

- **WHAT IN THE WORLD IS A FORENSIC SURVEYOR?**

- **Survcon 2019**

- **THURSDAY February 7, 2019**

- **BALLY'S- Atlantic City, New Jersey**

- **Presented by Bruce R Blair PLS, PP**

Possessing a professional license is **NOT** (typically) needed to be considered and qualified as an expert, but it goes towards the credibility of the witness.

Laws that regulate the licensed practice of surveying exist in every state, but do not prohibit the court from considering the surveyor an expert.

A licensed surveyor can clarify and add credibility to a court case about aspects of:

1. An industrial accident,
2. an automobile accident,
3. property line dispute,
4. criminal matters,
5. professional malpractice matters,

and

6. many other types of cases that arise.

Examples from the audience?

NEED:

Surveyors who build reputations in the forensics field and serve as expert witnesses are in high demand. In addition, the pay is typically pretty good too. It is rare that practicing as an expert will be a surveyors sole area of practice.

KEY POINT IS TRUST!

Required Knowledge:

1. Expertise in the area of practice.
2. Knowledge about many legal principles.
3. Communication Skills.
4. Information gathering skills.
5. Sleuth (in some matters.)

Use of Data:

The data this specialist collects, analyzes, and maps is typically included as evidence at a trial, hearing, or lawsuit. As in all court cases, all parties carefully scrutinize evidence, especially opposing counsel. Opposing council often hires their own forensic surveyor to contradict the surveying evidence.

Critical Skills:

It takes a great deal of precision to do forensic surveying. In addition, professionals who want to specialize in forensic surveying or serve as expert witnesses must be good communicators.

They have to convey technical

information in a way that people who do not have a background in surveying can easily understand in order to make decisions.

Technical competency along with superior communication skills are essential for the successful practice of Forensic Surveying.

- TECHNICAL SKILLS
- REPORT WRITING
- TESTIMONY

I-Experts: who are they?

- **A. What is an expert?** A prime example of the definition of an expert is seen in the Daubert standard which is a “*rule of evidence*” regarding the admissibility of expert witnesses testimony during the United States Federal Courts legal proceedings. Ultimately the judge must find it more likely than not that the expert’s methods are reliable and reliably applied to the facts at hand.

- **B. Qualifications of an expert:** An expert is often referred to as being one who is an actual practitioner experienced enough to be current with the technology and well versed in the history of the profession. In order to understand a particular situation you have to have had enough experience to be able to understand the process leading to the conclusions that are being challenged. You understand that process by having practiced it.

- Therefore you should not attempt to present an opinion outside of your area of expertise. To do so may actually put you in violation of **NJAC 13:40-3.1 (a) 12.1 - *Rendering engineering or land surveying services and/or professional opinions when not qualified by training education and experience in the specific discipline of professional engineering and/or land surveying that is involved.***

- It is our belief that an expert in an engineering or surveying case should be licensed in that discipline. They should be prepared to provide a cogent curriculum vitae as well as reference letters from previous clients. An expert should be able to prove that they “practice what they preach”.

C. Attorney-Client privilege

Because an expert is not the attorney's client, the attorney-client privilege generally *does not protect communications between the expert and the retaining attorney*. Therefore experts should assume that any oral or written report they make to or for the retaining attorney will be discoverable and can and will be used against them. The release of much of this information is governed by the "rules of evidence" which are revised from time to time. Recently "drafts of documents" between experts and clients were excluded from discovery.

Confidentiality is very important. Items discussed with your client should not be revealed to those not authorized by your client.

II-what does an expert
do?

A. Review's complaint and advises client

The determination needs to be made as to the validity of the complaint and whether or not it is supportable. A retainer letter is appropriate at this time spelling out the scope of services and anticipated costs to the client.

B. Provides affidavit of merit when appropriate.

The purpose of an affidavit of merit (AOM) is described by law and is part of an attempt to minimize “frivolous suits.” This is spelled out in legislation specific to New Jersey e.g. NJSA 2 A: 53 8-26 et seq. as originally enacted it applied to various professionals including architects and engineers and was later amended to include land surveyors. The certification under oath in the AOM must be based on sufficient credible information to satisfy the affiant that the case has merit enough to continue.

- In accordance with New Jersey Statutes Annotated, “in any action for damages for personal injuries, wrongful death, or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days of following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised were exhibited in the treatment, practice or work that is the subject of the complaint fell outside the acceptable professional or occupational standards or treatment practices.

- The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit, upon finding of good cause. The person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification, or by devotion of the person's practice substantially to the general area of specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.”.

C. Reviews discovery material: visits site

This material may consist of engineering drawings land surveys title searches drainage reports depositions interrogatories photographs and any other data or information of any kind the attorney may consider appropriate. Often an experienced expert will sense that pertinent information is missing and then request same. A visit to the site no matter how distant or difficult is **ABSOLUTELY** necessary to enable the expert to understand the issues. Is often necessary to interview the plaintiff or defendant but this must be done only with the approval of and usually in the presence of your client's attorney. The "rules of evidence " specifically include and exclude various types of communication reports drafts e-mails and a plethora of contacts which is best understood by the attorney.

D. Advises client

the information supplied and the facts you have discovered enabled you to arrive at an opinion. It is at this point that a decision is made as to whether or not your current opinion is favorable or harmful to the complaint. This is when it is important to make sure that your client understands the engineering or surveying issues and whether or not they support the allegations in the complaint. You may have discovered issues divergent from the assumed violation that turned the case in a different direction. It may even be determined that the best course for your client is to aggressively pursue a settlement.

E. Prepares report if requested

This program is not intended to be a dissertation on report writing. However you will in all likelihood be required to write a report of your findings. This may be in the form of sketches engineering drawings surveys photographs and other forms of communication. The report should be clear concise and based on the facts as determined by your opinion. In no case no matter how tempting should you attempt to deliver a legal interpretation of the facts. An opinion not based on the facts of the case is known as a “net opinion”.

- No Depositions in PA court. Depositions permitted in Federal Court, NJ, DC, FL, MD.
- A report is the basis of the testimony you are providing
- Must include methodology, basis, etc (SOUNDS LIKE DAUBERT TEST)
- Opinions to a “reasonable degree of Surveying/professional certainty”
- In NJ – “reasonable probability

- Preparation
- “Coaching”
- “Horse-shedding”
- **“Wood-shedding”**
- **“Sandpapering”**

- “Horse-shedding” – In the past there were carriage sheds near the courthouse in certain areas. James Fenimore Cooper is credited with coining the phrase “horse-shedding the witness. Attorneys would meet with witnesses in these sheds and rehearse testimony for trial.

- Preparation for testifying at a deposition-
 - Start Early
 - It is your attorney's duty to prepare you – BUT
 - Remember the three Ps
 - Prepare yourself – you are a professional
 - Depositions are not like trial testimony
(personal feeling – they are much more difficult and not pleasant experiences)
 - Clothing – always professional – depositions become less formal – unless videotaped

Preparation for testifying at a deposition-continued

- Behavior – be yourself – no grandstanding – no acting
- Looks – stares – glances – looking down – all are non-verbal cues (good or bad-both ways)
- Make sure you are projecting clear and loud enough for the jury – stenographer to hear.
- Never say – “let me be honest with you.”
- Watch for the “Ummmmms” “okays “ and “know what I mean?”
- Once excused – leave

Preparing to testify at trial

- Direct Examination – this is home run time. Your attorney should be throwing you lob balls. (High hanging curve balls)
- Cross Examination – expect the heat. This is two on- two out bottom of the 9th time. Expect the fast-ball and/or slider!

- Direct Examination – this is home run time. Your attorney should be throwing you lob balls. (High hanging curve balls)
- Cross Examination – expect the heat. This is two on- two out bottom of the 9th time. Expect the fast-ball and/or slider!

- Federal Rule of Evidence Rule 702
- Three Major Requirements:
 - 1. The proffered witness must be an expert, i.e., must be qualified,
 - 2. the expert must testify about matters requiring scientific, technical or specialized knowledge, (an expert's testimony is admissible so long as the process or technique the expert used in formulating the opinion is reliable,) and
 - 3. the expert's testimony must assist the trier of fact.

Reports generally have the following outline:

- cover letter
- title page
- introduction
- methodology
- Overview and summary of events
- findings
- Conclusions- discussion & analysis
- opinions
- qualifications and certifications.

F. An expert can expect to be deposed

It will be on the merits of the report and findings

It will be under oath and normally takes place at the opposing attorney's office.

The line of questioning from the opposing attorney will be investigative and often challenging and confrontational. **Be prepared**

In attendance will be a court stenographer, your client (attorney), attorneys of other interested parties and various and sundry hangers on.

You will be instructed as to the procedures for properly answering clearly. You should rehearse with your client what to expect and review your findings and your anticipated testimony. If the questioning is antagonistic, look to your client for direction. **Above all else, answer truthfully.**

You will receive a copy of your deposition

Read it carefully, noting any inaccuracies or misunderstandings.

G. Advises Client

Okay You may modify your opinion based on additional clarifying information at any time after we want to say anything more about devising a Discuss with your client as to whether or not important facts were omitted under questioning or disagreements or conflicts with other depositions, you may discover. From time to time your client may provide you with other discovery and material upon which you may be requested to opine. You may modify your opinion based on additional or clarified information at any time.

H. Prepares rebuttal report, if requested

It is the normal course of events that the plaintiff will provide the report done by their expert, first, attempting to provide proof of wrongdoing. The defendant will submit a report by their expert attempting to refute or rebut the claim.

As in most cases, there is usually two sides to every issue. Plaintiff's expert is to present the facts of the case and substantiating the claim and the defendant's expert presents an opposing view of the case. The other expert may be known or unknown to you. They may or may not grasp the issues in the case and may, in fact, slant their report from the truth, as you understand it.

If the case proceeds to trial, you may or may not be called to testify. It is therefore necessary that your report and or rebuttal be as complete and able to be understood by a judge, as possible.

I. Testifies at trial

Not all cases proceed to trial, in fact, most do not.

If it does, you will have an opportunity to discuss your testimony with your client prior to the actual court appearance. Be very wary of an attorney who says, “we will meet at the courthouse prior to trial to go over things”.

It has been observed that many lawyers, upon entering the courtroom, turn into actors. Their job is to defend their client. There are many issues of law which a surveying or engineering expert may not be familiar with. This may affect their testimony. The opposing attorney may attempt to get the witness (you) to say something inappropriate.

You are an expert. Because you are, you are allowed to refer to notes, calculations and other references during your testimony. You are not just a fact witness, and because of that you are one of the few allowed to give your opinion at trial. **Understand the questions, take sufficient time to consider your response, and answer truthfully.** If you do not understand a question, ask for it to be rephrased.

III-Why is an expert necessary?

1- Professional Liability cases

- A. Professional named as a Defendant.
- B. Alleged errors, mistakes and blunders.
- C. Alleged failure of licensee to meet “Standard of Care”

2. Civil cases

- A. Review of existing conditions alleged to be the two causes of complaint to determine presence of “deviation” from “normal”.
- B. Opine that “deviations” did or did not contribute to cause of action as filed.

IV-What is the Standard of Care?

1- Professional Liability case

- **A. in most professional liability cases whether representing the plaintiff or defendant, it is necessary to determine whether or not they performed according to how a reasonable licensee would have approached the matter.**

- **B. Did the professional service follow the statute or administrative code as well as the practice common to the area in which the service was provided. Knowledge of the area or fellow professionals in that area is very important.**

C. where is the quality control to assure compliance with the standard of care?

2. Civil cases

- A. Review of existing conditions alleged to be the cause of complaint to determine presence of “deviation” from “normal”.
- B. Opine that “deviations” did or did not contribute to cause of action as filed.

IT DEPENDS:

A. “The **standard of care** is the watchfulness, attention, caution and prudence that a reasonable person (whether engineer or surveyor) in the circumstances would exercise. If a person’s actions do not meet this standard of care than his/her acts fail to meet the **duty** of care which all people (supposedly) have toward others.”

B. “In tort law, a **duty of care** is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care, while performing any acts that could foreseeably harm others.”

V- Plaintiff or Defendant Cases?

- you don't need to specialize in either plaintiff or defendant cases
- When one specializes in either type of case, opinions may get slanted.
- It is easy to become biased.
- You will be tested by opposing counsel on this issue. **Be prepared!**

**VI- Improve your understanding
of the process**

- A. Read and stay current with available publications.
- B. Attend seminars on related topics (SEAK, TASA, ACSM, NJPLS etc).
- C. Improve your presentation skills:
 - 1) Public speaking.
 - 2) Ability to write clearly.
 - 3) Be available to your client or potential client.
 - 4) Be candid and frank when discussing a case. It may not be as good a case, as the lawyer/client thinks.
 - 5) Be prepared to be “attacked” by others

VII-Remember, this is a Business

- A. Be clear about your fees. Be clear with your client that you in no way guarantee a report showing a result that is advantageous to his case. It may not be so.
- B. Include approximate fee limits without prior written authorization to proceed. For example, you may indicate to your client, an estimated fee based on the facts at the outset of your investigation. Should additional fees be required, confirmed their authorization in writing prior to proceeding.
- C. Get a retainer (preferably nonrefundable).
- D. Have a written contract, including separate fees for depositions, as well as court appearances.
 - Remember the Boy Scout motto-**BE PREPARED**

- **QUESTIONS?**

Save & Close Delete Save & Forward New OneNote General Certificates All Fields Email Meeting More Address Book Check Names Business Card Picture Options Categorize Follow Up Private Zoom

Full Name...

Company

Job title

File as

Internet

E-mail...

Display as

Web page address

IM address

Phone numbers

Business...

Home...

Business Fax...

Mobile...

Addresses

Business...

This is the mailing address





Bruce R Blair
 BRB Forensics
 Professional Surveyor

(908) 797-7734 Work
 (908) 797-7734 Mobile
 bruce@nblairs.com
 734 Amwell Road
 Hillsborough, NJ 08844

Notes

Recognized Professional Surveying expert in NJ, PA and NY.
 NJ PLS license # GS 15098
 PA RLS license # SU 025977E
 NY LS license # 050343

Professional Land Surveyor and Planner Legal Expert and Forensic Surveyor Specializes in:

- Difficult land title issues
- GPS
- Professional Liability issues
- Seminar speaker on all things surveying
- Wetlands and land preservation surveying

SPECIALIZING IN THE NEW (FEB 2016) ALTA/ACSM REGS