surveyor's investigation.

**Rules relating to expert testimony.**

Rule 702, CRE, is the basic rule concerning expert testimony and provides:

*If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.*

**Qualification.**

As Rule 702 sets forth, an expert witness is one who possesses special knowledge or expertise in a scientific, technical or other special area by reason of his knowledge, skill, experience, training or education in such field. Thus, before being allowed to testify as an expert, one's qualifications must be established. In other words, one must be shown to possess some knowledge, skill, experience, training or education in the appropriate field of inquiry which the ordinary person does not possess.

An expert's special knowledge is usually established at trial by a series of preliminary questions asked before his opinions are presented. At the conclusion of these preliminary questions, the attorney offering the expert will ask the Judge to accept the witness as an expert in a particular field. The opposing attorney is then given the opportunity to "voir dire" the witness, or question him as to his qualifications. At the conclusion of this testimony the judge decides whether the witness does indeed possess special knowledge and should be accepted as an expert.

To establish the witness's qualification as an expert, a number of factors may be presented. For example, possession of a license required by Federal or state law to practice a certain occupation is generally sufficient to qualify one as an expert in the licensed field. This is especially true where an exam is required to obtain the license. In a field in which a license is required, one who does not have such a license generally will not be qualified as an expert.

Another factor is the witness's experience in the field of expertise, including not only the length of such experience, but also the nature and quality of experience. Education and training are also important. Degrees from colleges or universities, courses and seminars in the field of expertise and certificates of achievement are also important. Membership in professional

organizations and the offices held in those organizations may also be considered, as may honors and awards conferred by those organizations.

Another important consideration is whether the witness has taught courses or seminars in the subject or authored professional articles, treatises or texts. Prior acceptance by another court as an expert is also a factor, so every expert should keep a record of cases and courts in which you have been accepted as an expert.

**Basis of opinion**

According to Rule 702, CRE, once qualified as above, an expert may testify in the form of an opinion. That is, he may testify not only to facts, but as to the inferences and conclusions to be drawn therefrom. This is, of course, the very essence of expert testimony. However, expert testimony has other advantages. An expert is allowed to testify as to the basis of his opinion. According to Rule 703, CRE:

*The facts or data... upon which an expert bases an opinion... 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... upon the subject, the facts or data need not be admissible in evidence in order for the opinion... to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury... unless the court determines that their probative value... substantially outweighs their prejudicial effect.*

Thus, the Colorado Rules of Evidence establish what constitutes an acceptable basis for an expert opinion. Certainly, facts actually perceived by the expert may form the basis of his opinion and he is entitled to testify as to these facts. For the surveyor, this means he may base his opinion on the monuments, measurements, improvements and other facts he observed by performing his own survey. But note that this means the surveyors own work, not that performed by others under his supervision and control. A surveyor must have actually been present on the property and have exercised direct control over the proceedings if he is to base his opinions on *facts perceived by the expert*. This means you'd better do your own survey if you're going to testify as an expert. The expert may also base his opinion on facts related to him prior to trial. Clearly, such facts

themselves may well constitute inadmissible hearsay. Nevertheless, the surveyor may base his conclusions on such inadmissible evidence and may therefore testify as to these facts.

Further, under Rule 702, inadmissible evidence itself may be admitted upon two conditions. First, the expert must testify that such evidence is of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject in question. Second, the court must determine that the probative value of the inadmissible evidence in allowing the jury to evaluate the expert's testimony substantially outweighs its prejudicial effect. In almost every instance, the court will come down in favor of the admission of the evidence, reasoning that the experts opinion cannot be properly evaluated if part of the evidence upon which he relied is excluded. Thus, helpful evidence that would otherwise be unavailable may often submitted as part of the expert's testimony.

The expert may also base his opinion on facts he hears in the testimony of others at trial. This is used to a great extent as a basis for rebutting the testimony of opposing experts. It may also be used to form the basis for an explanation of facts which the surveyor weighed but decided not to use in his opinion.

Facts disclosed by testimony at trial which the expert **did not** hear may also form the basis of his opinion. These facts may be related to the expert as hypothetical question. The hypothetical must be a fair statement of the facts in evidence. The question is phrased in the form "Based on your expertise as a land surveyor, assuming facts A, B, C and D are true, what would you conclude regarding the boundary." Clearly, experts are very versatile tools for the astute attorney.

## The Role of the Surveyor in Court

### Witness fees.

When serving as an expert witness, a surveyor is entitled to charge and receive an expert's fee. The amount of this fee is a matter of negotiation between the surveyor, the client and the client's lawyer. The fee agreement should be in writing and should be attached as an exhibit to the expert report.

The agreement should specify either a flat fee or an hourly fee for the following services:

1. Preliminary investigation, including an inspection of the site, preparation of an estimate of costs, a review of the pleadings and a review of the surveys prepared by the opposing experts or any other surveyor.

2. The survey itself, including additional activity required for a court presentation.

3. Time with the attorney explaining the survey and its implications for the case.

4. Preparation of specialized exhibits for use at trial.

5. Time spent at depositions.

6. Time spent preparing the attorney to depose the opposing expert.

7. Time spent in trial preparation

8. Trial testimony.

9. Time spent at trial assisting the attorney in the examination of opposing experts.

**The fee absolutely cannot depend on the outcome of the trial!** If it does, the expert loses his independence and, therefore, his credibility. It is improper for the surveyor to condition the acceptance of a fee upon victory at trial or for the amount of the fee to be contingent upon the verdict.

**Expert status and what it means**.

A lay witness is one who does not possess any expertise in a particular field of inquiry.

Lay witness testimony is restricted. Generally, he can only testify as to facts which he personally observed, that is things he saw, touched, smelled, heard or tasted. He is not generally allowed to give his interpretation of those facts or to testify as to the conclusions to be drawn from those facts. A lay witness may not receive any fee other than a five dollar witness fee and a travel fee.

A person who possesses special knowledge or expertise in a scientific, technical or other special area by reason of experience, training or education may testify as an expert in such field once this special knowledge has been established. Once qualified, an expert may testify to facts he personally observed, just like a lay witness, but also as to which were reported to him by others prior to trial, facts contained in the testimony of others which he hears at trial, facts contained in the testimony of others which he did not hear and even as to facts not admitted or admissible in evidence. In addition, an expert may testify to his interpretations of those facts and the inferences he draws therefrom. He may also testify as to his opinion of the proper conclusions to be drawn from the facts, interpretations and inferences.

Thus, an expert is given great leeway in presenting testimony. This is in great measure because he is perceived to be a independent witness with nothing at stake on the outcome of the action. This is the basic reason why his fee must be independent of the result. So, to a degree at least, there is an element of professional trust underlying the experts position in court. Any abuse, or even suspected abuse, of this trust will completely undermine the expert's credibility and thus his usefulness to his client. Therefore, an expert must be, or at least appear to be, beyond reproach. He must take sufficient care in his observations to preclude any hint of carelessness. He must take great pains to observe and report all facts pertinent to the case, not just those favoring his client. **Above all**, he must maintain his impartiality and refuse to be put in the position of an advocate for his client's position. That is the attorney's job, not the expert's. That's why attorneys are allowed to argue, but not testify, for their clients. Finally, an expert should never offer an opinion which is clearly unsupported by the facts. To do so merely destroys his credibility.