

SURVEY EVIDENCE AND PROCEDURE

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1 ☐ **DISCLAIMER**

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

I. Know the Law that Governs Your Practice

"Ignorance of the law is no excuse." The professional service provider is governed by the law in all areas of his or her practice.

3 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"More specifically, the ancient equity maxim is *ignoranti juris non excusat*. This is commonly translated as 'ignorance of the law is no excuse.' This is not a new proposition. ... A fundamental premise of our legal system is that parties are presumed to know the law, and ignorance of the law is no excuse. It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. This concept is also applied in the non-criminal, regulatory law context."

Wyoming Refining v. United States, 58 Fed.Cl. 409, 414, 416 (U.S. Claims 2003).

4 ☐ **JEFF'S 10 COMMANDMENTS on
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"Judges, lawyers and laymen alike are all presumed to know the law regardless of conscious knowledge or lack thereof, and are presumed to intend the necessary and legitimate consequences of their actions in its light. Without that presumption one could escape the consequence of the law merely by denying prior knowledge of its existence and one's ignorance would become paramount to the law."

Samson v. State of Maryland, 341 A.2d 817 (Md.App. 1975).

5 ☐ **JEFF'S 10 COMMANDMENTS on
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"Ignorance of the law, which every man is bound to know, excuses no man, is as well a maxim of our own law, as it was of the Romans. That maxim applies equally to state and federal law, to both of which we are subjected."

Samson v. State of Maryland, 341 A.2d 817 (Md.App. 1975).

6 ☐ **JEFF'S 10 COMMANDMENTS on
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"Everyone is presumed to know the law, and the surveyor is no exception. This is an irrebuttable presumption that may not be overcome by contrary evidence. ...

Understanding and applying the correct law (including the laws of evidence) are unquestionably part of the surveyor's duties."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 38-39.

7 ☐ **JEFF'S 10 COMMANDMENTS on
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"'Practice land surveying' means any service, work, documentation, or practice, the performance or preparation of which requires the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the requirements of the relevant law, as applied to: ... establishing or reestablishing, locating or relocating, or setting or resetting the monumentation for boundaries of real property...."

Maryland Code, § 15-101 (k)(1)(i) & (ii) (2013).

8 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

II. You are Either an Original Surveyor or you are a Following Surveyor

The fundamental precepts of boundary surveying are, you are either an original surveyor setting out new lines for the very first time for a common grantor, or you are a following surveyor finding where the lines have become established on the ground.

9 ☐ **JEFF'S 10 COMMANDMENTS on
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"All lands are supposed to be actually surveyed; and the intention of the grant is, to convey the land, according to that actual survey ... And whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the grant or deed, shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed."

Riley v. Griffin, 16 Ga. 141 (Ga.1854).

10 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"And thus, it will be seen that courses and distances occupy the lowest grade, instead of the highest, in the scale of evidence, as to the identity of land ... in ascertaining the boundaries of lots of land, where a township has been laid out, the locations of the original Surveyor, so far as they can be found, are to be resorted to; and where they vary from the proprietor's plan, the locations actually made will control the plan."

Riley v. Griffin, 16 Ga. 141 (Ga.1854).

11 ☐ **JEFF'S 10 COMMANDMENTS on
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"While the original surveyor has a right or responsibility to establish new boundaries when he surveys previously unplatted land or subdivides a new tract, the sole duty of all subsequent or following surveyors is to locate the points and lines of the original

survey by locating existing boundaries. No following surveyor may establish a new corner or line, or correct erroneous surveys of earlier surveyors, when they track the original survey in locating existing boundaries."

McGee v. Young, 606 So.2d 1215, 1217 (Fla.App. 1992).

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"When finding the lines of a survey, the cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed. The primary objective in locating a survey is to 'follow the footsteps of the surveyor'; by which is meant to trace on the ground the lines as he actually ran them in making the survey. If the actual lines and corners run by the original surveyor can be found, they are controlling, even if they are inconsistent with the calls and references in that surveyor's field notes."

TH Investments v. Kirby, 218 S.W.3d 173, 204 (Tex.App.2007).

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"This is in accord with the Texas case of *Hill v. Whiteside*, 749 S.W.2d 144, 151 (Tex. Ct. App. 1988), in which the court opined 'when the senior survey can be easily identified, a junior survey cannot be made to control the senior survey.'"

Millar v. Bowie, 64 A.2d 509, 513 (Md.App.1997).

14 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Of course, most boundary disputes evolve from surveying mistakes or ambiguous deeds. The fact that one surveyor's interpretation of the original survey results in a tidier or neater package, however, does not suffice, of itself, to override the intent of the original surveyor."

Millar v. Bowie, 64 A.2d 509, 516 (Md.App.1997).

15 ☐ **JEFF'S 10 COMMANDMENTS on
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"Determination of which one of the two surveys best effects the true boundaries of the disputed land as intended by the original surveyor is a question of fact. ... Once the intent of the original surveyor is established, absent a finding of a patent mistake on the part of the original parties of such magnitude to vitiate the original intent, the trial court is bound by its factfinding to apply general rules of boundary law to effectuate the original intent."

Ski Roundtop v. Wagerman, 556 A.2d 1144, 1148 (Md.App.1989).

16 ☐ **CUPP v. HEATH**

TENNESSE COURT OF APPEALS

AT KNOXVILLE

E2010-02364-COA-R3-CV

August 11, 2011

17 ☐ **BOAK v. BEAVER**

MEADE COUNTY CIRCUIT COURT
46TH JUDICIAL CIRCUIT
Civil Action 10-CI-00269
September 10, 2015

18 ☐ **BOAK v. BEAVER**

"Mr. Smith testified that when a surveyor is required to re-trace a survey, he is required to first find the line and then measure it. A retracement of the survey does not mean that one measures to create the line, because the line is already there. Retracement surveys require the surveyor to find the line and then measure it."
Boak v. Beaver, at 7.

19 ☐ **JEFF'S 10 COMMANDMENTS on
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Here is the Problem:

NCEES Model Law

Licensure of Engineers and Surveyors

110.20 Definitions

B.4. Practice of Surveying—The term "Practice of Surveying," as used in this Act, shall mean providing, or offering to provide, professional services Professional services include ... information related to any one or more of the following: ...

c. Locating, relocating, establishing, reestablishing, or retracing property lines or boundaries of any tract of land, road, right of way, or easement.

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Here is the fix:

NCEES Model Rules

Introduction

210.20 Definitions

x.i. The terms "locating," and "establishing" used in the NCEES Model Law, Section 110.20 para. B.4.c., refer to an "original survey" of property being conducted for the owner(s) of a parent tract of land in order to:

a. delineate new property lines for a subdivision of the parent tract;

21 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

Here is the fix:

210.20 Definitions

b. re-configure existing property lines under common ownership for a new subdivision of property; or

- c. subdivide a section or portions of a section of land as a part of the Public Land Survey System (PLSS), that is under common ownership, where no such subdivision has ever been previously conducted on the ground.

The purpose of an original survey is to create an original subdivision or re-subdivision of land under common ownership.

22 ☐ **JEFF'S 10 COMMANDMENTS on
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Here is the fix:

NCEES Model Rules

Introduction

210.20 Definitions

x.ii. The terms "relocating," "reestablishing" and "retracing" used in the NCEES Model Law, Section 110.20 para. B.4.c., refer to a "retracement survey" of existing property lines or the boundaries of any tract of land in order to determine where the property lines have become established on the ground, either through a previous original survey of the property lines being retraced or by the application of appropriate boundary law principles governed by the facts and evidence found in the course of performing the retracement survey.

23 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

Here is the fix:

210.20 Definitions

A proper retracement survey shall include, but is not limited to:

- a. appropriate record and field research;
- b. gathering and evaluating the best available evidence indicating where the property lines being retraced have become established on the ground;
- c. if necessary, interviews with local landowners familiar with the property boundary lines in the community; and

24 ☐ **JEFF'S 10 COMMANDMENTS on
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Here is the fix:

210.20 Definitions

- d. reporting these findings on an appropriate map of survey indicating the corners and the lines retraced, the monuments found or set during the course of the survey, and an explanation of the boundary law principles employed by the surveyor in making such determination.

Any survey of property includes setting or resetting appropriate boundary monumentation, unless appropriate monumentation already exists.

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Surveying Property, or Doing Something Else:

- You are either doing that, or your are doing something else.
- If you are doing something else, you are not allowed to set monuments.

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Surveying Property, or Doing Something Else:

Forensic Survey - The application of surveying science to the elucidation of questions before courts of law and equity. Forensic surveys are not boundary surveys and, as such, no opinions are given as to the status of property lines or property corners, nor are property corners established or re-established as a result. The most common utilization of forensic surveys is for courtroom exhibits to advance legal theories, to support facts to be proven and to buttress expert witness testimony.

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III. The Civil Standard is a Preponderance of the Evidence

In civil court, a preponderance of the evidence that leads to the proof of the matter is all that is required.

28 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

- Beyond a Reasonable Doubt (Almost Certain).
- Clear and Convincing (Highly Probable).
- Preponderance of Evidence (More than 50%, or the Greater Weight).
- Substantial Evidence (More than a Scintilla, Less than a Preponderance).
- Scintilla of Evidence (The Smallest Trace).

29 ☐

30 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

IV. Not all Evidence is Good or Relevant Evidence

"Evidence, to be admissible, must be relevant to the issues, competent under established rules of law, and material in the sense of having some reasonable tendency to prove or disprove points in issue."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 32

31 ☐ **JEFF'S 10 COMMANDMENTS on
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Fed. Rules of Evidence

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal

conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

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

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Fed. Rules of Evidence

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

33 ☐ **JEFF'S 10 COMMANDMENTS on
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Can "Old-Timer"

(in the present day) testify as to where George Washington set the corner in 1748?

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EVIDENCE and PROCEDURE**

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

35 ☐ **FARRELL v. GARDNER**

Maine Superior Court

2003 Me.Super. LEXIS 250

December 5, 2003

36 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

V. The Best Available Evidence is the Surveyor's Criterion

There is always some evidence of a corners location, by definition, whatever that evidence is will be the best available evidence.

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"The surveyor must find the best available evidence that determines the location of the deed on the ground. In those areas in which there is widespread obliteration and loss of evidence, it may become necessary to accept evidence of an inferior type, such as hearsay and reputation, but whatever is accepted, it must be the best of that

found after an extensive and complete search of the record, the ground, and adjoining is complete."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 39.

38 ☐ **JEFF'S 10 COMMANDMENTS on
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"After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons."

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

39 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Monuments have special significance because monuments indicate the location of property at issue on the ground. The search for monuments must continue until the monuments are located or until there is an explanation for their absence. If necessary, the surveyor should consult former surveyors, landowners, residents, or other knowledgeable parties to determine monument sites or obtain other information tending to show where a piece of property should be located."

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

40 ☐ **JEFF'S 10 COMMANDMENTS on
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"Testimony of neighbors and informed residents concerning boundaries is an important source of information for resurveys. As stated in one treatise, 'a diligent, thorough, and complete search for all evidence is the fundamental essence of land surveying.' Through these investigative efforts, the surveyor attempts to reach his or her goal: the 'location of land boundaries in accordance with the best available evidence' even though the best evidence may be 'mere hearsay or reputation.'"

Newfound Mgmt. Corp. v. Sewer, 885 F. Supp. 727 (U.S. Dist. 1995).

41 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"For a corner to be lost it 'must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information.' (Citation omitted). The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position."

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

42 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Even though the physical evidence of a corner may have entirely disappeared, a

corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.”

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

43 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

“There is no clearly defined rule for the acceptance or non-acceptance of the testimony of individuals. It may be based upon unaided memory...or upon definite notes and private marks. The witness may have come by his knowledge casually or...had a specific reason for remembering. Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced.”

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

44 ☐ **DOWDELL v. COTHAM**

Court of Appeals of Tennessee
2007 Tenn. App. LEXIS 470
July 25, 2007

45 ☐ **NORTHROP v. OPPERMAN**

WISCONSIN SUPREME COURT
2011 Wisc. LEXIS 4
February 3, 2011

46 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

VI. The Resolution of any Boundary Problem is a Two-Part Question: What is the Boundary and Where is it Located?

The legal question is “what is the boundary?” the factual question is “where is it located on the face of the earth?”

47 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

“The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact.”

Walleigh v. Emery, 163 A.2d 665, 668 (Pa.Super.Court. 1960)

48 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

“We consistently have held that what boundaries a deed refers to is a question of law, while the location of those boundaries on the face of the earth is a question of fact. If facts extrinsic to the deed reveal a latent ambiguity, then we determine the intent from contemporaneous circumstances and from standard rules of construction.”

Theriault v. Murray, 588 A.2d 720 (Me.1991).

49 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

"The legal effect and operation of the deed, under which the appellee claims, is matter of law to be decided by the Court and not the jury."

Hanson v. Campbell's Lessee, 1863 Md. LEXIS 44 (Md.App.1863).

50 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

"In all cases of ambiguity arising on the face of a certificate or grant, as to the location of a tract of land, the jury is the proper tribunal to decide the fact of location on evidence *de hors* [extrinsic to] the instrument."

Hammond v. Ridgely's Lessee, 1821 Md. LEXIS 15 (Md.App. 1821).

51 ☐ **Stop Sign Analogy**

A Question of Law and Fact

"What are the boundaries of a particular tract of land is a matter of law, but where the boundaries of a tract are located is a matter of fact."

Ayers v. Huddleston, 66 N.E. 60, 63 (Ind.App. 1903).

52 ☐ **Stop Sign Analogy**

- Legal Question: What is it?

53 ☐ **Stop Sign Analogy**

- Legal Argument: The What Has Changed!

54 ☐ **Stop Sign Analogy**

- Factual Question: Where do you Stop?

55 ☐ **Stop Sign Analogy**

- Factual Question: Where do you Stop?

56 ☐ **Stop Sign Analogy**

- Factual Question: Where do you Stop?

57 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

- There are no "True" Answers Waiting to be Discovered; Only Well-Reasoned Opinions to be Given.

58 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor."

Williams & Onsrud, *What Every Lawyer Should Know about Title Surveys*, circa 1986.

59 ☐ **McGHEE v. YOUNG**

Florida Court of Appeals
Fourth District
606 So.2d 1215
October 7, 1992

60 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

VII. The Deed is Merely a Guide to Finding the Property on the Ground:
Not Proof of its Location

"It is not the office of a [deed] description to identify the premises, but to furnish the means by which they can be identified."

Sengfeld v. Hill, 58 P. 250 (Wash.1899).

61 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"A written deed is evidence of ownership; it is not proof of ownership. Land can be gained by unwritten means; hence, a paper title does not prove ownership. It is evidence only of the claim of ownership and the right of possession."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 21.

62 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"The issue here is not of a disputed boundary. It is what the deed means. It is an application of the deed to the land, and not of the land to the deed. While the object of the inquiry is to determine where the boundary is, the inquiry itself is what the requirements of the deed are rather than what the situation of the land is.."

Smart v. Huckins, 134 A. 520 (N.H.1926).

63 ☐ **JEFF'S 10 COMMANDMENTS on**

EVIDENCE and PROCEDURE

"We reiterate: It is a familiar rule that it is not the office of a description to identify lands, but simply to furnish the means of identification."

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

64 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Courses and distances, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect Courses and distances are pointers and guides, rather to ascertain the natural objects of boundaries."

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

65 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Parol evidence is, and must of necessity be, always admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

Sengfelder v. Hill, 58 P. 250 (Wash.1899).

66 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"An integral aspect of establishing record title to real property is proving its on-the-ground location. In the early case of *Neel v. Hughes*, the Court said: 'Every conveyance must either on its face, or by words of reference, give to the subject intended to be conveyed, such a description as to identify it. If it be land it must be such as to afford the means of locating it.'"

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

67 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"It is a fundamental principle of boundary law that the court's paramount objective in resolving boundary disputes is to fulfill the intention of the parties to the original instrument. ... The principles of boundary law are merely guides for ascertaining the intention of the parties to the original instrument."

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

68 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"A grant calling for a survey incorporates all matters concerning that survey as if the same were explicitly contained in the grant."

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

69 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"The rule that a line actually run by the surveyor, which was marked and a corner

made, entitles the party claiming under the patent or deed to hold accordingly, notwithstanding a mistaken description of the land in the deed, presupposes that the patent or deed is made in pursuance of the survey, and that the line which was marked and the corner which was made were adopted and acted upon in making the patent or deed, and therefore gives them controlling effect."

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

70 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Thus, where a conveyance is about to be made, and the parties go upon the land and have the line marked and surveyed, the line so fixed and intended will prevail over any inconsistent description in a subsequent conveyance."

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

71 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"We also note that, as a general canon of boundary law, it is well-settled that a call to an adjoining boundary takes precedence over a metes and bounds description in the same instrument. Therefore, as between a modern survey that is consistent with a call to an adjoining boundary and one consistent with the metes and bounds description but at odds with the adjoining boundary, the one faithful to the adjoining boundary ordinarily controls."

Porter v. Schaffer, 728 A.2d 755 (Md.App.1999).

72 ☐ **DILLEHAY v. GIBBS**

Tennessee Court of Appeals

No. M2010-0170-COA-R3-CV

June 16, 2011

73 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

VIII. Intent is King when it comes to the Interpretation of Written Documents

"The intent of the parties to a deed controls its interpretation."

Esteph v. Grumm, 887 N.E.2d 1248, 1252 (Ohio App. 2008).

74 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"It is a fundamental precept of property law that courts should construe instruments so as to give effect to the intent of the parties. ... Fortunately, however, the burden placed on the courts in scrutinizing deeds is facilitated by a body of judicially and legislatively created guidelines for the construction of deeds conveying property."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977).

75 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Initially, the court should seek to ascertain the intention of the parties by looking to the entire instrument. The court should be careful to try to give meaning to every clause and provision of the instrument."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

76 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Second, the court should look to the factual situation and the circumstances existing at the time the instrument was created."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

77 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Finally, the court may look to the subsequent acts of the parties to determine the correct construction of the instrument."

Brashier v. Burkett, 350 So.2d 309, 311 (Ala. 1977)

78 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Before a deed will be declared void ... all sources of inquiry which the description itself and the circumstances surrounding the parties and the conditions existing at the time of its execution naturally suggest must be exhausted in a vain effort to locate the property."

Sengfeld v. Hill, 58 P. 250 (Wash.1899).

79 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Parties making a conveyance are presumed to make it with reference to the state or condition of the premises at the time, and, if the description be sufficient when made, no subsequent changes in conditions can make it invalid."

Sengfeld v. Hill, 58 P. 250 (Wash.1899).

80 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Parol evidence is, and must of necessity be, always admissible to identify the property described in and conveyed by a deed, to ascertain to what property the particulars of description in the deed apply."

Sengfeld v. Hill, 58 P. 250 (Wash.1899).

81 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"When the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. ... The general descriptions contained in the boundary line "fit" two possible alternate interpretations on the ground. Therefore, it was proper and necessary for the court to receive parol evidence from both parties indicating where the boundary line was

commonly understood to lie.”

Hall v. Staley, 2003 N.C.App. LEXIS 1390 (NC App. 2003)

82 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

“It is well established that where the description given is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property.”

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

83 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

“Parol evidence is therefore often necessary to make descriptions intelligible.”

Harlan v. Muncie, 835 N.E.2d 1018 (Ind.App.2005).

84 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

How Do We Find Intent?

1. Start with the Deed
2. Search the Four Corners
3. Deed is only Evidence of Title, not Proof of Title
4. Ambiguities: There will always be some level of Conflict between the Written Document and what we find on the Ground.

85 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

IX. If Intent is King, Ambiguities are the Keys to the Kingdom

Ambiguities, either patent or latent, are the keys to the proper interpretation of written documents.

86 ☐ **FIRST NATIONAL BANK
v.
TOWNSEND**

Oregon Court of Appeals

555 P.2d 477

October 25, 1976

87 ☐ **RULES OF CONSTRUCTION**

OREGON REVISED STATUTES

TITLE 10. PROPERTY RIGHTS AND TRANSACTIONS

CHAPTER 93. CONVEYANCING AND RECORDING

DESCRIPTIONS, INCLUDING THE OREGON COORDINATE SYSTEM

ORS § 93.310 (2006)

93.310. Rules for construing description of real property.

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:

88 ☐ **RULES OF CONSTRUCTION**

- (1) Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by such particulars, if they constitute a sufficient description to ascertain its application.
- (2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.
- (3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

89 ☐ **RULES OF CONSTRUCTION**

- (4) When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title.
- (5) When tidewater is the boundary, the rights of the grantor to low watermark are included in the conveyance, and also the right of this state between high and low watermark.
- (6) When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

90 ☐ **RULES OF CONSTRUCTION**

"Some of the criteria by which legal descriptions are interpreted and governed are:

1. Where the calls of a deed are for natural as well as known artificial objects, both courses and distances, when inconsistent, must be disregarded.
2. Whenever a natural boundary is called for in a deed, the line is to determine at it: however wide of the course called for it may be, or however short, or beyond the distance specified.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

91 ☐ **RULES OF CONSTRUCTION**

- "3. Whenever it can be proved that there was a line actually run by the surveyor, or was marked, and a corner made, the party claiming under the grant or deed shall hold accordingly, notwithstanding a mistaken description of the land in the grant or deed.
4. When the lines or courses of an adjoining tract are called for in a deed or grant, the

lines shall be extended to them, without regard to distances, provided these lines and courses be sufficiently established.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

92 ☐ **RULES OF CONSTRUCTION**

"5. When there are no natural boundaries called for, no marked trees or courses to be found, nor the places where they once stood ascertained and identified by evidence; or where no lines or courses of an adjacent tract are called for, in all such cases, courts are of necessity confined to the courses and distances described in the grant or deed.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

93 ☐ **RULES OF CONSTRUCTION**

"Other criteria by which legal boundaries are interpreted and governed are:

6. Courses and distances occupy the lowest, instead of the highest, grade in the scale of evidence, as to identification of land.

7. Any natural object, and the more prominent and permanent the object, the more controlling as a locator, when distinctly called for and satisfactorily proved, becomes a landmark not to be rejected, because the certainty which it affords excludes the probability of mistake.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

94 ☐ **RULES OF CONSTRUCTION**

"8. Courses and distances, depending for their correctness on a great variety of circumstances, are constantly liable to be incorrect; difference in the instrument used and in the care of surveyors and their assistants leads to different results.

9. In ascertaining boundaries, the locations of the original surveyor, so far as they can be found, are to be resorted to; and where they vary from the proprietor's plan, the locations actually made will control the plan.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

95 ☐ **RULES OF CONSTRUCTION**

"10. Whenever, in a conveyance, the deed refers to monuments actually erected as the boundaries of the land, it is well settled that these monuments must prevail, whatever mistakes the deed may contain, as to courses and distances.

11. Courses and distances are pointers and guides, rather to ascertain the natural objects of boundaries.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

96 ☐ **RULES OF CONSTRUCTION**

"12. Where a given line is exceeded in a grant, according to the courses and distances, evidence may be given of long occupation under it, to prove the boundaries.

13. Boundaries and courses may be proved by hearsay, from the actual necessity of the case.

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

97 ☐ **RULES OF CONSTRUCTION**

"14. Where a line has been run and agreed on by the coterminous proprietors, and acquiesced in and possession held to it for eighteen or twenty years, the parties and those claiming under them are bound by it, no matter when, nor by whom, the line was run."

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

98 ☐ **RULES OF CONSTRUCTION**

"What is most material and most certain in a description shall prevail over that which is less material and less certain. ... Where all other means of ascertaining the true construction of a deed fails, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee."

Martin v. Patton, 483 S.E.2d 614 (Ga.App.1997).

99 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

X. The Only Boundary Line that Matters is the "Property" Boundary Between the Coterminous Landowners

The "Ultimate Issue" in any boundary dispute case is the property boundary between the disputing parties. No other line really matters.

100 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

The Ultimate Issue

"The purpose of the surveys in this boundary dispute is to locate accurately the boundary between the plaintiff's and defendants' property. To do this, the survey must begin with an accurate description of what land the parties own...."

Andrews v. Barton, 2008 Fla.App. LEXIS 1836 (Fla.App. 2008).

101 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

Federal Rules of Evidence

Rule 704.

Opinion on Ultimate Issue. (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

102 ☐ **JEFF'S 10 COMMANDMENTS on EVIDENCE and PROCEDURE**

Maryland Rules of Evidence

Rule 5-704 Opinion on ultimate issue.

"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."

103 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"In all courts, evidence is the purview of the jury (or judge as 'trier of the facts' if there is no jury); the law is always in the purview of the court. A Georgia decision permitted the surveyor to testify as to his opinion on the ultimate issue of the case without invading the province of the jury, so long as the subject matter was an appropriate one for opinion evidence. This is quite unusual."

Rouillard, Walter G., Lane J. Bouman and Hon. Robert Shelton, *Clark on Surveying and Boundaries*, Seventh Edition at 49.

104 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"North Carolina still retains the majority approach in that the expert land surveyor cannot give an opinion as to where a true boundary line is located, for that decision is the ultimate fact in issue to be determined by the jury from the evidence presented during the trial."

Robillard, Walter G., Lane J. Bouman and Hon. Robert Shelton, *Clark on Surveying and Boundaries*, Seventh Edition at 49.

105 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"Rule 704, provides that opinion testimony 'is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact."

Green Hi-Win Farm, Inc. v. Neal, S.E.2d 614, 616, 617 (N.C.App. 1986).

106 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"No witness can give opinions on the ultimate fact that is being tried. Permitting an expert to tell the members of the jury what they must decide is usurping their exclusive rights. ... The surveyor is more or less limited in the responses to the questions asked."

Robillard, Walter G. and Donald A. Wilson. *Evidence and Procedures for Boundary Location*, Fifth Edition at 509-510.

107 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

"A Mississippi court ruled on the question of whether the surveyor could be asked, 'Where is the true line?' The court replied: 'This is not a matter about which they could give their opinion.'"

Robillard, Walter G. and Donald A. Wilson. *Evidence and Procedures for Boundary*

Location, Fifth Edition at 509-510. According to the endnotes, quoting from the case of *Gichner v. Antonio Title Co.*, 410 F.2d 238 (Miss.1969).

108 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

Mississippi Rules of Evidence

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

109 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

Mississippi Rules of Evidence

Commentary to Rule 704.

Rule 704 abolishes the "ultimate issue rule" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it 'invades the province of the jury.'

110 ☐ **JEFF'S 10 COMMANDMENTS on
EVIDENCE and PROCEDURE**

Mississippi Rules of Evidence

Commentary to Rule 704.

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time.

111 ☐ **HARRIS v. ROBERTSON**

Supreme Court of Arkansas

813 S.W.2d 252

July 8, 1991