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The Land Surveyor as Expert Witness (General)

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Course Content

The Professional Land Surveyor is respected and held in high esteem in the community. He is proficient in measurement and in computations. Further, because the practice of property Surveying must consider inexact laws in addition to exact sciences, he is proficient in the law and in sound judgment. The surveyor then, is an expert in the science of measurement and in the art of boundary location

The qualification then, of an expert is necessary for the court to be satisfied of his competency. For the surveyor, mere licensing is not proof of competence. An expert is one who can demonstrate real knowledge, experience, and wisdom on the point in question. To prove him able to speak with authority, the following must be evaluated.

- (1) Education**
- (2) Registration or licenses**
- (3) Present professional Position**
- (4) Technical experience especially on related questions**
- (5) Recognition of expertise by other administrative, judicial or legislative bodies**
- (6) Membership in professional societies and other professional service**
- (7) Writings on surveying subjects**
- (8) Knowledge of general practice within the profession**

Qualifications will normally be drawn out of the witness by a series of questions. The witness should be slightly modest but should not neglect the complete statement of his qualifications.

The courts recognize certain testimony as being within the realm of an expert. Generally, such testimony must involve scientific, technical or other specialized knowledge. The basic difference from lay testimony is the scope of opinion evidence allowed. The expert witness, unlike the layman, may express opinions relative to matters not observed.

Various restrictions are applied to the subject matter of the expert's testimony. Such testimony, for example, must be beyond the general knowledge of the layman and it must be helpful to the court in determining the truth. In addition, the testimony must be evaluated on the basis of its acceptability to those of acknowledged expertise in the relevant area.

The expert should make every effort to rid his testimony of any bias or prejudice resulting from his association with his client or his previous consultations. This should

not be interpreted, however, as stifling the sincere convictions of the expert. An expert is entitled to his opinion and it is recognized that he would probably not have been employed if his opinion differed greatly from his client's position. Firm convictions based upon sound reasoning need never be suppressed.

The Professional Land Surveyor is often called upon to render expert testimony. This is generally through his employment by one of the litigants but may be by appointment of the court. In addition, surveyors, in a great many cases, act in a quasi-judicial capacity with the acquiescence of the concerned parties. For these reasons, and as a matter of good, sound practice, the surveyor would be well advised to perform all his surveys with an eye toward their being the object of future adjudication.

The Surveyor and Attorney Team

The surveyor and the attorney form a team. They will work closely together from inception through a final determination of the case. It is of great importance that the relationship be frank and open and that both the expert and the attorney educate each other in their respective areas of expertise.

In the initial phase it is important for the expert to understand the position of his client and the establishment of that position by the attorney. The expert, then, can study the matter and determine if he can support the position. If he cannot, it is his duty to inform his client and the attorney, without delay. The expert's professional reputation will stand behind his opinion; therefore, he must be firmly convinced that he is right.

Thereafter, it is vitally important for members of the team (surveyor, attorney, and other experts, if any) to learn to communicate. Technically, we all speak different languages. Early meetings of the team will establish parameters, define scientific terms, and generally establish a rapport between the parties.

Cross education, at this stage, is also important. Each expert has much to learn about the other. Further, it is not unlikely that an expert can provide input to another expert, or to the attorney. A surveyor, for example, generally knows the law related to land surveying and boundaries better than the attorney.

It is proper to discuss the entire case, both good and bad. Nothing should be withheld. If there is a fact injurious to the case, so be it. Also, the surveyor should make sure his position is known. He is the expert in measurements and in boundaries and should state his opinions firmly. The surveyor is cautioned that he is not an expert in the law, however, and he must be open minded to other opinions.

The middle phase of the development of the case concerns the preparation of work products. Study, analysis and the formulation of conclusions are being actively engaged in, usually by many hours of field and office investigation. It is necessary to keep contact throughout this phase, primarily via a reporting procedure.

The final phase of the expert-attorney relationship concerns the preparation of the case for trial. The direct (or affirmative) case will be presented first, by a process of questions from the attorney and answers by the expert. Obviously, this lends itself to careful preparation but should appear, on the stand, natural and unrehearsed. No question and, more importantly, no answer should be a surprise to the expert or the attorney. Hypothetical questions, if they are to be employed, will require more intensive preparation.

Preparation for cross-examination is not nearly as efficient as the direct case. The attorney and the expert can, however, pin down areas of uncertainty and discuss what could arise under adversary circumstances. Practicing cross examination questions and answers is also beneficial.

Finally, the expert can greatly aid the attorney in his preparation for cross-examination of the opposition's experts. This will probably require observation of the opposition's experts in court, as they testify.

The attorney and the expert are a team. Both have considerable responsibility to the other. The attorney, it should never be forgotten, is the final interpreter of the facts and the best judge of how the facts should be presented to the court. The advocate is, then, the final authority.

The Surveyors Work Product

Generally, the surveyor's main work product is a comprehensive survey map. In as much as this map will be, in all probability, the primary demonstrative evidence presented to the court, great pains should be taken in its preparation. A complete, thorough, and professional product is a reflection of its maker that will pay great dividends.

The surveyor should take a very personal interest in the preparation of the survey map. All data, whether or not it benefits the case, must be shown. Take nothing for granted. Trust no one, not even yourself. Check and double-check everything. Mistakes on the final map can be embarrassing.

- Careful field notes should always be kept. Thorough records of time spent on the project, as well as specific visits, will also prove helpful. Complete referencing of all historical documentation (prima facie evidence) will also prove useful.
- The surveyor would be well advised to quantify the accuracy of his measurements. Obviously, no measurement, or series of measurements, can be perfect. Statistically, however, an estimate of precision can be made. The equipment employed, the method of measurement, and a comparison to

recognized standards will be questioned in court. A frank statement of error must be presented and, in language the layman can understand.

- Leave no stone unturned in preparing work products. Check, double check, then check again. Remember that the professionalism of the surveyor's product is a measure of the professionalism of the surveyor.

Testimony

Eventually, the surveyor will be called to the stand, sworn in, and his testimony will begin. If he is to be effective, the surveyor must impress the court with the truthfulness of his conclusions and opinions. Watchwords are honesty, candor, and fairness; in a word: credibility. The testimony should frankly admit indisputable facts, even if they aid the opposition's case. The expert's manner should be dignified and modest and he should speak from a composed state of mind. All questions should be answered truthfully but only to the extent of his knowledge.

The expert should be aware that the testimony could be substantially more effective if he keeps certain precepts in mind:

- **Be prepared:** Considerable time has probably elapsed since the work products were prepared. Review the entire matter, including another visit to the site. Rehearse the testimony and possible cross-examination. Recheck everything! If you do nothing else, take the time to prepare carefully.
- **Tell the whole story:** As an expert, you are expected to be impartial. If there is evidence that supports the opposition's case, it is of no consequence to you. State these facts as you would those that support your case.
- **Be yourself:** This is no place for excessive egotism or modesty. Be composed, speak in a calm steady voice, and answer questions straightforwardly.
- **Communicate:** Tune your testimony to the layman. Even the judge should not be assumed to understand technical jargon. Talk to the court or jury, not the attorney. The witness is the best judge of whether he is communicating effectively. As necessary, adjust your testimony for maximum effect.
- **Do not volunteer information:** By so doing, you open up areas to cross examination that may not have been considered earlier. This is a concept, which should never be violated.
- **Understand the question:** If you do not, say so. If you are unsure of the answer, say so. Never guess. If a question is posed and you are requested to answer yes or no, assert your right to explain (if necessary).
- **The Why question:** Watch for this on cross-examination. If given the

opportunity, this type of question will allow you to get considerable testimony into the record.

- **Do not assert vast knowledge:** This will only trap you. Avoid answering every question with certainty. If you are not too positive, you will have room to add a detail that you may have overlooked earlier.
- **Do not become adversary:** This is decidedly not the witness' place. With experience an expert will become a "quasi-attorney" and should be especially careful with this area. Do not become angry and do not engage in sarcasm.
- **Avoid unnecessary hesitation** in answering a question, but do not blurt out answers either. Allow a moment's hesitation for your counsel to object, if he so desires, then answer.
- **Be professional:** You should be well dressed. Field clothes are not for court. Adopt professional demeanor.
- **Fees:** Have a definite fee arrangement, never a contingency. Answer questions about your fee straightforwardly. You are a professional entitled to a professional fee.
- **Exhibits:** Use demonstrative evidence whenever possible. Refer to exhibits by number when you testify and mark the exhibit when you refer to it. This will allow a review of the case, at a later date, by a higher tribunal
- **Correct mistakes:** If you have made a mistake in your testimony, make sure you call it to the attention of your attorney so you can correct it
- **Do not discuss the case** with jurors or the opposition attorney. Further, nervous habits (chain smoking, etc.) in sight of the jury during a recess, may leave a bad impression.
- **Prepare for the testimony,** and then answer all questions truthfully and straightforwardly.
- **Admit indisputable facts with candor.** Communicate. As in most things, the best advice is to be you.

If he is to be effective, the expert must impress the court with his credibility.

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