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White Paper
The Land Surveyor As An Expert Witness
In Litigation – Procedures, Techniques and Liabilities
Part 2 of 9

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Mission Statement

To promote the public’s perception of land surveying and to support all efforts by Professional Land Surveyors to elevate the stature of the profession. As an advisory organization, our purpose is to research, summarize, debate, and publish our findings on various topics relating to the principles and applications of the Professional Land Surveyors Act and the California Subdivision Map Act.

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I. Executive Summary

To understand the role of the California licensed land surveyor (“surveyor”) as an expert witness in either the California or the federal courts, it is important to first have a basic understanding of the civil litigation process and the responsibilities of the expert witness related to that process. This White Paper is part of the author’s Land Surveyor Liability series of nine (9) papers and focuses on the role of the surveyor as an expert witness in the litigation process. Secondly, this White Paper focuses on the liabilities associated with serving as an expert witness. There are several good texts and papers on the subject of expert witnesses in the litigation process. This White Paper will present alternate perspectives on the topic of expert witness engagements drawing on other various texts for a compilation of materials not previously presented in this format (see the Recommended Reading section at the end of this White Paper). This White Paper is specifically tailored to land surveyors.

Surveyors, acting as designated experts, guide the court and the parties in evaluating field evidence, conveyance documents, title insurance and the characteristics of the real property being surveyed. Real property civil litigation often involves complicated legal theories. The surveyor’s role is crucial in this legal process when dealing with issues relating to boundaries, easements, encroachments and other survey type issues. A licensed surveyor who acts as an expert witness is required to have an understanding of the legal process in order to understand his/her role in that process and to understand the liabilities and responsibilities associated with expert witness engagements. A surveyor wanting to work as an expert witness is not qualified simply by virtue of having a land surveyor’s license. The competent expert must also have the experience and expertise in surveying to form accurate and truthful opinions, withstand cross-examination and not expose oneself to liability if the surveyor’s opinion is clearly incorrect. It is critical that the surveyor expert form his/her own independent opinions. The expert witness should not be swayed by the attorney who hired them to simply give the opinion that the attorney desires, avoid any advocacy and maintain the highest professional standards of honesty in forming survey opinions.

Beyond the aspects of the technical functions of land surveying, the surveyor should know the difference between a “consulting expert” status and a “testifying expert witness”, the advantages of each to the client, the attorney, the surveyor and the Court. More than a passing acquaintance with both the Federal Rules of Evidence and the California Evidence Code are necessary to understand the distinctions between a consulting expert and a testifying expert

witness. Neither type of expert practices law – only attorneys practice law. However, the expert’s basic understanding of the language used by attorneys and of the legal system is critical to the surveyor who takes on engagements as an expert within the California or Federal court systems.

Pursuant to American Jurisprudence:

“If the ownership of property is an incidental factor in a case and not of apparent importance, the simplest and most satisfactory method of establishing proof of ownership is to permit a witness to state the fact as he or she knows it and leave the group for that belief to be developed by cross-examination.¹ However, if the question of title is the question at issue, or is a disputed fact of vital importance, many courts confine the witnesses strictly to the evidentiary facts of which they have knowledge, and do not permit them, even in form, to give an opinion or conclusion, and thus to assume the office of the trier of fact.²

It has been held that, regarding personal property, a witness may testify directly as to ownership; the testimony is viewed as a statement of fact, as distinguished from a conclusion of the witness.³ However, it has also been held that such testimony is inadmissible, especially if the question in the particular case is unusually complex.⁴

31A Am Jur 2d, *Expert and Opinion Evidence* § 123.

¹ Citing *Hunnicut v. Higginbotham* (1903) 138 Ala. 472; *Nolan v. Nolan* (1909) 155 Cal. 476; *Mathews v Livingston* (1912) 86 Con. 263, 85 A. 529.

² Citing *Carney v. Hennessey* (1901) 74 Conn. 107.

³ Citing *Hunnicut v. Higginbotham* (1903) 138 Ala. 472; *Nolan v. Nolan* (1909) 155 Cal. 476; *First Nat. Bank v. Robinson* (1914) 93 Kan. 464; *Olson v. O’Connor* (1900) 9 N.D. 504; *Jantzen v. Emanuel German Baptist Church* (1910) 1910 OK 339; *Strickland Transp. Co. v. Ingram* (Tex. Civ. App. Texarkana 1966), writ dismissed, (Oct. 5, 1966) 403 S.W.2d 192.

⁴ *Log Owners’ Booming Co. v. Hubbell* (1903) 135 Mich. 65.

II. The Civil Litigation Process

A. An Overview Of The Litigation Process – It’s Not Like Television

Civil litigation is not like television or the movies. There are rarely Perry Mason, Law and Order or even Boston Legal moments. There is rarely the type of drama portrayed in the media. Usually there is no drama at all. The legal system is designed to minimize such drama. Civil litigation typically involves two or more parties (individuals, business entities or governmental agencies) that are in some type of dispute where the plaintiff(s) is suing the defendant(s) (and sometimes the defendant cross-complains back against plaintiff or others) seeking monetary damages.⁵ There are also cases where injunctions, specific performance or rescission/reformation of contracts⁶ (known as equitable remedies) are requested by a plaintiff. A plaintiff may also seek a combination of monetary damages and equitable relief.

1. Attorneys’ Fees and Costs

Civil litigation can be extremely expensive. Plaintiffs and defendants who hire attorneys by the hour must plan to pay a typical minimum rate of \$200 per hour – for potentially hundreds of hours if the case goes to trial. Rates for experienced attorneys from well known, prestigious firms and attorneys in specialized areas (such as securities) can reach \$800 per hour. In addition to paying their attorneys, plaintiffs and defendants must also pay court filing fees (for complaints, motions, jury fees, trial fees, etc.), deposition costs, copying fees, faxing fees, telephone charges, transcription charges, postage charges, travel charges, witness fees, jury fees and various other types of costs too numerous to list in this paper. ***Also included in these costs are the costs of paying retained experts.*** Experienced expert witnesses fees and associated costs can, in some cases, be equal to attorney’s fees.

Attorneys usually require plaintiffs and defendants to advance a retainer fee that is kept in the attorney/client trust account and used to pay the attorneys’ fees and expenses. The retainer must be supplemented periodically by the plaintiff or defendant so that the attorney is ensured

⁵ By contrast, criminal matters involve the government prosecuting an individual defendant for the alleged commission of a crime. Civil litigation may also involve a private party suing a governmental entity; however, this White Paper primarily deals with civil litigation between two private parties.

⁶ Conveyance documents and mortgages are subject to reformation and rescission.

that he/she will be paid their fees. Sometimes, if the party runs out of money during the litigation process and cannot pay his/her lawyer, particularly if no trial is looming, the court will allow the lawyer to “sub out” of the case, leaving the plaintiff or defendant without counsel.

For certain types of cases (usually personal injury, medical malpractice or employment related matters), a plaintiff may be able to retain an attorney on a contingency basis. This means that the attorney is paid a percentage of any monetary recovery obtained in the case, whether that award is obtained by settlement, motion or trial. The upside to this scenario for the plaintiff is that he/she does not pay if the attorney does not win or settle the case in their favor. The downside is that, with a very large recovery, the plaintiff may actually pay the attorney much more than if they had paid by the hour. Defendants are rarely able to negotiate contingency arrangements with their counsel.

There are other potential problems with contingency arrangements. Plaintiffs typically pay between 33% and 40% of their total recovery to their attorney in a contingency arrangement. In addition to the contingency fee, which is calculated off the top from the total amount recovered, the attorney’s fee agreement will typically deduct any costs paid by the attorney (whether recoverable or not) from the total recovery before giving the remainder of the recovery to the plaintiff.⁷ Costs can sometimes run as high as the attorneys’ fees. This means that a plaintiff could potentially receive a very small portion of the total amount recovered.

In certain types of cases, such as contract disputes where the contract provides for the recovery of attorneys’ fees, as well as certain statutory causes of action, the “prevailing party” may be able to recover their “reasonable” attorneys’ fees. A “prevailing party” is typically defined by statute (or separately defined in a contract) as the party who obtains the largest net monetary recovery. The defendant is also considered the prevailing party if the plaintiff obtains no recovery or if the case is dismissed, if plaintiff receives no favorable outcome and/or if defendant prevails at trial. In other cases, the prevailing party is determined by whether the

⁷ In other cases, a lawyer may require a plaintiff to pay costs as they go through litigation so that the lawyer is not out of pocket for costs if his clients do not prevail. Obviously, if a plaintiff pays costs as they go, some of these costs would be returned to the plaintiff if they prevail in their case. Nevertheless, and as stated below, *not all costs charged to a client are recoverable* – i.e. statutes do not allow for some types of costs to be awarded to the prevailing party.

plaintiff obtained a larger recover than they were offered in a “statutory offer of compromise” (also known as a 998 offer).⁸

When a party is determined to be the “prevailing party” and they are entitled to attorneys’ fees, either by contract or statute, that party’s attorney files a motion for attorneys’ fees to be determined by the court. The losing party then files an opposition brief and the prevailing party files a reply brief. Typically, there is court hearing where the lawyers argue about what fees are “reasonable” and then the court awards “reasonable fees” to the prevailing party. “Reasonable fees” do not always translate into the fee that the prevailing party paid to their attorney. If the prevailing litigant hired an attorney at well above what the court considered a “reasonable hourly rate,” the prevailing party may only be able to recover the reasonable portion of the fee that they already paid.

Furthermore, the prevailing party is typically allowed to recover some categories of costs. Allowable costs in the California State Courts are determined by statute (California Code of Civil Procedure §§ 1032, 1033.5) and *do not include non-court appointed expert witness fees* (unless these fees were provided for by contract between the parties or are provided for by certain statutes). Expert witnesses need to keep this fact in mind when deciding whether or not to testify as an expert in a particular matter. Promises to be paid at the end of litigation can be problematic and may result in an expert not being paid at all. Arrangements to pay an expert witness a flat fee can also be problematic because the time devoted to a particular case varies greatly and the expert may not receive adequate compensation when they have agreed to a flat fee instead of an hourly rate. The expert must be available for trial on the date set by the court. Often the expert is kept waiting in the hall outside of the courtroom for hours or days waiting to testify.

The expert must take this probability into account before agreeing to a flat fee that may not compensate the expert for this waiting time. Research, preparation and analysis time spent with the attorney before deposition and before trial, both in reviewing the expert’s testimony, the testimony of other experts, parties and witnesses (in some cases) and in developing presentation materials for the jury can be extensive and must also be factored into any flat fee arrangement.

⁸ All of these examples are over-simplifications intended to give the reader a general idea about who is considered a “prevailing party.” It is beyond the scope of this paper to handle this concept in great detail.

That being said, in actuality, it is nearly impossible to quantify how much time will be required by the expert to provide expert witness services through trial. Typically, an expert will charge for standby/waiting and time either at the expert's normal hourly rate or at a reduced hourly rate. This should be set out in the expert's retainer agreement.

2. Litigation Is A Lengthy Process

Most civil litigation involves reams of paper and a great deal of time – complaints, answers, cross-complaints, motions, written discovery, depositions, expert depositions, pretrial motions and then up to two years (or more) and tens of thousands of dollars (or more) later, a trial. After a trial, there are post trial motions including possible motions for attorneys' fees and costs, motions for new trials and motions to vacate and set aside judgments. At the conclusion of the trial, and if the losing party at trial is not completely out of money, they may choose to embark on a path of written appeals that can take years to complete. Additionally, the losing party may contemplate filing for bankruptcy to avoid paying a money judgment awarded against them.

Furthermore, during litigation, the parties, their lawyers and the court all push at different times for settlement in order to avoid the cost, time and the uncertain outcome of a trial, appeal or possible bankruptcy by the losing party. Multiple settlement conferences, mediation and/or arbitration are almost always utilized in an attempt to resolve disputes thereby avoiding trial. Inevitably, judges push settlement conference(s) and alternative dispute resolution on litigants in an attempt to resolve cases and reduce the court's overburdened system. While settlement is often the most economical way to resolve a civil dispute, a good settlement means that both parties are probably not thrilled or even outright unhappy because they have both had to compromise more than they would like in order to achieve the settlement.

3. First Step – The Complaint and Response

A plaintiff begins his/her lawsuit against another private party by filing a complaint in the proper court. Generally, a plaintiff is free to file their complaint without seeking any pre-approval. In some cases, a plaintiff must obtain a "right to sue letter" from a governmental

agency before they can proceed to file their own lawsuit in court.⁹ In some professional negligence cases, a plaintiff must obtain a certificate of merit from a licensed professional in the particular field before filing their complaint. For example, pursuant to California Code of Civil Procedure § 411.35, plaintiffs must obtain a certificate in actions for professional negligence against architects, engineers and *land surveyors*. Section 411.35 states in pertinent part:

“(a) In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding . . . a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one . . . land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained

⁹ An example of this requirement includes employment discrimination matters (where a plaintiff must file their complaint with the California Department of Fair Employment and Housing (“DFEH”) and then request a right to sue letter to proceed with their complaint in civil court).

before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.”

California Code of Civil Procedure § 411.35. See **Exhibit A** for this complete statute.

The civil complaint sets out the basic grievances of the plaintiff. These grievances are referred to as “causes of action.” Examples of causes of action include breach of contract, fraud, negligence, misrepresentation, defamation (libel or slander) and discrimination. A large number of causes of action exist. Each cause of action has “elements” that must be proven by the plaintiff in order for plaintiff to prevail at trial. For example, a negligence action involves the elements of duty, breach, causation and damages. Lawyers will plead all elements of each cause of action in the complaint – some can be stated generally and some (such as fraud) must be stated with more specific facts to give the defendant a general idea of what the plaintiff is complaining about. A plaintiff will often plead many causes of action in the same complaint.

The complaint is filed in a particular court that has proper jurisdiction and venue. Jurisdiction and venue can be specified in a contract between the parties. In the absence of a contract, there are specific procedural rules that determine both jurisdiction and venue.¹⁰ Again, the plaintiff’s lawyer will determine both jurisdiction and venue and then file the complaint with the appropriate court. Once a lawsuit is filed, the plaintiff’s lawyer receives a summons and then proceeds to have the defendant(s) served with the complaint.

Once proper service is completed, the defendant has approximately 30 days to respond in California courts and 20 days to respond in federal court. These deadlines are extended by up to five days depending on how the summons and complaint are served. The defendant typically responds with an “answer” that includes denials and affirmative defenses. Alternatively, the

¹⁰ There are detailed procedural rules to determine both jurisdiction and venue. The details of these rules are beyond the scope of what can be covered in this paper.

defendant may respond by demurrer, by a motion to dismiss, by a notice to remove the action to federal court or by various other motions in an attempt to end the case before it gets started. There is typically a hearing before the court and then the court rules on defendant's motion – either dismissing plaintiff's complaint without prejudice (allowing plaintiff to re-file properly), with prejudice (barring plaintiff from re-filing), requiring plaintiff to amend their complaint, or requiring defendant to answer the complaint. If the defendant files a motion to remove the action to federal court, plaintiff has the opportunity for a hearing to possibly have the case returned to state court in certain circumstances.

Once all of the defendants have filed answers, the case is considered to be “at issue” and the next phases of the litigation begin. Usually, there is a status conference before the court where the lawyers and the judge discuss the timing of discovery, dispositive motions, settlement conferences and alternative dispute resolution. The court may also set a trial date at this settlement conference or reserve the scheduling of trial for a later status conference.

4. The Next Step – Written Discovery

The term “discovery” means exactly that – the parties seek to discover information related to their cases from one another. The first type of discovery is written discovery. The lawyers send each other written interrogatories, requests for admissions, requests for production of documents, demands for inspection (of property), and demands for independent medical examination (of plaintiff – usually in tort related cases). The lawyers go to their clients to obtain this information and respond to the requests. Discovery is liberally allowed and both plaintiffs and defendants are entitled to receive responses and documents requested as long as the responses “reasonably relate to the discovery of admissible evidence” – the actual information requested does not necessarily have to be admissible at trial. Nevertheless, some things are not discoverable because they are beyond the scope of allowable discovery or because they are protected by a privilege (attorney/client, spousal, physician/patient, etc.).

Deadlines for sending and responding to written discovery are governed by procedural statutes in either California or federal courts; however, the basic management of the written discovery process is left to the lawyers – unless, of course, the lawyers get into a dispute that they cannot resolve themselves. Discovery disputes happen frequently.

If there is a dispute as to whether certain things are discoverable, obtaining responses to discovery or obtaining certain documents, the lawyers will file motions with the court asking for

assistance. These include motions to compel discovery responses and motions for protective orders to prevent the requesting party from obtaining discovery responses. As with other motions, the opposing party may file an opposition brief and the moving party may then file a reply brief. There is a court hearing for the attorneys to make their arguments and then the judge renders an opinion regarding the particular discovery issue.

Although these procedures exist, the lawyers usually attempt to resolve discovery disputes without the help of the court because the losing party (and/or their lawyer) in a discovery motion could be ordered by the court to pay monetary sanctions to the opposing party. Repeated discovery violations may lead the court to exclude certain matters or witnesses at trial, or in the most extreme cases, dismiss the action entirely.

Several rounds of written discovery may take place during the course of litigation and a great deal of information and reams of documents are typically exchanged. During this time, lawyers may also do their own independent investigations of each others' claims, obtain copies of business licenses and permits, obtain copies of corporate documents, obtain copies of other public records, interview non-party witnesses and possibly conduct surveillance or employ various other discovery methods.

5. Party and Witness Depositions

The next discovery phase involves taking the depositions of the parties and witnesses. Often times, written discovery is still ongoing when depositions begin. A deposition is hybrid between an interview and trial testimony. During the deposition, the party (or witness) is asked questions by the lawyer who noticed the deposition. The opposing party's (or parties) lawyer is also present and can question the witnesses too. If a party is being deposed, that party's lawyer will "defend" them in their deposition by interposing objections to certain questions (thereby preserving those objections "on the record" for trial to be ruled upon the court) and by instructing their client not to answer certain questions (although they could be compelled to answer by the court). A non-party witness may also bring their own attorney to their deposition and their lawyer can "defend" them in the same manner as a party's attorney defends a party.

The deposition takes place in a conference room – usually at the office of the lawyer that noticed the deposition. There is a court reporter present who transcribes the entire deposition by literally writing down everything said during the deposition by the lawyers, parties and witnesses. Although more expensive, the noticing attorney may also videotape the deposition.

Usually, there is no judge present during a deposition. Although extremely rare, a judge or discovery referee may be present during depositions involving very contentious litigation. Any disputes that arise during the deposition are noted “on the record” and may be brought before the court by a later discovery motion (to compel responses or for a protective order) or at the time of trial. Deposition disputes are typically resolved between the attorneys to avoid the cost and possible sanctions associated with discovery motions.

Parties are required to have their deposition taken if the opposing party notices it. This includes a corporation or other business entity. Parties are almost always deposed. In the case of a business, the person most knowledgeable (“PMK”) or the managing officer or director are typically deposed. Supervisors and managers familiar with the facts of a case can also be required to submit to deposition. Other non-party witnesses are not required to submit to deposition simply through a deposition notice. Nevertheless, attorneys can subpoena witnesses to attend depositions (or trial). If an opposing party or the witness does not feel that the witness’s deposition is proper, they can object or move to quash or invalidate the subpoena by filing a motion before the court. In this case, the judge determines whether or not the particular witness must be deposed.

6. Designating Expert Witnesses and Expert Witness Depositions

As the case progresses, there comes a time when California Code of Civil Procedure and the Federal Rules of Civil Procedure require the parties to designate expert witnesses for trial. Although experts are not required, they are typically helpful to the parties to explain their theories of the case to a judge or jury at trial. Expert witnesses can also help the parties to clarify issues and evaluate their own case’s success at trial and worth for settlement.

Expert witnesses come from a variety of fields – medical professionals, real estate broker, appraisers and agents, construction specialists, economists, accountants, environmental experts, engineers, and *land surveyors* – the list could go on for pages. In order to be helpful to the parties, to the court and to a jury, the “expert” must have specialized knowledge and experience in their particular field. Also, the expert must be able to objectively evaluate the evidence in the case and come to their own independent conclusion without being influenced by the attorney who hired them – and is paying their fee. This is no small task. A good expert gives his/her own unbiased and honest opinion based on the evidence they are given to review. Sometimes, when an expert gives their unbiased opinion and it is not favorable to the client who retained them, the expert may be de-designated and possibly retained as a consulting expert instead.

a. Expert Witnesses In Federal Court

The timing of expert witness disclosures (as well as the timing of other disclosures and discovery) is governed in federal court by Federal Rule of Civil Procedure (“FRCP”) Rule 26. Expert witness requirements in federal court differ from requirements in the California court system. FRCP Rule 26 states in pertinent part:

“(a) *Required Disclosures.*

(2) *Disclosure of Expert Testimony.*

(A) *In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.*

(B) *Written Report.¹¹ Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:*

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

¹¹ Some state statutes require a written report to accompany a surveyor’s plat. The aspiring expert witness should consider preparing written reports when a project warrants, even if it not required by statute.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.”

Fed. Rule of Civil Procedure 26. See **Exhibit B** for this entire statute.

As stated in FRCP Rule 26, the designated expert must prepare a written report including the sources that the expert used in forming their opinions and a listing of their qualifications as an expert. The expert is not an advocate for a particular party. The expert is hired to form his or her own independent opinion based on the evidence that they are given and must cite to treatises and procedures that they used in forming their expert opinions. Expert witnesses will be deposed (in the same way parties and witnesses are deposed) on their opinions and their later trial testimony should be consistent with their deposition testimony. Furthermore, if an opposing party's lawyer (or their counter-expert) does not feel that a particular designated expert is qualified, that party can request that the court exclude the expert witness from testifying at trial. Although relatively rare, this does happen in cases where the expert does not have the correct minimum qualifications or where it is clear that their opinion is not based on the expert's independent judgment and proper sources of information. Pursuant to Federal Rule of Evidence 702 regarding testifying experts:

"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, if

(1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case."

Federal Rule of Evidence 702. See **Exhibit C** for this entire statute. See also Federal Rules of Evidence 703,704,705 and 706 dealing with expert witness testimony also contained in **Exhibit C**.

b. Expert Witnesses In California Courts

Similar rules apply to expert witness testimony in California courts. In California, expert witness designation and testimony is dictated by California Rules of Civil Procedure §§ 2034.010 through 2034.730. Although this White Paper does not allow for an in-depth discussion of these rules, a few highlights are as follows:

“§ 2034.210. Demand for simultaneous exchange of expert trial witness information; List; Expert witness declaration; Discoverable reports and writings

After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

(b) If any expert designated by a party under subdivision (a) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under Section 2034.260.

(c) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in subdivision (b) in the course of preparing that expert's opinion.

§ 2034.220. Leave of court not required; Time for making demand

Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

§ 2034.260. How information to be exchanged; What information to be included; When expert witness declaration required; Contents

(a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(b) The exchange of expert witness information shall include either of the following:

(1) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(2) A statement that the party does not presently intend to offer the testimony of any expert witness.

(c) If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(1) A brief narrative statement of the qualifications of each expert.

(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(3) A representation that the expert has agreed to testify at the trial.

(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis that the expert is expected to give at trial.

(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

§ 2034.270. Production of discoverable reports and writings

If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210.

§ 2034.300. Exclusion of expert testimony for failure to comply

Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

- (a) List that witness as an expert under Section 2034.260.*
- (b) Submit an expert witness declaration.*
- (c) Produce reports and writings of expert witnesses under Section 2034.270.*
- (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).”*

California Code of Civil Procedure §§ 2034.010 to 2034.730. See **Exhibit D** for entire statutes.

In California, the attorney hiring the expert witness must submit a declaration signed under penalty of perjury including a summary of the expert’s qualifications along with a brief summary of what their opinion(s) will entail. The demand for an exchange of expert witness information can also include a demand for the production of all reports and writings of the expert pursuant to California Code of Civil Procedure §§ 2034.260. The expert’s opinion must be unbiased and based on their own experience and accepted treatises and procedures. As in federal court, an unqualified expert or one shown to have deviated from accepted principles can be excluded from testifying at trial.

7. Dispositive Motions

In both California and the federal courts, plaintiffs and/or defendants can bring certain types of motions before the court to end a case before it reaches trial. These are called “dispositive motions” because they dispose of the case without a trial. Dispositive motions are typically brought toward the end of the discovery process when most of the evidence for trial has already been gathered. One such dispositive motion is a motion for summary judgment. Plaintiffs win these types of motions if they can show by declarations and documentary evidence that they can win their case regardless of what evidence the defendants present – there are no issues of material fact in dispute. Defendants win these motions if they can show by declarations and documentary evidence that they will successfully defend the case regardless of what evidence the plaintiffs present. In essence, a motion for summary judgment is a trial by declarations and documentary evidence decided by the court without a trial or jury’s participation.

Summary judgment motions are difficult to win. In preparing either the motion itself, or the opposition to the motion, experts are often called upon to prepare written declarations under penalty of perjury stating specific opinions and/or also submitting their expert

report to the judge for review. Declarations are typically drafted by the party's attorney; however, the expert witness must be certain that a declaration accurately reflects the expert's unbiased and truthful opinion because the expert is signing it under penalty of perjury. Alternatively, the surveyor expert can write the first draft of his/her declaration and allow the attorney to review it for format and content. Furthermore, if the case goes to trial, the expert must be willing to testify under oath at trial in a manner consistent with the content of their declaration or risk being impeached by the opposing attorney and possibly be liable for perjury (and risk a negligence action by the party who hired the expert).

8. Trial

If a case makes it to trial and has not settled either by the parties, or through some form of alternative dispute resolution and if it survives any dispositive motions brought by the parties, the expert witness will play a key role at trial. The party who hired the expert will be counting on them to testify consistently with their deposition testimony, their expert reports and any declarations they have signed. The expert must appear competent and knowledgeable when they testify so that they will be believed by the court (in a bench trial) or by the jury (in a jury trial).

Again, it is crucial that the expert witness forms their own independent opinion, that the opinion is based on accepted treatises and practice in their field of expertise and that they are actually qualified to give an opinion about the particular subject matter.

9. Post Trial Motions and Appeals

Even after a trial has ended, the litigation continues with post trial motions and possibly appeals. These areas are beyond the scope of this White Paper and will not be specifically addressed because expert witnesses are not involved in these phases of litigation.

III. The Role of the Land Surveyor as an Expert Witness

A. A Land Surveyor's Responsibilities as an Expert

As detailed above, the land surveyor, acting as an expert witness, is one small cog in the much larger wheel of the legal process. Typically, surveyor experts are not called upon early in the process because of designation deadlines under either California or Federal Rules of Civil Procedure and because attorneys often do not realize the value that a surveyor can provide to a

party early in a case. Nevertheless, once involved, it is imperative that the expert witness surveyor and the attorney work closely together to understand the surveyor's opinions and be able to successfully convey those opinions in deposition or at trial – through testimony, visual aids, PowerPoint presentations or other visual media. Because land surveying is extremely technical and legal theories are often complicated, a good attorney and a professional and competent surveyor will work together extensively and early in the case to provide the best outcome for the client.

The surveyor expert witness should be prepared to appear in court. A surveyor must accurately report the facts of the survey that they have been asked to conduct and stay within the scope of the opinion they have been requested to give. A surveyor must not trespass into areas where he/she does not have expertise. In addition to verbal testimony, a surveyor may be asked to explain a map, plat, record of survey or their own written report generated as a result of the surveyor being retained and designated as an expert for a party. When an opposing party objects to a surveyor's opinion, the opposing party will counter that opinion with the opinion of their own expert. The expert's opinion will be evaluated by the court and by the jury if the matter actually goes to trial. At trial, the surveyor provides their expert opinion supported by facts that they have personally observed during the survey – this is the extent of the surveyor's role. The jury (or judge in a bench trial) ultimately determines the facts of the case and the judge determines the applicable law.

In summary, land surveyors acting as expert witnesses must:

- Form their own independent opinions based on facts presented to them and observed by them;
- Base their opinion on accepted methods and practices in land surveying, and reference accepted land surveying treatises and methods in their written opinions and testimony;
- Not act as an advocate for the party that hired them and not be influenced to change their opinion by the attorney designating them;
- Make absolutely certain that they are qualified in the subject matter about which they are being asked to give an opinion;
- Always tell the truth, even if it means hurting the case of the party who hired them;

- Be aware that, if the expert witness surveyor crosses over into giving a “legal” opinion rather than a factual expert opinion, opposing counsel or the court may instruct the surveyor to confine his opinion to strictly surveying matters; The expert witness surveyor does not need to be overly concerned as to that which is legal advice and that which is not, the attorneys and the judge will make those decisions.
- Be prepared to give up considerable time to review evidence, write their opinion, be deposed and testify at trial;
- Cooperate with the attorneys involved regarding scheduling of deposition and make sure they are available at the time of trial;
- Be patient with the legal process.

The surveyor testifying in a case must be the one who made the survey. In the case of *Hermance v. Blackburn* (1929) 206 Cal. 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.”

B. The Relationship Between The Expert Witness and The Attorney Who Hires Him

An attorney serves a much different purpose in the legal system than an expert witness. The attorney is a paid advocate ethically bound to pursue the clients’ claims and protect the clients’ rights. Conversely, the expert witness is hired by a party to form an independent and unbiased opinion that will help all of the parties and the trier of fact (court or jury) to understand the evidence presented as it relates to their particular field of expertise. Inherently, the roles of the attorney and the expert witness do not blend together and each must understand and respect the role of the other.

The attorney is trained in the presentation of legal theories and arguments favoring his/her client’s position in the case. The surveyor expert witness must appreciate these qualities in an attorney and understand that the attorney is strictly an advocate for his/her clients so that the expert is not unduly persuaded by the attorney in shaping the expert’s opinion around that of the party paying the expert’s fee. The expert must have a discriminating ear when an attorney tells the expert the “facts” of the case and must draw an independent conclusion based on the actual evidence (from first hand observation of the evidence and the real property in question and

from his/her personal observations, research and experience). A surveyor expert witness acting as an advocate corrupts the legal process, calls into question his/her credibility and is likely to improperly alter the outcome of a legal proceeding. This type of behavior can arguably damage the parties involved in the litigation. Because of these factors, an experienced and qualified surveyor expert witness will maintain a professional relationship with the attorney.

In cases where a survey issue is at the heart of the complaint, attorneys are wise to engage the services of a surveyor early in the litigation process. By hiring an experienced surveyor as a consulting expert, the attorney and the surveyor can work closely together to develop the case based on the principles of surveying. Working as a consulting expert, the surveyor's work product is far more protected from discovery by opposing parties than it would be if the surveyor was a designated expert witness.

That being said, the surveyor expert should never act as an advocate for the attorney's client. Reports that may be damaging to the attorney's case are as critically important as those reports that fully support the attorney's case and a consulting expert surveyor can assist the attorney in evaluating these reports. The attorney who engages a surveyor as a consulting expert early in the case will be able to take full advantage of the surveyor's knowledge and expertise and maintain confidentiality of much of the surveyor's work product. See *Swartzman v. Superior Court* (1964) 231 Cal. App. 2d 195 (*superseded by statute*); *Armenta v. Superior Court (James Jones Co.)* (2002) 101 Cal. App. 4th 525; *Peterson v. Superior Court (Otto Zentner)* (1974) 39 Cal. App. 3d 267. Hiring an experienced surveyor as a consulting expert early in the litigation process can save valuable time and resources. Although a consulting expert may not give testimony, a consulting expert can be named as a designated testifying expert witness prior to the designation deadline.

In providing services, a surveyor expert witness must:

- Not rely solely on the attorney's research. The surveyor expert witness must perform his/her own research and survey the real property (where applicable) and gather and review the evidence in question so that he/she is not unduly influenced and biased by the attorney retaining the expert;
- Not comment on damage and settlement amounts of a client's case with either the client or the attorney;

- Not view a case in which he/she has served as an expert in terms of winning or losing. Attorneys win and lose cases, experts witness the outcome;
- Not work on a contingency basis;
- Not write a “final” expert report until discussing the opinion with the attorney who designated the surveyor so that, if the opinion is not favorable to the attorney’s client, the attorney can de-designate the expert and/or retain the surveyor as a consulting expert;
- Not keep copies of working notes once a final opinion is reached and prepared. The expert should have a company policy of destroying drafts and working notes and follow through with that policy in each case;
- Be prepared to answer questions regarding any writing in the margins of report drafts during deposition and/or trial;
- Not develop emotional attachment or sympathy for any of the parties involved. The role of the expert is simply to provide an unbiased expert opinion. It is also unprofessional to express personal feelings at the conclusion of a case;
- Never use “junk science” or biased studies when forming expert opinions;
- Not transmit any written work product to the attorney that you are working with before discussing the results with him/her by telephone. Your work is considered expert work product and once transmitted, this work may become discoverable;
- Not acquire “new knowledge” from photographs presented. Photos are unreliable for scale, distance or measurements. The expert should only testify regarding photographs personally taken by the expert. The expert must understand the difference between testifying about a photo he/she has taken (indicating personal knowledge of the images in the photo) and attempting to interpret a photo taken by someone else. (Exception for aerial photography).

- Never hide in the confines of technical jargon in an effort to impress the attorneys or the court. The court and the attorneys are relying on the land surveyor as a professional with expertise in his/her field. The surveyor should not try to act like a lawyer.
- Always be cooperative and courteous to the parties, attorneys and especially the court and jury. Respect and proper etiquette are always required in the courtroom. A qualified expert witness must never act pompous or disrespectful to anyone, even during strong cross-examination. The expert witness must always remain unemotional;
- Always be honest and readily concede any mistakes made.

In keeping with the points stated above, if the surveyor expert disagrees with the opposing expert witness surveyor, the expert surveyor should ask themselves why the two experts are in disagreement. Although attorneys for the opposing parties are adversarial, expert witnesses should not become adversarial with one another. Each expert surveyor is merely giving their opinion based on their personal observations, research and experience. There are times when opposing experts will legitimately agree and other times there may be a legitimate difference of expert opinions.¹² These differences should never be based on the experts becoming adverse to one another. This is not their role.

Furthermore, practically speaking, if a surveyor expert is asked to determine a “standard of care” in the surveying field, the expert must first be able to define the actual standard, cite authority for their opinion and explain how another surveyor did or did not meet the applicable standard of care. Furthermore, a surveyor expert witness must only opine about negligence or incompetence of another surveyor if the surveyor in question violated a statute (minimum standard of care). It can be demonstrated that a practitioner has complied with the applicable statutes and has fallen below the standard of care, therefore was negligent.

Although an expert witness may not simply read a treatise into the record at trial, the treatise may be used by an attorney to refresh the expert witness’s recollection on a given subject

¹² Typically, two experienced surveyors presented with the same evidence will come to the same or similar conclusions. Two experts may also weigh the same evidence differently. Conversely, if one surveyor missed a piece of material evidence, violated a standard of care, misinterpreted an important statute or ignored evidence, that surveyor’s opinion may be different than the other expert’s opinion, and may in fact, be inaccurate.

area. If the expert witness's opinion is based on a professional text or treatise, the expert should be prepared to specify a particular section of the text (rather than merely referring to the text as a whole). A good expert will always speak in a manner that is easily understood by the judge and jury. A lengthy discussion of a "least square adjustment" or an "error ellipses" will be of little use if not properly explained and understood by the listeners. If accuracy determinations are required, they should be explained in plain language using definitive statements.

A surveyor expert should allow ample time for several reviews of the evidence and to formulate and write his/her opinion. The expert must also be patient when waiting to testify in deposition, or more importantly, at trial. Trials are typically scheduled and then postponed for a variety of reasons. The surveyor expert may be ready to testify and then experience a delay of weeks or months before the trial actually begins. This means that the surveyor expert must re-familiarize themselves with the subject matter before the new trial date. The expert and the attorney should agree that the expert will be billing while waiting in the courthouse to testify. A prudent expert will have a retainer from his client to cover any anticipated billing prior to testifying.

When a trial date is scheduled, the surveyor expert should block out at least three days on his/her schedule for trial. The day (or days depending on the volume of material) before trial is used for preparing testimony and working with the attorney¹³, the next day set aside for testimony, may be postponed because of the pace of the trial. Experts and lay witnesses are often required to sit outside the courtroom for hours or days waiting to testify. This is simply a function of the trial process and cannot be avoided. The surveyor expert should not be angry with the attorneys for these delays because delays are part of the process. Sometimes, these delays could be due to the parties attempting to negotiate a settlement. Other times, motions are being presented and ruled upon before witnesses are allowed to testify. The expert witness should remain calm and not get anxious due to these delays.

¹³ Generally, an attorney will not ask a question at trial if they do not already know the answer to that question. This means extensive depositions by the opposing party's lawyer and ample trial preparation time with the lawyer designating the expert.

C. The Surveyor's Liability For Giving A Negligent Opinion

A surveyor offering opinions as a licensed professional and expert must be cognizant of the legal limits of his/her function and qualifications. Generally, the surveyor acting as a retained expert *cannot* rely on the absolute privilege of giving an “opinion” as stated in California Civil Code § 47.

As stated in the White Paper entitled “A Land Surveyor’s Guide To Defamation and Free Speech”, although a representation of opinion is ordinarily not actionable (Witkin, 5 *Summary of California Law, Torts*, supra at § 678, pg. 779), misrepresentations of opinion are actionable where the defendant holds himself/herself out to be specially qualified. *Id.* at § 680, pg. 781-782. The litigation privilege of California Civil Code § 47, which protects attorneys, judges, jurors, witnesses, and other court personnel from liability arising from publications made during a judicial proceeding, does not apply to an expert witness.

An expert witness may incur liability if he/she forms an expert opinion negligently. A client who does not prevail at trial is likely to be angry and looking for someone to blame. This same client may turn around and sue their own retained expert for negligence, even if the expert was not negligent. California Code of Civil Procedure § 47 does not protect a negligent expert witness from liability to the party who hired him. *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal. App. 4th 392. See also *Lambert v. Carneghi* (2008) 158 Cal. App. 4th 1120. For this reason, it is crucial that a land surveyor acting as an expert witness is qualified to render an opinion and that the surveyor forms that opinion carefully after evaluating all of the evidence presented to him/her. Errors and omissions insurance policies carried by surveyors provide a worthwhile monetary target for suit by unsatisfied clients. As all surveyors should know, the emotional tenor of a property boundary sometimes leads otherwise reasonable people to launch into litigation if they have a favorable survey. This can lead to expensive litigation, and for the losing party, further litigation against their surveyor expert in an attempt to recoup losses. For these reasons, it is important that surveyors acting as expert witnesses make sure their professional liability insurance covers them for expert witness work before embarking down this path. The surveyor expert should include contract language that indemnifies them from future suit brought by the attorney or client who retained them.

IV. Conclusion

Property boundary surveying is inherently legal in nature. A surveyor's opinions are anchored in his/her understanding of the law. The surveyor is not a lawyer and must always refrain from giving legal advice or legal opinions. The line between land surveying and providing legal advice is sometimes blurred and the land surveyor expert must always be mindful of the distinctions between the two. For example, the determination of a prescriptive right is a legal conclusion; the surveyor cannot make the determination the right exists, only present evidence of any such right. This is the case with most every legal theory i.e. adverse possession, acquiescence, estoppels, etc.

Nevertheless, expert witness work can be challenging and rewarding if a surveyor has the expertise and qualifications to render a truthful, unbiased and non-negligent opinion. Acting as an expert witness carries a heavy responsibility to the parties and to the court. Surveyors who want to act as expert witnesses must also be prepared to devote significant time and energy in order to fulfill their obligations. Expert work should never be taken lightly. There are liabilities associated with negligently preparing opinions in the course of litigation.

V. Practice Guide

Most expert witness engagements will begin with an attorney contacting the surveyor. The attorney often needs to designate an expert within a short time frame. The attorney will probably ask the surveyor for a copy of their resume (curriculum vitae or CV), a list of past cases for which the surveyor has been retained as an expert and a schedule of the expert's fees for acting as an expert witness. The surveyor must be prepared to provide a professionally written, accurate and truthful resume to the attorney so that the attorney can make the initial evaluation of the surveyor's qualifications and areas of expertise compared to the needs of the client in a particular case. The land surveyor must not exaggerate his experience or have any false information on the resume. The land surveyor should expect that the attorney will verify each item listed on the expert's resume. Any misstatement or exaggeration of the surveyor's experience could potentially be used to discredit the surveyor and impeach the surveyor's deposition or trial testimony.

When first speaking with a surveyor who may be retained as a designated expert, the attorney may not give a lot of details about the nature of the case. Either before or after sending their resume, the surveyor must ask the attorney for the names of the parties involved, the addresses of the properties involved and the name(s) of the opposing counsel to verify there are no immediate conflicts of interest. This process is often referred to as a “conflict check”. In the event there may be a conflict, the surveyor must be forthcoming and discuss this potential conflict with the attorney before moving forward, and in the case of an actual conflict of interest, the surveyor may be prohibited from being retained as an expert in the matter. It is better to determine conflicts immediately before progressing on to the detailed facts of the case.

Once a conflict check has been successfully completed, the surveyor must ask the attorney about the specific nature of the case. One of greatest liabilities for a surveyor is to accept an engagement as a designated expert when he/she is not truly qualified. A particular surveyor is not always considered to be a qualified expert witness by virtue of holding a surveying license. There are many different facets of land surveying, and the surveyor must be honest with himself and the inquiring attorney regarding his qualifications. If the surveyor is not a competent expert in the particular subject matter, it will certainly be discovered when the surveyor is deposed. By this time, the surveyor may have already exposed himself/herself to liability with the party retaining him.

Next, the surveyor should ask the inquiring attorney about the status of the lawsuit. Where are the parties in the litigation process? At the beginning of the case? Approaching trial? Somewhere in between? This is important for many different reasons. In the event a thorough survey has already been completed, the expert’s scope of work may only include validation of the process. The expert surveyor must carefully consider that which is being asked prior to accepting an assignment. This understanding contributes greatly to the economy and the efficiency of the legal process. The expert surveyor must carefully consider the scope of the assignment proposed before accepting the engagement. There are some cases where the expert witness surveyor may not even take out a survey instrument. Oftentimes, an in-depth review of the existing surveys and title documents is sufficient to prepare an expert report.

The surveyor should also ask to see a copy of the complaint. The surveyor should also ask if a surveyor expert has been retained by the opposing party and, if so, does the attorney have any information about the other surveyor? The surveyor should inquire if the attorney has retained other experts and in what fields. The surveyor should also ask if the litigation is against

another surveyor, and if so, the surveyor should confirm that the attorney has filed a certificate of merit. The surveyor should also ask who made this merit determination. If no determination of merit has been made, the surveyor should ask if he/she will be asked to make that determination.

The surveyor must also ask the attorney exactly what he/she will be asked to do – what is the scope of work? In addition, the surveyor must determine what deadlines will be imposed, when they will be paid for their services and who will be responsible for payment (the attorney or the client). The surveyor must be willing to commit the amount of time needed to complete their required tasks, depositions, declarations and possibly preparing for and participating in trial. Particularly with trials, there are almost always delays and uncertainties as to when the surveyor will actually be called to testify. Despite these uncertainties, the surveyor must be willing to commit to the entire process, rearrange their other work duties and possibly forego personal obligations in order to be available to testify when needed. The surveyor should never enter into an expert engagement without full commitment to the process. The surveyor must realize that the attorney (and client) is counting on the expert to see the process through to the end with professionalism and understanding as to delays associated with litigation and trials.

If all answers are acceptable and the surveyor feels comfortable with the subject matter and the timeframes imposed, the surveyor should obtain an executed engagement letter/retainer agreement (as required by California Business & Professions Code § 8759) from the attorney and then begin to review the complaint and any other documents obtained from the attorney. If these documents are consistent with the description of the case given by the attorney, the surveyor may move forward with the duties required to form an unbiased, truthful and competent opinion consistent with the scope of work and within their field of expertise.

In addition to producing surveying work product, the surveyor may be asked to prepare a declaration signed under penalty of perjury. Although, the attorney may prepare a draft of an expert declaration, the surveyor should read the declaration carefully making sure that it accurately reflects the surveyor's independent opinion. Many times, it is preferable for the surveyor to draft his/her own declaration, working closely with the attorney regarding its contents, wording and clarity. If the attorney prepares the declaration, the surveyor can accept the generic format; however, the surveyor must make sure that the words chosen reflect their own independent and unbiased opinion. As stated above, the surveyor signs the declaration under penalty of perjury stating that he/she has specific knowledge of its facts and stating that it is true.

As the case moves forward, the surveyor will likely be deposed by the opposing party(s) counsel. Expert witness depositions typically take place after the parties and other witnesses have been deposed. At the expert's deposition, all attorneys involved in the case will be present (and possibly their clients). The deposition is taken in an attorney's conference room or at a court reporter's office with a court reporter transcribing everything that is said during the deposition. Occasionally, depositions are also videotaped. A deposition is given under penalty of perjury and the expert must make sure that his/her testimony is accurate or risk being impeached at the time of trial. The expert will be questioned by the opposing party(s) attorney regarding the surveyor's qualifications, opinions and how he/she arrived at those opinions. Other attorneys, including the attorney retaining the expert, may assert objections to certain questions and the surveyor should wait until objections are made "on the record" before responding to a specific question. Because of this, an expert should wait briefly before answering a question from an opposing attorney. In some extremely contentious depositions, the attorney retaining the expert may instruct the expert not to answer a certain question, however, this is rare.

Sometimes, during questioning, the attorney for an opposing party may ask the surveyor questions that do not seem to have a particular logical pattern. The surveyor should not be confused by these tactics as the attorney may be attempting to confuse the expert, may be fishing for information or may be testing the surveyor's ability to testify accurately and convincingly at the time of trial. A surveyor expert should not, under any circumstances, attempt to answer a question they don't fully understand. It is perfectly acceptable for the surveyor to ask an attorney to repeat or rephrase a question that they do not understand. The surveyor should focus on the pending question, allow the attorneys to make objections and make sure the question is within the expert's area of expertise. The surveyor should take his/her time with each question and not allow the asking attorney to entirely control the pace of questioning as a tactic to get the surveyor to answer quickly, incorrectly or incompletely. The surveyor should carefully listen to and consider each question and then answer the question honestly. If the pending question goes beyond the surveyor's area of expertise or beyond the opinion the surveyor was asked to formulate, the surveyor must say so in the deposition. A surveyor expert should never guess at answering a question. It is easier for the expert to defend why they did not answer a question than to defend a guessed answer.

Within two or three weeks after completing the deposition, the surveyor will receive a deposition transcript from the retaining attorney. The surveyor will be asked to review the

transcript for accuracy and make sure that they did not answer any questions incorrectly or incompletely. If so, the surveyor will be asked to make corrections to the deposition transcript on a separate sheet of paper, sign the transcript under penalty of perjury and return it (along with any corrections) to the attorney who retained the surveyor. After it is reviewed by the attorney, it will be returned to the court reporter for correction and inclusion in the deposition transcript. The transcript will then be given to all of the attorneys involved in the case. Depending on the order of depositions, the surveyor may be asked to review party depositions or the depositions of other experts either before or after the surveyor is deposed.

Ideally, the expert witness surveyor will be able to attend the deposition of another surveyor. Nevertheless, this is not always possible due to economic constraints or objections by opposing counsel. If the surveyor is allowed to attend the deposition of another surveyor, the surveyor should prepare a list of questions and follow up questions for the attorney who retained him/her to consider asking during the deposition. A good expert witness deposition will flush out showing the weaknesses in the opposing party's case and weaknesses in the expert witness's knowledge base. An effective deposition of a negligent surveyor will get bring both parties back to the settlement table once the strengths and weaknesses in the surveyor's case are uncovered. Again, this deposition process contributes to the economy and efficiency of the legal system.

If the case has not settled by this point, the attorneys will begin to prepare for trial. The surveyor expert will begin to work closely with the retaining attorney and the attorney's staff to develop the expert's trial testimony and possible presentation materials to help the jury and court understand the expert's opinion. This process can be time consuming for the surveyor and he/she must be willing to devote the amount of time needed to prepare for trial.

The surveyor should be aware that many time cases that have not previously settled may settle on the eve of trial – however, there may not be a settlement and the trial will actually happen. Despite the possibility of a last minute settlement, attorneys and experts must work diligently and must assume that the trial will in fact go forward. This means working at the attorney's office to prepare their testimony – sometimes in the evenings while the trial is taking place during the day.

If the trial does go forward, the attorneys will report "ready for trial" on the scheduled trial date. The trial may begin on that day or the court may "trail the case" waiting for a courtroom to become available. This process can take days or even weeks. Again, the surveyor must be patient and work with the attorney for last minute changes or delays. This often means

the surveyor must change his/her work or personal schedule to accommodate the attorneys and the court. This is the price paid for being paid as an expert witness. Once the trial starts, the surveyor expert should also anticipate delays during trial. The retaining attorney may not be able to tell the surveyor exactly when they will testify and the surveyor may be left in the court's hallway for a day or two before they are called to testify.

At trial, the surveyor expert will be asked to give their opinion by the attorney who retained them. Oftentimes, the surveyor will use presentation materials (posters, graphics, slides, PowerPoint presentations) to explain their opinions clearly to the court and jury. The surveyor should testify honestly, clearly and professionally. The surveyor must be dressed in formal suit attire showing deference to the court. The surveyor should always be polite to the judge and all attorneys involved in the case. Raised voices or arguing are entirely unacceptable from the expert witness – even if the attorneys are contentious with one another, they must always be respectful to the judge.

Once the surveyor has given his/her opinion, they will be cross-examined by the opposing party's attorneys. Again, as was the case in deposition, the surveyor expert should listen carefully to the question asked, allow time for objections to the question by the attorneys or the court, and then answer the question honestly. The expert must make sure that the question posed is within their area of expertise, within the scope of what they were asked to do and consistent with their deposition testimony. It is perfectly acceptable for the surveyor to ask an attorney to repeat or rephrase a question that they do not understand.

When on the stand and responding to a question, the testifying expert witness should politely look at the attorney or judge asking the question. When a jury is present, the surveyor should not hesitate to look their way in order to see if they understand the response given.¹⁴ Most importantly, the expert should not look at the attorney(s) retaining him/her while being cross-examined, particularly when the surveyor is asked a question that may be damaging to a party. This action, although unintentional, makes the expert witness appear panicked, hedging the truth and looking for affirmation of their response. This restriction is not easily

¹⁴ In a jury trial, the jury decides questions of fact while the court decides questions of law. In a bench trial, the court decides both questions of fact and law.

accomplished. Often, opposing counsel will move to a podium nearer to the other counsel's table, putting both in the expert witness's field of view.

The surveyor expert witness must always keep in mind that every case has inherent strengths and weaknesses. Most times, this is why a case progresses to litigation. There is no clear cut winner or loser. Litigation is an emotional process for the parties involved and the surveyor expert cannot allow himself/herself to be caught up in the emotion of a case. A surveyor is not trained as an advocate for either plaintiff or defendant and he/she is not trained to present an opinion as an advocate. In the event that the surveyor wrongly assumes the role of advocate, he/she will sacrifice the expert's credibility. The surveyor expert should never try to be clever or disguise advocacy in his/her opinions. These tactics will be obvious to the court and/or the jury and, even without being impeached; the expert's credibility will suffer greatly.

A competent expert witness never overstates facts, never uses hyperbole and never uses personal attacks or statements with regard to a party, lay witness or another expert witness. The expert should always confine his/her statements of opinion to those within the surveying field. For example, a surveyor expert should never state that another surveyor expert's opinion is "crazy." This is an unprofessional personal attack. A surveyor expert is not an authority on mental illness and is not qualified to opine about someone else's sanity (or lack thereof).

The surveyor expert must keep in mind that questions of negligence or professional incompetence are actually legal questions. It is best not to offer definitive opinions regarding either – only offer evidence of either negligence or professional incompetence, but not ultimate conclusions.¹⁵ If asked directly by counsel or the court, the surveyor may opine about another surveyor's negligence or professional incompetence. Often opposing counsel will object to a surveyor expert providing these opinions by stating that the testimony "calls for a legal

¹⁵ It is helpful to include the following in a surveyor expert witness reports and materials.

"Note: This report represents the professional opinion of the preparer as a California Licensed Land Surveyor, and is based only upon the information cataloged elsewhere herein. If additional information regarding the case or cases reviewed is made available to the preparer, such information may warrant changes to the concluding opinions. This report does not represent a legal opinion and does not offer legal advice. This report does not represent a finding guilt or innocence."

conclusion.” After hearing the objection, the court will either sustain the objection (in which case the surveyor should not continue to respond) or overrule (deny) the objection (in which case the surveyor may continue giving his/her opinion). The court may ask the surveyor expert to give his/her opinion regarding another surveyor’s negligence or professional incompetence, and the expert witness should respond to the court’s inquiry and make eye contact with the judge.

A dishonest, arrogant or careless surveyor runs the risk of being impeached. In this event, the disgraced surveyor has wasted everyone’s time, money (qualifying damages) and has given the land surveying profession an unnecessary smudge. Furthermore, the impeached surveyor runs the risk of being accused of misrepresentation, defamation, professional negligence, incompetence and, possibly, a Board disciplinary action by the party who retained the expert.

If a surveyor is impeached during deposition or trial, he/she must take his/her medicine and answer the balance of the questions. Keep in mind that “gotcha” moments do occasionally happen. It is the mark of a true professional to remain composed and graciously admit a mistake or misstatement when it occurs. The surveyor can take a bit of solace in the knowledge that one surveyor’s opinion alone will generally not make or break an entire case – and if the contrary can be shown, there is always work in the Khewra Salt Mines.

The expert witness must always remember that his/her role in the litigation process is to provide truthful, professional and unbiased land surveying facts, knowledge and opinions to assist the court and/or the jury. The expert must keep in mind that they are not on trial. Plainly stating unbiased facts and opinions requires discipline, good writing skills and the ability to emotionally separate from a case. The truth cannot hurt an expert – although it may hurt a plaintiff’s or defendant’s case. Attorneys win or lose cases. Experts *do not* win or lose cases. They merely provide honest and unbiased professional opinions.

Throughout this White Paper, the author has emphasized that surveyors, acting as experts, must give their unbiased and truthful opinions after considering all of the evidence. This is not to say that the expert witness should automatically divulge information beyond or unrelated to the question being asked during deposition or trial examination. When the expert witness qualifies an answer, it appears as though the expert is making an excuse for what may be an acceptable practice. If more information is needed, the questioning attorney will ask the follow up question. If the opposing party’s counsel believes that the expert’s answer is inaccurate or incomplete, that attorney can ask follow up questions on redirect examination. The

court may also ask the witness to elaborate his/her response to a specific question. Finally, if the expert witness truly believes that the answer given is incomplete or misleading, the expert can ask the court for permission to elaborate. Elaboration of a response, without permission to a question that requires a simple “yes” or “no” response, may draw an objection from the attorney as being “non-responsive.” This objection can reflect poorly on the testifying expert and may draw unwarranted attention to meaningless facts.

The key to successful expert witness work is honesty and proper preparation. Expert witness engagements can be rewarding, interesting and a way to expand a surveyor’s practice. Nevertheless, expert engagements should not be taken lightly. Working on a litigation matter as an expert witness is a serious undertaking, exposes the surveyor to possible liability to the retaining client and can be very time consuming. A surveyor should only accept an expert witness engagement if the scope of work is well within their field of expertise, they are an experienced surveyor and they can devote adequate time to the process to be fair to the client(s) paying their fee.

VI. Recommended Reading

1. John Briscoe, *Surveying in the Courtroom, A Land Expert’s Guide to Evidence and Civil Procedure* (2nd ed. 1999).
2. Curtis M. Brown, *The Surveyor in the Courtroom* (1958) (reprinted 2009 with permission of Michael J. Pallamary, PLS, www.pallamaryandassociates.com).
3. Michael J. Pallamary, PLS, *Technical Article How The Court System Works, An Overview For The Professional Land Surveyor* (2008), LSACTS Technical Article 2010-100, www.pallamaryandassociates.com; published at www.lsacts.com.

VII. Disclaimers

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David Woolley is a licensed surveyor with over 23 years of experience in the field. Any substantive legal questions should always be addressed to competent licensed legal counsel.

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Glossary of Terms

Admissible Evidence – Evidence introduced is of such a character that the court or judge is bound to receive it; that is, allow it to be introduced at trial. To be “admissible” evidence must be relevant, and, inter alia, to be “relevant” it must tend to establish material proposition.

Advocacy – The act of pleading for, supporting, or recommending active espousal. An advocate is one who assists, defends or pleads for another.

Affirmative Defenses – In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. A response to a plaintiff’s claim which attacks the plaintiff’s *legal* right to bring an action, as opposed to attacking the truth of claim.

Alternative Dispute Resolution – Procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials. Such procedures, which are usually less costly and more expeditious, are increasingly being used in commercial and labor disputes, divorce actions, in resolving motor vehicle and medical malpractice tort claims, and in other disputes that would likely otherwise involve court litigation.

Appeals – Resort to a superior (*i.e.* appellate) court to review the decision of an inferior (*i.e.* trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed.

Curriculum Vitae (CV) – A short account of one’s career and qualifications prepared typically by an applicant for a position. Resume.

Conflicts of Interest – Term used in connection with public officials and fiduciaries and their relationship to matters of private interest of gain to them. Ethical problems connected therewith are covered by statutes in most jurisdictions and by federal statutes on the federal level. A conflict between the private interests and the official responsibilities of a person in a position of trust. The Code of Professional responsibility and Model Rules of Professional Conduct set forth standards for actual or potential conflicts of interest between attorney and client.

Consulting Expert – One who is knowledgeable in a specialized field, that knowledge being obtained from either education or personal experience. Opinion evidence of some person who possesses special skill or knowledge in some science, profession or business which is not

common to the average man and which is possessed by the expert by reason of his special study or experience. A retained consulting expert does not testify in deposition or at trial.

Declaration – A signed statement sworn to be true by the signer that will make the signer guilty of the crime of perjury if the statement is shown to be materially false (the lie is relevant and significant to the case).

Demurrer – An allegation of a defendant, which, admitting the matters of fact alleged by complaint or bill (equity action) to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer; or that, for some reason apparent on the face of the complaint or bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer. The formal mode of disputing the sufficiency in law of the pleading of the other side.

Dispositive Motions - A method for disposing of an entire case. A motion is an application made to a court or judge for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant.

Equitable Remedies - A remedy is a means of redressing an injury or enforcing a right in a legal action. Equity is justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. Equitable remedies include injunction or specific performance instead of money damages.

Injunctions – A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

Interrogatories – A set or series of written questions drawn up for the purpose of being propounded to a party, witness, or other person having information of interest in the case.

Jurisdiction – The authority of a court to hear and decide a case. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. To make a legally valid decision in a case, a court must have both “subject matter jurisdiction” (power to hear the type of case in question which is granted by the state legislatures and Congress) and

“personal jurisdiction” (power to make a decision affecting the parties involved in the lawsuit, which a court gets as a result of the parties’ actions).

Lay Witnesses – Person called to give testimony that does not possess any expertise in the matters about which he testifies. Used in contrast to expert witness who may render an opinion based on his expert knowledge if proper foundation is laid. Generally, such non-expert testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on perception of the witness (*i.e.* first-hand knowledge or observation) and (b) helpful to a clear understanding of his testimony or the determination of a fact at issue.

Material Evidence – The quality of evidence which tends to influence the trier of fact because of its logical connection with the issue. Evidence which has an effective influence or bearing on the question in issue.

Noticed – Information that one person gives to another, alerting the other party of the first party’s intentions. Notice of a lawsuit or petition for a court order begins with personal service on the defendants.

Oath – Any form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. An attestation that one will tell the truth, or a promise to fulfill a pledge, often calling upon God as a witness. All witnesses are given the oath (sworn in) before testifying.

Parties – The persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding.

Penalty of Perjury – A signed statement sworn to be true by the signer, that will make the signer guilty of the crime of perjury if the statement is shown to be materially false – that is, the lie is relevant and significant to the case.

Plead – To make, deliver, or file any pleading; to conduct the pleadings in a cause. Pleadings are formal allegations by the parties to the lawsuit of their respective claims and defenses, with the intended purpose being to provide notice of what is to be expected at trial.

Privilege – A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens.

Quash – To overthrow; to abate; to vacate; to annul; to make void; *e.g.* to quash an indictment.

Reformation – A court-ordered correction of a written instrument to cause it to reflect the truth intentions of the parties.

Rescission – To abrogate, annul, avoid, or cancel a contract, particularly nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party.

Sanctions – A financial penalty imposed by a judge on a party or attorney, or the act of imposing such a penalty.

Specific Performance – The remedy of requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon.

Standard of Care – In the law of negligence, that degree of care which a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such standard, he may be liable in damages for injuries of damages resulting from his conduct.

Statutory Offer of Compromise – A written offer of a specific sum of money made by a defendant to a plaintiff, which will settle the lawsuit if accepted within a short time. The offer may be filed with the court, if the eventual judgment for the plaintiff is less than the offer, the plaintiff will not be able to claim the court costs usually awarded to the prevailing party.

Subpoena – A command to appear at a certain time and place to give testimony upon a certain matter. A court order issued at the request of a party requiring a witness to testify, produce specified evidence, or both. A subpoena can be used to obtain testimony from a witness at both depositions (testimony under oath taken outside of court) and at trial. Failure to comply with the subpoena can be punished as contempt of court.

Summary Judgment – Procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved. A final decision by a judge upon a party's motion, that resolves a lawsuit before there is a trial. Summary judgment is awarded if the undisputed facts and the law make it clear that it would be impossible for the opposing party to prevail if the matter were to proceed to trial.

Summons – To cite a defendant to appear in court to answer a suit which has been begun against him; to notify the defendant that an action has been instituted against him, and that he is required to answer to it at a time and place named. A form prepared by the plaintiff and issued by a court that informs the defendant that he/she is being sued.

Treatises - A systematic exposition or argument in writing including a methodical discussion of the facts and principles involved and conclusions reached.

Venue – The appropriate location(s), according to law and court rules, for a trial. In civil cases, venue is generally proper in the county or district where important events related to the case took place, such as the signing or performance of a contract or the accident or other incident that led to a personal injury case. Typically, the plaintiff in a civil case may also sue in the district or county where the defendant lives or does business.

With Prejudice – As used in context in which an action is dismissed with prejudice, means an adjudication on merits and final disposition, barring right to bring or maintain an action on same claim or cause.

Without Prejudice – Where an offer or admission is made “without prejudice,” or a motion is denied or a suit dismissed “without prejudice,” it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided.