The Land Surveyor as a Witness

Preface

The main body of this paper first appeared in the publication of *The Law of Land Boundaries for the Maryland Surveyor and Related Materials* in 2008 (pages 257 through 270), and what follows is a revised version, with additional materials added for there to be a better focus on the land surveyor testifying as a defendant or lay witness; and to mirror the topic presently being presented at the Maryland Society of Surveyors 2020 Fall Conference Webinar, given on September 23rd, entitled: “Ready for the Courtroom – Are you Prepared to be an Expert Witness or a Possible Defendant.”

Introduction

The land surveyor as a professional man/woman must have certain knowledge of the application of the law as it pertains to the re-establishment of property lines. The surveyor must be familiar with the rules of law concerning the relative weight given to monuments, both natural and artificial, to courses and distances, adjoining boundary lines, areas, lines of possession and to many other elements. The surveyor must have a working knowledge of many complexing subjects like adverse possession and prescription. The surveyor must interpret many questions of law before he/she can correctly re-establish property corners and lines, and he/she must set those corners and lines in accordance with the location that his/her experienced skills tells him/her a court will probably uphold as to law and fact. It is said that the surveyor must be an "expert measurer" and as such he/she must use his/her instruments and mathematics to determine the length of lines and the number of degrees between those lines, taking into account factors such as temperature, tensions, elevations and myriad other conditions. He/she must understand the fundamental rules of geometry and trigonometry in working out certain formulas in order to solve for bearings and lengths of lines and areas.

The land surveyor must know how to obtain deeds and other title related instruments in the land records, and must delineate his/her findings in order to inform others in a clear and understanding way what his results are and how he/she came to those results. The surveyor, as an investigator, with a knowledge of science and the law, goes upon the land armed with all of the documentary evidence, deeds and former surveys that are available, searching for clues in the way of monuments and other physical evidence, as he attempts to "follow in the footsteps of the original surveyor," making measurements, observing what facts he/she can, taking into account both those in agreement and those in disagreement with the records, talking to property owners concerning the bounds of their properties and then coming to a conclusion from the facts in a manner that is consistent with his/her understanding of the law.

Taking all of the above into account, the surveyor must exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances, and he/she may be held responsible for such damages as are sustained due to his/her negligence and lack of skill.¹

¹ That reasonable or prudent man/woman, is a hypothetical person used as a legal standard especially to determine whether someone acted with negligence. This hypothetical person exercises average care, skill and judgment in conduct that society requires of its members for the protection of their own and of others’ interests.
Once the surveyor makes his/her finished drawing, sends to his/her client the plat of survey, along with a metes and bounds description if so ordered, files his/her records and notes away, and hoping to collect the fee, he/she may very well be then called upon to act as a witness in a court of law.

_________________________

Although the surveyor must know and understand the applicable law as it pertains to his/her profession and that he/she must conform his survey to his understanding of the law, the surveyor is not an expert on the law and his/her function in a court is to present the facts and evidence through his/her answers in response to questions put to him/her by the respective parties' counsel. The surveyor may conclude in his/her own mind that a certain principle of law applies, but it will be the trial court judge who will decide the applicable points of law.

In a court of law in a matter involving land boundaries, the surveyor may be a defendant, a lay or an expert witness, and he/she has no other function. In the field or in the office when he/she is working out his/her boundary problems, he/she may act as if he/she is the sole judge of the quality and weight of the evidence, but in the courtroom the court determines the quality of evidence and the conclusions.

However, before undertaking any discussion of any court procedures, once a surveyor has any inclination or warning of a claim or possible claim against him/her for a perceived error, that claim should be immediately reported to the liability insurance carrier – that is, of course after you have “kicked the trash cans” around the office a couple of times.\(^2\)

**Court Procedures**

The surveyor's conduct on the witness stand should always reflect an attitude of a reporter of facts. To be an effective witness, the surveyor must answer questions fully, factually, correctly and honestly. He/she must not try to duck or evade questions asked on cross examination that may place his/her opposition in a favorable light.\(^3\)

A surveyor as a lay witness, and like others called as lay witnesses, can testify only to the facts within his knowledge and cannot, for the most part, state his/her opinion, subject to some exceptions. The expert witness, however, can testify as to conclusions and give his/her opinion drawn from the facts within his/her knowledge. One can be qualified as an expert witness if he/she possesses special knowledge, wisdom or information regarding the subject matter under consideration, said knowledge, wisdom or information being acquired by study, investigation, observation, practice or experience.

\(^2\) One of the purposes for including this statement is to remember and honor my deceased friend and fellow surveyor, Chas Langelan, who kicked many trash cans in his career. The insurance industry will tell you to immediately report a claim, a hint, or even a threat of a claim… put the carrier on notice of any initial knowledge of a claim… when in doubt, talk to the agent or the carrier - report it!... read your policy… do not delay or make a late reporting of any potential claim… there is an obligation to report… there is no penalty for letting the agent or carrier know… you could possibly lose your insurance coverage by not reporting.

\(^3\) The witness, whether lay or expert, must be prepared for his/her character to be impeached by the opposing party, therefore, it is important for a witness to consult with, and reveal to the attorney, with whom he/she has been called upon to testify, concerning the witness’s prior criminal acts, reputation in the community, complaints filed with administrative boards, and the like, which if brought up at trial could embarrass the witness, and possibly cause the court to not look favorably on the witness’s testimony.
Usually, when a witness is subpoenaed to testify and if he/she neglects to appear, without sufficient excuse, the body of that person may be attached by the court and be fined an amount not exceeding $300.00. §9-201, Courts and Judicial Proceedings, Annotated Code of Maryland (“C&J”). A subpoena duces tecum, may command the witness to produce books, papers, documents or other tangible things (designated documents). Maryland Rule 2-510. Neither side in a lawsuit has a property right in a witness, and each party can interview or depose the witness to determine what knowledge he/she may have pertaining to the case. At one time in Maryland’s history, all witnesses testifying in Maryland courts were entitled to $1.00 per day for each day's attendance, plus a payment per mile for necessary travel. §9-202, C&J. However, this section of the Maryland Code has been repealed.

The court may upon its own motion and shall, upon the request of a part, order that witnesses other than parties be excluded from the courtroom until called upon to testify. An expert witness, however, who is to render an opinion based on the testimony given at the trial shall be permitted to remain during that testimony. Maryland Evidence Rule 5-615. Before a witness can testify, he/she must swear or affirm that he/she will tell the truth. In civil cases, no one is disqualified as a witness because of his/her interest in the event, as a party or otherwise, or by reason of his/her conviction of a crime, with certain exceptions, as always. However, no person who has been convicted of the crime of perjury shall be permitted to testify in any case or proceeding. §9-104, C&J. Usually when the name of a witness has been omitted from answers to interrogatories, the court in its discretion may prohibit that witness from testifying until the party who was thus surprised has had a reasonable opportunity to ascertain the nature of the proposed testimony and to prepare for it.

Testimony

Generally, the testimony of a lay witness is restricted to a statement of the facts rather than inferences and conclusions. Generally, lay witnesses are those who may testify to facts within their knowledge, and may not state their opinions, however, there are many exceptions to the rule.

Learned Hand, the famed American jurist, who served for many years as Chief Judge and intellectual leader of the United States Court of Appeals for the Second Circuit (headquartered in Manhattan, New York) wrote in 1901:

Again consider the rule, especially annoying in its constant invocation that a witness shall not be allowed to testify to this conclusion. I know of none more baffling to a witness. . . It must be remembered that all so-called facts are inevitably inferences from experience and the question is always one of degree where one should stop. . . Whatever its logical justification, it is the most annoying rule in its application that I know. King & Pillinger, Opinion Evidence in Illinois; Cases and Materials on Evidence, Louisell, David W., et al. (1968), p. 545.

At common law, all witness were confined strictly to statements of facts. From such facts the jury made the inferences and deductions upon which to support its verdict. This was the early rule in the American states. Allowing for a regrettable lack of uniformity in the decisions, it can be fairly stated that the American courts today, as limitations upon the common law rule, will permit a lay witness to testify to what are technically conclusions or opinions concerning matters, the basic knowledge of
which is derived from the application of one of the senses of sight, hearing, taste, smell or touch. In this category lay witnesses from a perceived fact are permitted to testify to a person's age; to the degree of light or darkness at a given time; as to distances; as to matters of quality, quantity, size, area and weights and measures.

There are ordinary situations (as distinguished from situations involving questions of science or special study) in which many courts accept limited practical experience as a sufficient qualification for the expression of what is actually an expert opinion. Thus, opinions of laymen have been admitted as to the value of real and personal property and personal services; the speed of vehicles involved in accidents; etc. In all of the foregoing situations it is emphasized that the general rule, more strictly enforced against lay witnesses than experts, is that opinion testimony is properly excluded where, in the opinion of the trial court, it goes to the "ultimate issue" before the jury for determination. Busch, Trial Procedure Manuals; Evidence, supra, p. 546, 547.

There is no clear distinction between fact and opinion. Lay witness will be allowed to testify about subject matters readily understood by the court; however, expert witnesses testify about subjects that the court, or certain the average person would not have the required knowledge concerning a certain subject matter.

Qualifications of an Expert Witness

In order to be acceptable as an expert witness, a person must be shown to be competent on the subject on which he/she is to testify. Stickell v. Baltimore, 252 Md. 464, 250 A.2d 541 (1969). Generally, an expert is qualified because he is better able to form an accurate opinion as to the matter under consideration than is the average man/woman of the community. Pennsylvania Thresherman & Farmers' Mut. Casualty Ins. Co. v. Messenger, 181 Md. 295, 29 A.2d 653 (1943). And this qualification applies whether he/she has gained his knowledge from observation or experience, study of books, maps or recognized authority, or any other reliable source. Whether the expert possesses the requisite qualifications is the preliminary question for the court, Spence v. Wiles, 255 Md. 98, 257 A.2d 1964 (1969); to be determined as a matter largely within its discretion. The court's determination of the qualification will only be disturbed on appeal if there is a clear showing of abuse of discretion.

Prior to an expert being able to testify, he/she will be required to demonstrate his/her qualifications. An attorney, in an attempt to show that a surveyor has the requisite education and skills of his profession to enable him/her to speak with authority on the subject of boundary location, would probably explore the following:

1. Registration or license. A licensed witness is presumed to qualify as an expert. 31 Am.Jur.2d §28.

2. Education through college, advanced training and post-graduate study, showing the expert's ability to testify in the area that is under consideration. However, college training is not indispensable.

3. On-the-job training which is of special significance to the litigation. Generally, Maryland's registration statute seems to insure this requirement.
4. History of employment and professional practice.

5. Details of experience and particular assignments, especially related to the question being tried.

6. Knowledge of what other surveyors generally do, especially in the locality in question.

7. Membership in professional societies, emphasizing the elected office held by the prospective witness. This will indicate the deference and respect paid to the witness by others in the field.

8. Articles, books, speeches, treatises, etc. written and/or published by the witness dealing with subjects that are of particular significance in the litigation.

In general, the witness should be prepared to detail his qualifications in a narrative fashion with only one or two prompting preliminary questions; leading questions are permitted on preliminary matters.

It has been said that:

One qualified by professional, scientific or technical training or practical experience, in regard to a particular subject or field of endeavor, which gives him/her special knowledge not shared by persons in the ordinary walks of life, may testify as an expert on questions coming within the field of his training and experience, subject of course, to the general exclusionary rules of evidence in respect to materiality and relevance of the testimony, but if not so qualified, his testimony is incompetent. 31 Am.Jur.2d §26, Expert and Opinion Evidence.

Once the expert has been qualified, he should keep the following in mind:

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

2. He/she should be absolutely unbiased and honest.

3. He/she should have real expert knowledge of his particular subject.

4. He/she should be prepared to discuss the opinions of authorities and state why he/she agrees or disagrees with them. In this regard, he should be familiar with the standard surveying treatises (Clark, Brown, etc.).

5. His/her testimony should be limited to those things and opinions that he/she can defend before other experts in his particular field.

6. Recognizing that the surveyor has his/her own jargon and slang, when the surveyor acts as an expert witness, he/she must be understood by the judge and jury. If not completely understood because of such jargon type language, his/her testimony will be worthless.
Expert evidence is admissible when the witness offered as an expert has particular knowledge or experience, not common to the world, which renders his opinion founded on such knowledge and experience an aid to the trier in determining the question at issue. Expert testimony is proper when the subject matter of the inquiry is of such a character that is not within the knowledge of an ordinary person and only a person of special skill or experience is capable of forming a correct judgment.

Generally, even where opinion evidence is admissible, at one time it could not be an opinion as to the "ultimate issue" since such testimony would supplant the judgment of the jury and usurp their providence. *Capitol Traction Co. v. McKeon*, 132 Md. 79, 103 A. 314 (1918). There is, however, a decided tendency in Maryland toward liberalization of the ultimate issue rule and to allow any expert opinion testimony, in the sound discretion of the trial judge, if it will be of value to the jury, regardless of the fact that it may touch on the ultimate issue. A witness cannot state a conclusion as to the cause of an injury if the cause is disputed. There are a few cases in which an opinion is permitted on an ultimate issue because of the extreme difficulty or impossibility of conveying to the jury sufficient facts upon which to base its finding unless an opinion is permitted. [§9-120, C&J, allows a licensed psychologist to testify on ultimate issues (insanity, etc.) once qualified as an expert].

Even though the general rule is that the scope of cross examination of an expert is limited to the general scope of the direct examination, the more prevalent practice is to allow a wide latitude of inquiry. Cross examination of expert witnesses may take the form of hypothetical questions. An expert witness may be cross examined through questions intended to show possible bias or prejudice through compensation.

Again, with respect to the "ultimate issue," permitting an expert to tell the members of the jury what they must decide is usurping their exclusive rights. If the northeast corner of a property is in dispute and any of three iron pipes might be the right one, the surveyor may not be able to tell the judge or jury which one they should select. He/she can walk all around the subject and even answer hypothetical questions that almost give direct answers to the solution. He/she can testify as to what bearings and distances from other points connect to the found pipes at the northeast corner and their relationship to other corners confirmed by the survey, and how the found pipes relate to the pertinent deed and former surveys, but at one time in our legal history, he/she would not have been able to tell the jury which pipe, in his/her opinion, was the correct pipe.

In *Kirby Lumber Co. v. Adams*, 93 S.W. 2d 382, in response to the ruling on the question of whether the surveyor could be asked, "Where is the true line?", the court said:

> This was not a matter about which they could give their opinion. It was a matter capable of being fully stated to the jury. The witnesses had surveyed the land and they fully described all the facts as found by them on the ground. It was the providence of the jury to conclude from all the facts provided whether the line was where intended for by appellants or where shown by the opinion of the witnesses was the very question in issue between the parties and was one for the jury alone to determine.

No expert opinions may be given to the jury if they are capable of forming their own opinion. The purpose of giving expert opinions is to advise the jury on matters beyond their knowledge, not on matters within their knowledge. Fortunately, the expert witness does not have to decide when he can
or cannot give opinions. The judge will tell him. A question is presented to him, and if the other side objects, the judge will rule on whether the question can be answered. Evidence and Procedures for Boundary Location, Brown and Eldridge, p. 452 (1962).

Compensation of Expert Witness

The right of an expert to refuse to testify as to matters of opinion, without compensation, is traced back to common law. In Webb v. Page, 1 Car. & K. (Eng) 23 (1843), the right of the expert to demand compensation prior to testifying was upheld. For the usual witness fee, a lay or expert witness is required to testify to facts seen or observed by him. If a surveyor observes certain facts or sets certain monuments, he/she may be compelled to testify as to these facts. But where a party selects an expert to render an opinion on a particular subject, the expert can refuse until satisfactory arrangements are made for compensation. However, if a person is subpoenaed, he/she is bound to testify as to what he/she knew and how he/she acquired the knowledge. But there is nothing in the law that compels an expert witness to make a free preliminary investigation to prepare himself/herself for expressing an opinion. A surveyor who is asked to perform certain surveys as a preparation for litigation cannot be compelled to do so without compensation. If a deed is presented to a surveyor in court, and he/she is asked where it is located on the ground, the surveyor may refuse to read the document and give an opinion. But if he/she has already read the document and has already formed an opinion, he/she probably would be bound to express his opinion.

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

The surveyor's fee for expert testimony is a contractual arrangement between the surveyor and the party engaging him/her. The courts cannot compel a person to perform work. Before commencing the work, the surveyor should have a clear understanding of what his fee will be. It is advisable to include within the fee all expenses that will be incurred in court appearances, since a person is compelled to appear in court whether he receives a fee or not. The compensation of expert witnesses cannot be dependent upon the outcome of the litigation, since it furnishes a powerful motive for exaggeration, misrepresentation, or suppression. Cross examination may extract from an expert the fact that he/she is to receive a fee and the amount of that fee. As stated in 31 Am.Jur.2d, §10, Expert and Opinion Evidence:

The rule that a witness testifying to facts in a case can claim on the fees fixed by law has been applied where a witness is a professional of skilled person. Thus, a physician [surveyor] who has acquired knowledge of a patient [client] or of specific facts in connection with a patient [client] may be called upon to testify with relation thereto without payment of more than the ordinary witness fee, although the testimony is based upon knowledge and opinions that are the result of his special learning.

The courts are not agreed, however, as to the duty of an expert witness to testify as to his professional opinion without payment or tender of additional compensation. It is held by some courts in the absence of statute on the subject that an expert testifying to his opinion is entitled to additional compensation; that he/she cannot properly be
compelled, if unwilling, to give an opinion for the benefit of a private litigant; and that he is not guilty of contempt in refusing to testify as to his professional opinion, in the absence of payment of such compensation.

In *Keller v. Harrison*, 151 Iowa 320, 128 NW 851, 131 NW 53, it was decided that a county surveyor who made a survey and who investigated a prior survey, and who as a witness stated the results of his/her examination, is within a statute authorizing additional compensation to witnesses testifying to an opinion founded on special study.

§ 2-102, *Courts and Judicial Proceedings, Annotated Code of Maryland*

This Code Section generally states that a court may appoint a surveyor, if it advisable in a specific proceeding, and that such surveyor be compensated in an amount charged by members of the Maryland Society of Surveyors for similar services in the county concerned with the controversy.

**Maryland Rule 5-701**

If the witness is not testifying as an expert, the witness’s testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.

**Maryland Rule 5-702**

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 with expert 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.  

**Maryland Rule 5-704(a)**

…, 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…

---

4 Under Maryland law, expert testimony as to degree of care is not needed where the average juror would know negligence defendant’s conduct ordinarily was not that of prudent person. *Adams v. NVR Homes, Inc.*, 135 F.Supp.2d 675 (2001). A plaintiff in a negligence action must put on expert testimony to establish what the standard of care is if the subject in question is so distinctly related to some science, profession or occupation [land surveying] as to be beyond the ken of the average layperson. *Convit v. Wilson*, 980 A.2d 1104 (D.C. 2009)
Note

In Brown v. Smith, 173 Md.App. 459, 920 A.2d 18 (2005), it was held that the trial court did not abuse its discretion by allowing Randy Rolls, an attorney and licensed title insurance underwriter, to testify as an expert witness regarding the intent of the property owners’ common predecessor-in-title, concerning an alleged easement over a certain farm lane when that common predecessor-in-title conveyed three parcels of property on the same day. The attorney, who had been qualified as an expert witness, had special experience in examining and giving title opinions regarding properties in Frederick County, and such testimony was admissible even though it embraced an ultimate issue to be decided by the trial court. The trial court ultimately rested its decision on the language of the deeds themselves, reaching a legal rather than a factual conclusion.5

Hearsay Evidence and Exceptions to the Rule

Maryland Rule 5-803

Hearsay evidence has been defined as “testimony in court of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter [the “hearsay rule”]. Mutyambizi v. State, 33 Md.App. 55, 363 A.2d 511 (1976). 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. Maryland Rule 5-801(c). However, there are many exceptions to this rule, far too many to quote here. Maryland Rule 5-803 states in part as follows:

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

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(20) Reputation concerning boundaries or general history. (A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community. (B) Reputation as to events of general history important to the community, state, or nation, where the historical events occurred...

Maryland Rule 2-402(f)(B)(3)

Unless the court orders otherwise on the ground of manifest injustice, the party seeking discovery: (A) shall pay each expert a reasonable fee, at a rate not exceeding the rate charged by the expert for time spent preparing for a deposition, for the time spent in attending a deposition and for the time and expenses reasonably incurred in travel to and from the deposition; and (B) when obtaining discovery under subsection (f)(2) of this Rule, shall pay each expert a reasonable fee for preparing for the deposition.

5 The “ultimate issue” statement made by Mr. Rolls was simply that the Browns [the defendants] “would not have a right of way over the Smith [the plaintiff’s] property.”
Subsection (f)(2) states, in part, that when an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery of the identity, findings, and opinions of the expert may be obtained only if a showing of the kind required by section (d) of this Rule is made.

**Kilsheimer v. Dewberry & Davis**  

The *Kilsheimer* case involved the proper interpretation of Maryland Rule 2-402(e)(3) concerning the award of fees to expert witnesses with regard to discovery. At a settlement conference with the court the parties settled the underlying tort case, however, they were unable to agree on the amount of fees for two of the experts, and consequently submitted their dispute to the circuit court for resolution, which was then appealed to the Maryland Court of Special Appeals. With regard to what a “reasonable” fee should be for experts, the appeals court looked to the federal rules of procedure for guidance, and stated that:

We have not uncovered any Maryland cases specifically addressing the factors that the trial court should consider regarding the award of expert fees. To the extent a federal rule of procedure mirrors the language in its Maryland counterpart, cases interpreting the federal version are persuasive. *Bartell v. Bartell*, 278 Md. 12, 357 A.2d 343 (1976)… Federal Rule of Civil Procedure 26(b)(4)(C), in pertinent part, is as follows: “Unless manifest injustice would result, … the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection…”

Concerning escalation of expert witness fees and the all too frequent attitude of experts that their fees should be set at the maximum-the-traffic-will-bear is of great concern. The escalating cost of civil litigation runs the grave risk of placing redress in the federal courts beyond the reach of all but the most affluent. [The appeals court then considered factors in awarding reasonable attorneys’ fees pursuant to contractual provisions, along with *Maryland Rule 1.5(a).*]...

A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; … (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained;… the experience, reputation, and ability of the lawyer or lawyers performing the services…]

**Note**

In the *Kilsheimer* case, the appeals court stated in a footnote: “The few cases that have considered the question of expert witness fees can probably be explained by the fact that the litigants usually resolve these types of disputes without court intervention. We certainly encourage that practice.”
Preparation for Testimony

One of the most important roles that an expert witness can play is to help the attorney in his/her preparation for the litigation. There is probably no lawyer who knows more about surveying practices than the surveyor and for that reason the lawyer should depend on the surveyor for help in understanding the particular matter in controversy. The lawyer and the surveyor should work hand in hand in preparing the case, analyzing the testimony taken at depositions and making sure that the technical aspects of land surveying are fully understood and can be explained to a jury.

A thorough and complete review of all data, evidence and facts is the first order of business for refreshing one's memory. Take nothing for granted. Check all of the data carefully. No person sitting in the witness chair with all eyes in the courtroom on him/her, and therefore obviously nervous, can answer questions put to him/her by the respective lawyers without the benefit of review. Re-walk the survey lines, re-examine the monuments, take note of the present conditions of fences and possession.

Have the exhibits, including plats, pictures, sketches and notes ready. Make sure that the plans are large enough for the judge and jury to see and clear enough to understand. Important points should be given letters and numbers to facilitate ready reference in testimony. In court if one testifies "from this point to that point" it means nothing on the record.

"From point C on Exhibit A to point D" means something which can be reserved for possible review by a higher court. Nods of "yes" or "no" are not recorded. In one Colorado case the surveyor referred to fifty points on exhibits without any mark whatsoever to give the appeals court any indication as to what marks he was testifying about. The Colorado court refused to consider the surveyor's evidence. This appears to be the attorney's fault more than the surveyor's, but as a potential witness, everyone should be aware of this potential problem.

The survey itself should show all measurements, points found, name of surveyor, date of survey, scale, north arrow and all other pertinent facts. The plan or survey may not be evidence in itself, but for the purpose of enabling the jury and/or judge to understand and apply the testimony in the case, it may be invaluable.

The test or value of the survey is how understandable and convincing would it be if presented to a jury of laymen. One important thing to remember is that the court will expect that the surveyor has located the property on the ground strictly in accordance with the record description. When the description gives adequate points of reference and those points can be found, but when the surveyor must rely on lines of possession, such facts must be adequately reflected on the plat itself.

A point that must not be overlooked is that being an expert witness on the stand is only part of the process. The expert can be a great help off of the stand. A large part of the value of an expert to an attorney is the advice and information he can give not only with reference to the subject matter to be covered in his own testimony, but also with regard to the development as a whole of that aspect of the case concerned with the expert's field.
Dundalk Holding Co. v. Easter
195 Md. 488, 73 A.2d 877 (1950)

This is one of the leading cases in Maryland concerning the surveyor as an expert witness. In this particular Dundalk case, Judge Henderson speaking for the Maryland Court of Appeals, said that:

The opinion of a qualified surveyor, like that of other experts, is admissible, but if the grounds of the opinion are disclosed and shown to be legally insufficient, the court must so instruct the jury. If legally sufficient, the question, of course, is one for the jury.

In this Dundalk case the surveyor was allowed to testify that the line could not be determined by existing monuments or markers on the ground as the deeds were full of inaccuracies and errors and that his opinion was based on a city survey of about twenty-five years old and the establishment of adjoining property boundaries. As a side note, the plaintiff's declaration described an encroachment as "one foot more or less". The plat offered into evidence showed the encroachment varying from .36 to .95 feet. The court said in essence that the actual dimension was within the "more or less" as it conformed to the evidence.

The surveyor is many times called upon to give testimony on questions of technical skill and experience with which they are particularly acquainted in order to aid the trial court in its difficult task of translating the words in a deed into monuments on the surface of the earth in accordance with accepted surveying practices. Thus, expert testimony of surveyors and engineers showing the proper method of surveying the calls in a deed are admissible as against both parties to the deed since they must be deemed to know that technical words are to be interpreted as usually understood by persons in the profession or business to which they relate.

Richfield Oil Corp. v. Crawford
39 Cal.2d 729, 249 P.2d 600

In the Richfield Oil Corp. case, the court permitted the surveyor to testify that a call for "due north" should be surveyed on the astronomical rather than a magnetic basis.

Note

Once called as an expert, he/she should put his skills to work in reviewing the materials and preparing for testimony. The expert must be thorough in his testimony and attempt to convince the court of his position. To be effective, the court must be impressed with the expert's honesty, candor and fairness. The expert must take a positive attitude and speak clearly from a composed state of mind. The expert must be responsive to the questions asked, but avoid answering every question with complete certainty. The expert's conduct and demeanor while testifying could well determine the outcome of the litigation before the court.
In Maryland there is a body of case law that will allow an unregistered surveyor to be qualified as an expert witness under certain circumstances. The Warczynski case involved a suit for a mandatory injunction which concerned an encroachment of a party wall. At page 576 of the 2nd Atlantic Reporter, the court said:

The appellees produced a witness, Mr. Louis Evans, a surveyor who was in the employ of a registered surveyor, Mr. Vernon C. Lutz. Mr. Evans was permitted to introduce into evidence and to testify with regard to a plat prepared by Mr. Lutz' office and also with regard to field notes of a survey upon which the plat was based. The witness himself had not made the plat nor had he participated in making the actual survey. The plat was authenticated by the signature of Mr. Lutz, which Mr. Evans identified. Mr. Lutz' absence was due to illness. The chief surveyor in charge of the party which made the survey, who was the individual who made the field notes, was also unavailable as a witness because he had moved out of the state.

The witness had been engaged in surveying work for thirteen years and had been in the employ of Mr. Lutz for four years. He testified that the survey had been made by individuals employed by Mr. Lutz' office, that the field notes were made in the ordinary course of business, that the plat was prepared by being computed and plotted from the field notes, and that the plat was prepared under the supervision of Mr. Lutz and was signed by him.

We think that the witness was sufficiently qualified and an expert to interpret the plat and the field notes. He met the test stated in Baltimore Refrigerating & Heating Co. v. Kreiner, 109 Md. 361, 71 A. 1066, 1070, wherein the Court stated: 'It must be shown the witness possesses such intelligence and such familiarity with the subject as in the sound discretion of the court will enable him to express a well-informed opinion in regard thereto'. See also Wightman v. Campbell, 217 N.Y. 479, 112 N.E. 184, 185, in which the appellant objected to the admissibility of the testimony of a surveyor who testified how he had located certain lines with the aid of field notes made in the year 1851 by a surveyor then deceased who had surveyed the property. The Court said: 'Field book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, are admissible in evidence as being made in the discharge of a professional duty. . . If the proper foundation has been laid for the introduction of the notes in evidence, as easily might have been done by showing that they were made within the scope of professional employment, and the notes had put in evidence, the witness himself a surveyor and competent to interpret them, could have testified therefrom as to the location of the boundary lines of the Taylor Farm, and the evidence would have been entirely proper'.

The records from which Mr. Evans testified were shown to have been made or kept in the regular course of a business or profession, and as such they were admissible as evidence." (Emphasis added). (Citations omitted).
The Maryland Court of Appeals endorsed the Warczynski decision in Klavens v. Siegel, 256 Md. 469, 260 A.2d 637 (1970). In Klavens, the lower court permitted Norman Herman [sic – his correct name was Hermann], an employee of Matz, Childs and Associates to testify from field notes found in the files of his firm, which he had not personally compiled or prepared. On appeal, this testimony was allowed as evidence.

In Summary

The United States Attorney’s Office (Middle District of Pennsylvania) published a good list of tips for when you are called upon to be a witness in court, which are as follows, however, somewhat edited:

Refresh Your Memory – This will assist you in recalling the facts more accurately when asked a question.

Speak in Your Own Words – Don’t try to memorize what you are going to say – Be yourself, and prior to trial go over in your own mind the matter abut which you will be questioned.

Appearance is Important – A neat appearance and proper dress in court are important.

Speak Clearly – Present your testimony clearly, slowly and loud enough so that the judge and jury can easily hear and understand everything you say.

Do Not Discuss the Case – That is: While in the courthouse, do not discuss the case with anyone, except for the attorney who may be representing you. Especially, do not ask other witnesses about their testimony, and do not volunteer information about your own testimony.

Be a Responsible Witness – When you are called into court for any reason, be serious, avoid laughing, and avoid saying anything about the case until you are actually on the witness stand.

Being Sworn in as a Witness – When you take the oath, stand up straight, pay attention to the clerk administering the oath, and say “I do” clearly.

Tell the Truth – That is: Tell the Truth!6

Do Not Exaggerate – Do not make overly broad statements that you may have to correct.

Listen Carefully to the Questions – Answer the questions posed to you, and not an unasked question which you would prefer to answer.

6 Perjury – A person may not willfully and falsely make an oath or affirmation as to a material fact: (1) if the false swearing is perjury at common law; (2) in an affidavit required by any state, federal, or local law;… (b) Penalty – a person who violated this section guilty of the misdemeanor of perjury and on conviction is subject to imprisonment not exceeding 10 years… § 9-101, Criminal Law, Annotated Code of Maryland.
**Do Not Lose Your Temper** – A witness who is angry may exaggerate or appear to be less than objective, or emotionally unstable. Keep your temper and always be courteous – Don’t be a “wise guy.”

**Respond Orally to the Questions** – Do not nod your head for a “yes or “no” answer.

**Think Before You Speak** – Listen carefully to the questions you are asked. If you don’t understand the question, have it repeated.

**Correct Your Mistakes** – If your answer was not correctly stated, correct it immediately.

**Do Not Volunteer Information** – Answer only the questions asked of you.

**Objections by Counsel** – Stop speaking instantly when the judge interrupts you, or when an attorney objects to a question. Wait for the judge to tell you to continue before answering any further.

**Be Positive and Confident** – Give positive, definite answers when at all possible. Avoid saying: “I think,” or “I believe.”

---

Presented by:
James J. Demma, Esquire
11 North Washington Street, Suite 700
Rockville, Maryland 20850
(301) 762-1600; (301) 517-4809
jdemma@milesstockbridge.com