

Courtroom Preparation and Testimony – Maryland

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Michigan: Surveyors have some Work to Do... Poch v. Urlaub; 357 Mich. 261; 98 N.W.2d 509; 1959

- ▶ "We agree with the judge below that this survey could not lawfully be regarded. **A surveyor has no more right than anyone else** to decide upon starting points and other elements of location. **We have had frequent occasion to refer to the mischief done by the officious meddling** of such persons under some notion that it is within their province to **unsettle possessions and landmarks.**"
- ▶ In **Fisher v. Dowling**, again the Court said: "We have had frequent occasion to **condemn the assumptions of surveyors in determining lines and landmarks according to their own notions.** They have no such right, and their assumptions are not lawful. **There are few evils more annoying** to public or private peace than the intermeddling with land boundaries, and the disturbance of peaceable possessions."

Surveyor Testified...: Maryland (1)

Kennedy–Chamberlain Dev. Co. v. Snure:
 212 Md. 369; 129 A.2d 142; 1957

- ▶ Mr. **Harold G. Free**, who is Vice-President of the Kennedy–Chamberlain Development Company and also Vice-President and Treasurer of the Kenwood Golf and Country Club, and **who is also a registered professional engineer and land surveyor, testified for the plaintiffs** and gave a description of the topography of the areas involved in these proceedings, and he expressed it as his opinion that the drainage construction, when completed, would increase the volume and velocity of the flow of water, and
- ▶ "it is quite probable that in the rush of additional water that there would be considerable change in the present course of the stream."

Surveyor Testified...: Maryland (2)

Kennedy–Chamberlain Dev. Co. v. Snure:
 212 Md. 369; 129 A.2d 142; 1957

- ▶ The evidence shows that the drainage plans have been approved by the Washington Suburban Sanitary Commission, an administrative agency which has jurisdiction over plans for storm drainage systems in Montgomery County.
- ▶ On cross examination, Mr. Free admitted that he was familiar with these plans and with the fact that they had been approved by this Commission.
- ▶ He also admitted that he accepted the Sanitary Commission requirements "with regard to the design of storm systems."

Surveyor Testified...: Maryland (3)

Kennedy–Chamberlain Dev. Co. v. Snure:
 212 Md. 369; 129 A.2d 142; 1957

- ▶ The witness was further questioned as to the accuracy of a statement made by him at a public hearing before the Montgomery County Council in June, 1955.
- ▶ He admitted the correctness of the following statement: "The corporation bought a parcel of surplus land from the government and recognizing the problem of drainage from the start, proposes to develop it into salable lots.
- ▶ They have put a plat on record, accepting the area, recognizing that it is a problem piece ...

2nd Surveyor Testified...: Maryland (4)

Kennedy–Chamberlain Dev. Co. v. Snure:
 212 Md. 369; 129 A.2d 142; 1957

- ▶ Another witness for the plaintiffs, Mr. Vernon D. George, a land surveyor, with ten or twelve years experience in storm drainage work, testified that ...
- ▶ ...the installation of the proposed drainage system would concentrate the water and discharge it on to the land, but so far as erosion is concerned "it would just be hazarding a guess as to what actually would happen."

3rd Surveyor Testified...: Maryland (5)

Kennedy-Chamberlain Dev. Co. v. Snure:
212 Md. 369; 129 A.2d 142; 1957

- Mr. Donald Lee Chamberlain, a registered professional engineer and land surveyor, who is president of both plaintiff corporations, testified that he had appeared before the Montgomery County Council and objected to the proposed plans, ...

4th Surveyor Testified...: Maryland (6)

Kennedy-Chamberlain Dev. Co. v. Snure:
212 Md. 369; 129 A.2d 142; 1957

- Mr. Donald McCathran, a registered land surveyor, and an employee in charge of the design section of the Highway Engineering Division of Montgomery County, testified on behalf of the defendants that ...
- ...he prepared the storm drainage plans in issue, that these plans were approved by the Washington Suburban Sanitary Commission, that the drainage system would provide for the draining of the proposed Radnor Road all within the watershed, and that it would not drain any area not now being within the natural drainage boundaries.

Court's evaluation...: Maryland (7)

Kennedy-Chamberlain Dev. Co. v. Snure:
212 Md. 369; 129 A.2d 142; 1957

- The appellants' evidence consists largely of the opinions of engineers, based on experience, which are conclusions as to alleged future damage.
- While this type of testimony has considerable value, it leaves too much to be desired by way of accuracy and tends to border on speculation and surmise.
- It assumes conditions which do not exist. Damage does not necessarily result from an increased flow of surface water.

NJ: Courts hold Surveyors to Standard: (1)

From a 1978 NJ ruling

- Licenses to practice professional engineering or professional land surveying are required as a matter of public policy of this State **"in order to safeguard life, health and property, and promote the public welfare"** *
- Like the profession of engineering, we regard that of land surveying as **"no ordinary trade or calling."**
- It involves not only skill and knowledge, but certainly honesty, integrity and reliability.**
- The products of land surveyors **are cornerstones of titles and are relied upon by real estate purchasers, lenders and title insurers.**

NJ: What we don't want to see...: (2)

From a 1978 NJ ruling

- In the light of these tenets **we have no difficulty in determining that the State Board acted appropriately within the jurisdiction conferred upon it. Its finding of appellant's tainted character and reputation supported by ample proof of his convictions warranted the revocation within the legislative authority.**
- In the first place, **it would appear to be incongruous that one must have a good character and reputation in order to qualify for a license, but need not continue to enjoy the same character and reputation once the license is issued.**

Texas – Questionable Survey: (1)

Snellings v. Snellings: 482 S.W.2d 707; 1972

- that the parties **employed a surveyor FFFFFFFF to survey and divide the land** into two tracts of equal acreage;
- that relying on the field notes of the surveyor the parties executed warranty deeds to each other conveying to the other what was thought to be one-half of the H. A. J. and Mary Snellings land;
- that surveyor FFFFFFFF **erroneously computed the acreage of the land to be 240 acres**, and erroneously computed his division of the same, which was conveyed by the parties to each other, to be two tracts containing 120 acres each;

Texas – Questionable Survey: (2)

Snellings v. Snellings: 482 S.W.2d 707; 1972

- ▶ that **all the parties relied on this erroneous and incorrect information**, by mutual mistake accepted the field notes as equally dividing the land as to acreage, and executed their deeds to each other for 120 acres each, based on such erroneous information;
- ▶ that plaintiffs learned by a later survey that the total **acreage is only 229.24 acres**, and that the part deeded to A.O. Snellings was only **94.08 acres**, while the part deeded by A. O. Snellings to defendants contained **135.16 acres.**;

Good Research: Vermont (1)

Kelly v. Barnard: 155 Vt. 296; 583 A.2d 614; 1990

- ▶ 1. **affidavits from DDDDDD**, a surveyor who had **conducted extensive boundary and highway research** in the Town of Barnard, stating that he had examined the Barnard Land Records and the area of the disputed roads in 1985 and had **uncovered (a) a survey of the Wheat Road dated September 17, 1816** and recorded in the Barnard Land Roads and Villages Book at Page 39 on January 1, 1817, and (b) **a survey of the Park Hill Road dated September 9, 1788** and recorded in the Barnard Land Roads and Villages Book at page 5;

Good Research: Vermont (2)

Kelly v. Barnard: 155 Vt. 296; 583 A.2d 614; 1990

- ▶ 2. **affidavits from CCCCCC**, a registered land surveyor in the State of Vermont, stating that (a) in 1985, **he supervised a survey of the "so-called Wheat Road's" present centerline and the "so-called Park Hill Road's" present centerline**; and (b) in the process of conducting the 1985 survey, he found (i) clear evidence of Wheat Road's and Park Hill Road's continued existence and (ii) **that the centerline of the current roadbeds closely followed, for the most part, the path of the same laid out in 1816**;

Good but not perfect... Vermont (3)

Kelly v. Barnard: 155 Vt. 296; 583 A.2d 614; 1990

- ▶ The defendants **fire a battery of frivolous challenges** at the affidavits of CCCCCC and DDDDDD. Suffice it to say that the affidavits show that the affiants were qualified to testify as to the facts the court used the affidavits to establish. DDDDDD, an experienced surveyor, testified as to the results of research he personally conducted. CCCCCC, a registered land surveyor, testified as to the results of a survey he personally supervised.
- ▶ **...Defects in other information contained in the affidavits are irrelevant since that information was not relied on by the court in its decision.**... (where an affidavit contained certain objectionable statements, the court struck those statements but considered the remainder of the affidavit);

Getting in to the Process

What makes an Expert: Connecticut (1)

White v. Minister of Correction:

145 Conn. App. 834; 77 A.3d 832; 2013

- ▶ "The court may properly admit expert testimony only from a witness it has first determined to be qualified to testify on a particular matter."
- ▶ "...Generally, expert testimony is admissible if
- ▶ (1) the **witness has a special skill or knowledge** directly applicable to a matter in issue,
- ▶ (2) that **skill or knowledge is not common** to the average person, and
- ▶ (3) the **testimony would be helpful to the court** or jury in considering the issues. . . .

What makes an Expert?: Maryland (1)

Serdenes v. Aetna Life Ins.

21 Md. App. 453; 319 A.2d 858; 1974

- Of course, lack of formal education does not negate the expertise of a particular witness. It is the witness' knowledge of the subject matter, often gained through experience, that determines whether the witness is an expert.
- The decision as to whether a witness is an expert, and thus qualified to offer an "expert opinion" rests within the sound discretion of the trial court and will not be disturbed on appeal unless the trial judge's ruling is clearly erroneous or he has abused his discretion.

Build a Curriculum Vitae (CV)

- Articles Written
- Presentations at Chapter or state meetings
- Committee Postings for State Society
- Awards received
- Continuing Education Classes
- Projects with Challenges – court testimony
- Make sure to build an exhaustive CV and...**
- Keep it current!**

Some General Guidelines:

- Every "Smart Remark" that you wish you could make needs to be completely out of your system when you testify!
- It is better to know the Judge than the law...
- You can have as much justice as you can afford.
- Following the Presumptions of the court doesn't mean you'll win...

Presumption: 3-Rod Road: Vermont (1)

Bren v. Eardensohn: 2007 Vt. Super. No. 320-5-05

- ...If the boundaries could not be ascertained, **the statute created the "presumption that an existing highway was originally laid out as a three-rod road ...**
- ...If the party opposing the presumption could show that the **centerline of travel in fact had moved from its original location**, then the **presumption would disappear**, and the court would have to find the location based on all the evidence.
- 19 V.S.A. § 32. Section 32 now reads:**
- A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.**

Rebuttable Presumption: Vermont (2)

Cameron's Run v. Frohock:

2010 VT 60; 188 Vt. 610; 9 A.3d 664; 2010

- Frohock's lot depth to its back boundary as shown in the 1977 survey was **entirely dependent upon GGGGGG's assumption that Railroad Street Extension was three rods wide.**
- That assumption, in turn, was based on his knowledge that town highways were typically three rods wide. **That these assumptions were reasonable did not mean the surveyor was necessarily correct.**

That first meeting is critical!

1. What tone will you set at your initial meeting?
2. Who are you actually working for?
3. How will you be paid?
4. Are you being appointed by the Court?
5. What is the REAL ISSUE for the client?
6. Do you want to be involved, and in what capacity?

Who is in charge?

Who will control the various aspects of the case?

Complete Cooperation and understanding between the Attorney and the Surveyor is of key importance – cases have often been lost because the Attorney did not know what questions to ask.

Note: This may not be the Attorney's fault!



Is this a court case or a play?

- ▶ Both...It is easy for the surveyor to get so wrapped up in the game that he or she forgets that this is of major importance to the client.
- ▶ However...Quite a bit of the arguments and apparent antagonism in the courtroom is for the benefit of the jury.
- ▶ Appearance is everything!!



Were you appointed by the Court?

- ▶ This would seem to be a great honor, and looks good on your resume...
- ▶ This also allows you the unique opportunity to be used as a hockey puck by all parties.
- ▶ The Attorney who seems to be your ally at the beginning of the process may become your opponent.



Those casual requests...

- ▶ It is not unheard of for rival attorneys to attempt to obtain proprietary information from the surveyor by the age-old tactic of using an offhand approach, "oh, we just need a copy for our records"
- ▶ It is prudent to ALWAYS ask your attorney before releasing any information to anyone.



Adequate Research for the job.

The Attorney may have already performed research on the project when you are first contacted. *You will probably need to perform additional research because the title search frequently ignores references to adjoiners not in the direct chain of title of the client.*

Attorneys and Surveyors tend to look for different aspects when performing deed research.



Research other locations

- ▶ Make sure to get copies of any affidavits or depositions by various witnesses; valuable information can be found which may well strengthen (or undermine) your boundary analysis.
- ▶ "Dumpster Diving" in clients personal files (with their permission!) may yield valuable information not on the public record.
- ▶ Old U.S.D.A. aerial photographs can be critical!



Surveyor & Proper Research: New York (1)

Bergstrom v. McChesney:
92 A.D.3d 1125; 938 N.Y.S.2d 663; 2012

- ▶ The **surveyor stated in his affidavit** that he prepared his survey based on the **property description contained in plaintiff's deed as well as those of her predecessors in interest**.
- ▶ ...certain **highway appropriation, county acquisition and tax maps**, and **other relevant agreements and documents**. He **detailed the means by which he located certain markers**, monuments and lines referenced in the property description, ...

Surveyor & Proper Research: New York (2)

Bergstrom v. McChesney:
92 A.D.3d 1125; 938 N.Y.S.2d 663; 2012

- ▶ ...and **opined that plaintiff's property clearly includes the disputed parcel** and **plaintiff is the owner of that parcel**.
- ▶ Finally, he stated that he had reviewed the deed by which McChesney acquired title to her real property, and opined "with certainty" that the disputed parcel was not included in the property description contained in McChesney's deed.

Surveyor & Proper Research: New York (3)

Bergstrom v. McChesney:
92 A.D.3d 1125; 938 N.Y.S.2d 663; 2012

- ▶ Defendants also provided an affidavit from a surveyor **purporting to critique the methodology of plaintiff's surveyor**.
- ▶ However, **defendants' expert did not actually review any of the underlying surveys or deeds, and offered no opinion as to ownership of the disputed parcel**. Instead, his affidavit consisted solely of a response to a hypothetical question posed by defendants' counsel.
- ▶ **Based upon assumed facts, defendants' expert opined that...**

Significant Research: Maryland (1)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ Draper K. Sutcliffe, a civil engineer and land surveyor, **testified for the Drapers** in the first case that ...
- ▶ ...his search of the land records and work at the site had enabled him to plat the location of the Stottlemeyers' 10.5 acre tract (he found that this tract -- Parcel 2 -- actually contained 13.3 acres) and the location of the 61 acre farm of the Drapers as it touched the common boundary line of the 10.5 acre tract of the Stottlemeyers.
- ▶ He went back to Lot No. 220 of the larger tract of which the Drapers' land was originally a part.
- ▶ He also found that the 8.5 acre tract of land in dispute actually contained 8.8 acres.

Back to Parent Tract: Maryland (2)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ He **traced the Draper title back** to the deed from Levi Estow to John Hornie dated **October 6, 1856**, recorded among the Land Records of Washington County on February 2, 1857.
- ▶ This deed was for three parcels of land, the Draper land being part of Parcel 3 which describes 615 acres.
- ▶ Mr. Sutcliffe's plat, showing the monuments, courses and distances of the line between the 10.5 acre Stottlemeyer tract and the 8.5 acre tract in dispute, was introduced into evidence.

More Research: Maryland (3)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ Ralph H. Donnelly, civil engineer and land surveyor, testified for the Stottlemeyers and his plat was introduced into evidence in the present case. Mr. Donnelly traced the 10.5 acre Stottlemeyer tract in the land records to a deed dated April 23, 1853, from Jonathan Meredith and John Spear Nicholas to Hezekiah Boteler and Barton Boteler, and duly recorded, in which the boundary in question was described, in part, as follows:

Typical Testimony: Maryland (4)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ " * * North thirty five degrees East nineteen perches to a stone near the Antietam Creek, thence with the meanderings of said creek within four feet of the water the sixteen following courses and distances, viz., South forty three and a half degrees East twelve perches * * * then follow the other courses and distances * * * to "South eighty nine and a half degrees West Twelve perches, then leaving said creek North eighty one degrees West twelve perches, North seventy five degrees West eight perches ...

Not a Riparian Owner...: Maryland (5)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ It thus appears from the evidence produced by the Stottlemeyers themselves that the boundary line of Parcel 2 -- the 10.5 acre tract -- which separates that land from the land in dispute is established by deeds of record with a call to a stone, not on the bank of Antietam Creek but four feet from the bank. In addition to this artificial monument, which is still in place and located on the ground by all the surveyors, the sixteen courses and distances which follow the "meanderings of Antietam Creek" are all four feet from the then bank of the creek.

Not a Riparian Owner...: Maryland (6)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ This testimony, which is uncontradicted, establishes that the Stottlemeyers never owned any land abutting Antietam Creek and that a narrow strip four feet wide was owned by someone other than the Stottlemeyers as owners of the 10.5 acre tract.
- ▶ In short, the Stottlemeyers were never abutting riparian owners and hence the legal doctrines in regard to accretion, reliction and other doctrines of law relating to riparian owners are not applicable so far as the owners of the 10.5 acre tract are concerned.

Not a Riparian Owner...: Maryland (7)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ Although J. Harold Seibert, County Surveyor, who testified in the first case, had originally been of the opinion that the Stottlemeyers as owners of the 10.5 acre tract were owners of the land in dispute, he testified that, upon further research and reflection, he had changed his mind.
- ▶ When asked about his former opinion, he stated: "Yes, from our surveys and from observations on the ground we changed our minds entirely about this."
- ▶ He further testified in regard to the land in dispute that in his new opinion, the Stottlemeyers did not own the disputed land.

Not a Riparian Owner...: Maryland (8)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ The final result of all the expert testimony and other evidence was that there really was no ultimate dispute among the experts in regard to the location of the disputed boundary both as described in the relevant deeds and as appeared on the ground, although Mr. Donnelly was of the opinion that the Stottlemeyers owned the land in dispute. The stones called for in the deeds are still there and, curiously enough, after all these years, there is a twin elm growing at the place of the call "to an Elm tree," -- possibly a descendant from the original Elm tree -- and there is a dead oak where the original call was "to a white Oak tree."

Not a Riparian Owner...: Maryland (9)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- ▶ An examination of Plaintiffs' Exhibit No. 13 in the first case which was a photostatic copy of a plat, dated March, 1850, and bearing the legend "Part of Antietam Iron Works, Containing 161 1/2 Acres," with a scale of 1" -- 30 perches (495') shows a line near the then bank of Antietam Creek but the line appears to be a short distance away from the water of the Creek, itself.
- ▶ The deeds and other evidence indicate an intention of the original draftsmen to insure that the owners of the land on the north and east side of Antietam Creek should not have any rights as a riparian owner

Case Study – Research: Ohio (1)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- ▶ *The Dispute:* This case involves a dispute over the ownership of the 14-foot right of way reserved in the Sims deed. **Over the years, all parties and their predecessors in interest have used the right of way at issue for ingress and egress to the adjoining properties.**
- ▶ **There have been multiple surveys performed in this case. Each of the surveys performed used a line within inches of the others to mark the western boundary of the property** to the immediate east of that property owned by the plaintiffs and the defendants. **In other words, these surveys use a similar line to mark the western boundary of the Old Schoolhouse Lot.**

Case Study – Research: Ohio (2)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- ▶ The court finds that the surveys conducted by XXXXXXXX, XXXXXXXX, and XXXXXXXX **do not reflect the intent of the grantor, as evidenced by the chains of title. In the original deed from Sims to Brown, dated April 30, 1860,** the grantor states that the property is conveyed "Reserving the right of way along Smith's line to the Williamsburg road." From this, the court finds that Sims intended to convey the property with a reservation of a right of way along Smith's line, which became the Old Schoolhouse Lot.

Case Study – Research: Ohio (3)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- ▶ **Although the language in the deed may have changed, the intent of the original grantor,** Sims, to convey the property subject to a reserved **right of way** across the plaintiff's property and connecting the defendant's property to the main road **is clearly reflected in the language so chosen.**
- ▶ The court finds, however, that the **intent of the grantor was lost within the defendants' chain of title;** and this is, perhaps, **the reason that the surveys concluding that the defendants own the land do not echo the intent of the original grantor, Sims.**

Case Study – Research: Ohio (4)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- ▶ From this, the court finds that the **intent of Sims in the Bess deed was to convey the Bess property with an assignment of the use of the right of way** across the Brown property. This specific language is also used in the deed from Bess to Beck, recorded on February 5, 1869.
- ▶ The confusion in the defendants' chain of title appears to have arisen on March 13, 1906, when Beck conveyed a "tract or strip of land for a Right-of-Way" to C.W. Jordan (the "first" deed). **That deed appears to indicate, at first glance, that Beck owned the property outright.**

Case Study – Research: Ohio (5)

Roll v. Bacon: 160 Ohio Misc. 2d 23; 2010

- ▶ Upon reviewing the first deed for the "tract or strip of land for a Right-of-Way," the court finds that **Beck did not intend to convey fee simple title in the strip of land** but instead made a conveyance of the use of a right of way across the adjoining property. This is evidenced by the language used, i.e., "for a Right-of-Way"
- ▶ However, many of the deeds subsequent to the March 1906 deed **dropped the "right-of-way" language, and they appear to convey fee simple title to the 14-foot tract of land.** This "third tract of land" appears in the conveyance from Jordan to Hughes, recorded February 26, 1914...

If the surveyor is Deposed...(1)

- ▶ It is common practice for the attorney working against the surveyor in question to do everything possible to set that surveyor at ease – in the hope that he or she will make some unguarded or inaccurate statement which can later be used against the surveyor in the courtroom.
- ▶ Depositions are now commonly run through a word and phrase analysis, and cross referenced for all significant words.

If the surveyor is Deposed...(2)

- You May want to take your own notes while being deposed.
- Consider the way the attorney asks questions.
- What is the style of questioning??
- What is the attorney looking for??

Communications by e-mail

- Never put anything in an email that you would dislike seeing on a billboard
- The recipient of the email can read neither your body language, facial expression, nor your tone of voice. This is not to say the effective email communication is impossible, but it requires extra care.
- Type your email and then re-read your own work before you hit the "send" Button.

Facebook, Twitter, and Myspace

- There now exist corporations and software devoted exclusively to "mining" various on-line resources for information on rival attorneys, witnesses, and experts.
- Numerous articles have been devoted to the absolute necessity of ensuring that information which could be used to embarrass or compromise a witness (expert or otherwise) be removed from public internet access.

Most State Surveying Standards are not sufficient!

- Most states have written requirements stating that the surveyor shall be able to communicate effectively, but in a courtroom scenario, this is more critical than ever.
- **The Virginia Standard: 18VAC10-20-55. Language and comprehension.**
- Every applicant applying for licensure or certification shall be able to speak and write English to the satisfaction of the board.

Negligence and the Surveyor

Parameters for Negligence: Maryland (1) Lopata v. Miller: 122 Md. App. 76; 712 A.2d 24; 1998

- Appellants contend that appellees, **as licensed real estate agents** assisting appellants in the purchase of a home, owed a duty of care to appellants, which they breached by **failing to verify the accuracy of the information provided in the MLS.**
- Appellants argue that the trial court was legally incorrect in concluding that appellees did not owe this duty of care.
- According to appellants, the trial court based its grant of summary judgment on an incorrect legal principle, and thus, the entry of judgment should be reversed.

Parameters for Negligence: Maryland (2)

Lopata v. Miller: 122 Md. App. 76; 712 A.2d 24; 1998

- Appellees' first defense is that they did not owe appellants a duty to verify the information contained in the MLS because the listing and the contract of sale both expressly disclaimed such a duty.
- According to appellees, the contract of sale, which did not contain any representation concerning the parcel's acreage, **explicitly put appellants on notice that they had the option of hiring a land surveyor** to ascertain the exact location, size, and boundaries of the property.

Parameters for Negligence: Maryland (3)

Lopata v. Miller: 122 Md. App. 76; 712 A.2d 24; 1998

- "In Maryland, the prima facie elements of the tort of negligent misrepresentation are:
- '(1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
- (2) the defendant intends that his statement will be acted upon by the plaintiff;
- [KK note: continued]**

Parameters for Negligence: Maryland (4)

Lopata v. Miller: 122 Md. App. 76; 712 A.2d 24; 1998

- (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;
- (4) the plaintiff, justifiably, takes action in reliance on the statement; and
- (5) the plaintiff suffers damage proximately caused by the defendant's negligence."

Parameters for Negligence: Maryland (5)

Lopata v. Miller: 122 Md. App. 76; 712 A.2d 24; 1998

- Negligent misrepresentation is a form of negligence.
- In order to maintain an action in negligence, "a plaintiff must prove the existence of four elements:
- a duty owed to him,
- a breach of that duty,
- a causal connection between the breach and the injury,
- and damages."

Negligence: Texas (1)

DDDDDD v. Larsen: 700 S.W.2d 231 (1985)

- Actionable negligence presupposes the existence of a legal relationship** between the parties through which the wrongdoer owed a duty to the injured party.
- The duty may be **imposed by contract** or, irrespective of privity of contract, by law. Thus, although contractual privity assures a sufficiently close nexus between the parties upon which fairly to predicate liability, it is not, as DDDDDD argues, indispensable to the imposition of a legal duty of care.

Negligence: Texas (2)

DDDDDD v. Larsen: 700 S.W.2d 231 (1985)

- Although we have found no Texas case holding a surveyor liable in negligence** to a third party, other jurisdictions have imposed liability on surveyors, and the rationale is applicable to the instant case.
- First, the transaction indirectly **was intended to benefit Larson**, and the **harm was reasonably foreseeable**.
- The survey plat was addressed "TO ALL PARTIES INTERESTED IN PREMISES SURVEYED" and bore the following warranty:*

Negligence: Texas (footnote) (3)

DDDDDDD v. Larsen: 700 S.W.2d 231 (1985)

- › **Hutchinson v. Dubeau, 161 Ga.App.** 65, 289 S.E.2d 4 (Ct.App.1982) (surveyor liable if knew or should have known third person would use and rely on plat in a subsequent transaction involving the property);
- › **Rozny v. Marnul, 43 Ill.**2d 54, 250 N.E.2d 656 (1969) (tort liability measured by scope of duty owed rather than by artificial concepts of privity);
- › **Tartera v. Palumbo, 224 Tenn.** 262, 453 S.W.2d 780 (1970) (defendant knew survey would be used in describing property in warranty deed).

Negligence – 2 types: Texas (4)

DDDDDDD v. Larsen: 700 S.W.2d 231 (1985)

- › DDDDDDD argues that the evidence was legally or factually insufficient to support a finding of gross negligence. We agree.
- › **Gross negligence is "that entire want of care** which would raise the belief that the act or omission complained of was the **result of a conscious indifference to the right or welfare of the person or persons to be affected by it."**
- › What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages.

Negligence: Maine (1)

Somebody vs. somebody else:

2005 ME 116; 885 A.2d 779; 2005

- › Whether a party owes a duty of care is a question of law, while breach of the duty and causation are questions of fact.
- › We have not had the occasion to state the standard of care owed by a land surveyor.
- › **"standards for demonstrating the elements of professional negligence do not differ from profession to profession."**

Negligence: Maine (2)

Somebody vs. somebody else:

2005 ME 116; 885 A.2d 779; 2005

- › The plaintiff in a professional negligence action must establish the appropriate standard of care, demonstrate that the defendant deviated from that standard, and prove that the deviation caused the plaintiff's damages.
- › Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a **"reasonably prudent surveyor" would have applied with regard to the same project.**

Negligence: Maine (3)

Somebody vs. somebody else:

2005 ME 116; 885 A.2d 779; 2005

- › **Both Maryland and North Carolina** state that a surveyor must **"exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances."** -- Reighard v. Downs, 261 Md. 26, 273 A.2d 109, 112 (Md. 1971); Associated Ind. Contractors, Inc. v. Fleming Eng'g, Inc., 162 N.C. App. 405, 590 S.E.2d 866, 870 (N.C. Ct. App. 2004)
- › (providing nearly identical language). We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that **degree of care that an ordinarily competent surveyor would exercise in like circumstances.**

Negligence: Maryland (1)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- › It is claimed that a transposition of figures created this litigation. Appellant Lanius K. Reighard (Reighard) sued appellees Leo Clark Downs (Downs), doing business as Harford Survey Associates, and Earl Bradley Crabtree (Crabtree), Downs' employee, ...
- › ...when it developed that a tract of land Reighard purchased in Harford County contained two and a half acres less than a plat had shown.
- › **"enclosed area" to be "22.075 Ac. +/-".**

Negligence: Maryland (2)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- Reighard testified that he advised Crabtree (stipulated to have been an employee of Downs) that he wanted lots of approximately one acre in size with a minimum frontage of 125 feet.
- Many additional plans were submitted. The June 3 plat showed 19 lots; the July 8 plat, 20 lots; the August 9 plat, 17 lots; and the September 27 plat, 17 lots. Settlement was made on August 15, 1966.

Pure Calculation Error: Maryland (3)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- When Downs was requested to compute the size of each of the then remaining 17 lots and the area included in the roadbed it was discovered that the area enclosed on the plats (and purchased by Reighard) ...
- ...comprised 19.58 acres rather than 22.075 acres.
- There was no contention of error in the laying down of the lines.
- The error was one of computation brought about by inverting two coordinates when they were fed into a calculating machine by Crabtree.

Surveyor is a Professional: Maryland (4)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- Reighard assigns as error here the rulings of the trial judge (1) "holding [he] had no enforceable contractual rights as a result of a direct agreement between the parties..."
- The liability of a surveyor for his errors does not differ from that of professional people generally. He may be held responsible for such damages as are sustained as the result of his negligence and lack of skill. He is obliged to exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances.

Acreage – How Accurate?: Maryland (5)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- The parties stipulated, "[W]hen a surveyor states the area included within a given perimeter and extends that description to tenths or hundredths or thousandths and follows that designation with the symbols plus or minus,
- ...that the plus or minus indicates variations only in the last stated digit; so that in cases where it would be stated to the hundredths of an acre, the plus or minus implies that there will be a difference of hundredths of acres;
- and when it goes to thousandths of an acre, the plus or minus indicates variations of a thousandth of an acre or thereabouts."

Negligence: Maryland (6)

Reighard v. Downs: 261 Md. 26; 273 A.2d 109; 1971

- The other side of the coin, however, is that Reighard made his offer believing that lots could be made out of the tract proportionate to the acreage represented by Downs as being in the tract, and in accordance with his directions to Downs relative to subdivision.
- Certainly, a surveyor exercising ordinary skill and prudence under similar circumstances should not invert the coordinates when computing acreage. In this case, the erroneously computed acreage exceeded 10% of the true acreage.

Standard of Care: West .Va. (1)

Wells v. Tennant: 180 W. Va. 166; 375 S.E.2d 798; 1988

- The court reformed a deed establishing the disputed boundary line and dismissed the appellant's third-party complaint against the prior owners of her property and against a surveyor of the property. **The appellant had claimed that the prior owners were obligated to her under a covenant of general warranty and that the surveyor had negligently surveyed the line in dispute.**
- It appears that **xxxxxxxxxx did not lay the boundary line out in the manner in which xxxxxxxx's mother and aunt had intended it to run** and that **as a consequence a garage, which was supposed to be on the aunt's lot after partition, was actually on xxxxxxxx's mother's lot.**

Standard of Care: West .Va. (2)

Wells v. Tennant: 180 W. Va. 166; 375 S.E.2d 798; 1988

- It is **generally recognized** that under certain circumstances **a surveyor can be held liable for failure to exercise due skill and care in making a survey...**
- However, many circumstances affect the potential liability of the surveyor. For instance, **the connection between the surveyor and the injured party has been recognized to have some bearing on the case.**
- Whether the surveyor's error proximately caused the injury is relevant...**
- Likewise, **whether the surveyor has deviated from the standard of care applied to his profession has some bearing on his liability.**

Standard of Care Conclusion: West .Va. (3)

Wells v. Tennant: 180 W. Va. 166; 375 S.E.2d 798; 1988

- In examining the record presently before the Court, this Court believes **that the record was not sufficiently developed on the facts relating to xxxxxxxxxx's survey to determine whether it is potentially liable to the appellant** and that, at very least, inquiry concerning the facts is desirable to clarify the application of the law.
- Accordingly, the Court concludes that the **granting of summary judgment on the third-party claim against the surveyor was inappropriate** and that **the relationship between the appellant and the surveyor and the surveyor's survey of the boundary line in dispute should be developed further.**

Negligence Requirements: Maryland (1)

Bacon v. Arey: 203 Md. App. 606; 2012

- Appellant contends that the circuit court erred in dismissing his tort and constitutional claims on the ground that the claims were barred by the statute of limitations.
- Appellant argues that he learned of the "concert of action to alienate [his] property rights" in August 2007, and that he timely filed the second amended complaint weeks later.
- Appellant maintains that the circuit court incorrectly assumed that Plat 21707 was in his chain of title.
- Appellant contends that appellees' intentional concealment of the existence of Farm Road continues to this day

Where does Duty extend?: Maryland (2)

Bacon v. Arey: 203 Md. App. 606; 2012

- appellant argues that the **Survey Company** owed him an implied duty of care to complete an accurate survey. Appellant maintains that the **Survey Company's** failure to include Farm Road in the survey "must be considered a breach of a standard of care to the public, including [a]ppellant."
- Alternatively, appellant argues that the **Survey Company's** actions are so grievous that they create an immediate apparent duty.

Where does Duty extend?: Maryland (3)

Bacon v. Arey: 203 Md. App. 606; 2012

- Survey Company** contends that they owed no duty to appellant because under Maryland law, "a surveyor of a disputed boundary line does not owe a duty of care to a non-reliant third party adjacent landowner."
- A surveyor, therefore, cannot be held liable to such a plaintiff."
- At oral argument, the **Survey Company** argued that the requirement that a surveyor in Maryland be licensed does not create a duty to adjoining property owners who did not rely on the work completed by the surveyor.

Statutes of Limitations: Maryland (4)

Bacon v. Arey: 203 Md. App. 606; 2012

- Md. Code Ann., Courts and Judicial Proceedings Art. ("CJP") § 5-101 provides that "[a] civil action at law shall be filed **within three years** from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."
- Slander and libel fall under a different provision, CJP § 5-105, which provides that "[a]n action for assault, libel, or slander shall be filed **within one year** from the date it accrues."

Discovery Rule: Maryland (5)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ For purposes of the statute of limitations, when a cause of action accrues in a civil case is determined by application of the "discovery rule."
- ▶ The "discovery rule" provides that "the action is deemed to accrue on the date when the plaintiff knew or, with due diligence, reasonably should have known of the wrong."
- ▶ Under the "discovery rule," which was expanded generally to all civil cases in *Poffenberger, 290 Md. at 636-38*, the Court of Appeals held that the statute of limitations is activated by:

Inquiry Notice: Maryland (6)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ [A]ctual knowledge--that is express cognition, or awareness implied from ...knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry [thus, charging the individual] with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.
- ▶ In other words, a [person] cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him; and if he neglects to make such inquiry, he will be held guilty of bad faith and must suffer from his neglect.

Fraudulent Concealment: Maryland (7)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ One general exception to the accrual of the statute of limitations occurs in situations in which a defendant fraudulently conceals the cause of action from the plaintiff "so as to prevent its discovery by the exercise of due diligence."
- ▶ ...that there was no fraudulent concealment as appellant's claim of concealment was unsupported by the record.
- ▶ We are unconvinced that a fraudulent concealment theory is applicable in this case.

Fraudulent Concealment: Maryland (8)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ Although appellant alleged fraud and fraudulent concealment ...the complaint falls far short of setting forth specific allegations ...
- ▶ Rather, appellant generally alleges that appellees "conspired" and "were aware of, condoned, encouraged and participated in the conspiracy and/or concert of action" which "falsely" denied the existence of Farm Road.
- ▶ Appellant provides no facts to substantiate that appellees' alleged fraud kept him in the dark as to a cause of action or how he discovered the fraud, nor does appellant allege facts accounting for any delay in discovering the fraud despite his "exercise of ordinary diligence."

Duty of Care: Maryland (9)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ Although we conclude that the circuit court properly dismissed the claims against the **Survey Company** on the ground that the statute of limitations had expired, we shall briefly address the issue of whether the **Survey Company** owed appellant a duty of care.
- ▶ Appellant contends that the **Survey Company**, as licensed surveyors, owed a duty of care under Maryland law to members of the public, including him, to correctly survey Brown's property and include Farm Road in the survey.
- ▶ Simply put, we disagree.

Duty of Care: Maryland (10)

Bacon v. Arey: 203 Md. App. 606; 2012

- ▶ There can be no negligence where there is no duty that is due; for negligence is the breach of some duty that one person owes to another.
- ▶ It is consequently relative and can have no existence apart from some duty expressly or impliedly imposed. In every instance before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which duty would have averted or avoided the injury.

Duty of Care: Maryland (11)

Bacon v. Arey: 203 Md. App. 606; 2012

- As the duty owed varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies, and the act complained of never amounts to negligence in law or in fact; if there has been no breach of duty.
- a surveyor of a disputed boundary line does not owe a duty of care to a non-reliant third party adjacent landowner. A surveyor, therefore, cannot be held liable to such a plaintiff.

Duty of Care: Maryland (12)

Bacon v. Arey: 203 Md. App. 606; 2012

- At the heart of this case and *Carlotta* is whether a surveyor owes a duty of care to other property owners aside from the person who employs him.
- Here, there is a dispute concerning a licensed land surveyor who allegedly conducted a survey and "deliberately omitted" Farm Road as an easement.
- Applying *Carlotta*, we hold that the mere licensing of surveyors does not create a private cause of action by members of the general public against those surveyors.

Duty of Care: Maryland (13)

Bacon v. Arey: 203 Md. App. 606; 2012

- Absent any statutory or case law in Maryland demonstrating that a surveyor owed a duty of care to the general public, including appellant, or that Maryland intended to create such a duty through licensing, we decline to find that the *Survey Company* owed a duty to
- (We did not extend tort liability to title companies, noting that "[w]e have not been directed to, nor have we found, a statutory obligation in Maryland that imposes on either a title company or a title insurer a duty to exercise due care in performing a title search, such as found in some other jurisdictions.").

Duty of Care: Maryland (14)

Bacon v. Arey: 203 Md. App. 606; 2012

- JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.
- COSTS TO BE PAID BY APPELLANT.

Some Procedural Hints

Storage Location and the effect it has on the admissibility of evidence.

- Where and how tax maps, photos, and other documents are archived or stored can make a big difference on it's admissibility.
- Documents archived through a state or federal agency are generally admissible (U.S.D.A., county deed room, tax office, etc.)
- Documents archived privately (Businesses, individual landowner, law firms) may be harder to get into the courtroom.

Writing a report or summary

- ▶ This is frequently a very good idea, but consult with your attorney before signing and sealing a report. It may contain information, analysis, or conclusions that should not be released prematurely.
- ▶ If your report in it's early stages is maintained as a draft report or as your persona notes, it is much more difficult for rival attorneys to subpoena.
- ▶ A signed and sealed report or plat can legitimately be acquired by other attorneys through the process of discovery.

Initial site visit

- ▶ In his recent book on Forensic Surveying, Don Wilson recommends that the surveyor photograph any significant evidence on the first trip to the survey site.
- ▶ Digital cameras have made it easy to take and store large numbers of photographs, so don't be reluctant.

Data storage for photographs

- ▶ Make sure that your storage is as inaccessible as possible – Be able to state with surety that these are your original unedited photos.
- ▶ Cloud storage of photos may compromise the admissibility of the images as evidence.

Continue to photograph

- ▶ Take additional photographs throughout the survey process; you may be able to document changes to the job site due to:
- ▶ Illegal (?) grading
- ▶ Iron pins or other evidence which mysteriously appears, disappears, or moves.

Field Location

- ▶ Make sure to participate in all phases of the survey process – I've been questioned regarding appearance of terrain, undergrowth, and general appearance of a tract in an apparent attempt to show that I had not, in fact, exercised responsible charge and visited the site.
- ▶ Additional redundancy is a definite necessity since, in the event where two surveyors disagree over relative location of features, things can quickly degenerate into "He said,...she said..."

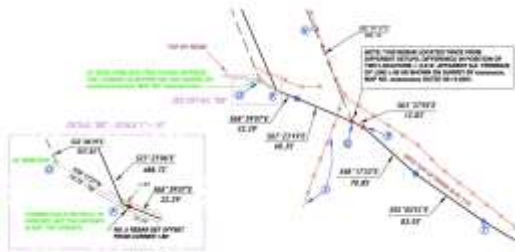
Where are the Features?:New York

Seltzer v. Bayer:

272 A.D.2d 263; 709 N.Y.S.2d 21; 2000

- ▶ **Defendant's surveyor stated** in an affidavit that **all the posts are either on defendant's property or are bisected by the property line.**
- ▶ **Plaintiff's surveyor noted on the map that the posts are on plaintiff's property.**
- ▶ Thus, **the question of exactly where defendant's fence is situated has not been resolved**, and defendant has failed to establish as a matter of law that she is not trespassing on plaintiff's property

Redundant Location can help



The Surveyor on the ground

Texas – Surveyor Testimony: (1)

Hynek v. San Angelo: 268 S.W.2d 493; 1954

- Mr. J. A. Simpson, a land surveyor for 50 years and County Surveyor of Tom Green County for the last 27 years testified that he had done considerable surveying work in the Minter Addition, Miles Addition Acre Lots and Robertson Subdivision of Acre Lot 6.
- We quote the following from the testimony of Mr. Simpson not only to show that the west line of the Acre Lots was located but to show that Minter Street can be definitely, accurately and easily located from the judgment:

Texas – Surveyor Testimony: (2)

Hynek v. San Angelo: 268 S.W.2d 493; 1954

"I have seen the original plat of the Robertson subdivision. The first time I saw it was about October 1928. * * * That strip you show me on the plat indicates a street, the way interpreted by me; I left it there as a street on both sides in the Minter Addition and Robertson subdivision.

That black line would be the actual east line of the Robertson subdivision; the field notes of Acre Lot 6, which is a Robertson subdivision shows it to be a subdivision of (five) Acre Lot 6, Miles Addition, and the field notes on that are practically the same as shown on this map here.

Texas – Surveyor Testimony: (3)

Hynek v. San Angelo: 268 S.W.2d 493; 1954

"I have surveyed that property on the ground.

In 1926 I made a plat of the Robertson subdivision showing a street between that and Minter Addition and Acre Lot 8 of Miles Addition.

Plaintiff's Exhibit No. 5 is a plat I made myself; I do not think it is to scale because I just placed it over the map on record and traced it.

At that time I located the Robertson subdivision on the ground, including the east line of that subdivision, which would be the east line of Block 21.

Texas – Surveyor Testimony: (4)

Hynek v. San Angelo: 268 S.W.2d 493; 1954

I also located the west line of Minter and of Acre Lot 8, Miles Addition; there is a strip in there between the two different additions. It is a street on the ground and I made the plat. * * *

"Thereafter I made a plat of the Robertson subdivision showing the east line of the subdivision, I believe in September 1952.

Plaintiff's Exhibit No. 6 is that plat which I made; the plat accurately shows the position of the east portion of the addition as I found it on the ground, exactly like I staked it off.

Texas – Surveyor Testimony: (5)

Hynek v. San Angelo: 268 S.W.2d 493; 1954

"I have my field book which contains a plat of the Robertson subdivision, work I did for Mr. Hunter in 1945.

This field book is made up directly on the basis of the original deeds. The plat in my field book is the same as the plat introduced in evidence.

My records show that I made five surveys in that Robertson subdivision, beginning back in 1928; I probably have made more than that. Every time I have been on the ground and surveyed the property in and about Minter Street I have always found a street there

On the Stand

Courtroom toolkit

- Calculator
 - Scale
 - Protractor
- Laptop computer
 - Laser Pointer
- Copies of your deeds, worksheets, plats
- Prints of some of your own Photographs.

Evidence: Questions to Ask:

Forensic Evidence: Science and the Criminal Law
2nd Edition: Terrence F. Kiely

What facts or assumptions or surmises can be obtained from the examination of one of **more physical items gathered...**

What is the likely basis for such assumptions or projections, or guesses?

How dependent is the **power of forensic evidence** on the traditional **observation by eyewitnesses?**

How much of forensic analysis and comparison testimony have to do with scientific theory or recognized scientific methodology?

Evidence: What is your goal?

Forensic Evidence: Science and the Criminal Law
2nd Edition: Terrence F. Kiely

The historical hallmark of crime-scene investigation has always included **close observation, well-paid attention, and the application of common sense and logic** to solving the crime...

State and Federal courts in **both civil and criminal cases** are increasingly occupied with cases centered on the **need for an encompassing and practice-oriented definition of science and scientific method** as an essential precursor to the admissibility of opinions of experts based upon that science.

Definitions regarding Evidence:

Black's Law Dictionary

- Indispensable evidence: Evidence without which a particular fact cannot be proved.
- Conclusive evidence: Evidence so strong as to overbear any other evidence to the contrary.
- **Prima Facie evidence: Evidence that will establish a fact or sustain a judgement unless contradictory evidence is produced.**
- Primary evidence (best evidence): Evidence of the highest available quality.
- Secondary evidence: evidence that is inferior to the primary evidence, but becomes admissible when primary or best evidence is inaccessible.
- Direct evidence: Evidence based on personal knowledge or observation
- Indirect (circumstantial) evidence: Evidence based on inference and not on personal knowledge.

Don't die before the trial date...

Graham v. Dolan: No. 11-0999 W.Va. Appeals. 2012

- › Petitioners next argue that the circuit court erred in placing no weight on the survey performed by XXXXXXXXXX "simply because of Mr. XXXXXXXXX's demise and hence inability to appear in Court to testify regarding said survey."
- › Respondent argues that petitioners failed to present any expert testimony to counter the testimony of his expert surveyor Mr. XXXXXXXXX.

The Constellation of Evidence.

- › The Surveyor needs to consider all available evidence – Deeds, conversations with neighbors, Sketches on grocery bags, as well as all physical evidence on the ground. Balk lines, old creek beds, fences, age of trees, creek fords, old road beds are all helpful.
- › Compare magnetic variation with original time of survey; find multiple avenues to prove your analysis. (Virginia like most states, takes judicial notice that magnetic declination varies over time)
- › The idea is to build a "high degree of professional surety" by developing a strong preponderance of evidence. – translation: swat a mosquito with a sledgehammer.

Justice Thomas Cooley

- › If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State statute to direct a surveyor to locate or "establish" a corner, as the place of the original monument, according to some inflexible rule. **The surveyor, on the other hand, must inquire into all the facts, giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither his opinion nor his survey can be conclusive upon parties concerned, and, second, that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.**

Surveyors Function: Connecticut (1)

Bond v. Benning: 175 Conn. 308; 398 A.2d 1158; 1978

- › **Both parties submitted into evidence the testimony of surveyors. The defendants' surveyor failed to search back the title to determine the source of the Benning parcel.**
- › The plaintiffs' surveyor searched title back as far as the mid-1850s, also inspecting the deeds of adjoining neighbors. On the basis of his search of the deeds, maps of record, assessor's information, his inspection of the property, the field work and calculations done by his associates and his own experience as a registered surveyor, the plaintiffs' surveyor determined that the disputed portion of land was within the plaintiffs' boundaries.

Surveyors Function: Connecticut (2)

Bond v. Benning: 175 Conn. 308; 398 A.2d 1158; 1978

- › **Where a surveyor**, whose qualifications are accepted by the court, has made a map showing the sum of various acquisitions **based upon an examination of the chain of title** of all the parties affected, **a review of the maps of record and information in the town records, an inspection of the property** in question, field work and calculations, his testimony may be accepted as that of an expert.

Surveyors Function: Connecticut (3)

Bond v. Benning: 175 Conn. 308; 398 A.2d 1158; 1978

- › His opinion "requires not merely a knowledge of the **principles and practices of conveyancing as far as they enter into the interpretation of deeds,**
- › ...but also the power to **compare and coordinate various descriptions** of the **land in question and of other adjacent lands** and to **fit together the boundaries, monuments and other indicia of location so as to apply the terms of the deeds to the actual ground** as represented upon a properly authenticated map.
- › Such a function is so much a matter of special training and experience as to fall within the proper range of expert knowledge."

NJ: Surveyor Testimony-features: (1) Beyer v. Cutler Brothers: 2010 N.J. Super. Unpub

- ▶ Beyer relied on a survey by Arthur James Schappell, Jr., a licensed land surveyor,
- ▶ Schappell testified that while preparing the survey he recorded the location of a dust bin, a building, a number of concrete pads, a dumpster set against one of the buildings, and piles of stacked pallets, all of which had been encroaching on the roadway.
- ▶ Schappell noted that the encroaching objects were not included on the 1990 survey, but acknowledged that their absence from the survey did not mean those items were not on the property at that time.

The psychology of the courtroom

- ▶ An opposing attorney during cross-examination wants to create an "aura" around the surveyor which implies dishonesty, unreliability, and/or ignorance
- ▶ Your attorney, of course wants you to appear wise, noble, and in all ways the greatest thing since sliced bread.
- ▶ Your speech, appearance, and bearing go a long way towards cementing your reputation.

What does the Judge think?: Maine (1) Sargent v. Coolidge: 399 A.2d 1333; 1979

In reaching this conclusion, the **Superior Court Justice accepted the testimony of the witness surveyor that he could find the starting point in the deed.**

The surveyor had traced the title back to 1852. Furthermore, the Justice may have taken into consideration the fact that the title to the described land had been researched by attorney and that a certificate of title had been given.

The weight to be given to the opinions of surveyors, as well as the credibility of any witness, is the prerogative of the trier of facts, here the single Justice. *Rusha v. Little, Me., 309 A.2d 867 (1973); Perkins v. Conary, Me., 295 A.2d 644 (1972); Sowles v. Beaumier, Me., 227 A.2d 473 (1967).*

Credibility of Expert Witnesses: Vermont

Town of Bethel v. Wellford:
186 Vt. 612; 987 A.2d 956; 2009

- ▶ The bulk of **landowner's arguments surround the credibility the trial court gave to testimony from surveyor AAAAAA, surveyor BBBBBB,** and several former Bethel townspeople.
- ▶ **It is the trier of fact, however, who evaluates the credibility of the witnesses and the persuasive effect of the testimony.** *Cabot v. Cabot, 166 Vt. 485, 497, 697 A.2d 644, 652 (1997)* (noting that as the trier of fact, **it is the province of the trial court to evaluate the credibility of witnesses**).

Texas – First Surveyor Discredited: (1)

Johnson v. McDaniel: No. 07-12-00363-CV: 2014 App.

- ▶ In July 2010, Johnson filed a motion to continue the scheduled hearing on the Elliotts' second motion for partial summary judgment, requesting time to allow **his newly-retained surveyors (BBBBBBBB and CCCCCCCC)** to complete a second apportionment survey. Johnson asserted the **newly-retained experts were necessary because** his original surveyor, **AAAAAAA,** had been discredited.
- ▶ Summary judgment evidence established that, on deposition, **AAAAAAA "admit[ted] he had failed to comply with reasonable survey standards"** and failed to establish a critical survey point on the ground by simply picking his point of beginning at random.

Texas – Clever Attorney Tactic: (2)

Johnson v. McDaniel: No. 07-12-00363-CV: 2014 App.

On deposition, **AAAAAA testified** that, to do an apportionment survey, **you must find the original bank** and establish endpoints to establish where to begin and end the apportionment calculation. He admitted that, to find his endpoints, ...

he **"started at the bridge--which that's a good spot to start, because that's where [he] had to unload to get out-- [n]ow at the time, not knowing, really, where it all tied back in, that's just where I started, at that time."** He confirmed his survey was based in part on GPS shots taken while flying over the area in an airplane to "fill in what voids I might have" where he **"couldn't get to it" despite having agreed with counsel that the survey points should be located on the ground.**

Attorney Stereotypes – and how to deal with them...

- ▶ “The Center of the Universe”
- ▶ The one who yells in your face
 - Corollary: Answer my question, “Yes” or “no”
- ▶ The number cruncher
- ▶ The snide insinuator
- ▶ **The calm collected professional**

Build your reputation with the Jury

- ▶ Using a base layer such as U.S.D.A. aerial photographs or U.S.G.S. quad sheets starts you off with a familiar and dependable starting point upon which it is very difficult to cast any doubt.
- ▶ Build your case in an orderly manner; lay the groundwork.
- ▶ Don’t talk over the heads of the Jury! They don’t care about what type of GPS equipment you used to establish your base control points.
- ▶ Show some humility

Attorneys may quote case law out of context

- ▶ It is not unusual to see case law cited by counsel for plaintiff or defendant which has been overturned by later decisions
- ▶ Alternatively, you may see a quotation in a later case which, upon careful consideration of the original opinion, never reflected the opinion of the justices in the earlier case.

How should you dress?

- ▶ Option 1: Since you should be judged on your expertise rather than on your appearance, Wear comfortable clothes.
- ▶ Option 2: Nice Slacks and a Polo Shirt (clean)
- ▶ Option 3: Wear your best suit and Tie as a sign of respect for the institution of the Courts.
- ▶ Option 4: Whatever your Attorney tells you to wear.
- ▶ Books have been written on the proper mode of dress for courtroom appearance. Color, Style??

Communication with judge and jury.

- ▶ When testifying in court, it is important to adjust your delivery to the audience – for a summary hearing before a judge, you can be more technical.
- ▶ On the other hand, a jury will almost surely be composed entirely of individuals with no familiarity with the surveying profession.
- ▶ (You can just about count on the last; at least one of the Attorneys involved has a vested interest in making sure that there is no relevant expertise on the jury.)
- ▶ **Weissman’s hay only fools Russian...**

How to answer a question.

- ▶ The professional is not required to answer with a simple “yes” or “no”, and may elaborate on his explanation. This does not stop attorneys from attempting to channel you to one word answers.
- ▶ Never allow the cross-examining attorney to phrase your answers; a difficult task since this can be done quite subtly.
- ▶ Be clear and concise – Judges (and juries) do not want to spend more time than necessary on a given case.

Be Forceful (sometimes)

- › What is the content of your response?
- › How sure are you of your answer – are there multiple pieces of evidence supporting your position, or just one or two?
- › It is not necessary nor desirable to be completely passive.
- › Projecting confidence is fine, but projecting arrogance will ultimately hurt your client.

Depositions and testimony of other experts or witnesses

- › Useful evidence may be obtained by the surveyor before the trial begins if transcripts of all of the depositions is made available to you.
- › It is permissible to sit in the public portion of the courtroom and listen to testimony of other experts.
- › Take notes; what they say may be useful when you are questioned.
- › Listen to what everyone says; not just the witness.

A long list of ways to trip you...

- › The number one tactic of the attorney in the courtroom: take a complex situation involving conflicting evidence, gray areas in the rules of construction, and multiple descriptions; distill the problem down to two or three lines in one deed; and then demand a yes or no answer to a simple question.

Calculating error of Closure: W.Va. Kincaid v. Morgan: 188 W. Va. 452; 425 S.E.2d 128; 1992

- › Appellants contend that **the survey was inaccurate because the surveyors did not produce "closure" calculations at trial.** Closure is a term used to describe calculations relating to the accurateness of the survey.
- › **The surveyors testified that they did make closure calculations and that their survey was accurate.** Nothing in the record before this Court contradicts that testimony.

Know Rules of the court: Virginia

Talbot v. Richmond and Danville RR.; 72 Va. 685; 1879

- › Seeking the intent of the parties as manifested by an instrument, **the court is not**, under the established rules of construction, **to be tied down to the terms and expressions referred to.** Especially is it not at liberty arbitrarily to break up the intimate companionship of words and lop one member of a sentence from another.
- › The maxim is, *noscitur a sociis*. It must consider all the language employed--**the instrument as a whole and every part of it. The general intention to be collected from the whole context, and every part of a written instrument, is always to be preferred to the particular expression.**

Intent of the Parties: Maryland (1) Winter v. White: 70 Md. 305; 17 A. 84; 1889

- › In the construction of a deed, as in all other instruments, the intention of the parties must prevail, unless such an intention contravenes some well settled rule of law.
- › The object of the descriptive part of a deed, is to define what the grantor meant to convey and the grantee to receive; and when the intention of the parties is apparent and plain on the face of the deed itself, there is no room for construction.
- › It is equally well established, that the intention of the parties should prevail in expounding deeds, if not repugnant to some principle or maxim of the law, which is to be collected from the whole deed.

Intent of the Parties – Texas

Luckel v. White: 819 S.W.2d 459 (1991)

- ▶ The **primary duty of a court when construing such a deed** is to ascertain the intent of the parties from all of the language in the deed by a **fundamental rule of construction known as the "four corners" rule**.
- ▶ "That intention, when ascertained, **prevails over arbitrary rules.**"
- ▶ The court, when seeking to ascertain the intention of the parties, attempts to **harmonize all parts of the deed**.
- ▶ "[T]he **parties to an instrument intend every clause to have some effect** and in some measure to evidence their agreement."

NJ: Don't Interpret what is clear...(1)

State v. Brewster: 42 N.J.L. 125; 1880

- ▶ No principle is better settled, said Justice Elmer, or more important to be faithfully adhered to by the courts called upon to enforce written statutes, than that, in the absence of ambiguity in the language used, ...
- ▶ ...no exposition shall be made which is in opposition to the express words; or, as the maxim is sometimes expressed, ...
- ▶ ...it is not allowed to interpret what has no need of interpretation.

Being led about by the nose...

- ▶ An attorney may walk you through a step by step analysis of a survey that is incorrect (in your opinion) while carefully leaving out the one crucial item with which you disagree; this encourages you to give an answer that sounds favorable to the opposing attorney since it appears to the jury that you have agreed with his analysis.
- ▶ *One possible answer that, while you can answer his hypothetical question, he has left out so many factors from the totality of the analysis as to make the answer meaningless in the real-world situation that is being tried. This is a variation of the next item on my list, and probably the ...*

The final question of the sequence.

- ▶ Attorneys will frequently modify the tactic described above by following a sequence of questions towards a goal, but omitting the crucial final question, leaving the jury to feel that they have come to a conclusion themselves rather than having been manipulated by the attorney.

Prince Macchivelli

- ▶ Niccolo Machiavelli, a diplomat in the pay of the Republic of Florence, wrote "The Prince" in 1513 after the overthrow of the Republic forced him into exile. It is widely regarded as one of the basic texts of Western political science, and represents a basic change in the attitude and image of government. (Paul Halsall; November 1996 halsall@murray.fordham.edu)
- ▶ One of his guiding principles was (paraphrase) to get past the bad experiences as quickly as possible; by contrast, one should attempt to make the good times last as long as possible.

Checkmate...However...

- ▶ At some point, if you understand the direction in which the cross-examining attorney is taking you, **and it is inevitable that an awkward piece of information will come out**, it is often better to present the data in a forthright manner, rather than having it appear a reluctant admission.
- ▶ Then move on to a new topic.
- ▶ **Topics that Attorneys love to win admissions on include**
 - ▶ A. How much you are (will be, have been) paid.
 - ▶ B. Your long working relationship (if any) with your client.
 - ▶ C. General personal information which might be construed to create a conflict of interest.

There is no Box!

- ▶ The surveyor may not be aware that, when he or she is in the "witness box" *one can ask permission to get up and go to your exhibits in order to better answer questions.*
- ▶ This request can be made more reasonable on the pretext that, by using exhibits on stands close to the jury, that your answers will be more clearly understandable by the jury.

Actually, there is one box...

- ▶ The Jury is seated in a separate section, and there is a "magic line" which the expert cannot cross; never attempt to hand anything across that line, including photographs or other exhibits.

The close second and third for "most used trick" award

- ▶ Getting your goat!
- ▶ Accelerating the pace of questioning in hopes that you will rush your answers.
- ▶ *The Expert is not required to answer with extreme speed; you are allowed to collect your thoughts before answering, but it can feel awkward until you get used to everyone staring at you. Remember: they are not paying you to break the land speed record.*
- ▶ Variation: quick subject shifts to keep you off balance.

Trip up Tactic no. 4-6

- ▶ Using map copies that are intentionally blurred, vague, or otherwise confusing *example: can pull out your own photos if the court copies are unclear, or ask to use a different exhibit.*
- ▶ Using a web of numbers to confuse both the jury and the surveyor. *Example: adding up old slope distances to compare with modern horizontal measures.*
- ▶ Just Say "No"

Aerial Photographs

Aerial Photographs: Maine (1) Bryer v. Morgan: Docket No. CV-85-4 (1986)

- ▶ The disputed portion of the boundary was marked by a visible line in the form of a stonewall for at least the period from 1924 to 1964. Although the stonewall in this area was not as high as other portions of the stonewall (testimony indicated that the height of the wall in the disputed area was no more than one and one-half to two feet), the fact remains that the stonewall was visible.

Aerial Photographs: Maine (2)

Bryer v. Morgan: Docket No. CV-85-4 (1986)

- On this issue of the visible line, the aerial photograph used by plaintiffs' surveyor to plot the course of the missing portion of the stonewall was indispensable to plaintiffs' case. Its availability corroborates the testimony about the existence of the visible line, and its use by the surveyor to plot the course provides the court with an accurate basis for making a judgment on the proper boundary description. The flawed recollection of the plaintiff and his witnesses about the precise location of the boundary would not have provided an adequate basis for such a judgment.

Aerial Photographs: Maine (3)

Bryer v. Morgan: Docket No. CV-85-4 (1986)

- Moreover, the aerial photograph is the best response to defendants' thoughtful argument that plaintiffs should be precluded from arguing the doctrine of acquiescence in this case because the stonewall in the area in dispute no longer exists. Defendants see the possibility of fraudulent claims when the monuments or fences that mark the visible lines are gone. However, the aerial photograph again corroborates beyond any question the testimony of those who claim that the visible line was there.

Aerial Photographs: Maryland (1)

Stottlemeyer v. Kline: 255 Md. 635; 259 A.2d 52; 1969

- The testimony in this case was lengthy and the exhibits voluminous, including maps, plats, land records, aerial photographs, transparent overlays and surveys. A large amount of testimony was by Land Engineers and Surveyors.
- Without passing on the title to said three acres, more or less, I think it suffices to say that certain land exists between the Stottlemeyers' southeastern boundary and the Antietam Creek as shown particularly by the transparent overlay on the aerial photographs and by the metes and bounds description

Aerial Photographs: Maryland (1)

Costello v. Staubitz: 300 Md. 60; 475 A.2d 1185; 1984

- Moreover, in the 1950s, a shed, ...was constructed on the disputed property. The claimant and several neighbors testified that the shed had continuously remained in the same location since its construction.
- This evidence was contradicted by a photogrammetrist who testified on behalf of the record owners that, in his opinion based on aerial photographs taken of the disputed property in 1962 and 1963, no shed existed on the disputed property during those years. The photogrammetrist additionally testified that a shed was located on the disputed property subsequent to 1970.

Frye Test & Daubert Test

NJ: Court as "Gatekeeper" for evidence: (1)

New Jersey v. Nesbitt: 185 N.J. 504; 888 A.2d 472; 2006

- Trial courts are expected to perform a gatekeeper role in determining whether there exists a reasonable need for an expert's testimony, and what the parameters of that testimony may be.
- Consistent with Evidence Rule 702, a trial court must be satisfied that the expert's knowledge and experience is reasonably required to inform the jury on a matter that may be beyond the jurors' ken and will help jurors understand the evidence or determine a fact in issue.

NJ: Court as "Gatekeeper" for evidence: (2)

New Jersey v. Nesbitt: 185 N.J. 504; 888 A.2d 472; 2006

- Expert testimony, including opinions that embrace ultimate issues, is permitted when the testimony has value in assisting the jury's understanding of facts and their significance, and when the trial court finds that that testimony is not unduly prejudicial.

The "Frye" Test: (1)

Frye v. United States:
293 F. 1013; 54 App. D.C. 46; 1923

"The rule is that the opinions of experts or skilled witnesses are admissible in evidence ...
...in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, ...
...for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it.

[KK continued]

The "Frye" Test: (2)

Frye v. United States:
293 F. 1013; 54 App. D.C. 46; 1923

When the question involved does not lie within the range of common experience or common knowledge, ...
...but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence."

The "Frye" Test: (3)

Frye v. United States:
293 F. 1013; 54 App. D.C. 46; 1923

while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, ...
...the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye-Reed Test: Maryland (1)

Fleming v. Maryland: 194 Md. App. 76; 1 A.3d 572; 2010

- The State argues that the firearms toolmark testimony was admitted properly under Frye-Reed, because the expert witnesses used the method traditionally used in Maryland, by both the Maryland State Police and the forensic laboratories located in Maryland. The State argues further that its reliability has been judicially noticed in Maryland.
- The admissibility of expert testimony concerning scientific or forensic evidence **is governed in Maryland by the Frye-Reed standard**, which provides that scientific techniques can be admissible if they are "generally accepted" in the scientific community.

Frye-Reed Test: Maryland (2)

Fleming v. Maryland: 194 Md. App. 76; 1 A.3d 572; 2010

- See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)*
- (holding that with respect to scientific evidence, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.")
- The Frye standard was adopted in Maryland in *Reed v. State, 283 Md. 374, 389, 391 A.2d 364, 372 (1978)* (discussing the policy considerations behind the "general acceptance" requirement, and concluding that...

Frye-Reed Test: Maryland (3)

Fleming v. Maryland: 194 Md. App. 76; 1 A.3d 572; 2010

- ▶ "[f]or the foregoing reasons, we agree with the 'general acceptance' rule which the Frye case sets forth.").
- ▶ The Court of Appeals has encapsulated the standard as follows:
- ▶ "Where the validity and reliability is so broadly and generally accepted within the scientific community, as is the case of ballistics tests, blood tests, and the like, a trial court may take judicial notice of its reliability.
- ▶ Likewise, a court may take judicial notice that certain procedures, widely recognized as bogus or experimental, are unreliable."

Frye-Reed Test: Maryland (1)

State v. Brightful: 2012 Md. Cir. Ct. (consolidated)

- ▶ In *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), held that the Frye standard had been superseded by Federal Rule of Evidence 702.
- ▶ However, when the **Maryland Rules of Evidence were drafted, the Committee specifically stated** that Maryland Rule 5-702, although patterned on the Federal Rule, was not intended to overrule *Reed v. State*, 283 Md. 374, 391 A.2d 364 and **the Frye-Reed standard is followed in Maryland** to determine the admissibility of scientific evidence.

The "Daubert" Test: (1)

Daubert v. Merrill Dow Pharmaceuticals:

509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

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

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."

The "Daubert" Test: (2)

Daubert v. Merrill Dow Pharmaceuticals:

509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful

The "Daubert" Test: (3)

Daubert v. Merrill Dow Pharmaceuticals:

509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),

...whether the expert is proposing to testify to (1) scientific knowledge that...

(2) will **assist the trier of fact to understand or determine a fact in issue**. This entails a preliminary **assessment of whether the reasoning or methodology** underlying the testimony is scientifically **valid** and of whether that reasoning or methodology properly can be applied to the facts in issue.

The "Daubert" Test: (4)

Daubert v. Merrill Dow Pharmaceuticals:

509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact **will be whether it can be (and has been) tested**.

"Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."

The "Daubert" Test: (5)

Daubert v. Merrill Dow Pharmaceuticals:
509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.

...in some instances well-grounded but innovative theories will not have been published,

...Some propositions, moreover, are too particular, too new, or of too limited interest to be published.

...But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.

The "Daubert" Test: (6)

Daubert v. Merrill Dow Pharmaceuticals:
509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."

Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," ... may properly be viewed with skepticism.

The "Daubert" Test: (7)

Daubert v. Merrill Dow Pharmaceuticals:
509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules.

Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

The "Daubert" Test: (8)

Daubert v. Merrill Dow Pharmaceuticals:
509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469; 1993

Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

NJ: Affirms "Frye Test": (1)

New Jersey v. Harvey: 151 N.J. 117; 699 A.2d 596; 1997

- ▶ ...we continue to apply the general acceptance or *Frye test* for determining the scientific reliability of expert testimony. In Frye, ... the court wrote:
- ▶ [W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

NJ: Rejects "Daubert Standard": (2)

New Jersey v. Harvey: 151 N.J. 117; 699 A.2d 596; 1997

- ▶ In 1993, the United States Supreme Court abandoned Frye's general-acceptance standard as the exclusive test for admitting scientific testimony in favor of the more relaxed standards of Federal Rule of Evidence 702.
- ▶ Even before the United States Supreme Court decided Daubert, this Court had relaxed the test for admissibility of scientific evidence in toxic-tort cases.
- ▶ We have been cautious in expanding the more relaxed standard to other contexts.
- ▶ Thus, the test in criminal cases remains whether the scientific community generally accepts the evidence.

What standard of surety?

- In most cases, the surveyor is testifying in civil court, rather than criminal court, so "beyond a reasonable doubt" is not required.
- "A high degree of professional surety is what we need to strive for, where there is a heavy preponderance of evidence on one side or the other of any decision.
- Are you positive??

Rules of Evidence

Ultimate Issue: Connecticut (2)

White v. Minister of Correction:
145 Conn. App. 834; 77 A.3d 832; 2013

- "An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact.
- . . . An expert may, however, give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass"

Surveyor and Ultimate Issue: W.Va.

Clear Fork Coal Co. v. Anchor Coal Co.:
111 W. Va. 219; 161 S.E. 229; 1931

- The last assignment of error is the refusal to allow C. E. Krebs, an engineer, to answer a question as to how he would locate the disputed corners. His answer was vouched on the record to be: "If I were permitted to locate this line having the point designated in the question, I would locate the county line, and from that county line I would extend the line N. 23 W. the distance it scales on the map from the county line, which, in this direction, is 240 feet and I would locate that as the northeast corner of lease No. 4. Then I would go to the forks of Tom's Branch and locate the other corner of this line, and run the line from the forks of Tom's Branch to the point 240 feet north of the county line, on the line extending N. 23 [degrees] W."

What a Surveyor can testify to...

12 Am Jur 2d Boundaries § 100 Testimony of & concerning surveyors

- A registered or licensed surveyor may testify as an expert witness, and is admissible in determining the boundary between properties.
- A surveyor can testify as an expert about work performed by other surveyors, and he or she can testify as to his or her own survey performed on the property in dispute. The surveyor's expert opinion can be based on deed descriptions, field notes, maps, other surveys, points on the ground, facts proved by other witnesses, and hearsay evidence,
- but if a surveyor does not have a factual basis for his or her location of the property line, his or her conclusion is not evidence of the location of the boundary.

Rules of Evidence: Maryland (1)

Rule 5-702. Testimony by experts

- Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
 - (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
 - (2) the appropriateness of the expert testimony on the particular subject, and
 - (3) whether a sufficient factual basis exists to support the expert testimony.

Rules of Evidence: Maryland (1)

Rule 5-703. Bases of opinion testimony by experts

- ▶ (a) In general. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rules of Evidence: Maryland (2)

Rule 5-703. Bases of opinion testimony by experts

- ▶ (b) Disclosure to jury. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) ...
- ▶ ...may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence.
- ▶ Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

Rules of Evidence: Maryland (3)

Rule 5-703. Bases of opinion testimony by experts

- ▶ (c) Right to challenge expert.
- ▶ This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.

Rules of Evidence: Maryland (1)

Rule 5-704. Opinion on ultimate issue

- ▶ (a) In general. Except as provided in section (b) of this Rule, testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.
- ▶ (b) Opinion on mental state or condition. An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged. That issue is for the trier of fact alone...

Rules of Evidence: Maryland (1)

Brown v. Smith: 173 Md. App. 459; 920 A.2d 18; 2007

- ▶ At trial, the Smiths presented expert testimony by attorney and licensed title insurance underwriter Randall Rolls, who has given title opinions on properties in Frederick County for more than 27 years.
- ▶ Rolls observed that the deed scrivener's detailed metes and bounds description of the right of way demonstrated a "fairly high degree of sophistication," indicating that the deeds should be strictly construed because they were created by a professional.

Rules of Evidence: Maryland (2)

Brown v. Smith: 173 Md. App. 459; 920 A.2d 18; 2007

- ▶ ... Browns complain that, although Rolls is unquestionably an expert, the trial court erred in permitting Rolls "to testify as to the original grantor's intent." In their view, this testimony constituted a "guess" as to "what the parties' original intent was[.]" which should have been excluded as impermissible conjecture.
- ▶ We do not agree.
- ▶ First, even if Rolls did offer an opinion on the ultimate issue of the grantor's intent, it was not error or an abuse of discretion to admit it. *See Md. Rule 5-704(a)*

Rules of Evidence: Maryland (3)

Brown v. Smith: 173 Md. App. 459; 920 A.2d 18; 2007

- Second, the trial court ultimately rested its decision on the language of the deeds themselves, reaching a legal, not a factual, conclusion. *See Calvert Joint Venture # 140 v. Snider, 373 Md. 18, 38, 816 A.2d 854 (2003)*
- ..."the construction of a deed is a legal question for the court, and on appeal, it is subject to de novo review".
- Although the court may have been aided in reaching this legal conclusion by Mr. Rolls' explanations, it was the deeds themselves that were the basis for both Rolls' opinion and the court's conclusion.

Hearsay Evidence

Expert's sources-Hearsay: Maine (1)

Milliken v. Buswell: 313 A.2d 111; 1973

- As we said in *Warren v. Waterville Urban Renewal Authority, 1967, Me., 235 A.2d 295*:
- "The **opinion of an expert is not necessarily rendered inadmissible** or incompetent because it may be based on knowledge **of facts gained from hearsay sources**."
- Any **expert worthy of the name must of necessity assimilate prior learning derived from the experiences of others**. As an expert witness he **draws upon various sources of information whose credibility or trustworthiness he must determine in the light of his expertness**. It would completely frustrate the use of expert witnesses if they were obliged to substantiate each single factor upon which their ultimate opinion must depend upon firsthand personal knowledge or personal experience...

Expert's sources-Hearsay: Maine (2)

Milliken v. Buswell: 313 A.2d 111; 1973

- If **some of the expert's factual information is derived from sources fairly trustworthy though hearsay** and he has as such the ability to co-ordinate and **evaluate that information with all the other facts in his possession secured through personal observation**, the trial court may in the exercise of a sound discretion permit the expert's ultimate opinion to be considered by the jury [the factfinder]."
- The defendants' counsel was within his rights in cross-examination to bring out before the factfinder some of the hear-say sources tapped by the surveyors to support their ultimate opinion, but, having done so, he cannot now complain about the hearsay, provided their ultimate conclusion was actually based on their own independent investigation and calculations.

Hearsay & the Professional: Maryland (1)

Kent Village v. Smith:

104 Md. App. 507; 657 A.2d 330; 1995

- It has long been accepted in Maryland, as a matter of common law, that an expert witness may express an opinion that is based, in part, on hearsay if the hearsay is of a kind that is customarily relied on by experts in that particular calling.
- Dr. Davis stated that it was usual and customary in her field of rehabilitation counseling to rely on medical personnel, social workers, and psychologists, as well as on relevant records, statistical data, and literature, "in order to get a full picture of the individual that we're working with, because my field crosses professions." That was not disputed by appellants.

NJ: Testimony of Neighbors: (1)

Curtis v. Aaronson: 49 N.J.L. 68; 7 A. 886; 1886

- Proof of declarations of persons since deceased, in respect to private boundaries, to be admissible in evidence, ...
- ...must have been made by a declarant in possession as owner at the time, ...
- ...and while engaged in pointing out the boundary in question, and such declarations need not be against interest or in disparagement of title; ...
- ...they are received when nothing appears to show an interest to deceive or misrepresent.

NJ: Testimony of Neighbors: (2)

Curtis v. Aaronson: 49 N.J.L. 68; 7 A. 886; 1886

- ▶ In such cases, ...being the mere voluntary statement of a stranger, not under oath, or in presence of parties, cannot, under any rule of reason or safety, be regarded as competent testimony upon which to determine private title to lands, ...
- ▶ ...and whether made ante or post litem motam, are equally objectionable and illegal; and while the courts of some states have, as it would seem, been willing to receive such testimony, in this state we have not gone so far.

Lessons in Common Law & Case Studies

Can a surveyor testify in court regarding issues of title?

- ▶ Remember: "It is better to know the Judge than the Law"
- ▶ Generally, the textbook response is "No", and it is frequently true
- ▶ If the Judge wants to hear your comments, you will be allowed to answer questions regarding questions of title.

Can a surveyor quote case law?

- ▶ Absolutely! (but think twice before printing it on a map...)
- ▶ You may need case law on subjects that, to you, seem to need no clarification, such as junior-senior title, or that the call for a creek carries to the center of the creek.
- ▶ If your case hinges on a principle, come prepared with proof that the principle in question is applicable to your state.

Speak the Court Language: Ohio

Kennedy v. Rose: 2008 Ohio 3929

- ▶ Harkness testified that the Hill property was originally part of the premises referred to as the parent parcel and that the **first conveyance of what is now the Hill property occurred in 1949**. He further testified that the records reflect that this was the **first conveyance of property from the parent parcel and therefore senior in priority**.
- ▶ Harkness stated that in order to determine the starting point, he attempted to find monumentation that would have existed in 1949. He testified that in order to determine monumentation **you must research how people use property and particularly how this property was used in 1949**.

Speak the Court Language: Ohio:

Kennedy v. Rose: 2008 Ohio 3929

- ▶ Harkness testified that the last call of the triangle fell within the area of Tunnel Hill Road but that **the vast majority of decisions made in Ohio** and other states transfer property to the center of a road unless otherwise indicated.
- ▶ **We find that the testimony of Charles Harkness established that he conducted his survey in accordance with surveying standards. Harkness researched and utilized other sources of information to determine the intent of the parties in creating the original boundary** lines consistent with Ohio Adm. Code 4733-37-02. Furthermore, he relied on feasible monumentation both natural and artificial.

Texas – Ultimate Goal in Land Dispute: (1) Arkansas Co. v. Johnson 2008 App: NO. 13-05-563-CV

In a boundary dispute, the ultimate object of the trier of fact is to determine the "true location of the line in dispute." ...Moreover,

[w]hen this cannot be done with reasonable certainty due to the lapse of time or the obliteration of the evidence of the original locator, ...

it is not only permissible, but, out of necessity, required that the courts resort to any evidence tending to establish the place of the original footsteps of the surveyor which meet the requirement that it is the best evidence of which the case is susceptible.

Texas – Ultimate Goal in Land Dispute: (2) Arkansas Co. v. Johnson 2008 App: NO. 13-05-563-CV

Although the parties do not direct us to, nor can we find, any Texas case interpreting the phrase "substantially correct" as used in a boundary dispute jury charge, courts have clarified the phrase in other contexts.

Substantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, and that is not affirmatively incorrect.

Going for the Jugular...: Michigan (1) Obrecht v. National Gypsum: 361 Mich. 399; 105 N.W.2d 143; 1960

- The greatest burden of an appellate court – usually – is that of searching, sifting, and stating the facts of reviewable moment. With the facts assembled and known for what they are, the legal jugular of the case invariably becomes exposed for definitive and precedential treatment
- "More and more, we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts -- the facts which generate the law.
- Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light."

Justice Thomas Cooley

- ▶ "I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgment. Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions."