THE SURVEYOR IN COURT

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Introduction. The very nature of surveying makes it probable that the property-line surveyor will occasionally be a witness or a litigant in court. When a surveyor is called upon to monument a property line, it may happen that one of the adjoiners will disagree with his monument line location and will refer the matter to the courts. The adjoined might claim ownership due to a line of possession, or he might claim the surveyor erred. But whatever his claim, the dispute will probably end in court, and the surveyor will be a witness.

Without disagreement, investigation and experiment would cease. The arts and sciences have progressed because people disagreed with the old methods and have advanced new ideas. Not all disagreements are objectionable. Because of disagreement of opinion, the judge of the higher court sometimes reverses the opinion of the judge of the lower court. In fact, many attorneys depend upon differences of opinion for their very livelihood. Disputes have been with people and will continue to be with them. Likewise, it is reasonable to expect that surveyors will occasionally disagree, and litigation will sometimes be created because of such differences of opinion. Honest differences of opinion based upon sound reasoning from the true facts in evidence may be considered as a healthy condition.

The surveyor has many opportunities for errors. He may make a wrong measurement or calculation, and thus be the cause of a costly mistake. Such errors, unless voluntarily settled by the surveyor, usually end in a damage suit.

In some States, such as California, whenever a judge feels that the court needs the services of an expert to aid in interpreting or observing facts, it may appoint an expert on its own motion. Thus, the surveyor, as an expert, might serve the court.

From this discussion, it can be concluded that all actively engaged property line surveyors must expect, at some time that they will be called upon to appear as a court witness. In this paper, it is presupposed that the surveyor is a witness, not a litigant.

*Duties of a Surveyor in Cour*t. In litigation involving land boundaries, the surveyor is a witness, either lay or expert. He has no function other than as a witness describing facts within his perception, or as an expert witness expressing opinions within his special field.

In the practice of surveying, the client asks the surveyor to give him a solution to a particular boundary problem. The surveyor works until he finds a *solution* and presents the results to the client. In a court case, the surveyor is a witness who presents the facts, and the court decrees the solution. Thus, in court cases the surveyor must change his mode of thinking and always remember that it is not he who is solving the problem. He is a witness.

Court Trials. All of the procedures and methods used in court trials, though interesting, are not of vital importance to the surveyor. Since the surveyor is a witness, it is important that he know how to properly conduct himself as a lay or expert witness. And it is important that he know what fees, if any, he is entitled to. These items will be discussed.

Pre-trials. Pre-trials, as practiced in some states, are for the purpose of eliminating unnecessary court time and are an attempt to reach agreement on what are the issues in the case. The attorneys and the judge, in conference, discuss the issues and agree upon which points of evidence will be taken. At this

time, the judge or the attorney for either side may ask for an expert witness. Often they are appointed in boundary disputes.

Oath, Questions, and Answers. Prior to testifying, a witness is placed under oath to tell the truth, the whole truth, and nothing but the truth. This does not mean that the witness is to volunteer information and ramble along on any subject that he thinks might have a bearing on the case. He is to answer questions put to him. If the answer to a question result in a half-truth and the witness feels that further information should be given, and yet the information is not called for by the question, he may ask permission of the court to clarify his answer. The reason testimony is, in general, limited to the answering of questions is that the court wants to know in advance whether the subject matter the witness is to talk about is admissible evidence. Also, the opposing side has an opportunity to object if the question asked is improper.

Direct and Cross-examination. The examination of a witness by the part producing him is called the direct examination; the examination of the same witness, upon the same matter, by the adverse party is called the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise directs. (Sec. 2045, C.C.P.)

> [NOTE: Refers to Section 2045 of the California Code of Civil Procedure. The recitation is a verbatim reading of the code.]

Leading Questions. A question that suggests to the witness the answer which the examining party desires is called a *leading* or *suggestive question*. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions. But if he examines him as to other matters, such examination is to be subject to the same rules as direct examination. (Sec. 2046, C.C.P.)

> [NOTE: Section 2046 reads as follows: Leading Question defined. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances, making it appear that the interests of justice require it.]

Hearsay. Evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say, is called *hearsay evidence*. (*Black's Law Dictionary.* West Publishing Co., St. Paul, Minn.)

Evidence based upon rumor, common talk, or the statement of someone else is hearsay and, with few exceptions, is inadmissible as evidence. In surveying practice, the surveyor often bases his opinions upon hearsay facts, such as a monument found and commonly reported by many as being in a correct position. Obviously a surveyor could not be present in person when all of the original surveys were made; hence his opinion of where property lines belong may be based entirely upon hearsay evidence of where the original surveyor set his monuments.

Expert opinions are admissible even though they may be based upon inadmissible hearsay evidence.

Jury. All questions of fact, where the trial is by jury, are to be decided by the jury, and all evidence thereon is to be addressed to them. (Sec. 2101, C.C.P. Cal.)

[NOTE: Section 2101 reads as follows: Questions of fact, how tried. All questions of fact, where the trial is by jury, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.]

A jury trial may be requested by either side. If there is a jury trial, the jury decides questions of fact. If a government section corner is lost and there is a dispute over which of several monuments represents the true corner, the jury would decide which monument represents the true corner. If a fence has been in existence for a period of time and the question arises as to how long the fence has been in existence, the jury would decide. But if there were a question of the legal interpretation of the meaning of a deed term, the judge would decide that.

Not many attorneys care for jury trials in boundary litigations; hence, the judge usually tries both facts and law. In such event, the surveyor testifies to most of the testimony as to the facts concerning boundaries. A surveyor's main duty is to gather facts. He measures distances, angles, and bearings and searches for monuments. Any fact he observes and measures is a fact to which he may testify.

Lay Witness. Lay witnesses are those that may testify to facts within their knowledge and may not state their opinions.

This is the rule. But there are many, many exceptions to the rule. In fact, practically all of the discussion of the rule centers on instances that are exceptions.

Often there is no way of extracting the facts from a lay witness other than by allowing him to express an opinion on things derived from his own perception. A statement that there was an *old* fence between the two properties is an opinion. *Hot* or *cold* may only be an opinion, especially when a person says how *hot* or *cold* a thing is. The lay witness testifies about subject matter readily understood by the court. Preventing the lay witness from stating opinions, especially on matters regarding which he is not qualified to do so, tends to prevent fraud and perjury and is one of the strongest safeguards of personal rights.

Expert Witness. Generally a witness may testify as an expert witness if he possesses peculiar knowledge, wisdom, or information regarding the subject matter in consideration, said knowledge, wisdom, or information being acquired by study, investigation, observation, practice, or experience. But such knowledge is not of the type that is likely to be possessed by ordinary laymen or inexperienced persons. (King vs. King et al, [161 Miss. 51])

Because of training and experience, many surveyors are qualified to be declared experts by the court. The word "many" instead of the word "all" was used advisedly. Mere licensing is not proof. An expert is one who can demonstrate real knowledge, experience, and wisdom on the point in question.

Because of his special knowledge, the expert is permitted to testify as to conclusions drawn from facts within his field. The expert gives the result of a process of reasoning, which can be mastered only by special training.

Appointment of Expert Witnesses. Either side may call their own expert witness. In some jurisdictions the court may appoint an expert.

"Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil or criminal, pending before such court, that expert evidence is, or will be required by the court or any party, to such action or proceeding, such court or judge may, on

motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable." (Sec. 1871 C.C.P. Calif.)

The practice of the parties hiring their own expert witnesses has been severely criticized. There is an implication of bias towards the party calling the expert, especially when a sizable fee is involved. A recommitment or pre-consultation with a party in itself presents the flavor of bias. A party may interview many experts before he can find one that is favorable to his cause, and thus not present a true picture to the court. It is indeed unfortunate that the same brush often tars many. Such ideas are all injustice to the conscientious expert whose only concern is the truth of the principle involved.

Duties of Expert Witness. A summary of the duties demanded of an expert witness is:

a) All questions put to him should be answered clearly and intelligently.

b) He should be absolutely unbiased and honest.

c) He should have real expert knowledge of his particular subject.

d) He should be prepared to discuss the opinions of other authorities and state why he agrees or disagrees with them.

e) His testimony should be limited to things and opinions that he can defend before experts in his particular field.

The opinions of the expert are generally only arguments in behalf of a litigant. Hence, his testimony is often valuable only because of the reasons and facts given to support his conclusions. Rejection of conclusions unsupported by facts or reasons can be expected.

Testimony that cannot be understood by the judge or jury is practically valueless. A statement that "I ran a traverse around the deed and found an error of closure of two feet" is simple to the surveyor but obscure jargon to the average person. It is doubtful if the judge or jury would know that the traverse might be an office calculation and not a field measurement. "Error of closure" certainly needs clarification to most people. A judge became a judge because he was an attorney, not a surveyor. One of the assets of a good expert witness is simple, clear English. Don't try to awe the jury by your ability to "elucidate" by "ostentatious" terminology. Explain by simple terms.

At no time should the surveyor place himself in such a position that he is obligated to take a particular side in his testimony. When the expert is on the stand, he should make every effort to rid himself of any bias or prejudice resulting from who is paying the fee or who has previously consulted with him.

No one can expect to remember in detail all of the facts he is to present without refreshing his memory. Surveyors take field notes and develop evidence in writing. Maps are examined and deeds are read. Prior to taking the stand, the surveyor should re-familiarize himself of all the data; otherwise embarrassment may result from a searching cross-examination. He should be especially prepared to explain the error of the contrary opinion.

Opinion Evidence. As previously stated, the lay witness is limited to testimony concerning facts and may sometimes give opinions on things that are easy for everyone to understand. The expert may give opinions on subjects that are beyond the knowledge of average people. But such right to give opinions is not unlimited.

No witness can give opinions on the *ultimate fact* that is being tried. Permitting an expert to tell the jury what they must decide is usurping their exclusive rights. If the north quarter corner location is in dispute and any one of three stone mounds might be the right one, the surveyor cannot tell the judge or jury which one they should select. He can walk all around the subject and even answer hypothetical questions that almost give direct answers on the solution. He could describe in detail the shape and size of the mounds and describe any special marking found. If leaves were found under one of the mounds, indicating recent construction, such a fact could be emphasized. What was found in other similar locations and whether the original surveyor consistently set a certain type of monument could be discussed. Needless to say, the examining attorney would have to be well versed on the facts observed by the surveyor; otherwise he would not know which questions to ask. The surveyor is more or less limited in his response to the questions asked.

No witness may give his opinion on the questions of law presented. Whether a deed was properly executed or how a deed word should be interpreted are questions of law for the court to decide. The court and attorneys are experts at law, not the surveyors.

No expert opinions may be given to the jury if they are capable of forming their own opinion. The purpose of giving expert opinions is to advise the jury on matters beyond their knowledge, not on matters within their knowledge.

Fortunately, the expert witness does not have to decide when he can or cannot give opinions. The judge will tell him. A question is presented to him, and if the other side objects, the judge will rule on whether the question can be answered.

Hypothetical Questions. A hypothetical question is a question put to an expert witness containing a recital of facts assumed to have been proved or proof of which is offered in the case and requiring the opinion of expert witness thereon.

Hypothetical implies “assumed without proof.” Each side thinks or hopes that they can prove certain facts to be true. But neither side can be certain of what the jury will declare to be true. So a hypothetical question such as, “Assuming that this, this, and this are true, could you express an opinion as to whether a person so injured could continue doing surveying work”?, is asked. The facts assumed to be true are the facts presented or to be presented in the case. If the jury finds that the facts are not as assumed, the opinion of the expert is without effect. Several hypothetical questions may be asked by adding extra-assumed facts or subtracting assumptions.

Hypothetical questions are more frequently used for doctors in personal injury cases. Rarely, the surveyor will find such questions presented to him.

Cause and Effect. An expert may testify as to what might have caused a thing; but it is better not to say what did cause it. Thus, a surveyor might testify that measuring from an incorrect monument located five feet from the correct monument might cause the improper location of a fence. He should not say that it was the cause; that is for the jury to decide. To say that a 2” x 2” pine stake located at the property corner would completely disappear in 30 years, due to decomposition, termites, etc., would be improper. To say that at all locations where pine stakes were originally set none were found that were over 30 years old, and those older than 10 years were in a bad state of decomposition, would be proper.

Textbooks. Because the author of a book cannot be cross-examined and the author did not write his book under oath, books are, by common law, excluded as evidence.

In most states, by statute law, the right to use books of science or art and published maps or charts is permitted under limited conditions. In California, section 1936 of the Code of Civil Procedure makes "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, . . . prima facie evidence of facts of general notoriety and interest."

From Gallagher vs. Market St. Ry. Co., [67 Cal. 13] is extracted, "Evidence of this sort is confined in a great measure to ancient facts, which do not presuppose better evidence in existence. . . The work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature. Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individual or mere local communities. Such facts include the meaning of words which may be proved by ordinary dictionaries and authenticated books of general literary history and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination. Thus, mortality tables for estimating the probable duration of the life of a party at a given age; chronological tables; tables of weights, measures, and currency; annuity tables; interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subject as may be involved in the trial of a cause."

The expert's memory may be refreshed by referring to standard works of his profession, but the books may not be read to the court. The witness may state the reasons for his opinion, even though the reasons were founded on books, as a part of his general knowledge. If a witness bases his opinion upon a book and says so, extracts from the book may be read to contradict him. But, if an expert has testified from his own experience, books may not be received in evidence to show that the authors of books disagree with the opinion of the expert.

Power to Compel Expert to Testify. (2 ALR 1576 annotated, The Lawyers Co-operative Publishing Company, Rochester, N. Y.) The right of an expert to refuse to testify as to matters of opinion, without compensation, is traced back to English common law. In Webb vs. Page (1843) 1 Car. & K (Eng) 23, the right of the expert to demand compensation prior to testifying was upheld.

For the usual witness fee, a lay or expert witness is required to testify to facts seen or observed by him. If a surveyor observes certain facts or sets certain monuments, he may be compelled to testify as to these facts. But, where a party selects an expert to render an opinion on a peculiar subject, the expert can refuse until satisfactory arrangements are made for compensation.

Many jurisdictions hold that an expert must testify to facts within his knowledge even though special study, learning, or skills were required to determine them. In Fonda vs. Bolton (1883) [6 NJLR 240], a civil engineer was denied the right to recover compensation for services as an expert witness. The party who employed him to make a survey called him as an expert. Since he attended court under a subpoena, he was bound to testify as to what he knew, however he acquired the knowledge. In Summers vs. State [5 Tex. App. 365], a medical expert was compelled to report on the findings of a post mortem examination without extra compensation.

But there is nothing in the law that compels an expert witness to make a free preliminary investigation to prepare himself for expressing an opinion. A surveyor who is asked to perform certain surveys as a preparation for litigation cannot be compelled to do so without compensation. If a deed is presented to a surveyor in court and he is asked where it is located on the ground, the surveyor may refuse to read the document and give an opinion. But if he has already read the document and has already

formed an opinion, he probably would be bound to express his opinion.

In United States vs. Cooper, [21 D.C. 491], the court observed that it was an obligation of an expert to serve upon payment of a reasonable fee.

In summary, in many jurisdictions surveyors are bound to testify to the results of surveys performed in the past. They are not bound, without compensation, to express opinions on things that require professional preparation prior to expressing the opinion.

It is interesting to note that an expert witness may not refuse to answer a question on the grounds that it will cause him civil liability. Usually the only grounds for refusal to answer a question are that the answer may cause the witness to self-incriminate himself for a crime. Refusal to answer a question because it may cause embarrassment, disgrace, or monetary loss from civil liability is not an excuse. The privilege of refusal to answer a question applies only to crimes. [CJS Vol. 98, p98].

Expert Witness Fees. The surveyor's fee for expert testimony is a contractual arrangement between the surveyor and the party engaging him.

The courts cannot compel a person to perform work. If a measurement or observation is required, the right of a litigant to hire an expert is recognized. Before commencing the work, the surveyor should have a clear understanding of what his fee will be. If the work is performed and there is no understanding as to the amount of the fee, the surveyor may be compelled to testify as to what he knows without the benefit of a fee. It is advisable to include within the fee all expenses that will be incurred in court appearances, since a person is compelled to appear in court whether he receives a fee or not. The only collectable part of the contract is the work for preparation to appear in court.

The rule is that a so-called expert witness is not entitled to extra compensation for any testimony, which he may be required to give under an ordinary subpoena of the court. [16 AIR 1462.]

The compensation of an expert witness cannot be dependent upon the outcome of the litigation, since it furnishes a powerful motive for exaggeration, misrepresentation, or suppression.

"We are aware that witnesses who are to be called to give expert testimony which involves the special knowledge and skill of the witnesses, and often requires examination and study upon a particular branch or science, are, from the necessities of the case, justified in demanding and receiving compensation for their time and labor devoted to the investigation of the particular science about which they are to testify; but this practice has been allowed from the necessities of the case, and the inability of courts and juries to determine questions without the benefit of such expert knowledge. Such agreements, however, can never be valid where the amount to be paid is to depend upon the testimony that is to be given, and where the right of compensation depends upon the result of the litigation." [Re Schapiro, 144 App. Div. 1, 128 NY Supp 852.]

Amount of Expert Witness Fee Is Subject to Cross-Examination. Cross-examination may extract from an expert the fact that he is to receive a fee and how much the fee is.

"The amount of an expert's fees, whether stipulated in advance of a trial or determinable in the future, has a direct and vital bearing upon his credibility, interest, bias, or partisanship, and the rule permitting cross-examination with reference thereto should be liberally applied." [33 ALR 2nd 1167, annotation 33 ALR 2nd 1170.]

"An engineer who testified for the petitioner may be asked on cross-examination, if he had not

been promised ‘considerable money’ if the preceding went through, as it is always competent to ask a witness, on cross-examination, by whom he is employed and whether he is paid, in order to show his interest.” (West Skokie Drainage District vs. Dawson, 243 ill. 175.)

In a park condemnation proceeding, it was error not to allow a question asked of a real estate agent, which had estimated values for the city, as to whether he was interested in the sale of land that would be benefited by the park. (Oakland vs. Adams, 37 Cal. App. 614.)

Survey Must Be Done by Surveyor. The surveyor who testifies in a case must be the one who made the survey. In the case of Hermance vs. Blackburn (206 CA 653) the court notes “ . . . it was error to permit a witness to testify that a certain arch protruded over the lot line where said witness testified that the survey was not made by him personally, but by men in his employ.”

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