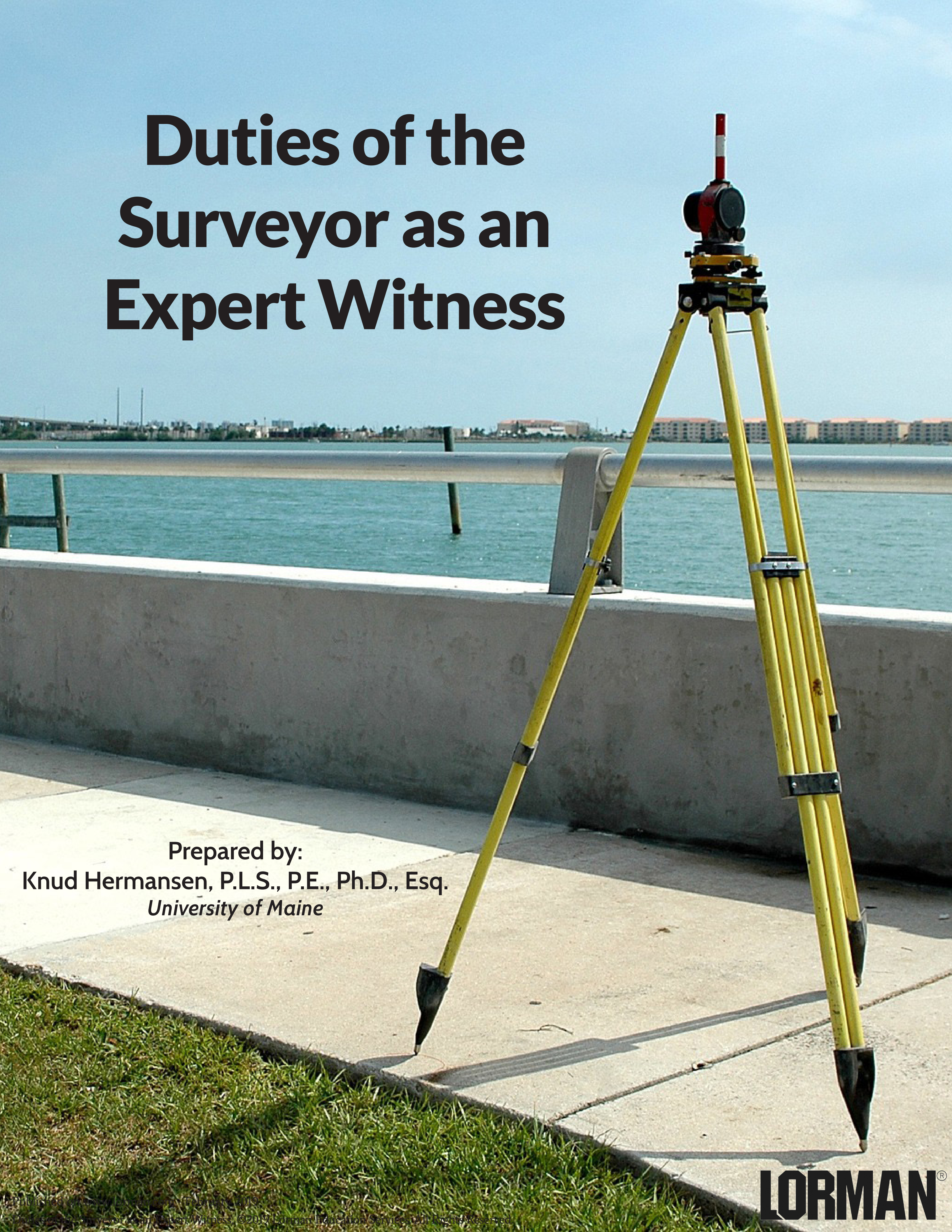

Duties of the Surveyor as an Expert Witness

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DUTIES OF THE SURVEYOR AS AN EXPERT WITNESS

1. Provide a credible and compelling opinion
2. Communicate that opinion
3. Defend the opinion
    a. To client
    b. At deposition
    c. At trial

EVALUATION OF BOUNDARY DISPUTE CASES

1. **Perform a Conflict of Interest Analysis** — One of the first considerations for any attorney in any situation is to determine whether there exist an actual or the potential for a conflict of interest. In boundary disputes, the inquiry should not only focus on the potential litigants and major parties but the properties involved as well. For example, if an attorney or her firm has certified the title to a previous owner and the boundary litigation reveals there is a potential title problem (often the case), the attorney is potentially a party in the event of expanded litigation. As a result, the attorney should tread cautiously before becoming involved with any boundary dispute involving property in which they have previously passed judgment on the soundness or marketability of the title.

2. **Evaluation of the Dispute (Client's Motives)** — Often the next hurdle that must be crossed is to determine the client's motives for their dispute. This is seldom dealt with as an issue by itself. It is usually drawn from the conversations, circumstances, demeanor, and situation. In hindsight, many attorneys discover they have wasted considerable time and effort preparing to litigate a boundary dispute case where none existed. The fact is that a realistic basis for many boundary disputes are unkind words between neighbors, insults among neighboring children, or the choice of a pet's toilet location. In due course, neighbors anger evolves and centers on their boundary location which makes a worthy subject to focus their pent up anger upon. Upon such real or imaginary lines there exist so much possibility for retaliation. There are trees to be mutilated, gaudy paint displayed, fences erected, fences removed, and words exchanged. Frequent are the people who think a $800 wood fence on an imaginary line is more worthy of their limited funds then a surveyor's pin on the real line. In such cases the boundary is little different then the children in a difficult divorce. Most experienced attorneys recognize that the client seeking revenge must be dealt with in a different manner than those seeking justice — wise counsel being generally wasted on the former.

An obvious outgrowth and extension of this evaluation point is to determine the client's stamina for litigation and the extent of their resources. There is little case history involving the litigation of boundaries surrounding mobile homes.

3. **Determine the Basis for the Dispute** - At the very outset of the evaluation of the client's case, the basis of the dispute should be determined. In many cases, overlapping titles are confused with boundary location disputes. Determination of the underlying cause of the dispute is important in order to focus on the relevant information required for resolving the problem.

Overlap - An overlap is caused where: 1) the common grantor mistakenly created two separate and distinct boundaries where there should have been one or 2) a person has occupied a strip of land of another for a sufficient period of time to raise a presumption of title to the strip by an equitable doctrine such as adverse possession. Overlaps are resolved in favor of the superior title. The recording acts coupled with equitable principles such as estoppel, adverse possession, acquiescence, practical location, and waiver have a deciding role in this situation. Surveyors typically play only a minor role - describing the overlap area in order to provide a clear description to be used in the order granting the relief sought.

Example — A person, assuming they own a 100 rod by 50 rod rectangle, deeds the east 50 rods to "A" and the west 50 rods to "B." It is discovered the actual length of the rectangle is 98 rods.

Boundary Location - In a boundary location dispute, the instruments to adjoining tracts describe one and the same common boundary. Unfortunately, in applying the description to the site, there is conflicting evidence in regard to the location of the common boundary. In this case, the correct boundary location is determined by the weight of evidence. Lines of occupation may serve as evidence of the record location. Surveyors play a major role in gathering information, evaluating evidence, applying the information to the site, and formulating a professional opinion on the location of the boundary.

Example — A person, assuming they own a 100 rod by 50 rod rectangle, deeds the east and west parts to different persons calling for the common division line to be "cedar posts set 50 rods from the exterior corners." The posts cannot be found and it is discovered the actual length of the rectangle is 98 rods.

It is not uncommon for a case to reach the trial court where one side argues title by adverse possession while the other side, oblivious to the absurdity, counters the claim of adverse possession with evidence tending to establish the location of the record boundary.

3. **Communicate the Complexities, Difficulties, and Alternatives to the Client** — Boundary disputes are a somewhat rare experience among many attorneys. As a consequence, they are looked upon as a unique form of title problem that can be handled using only a fundamental knowledge of real property law. As experienced attorneys are well aware, boundary disputes are only rivaled by divorces in the ferocity and anger of the litigants. Even divorce lawyers often stand in awe of the ferocity exhibited in boundary disputes involving neighbors who are also related. Murders and physical assault are not unheard of. It must be remembered that many of America's early battles involving settlers, Native Americans, and foreign powers was over boundaries. To compound the matter are the often complex and technical details involved in determining the boundary location. Judges and attorneys are often unprepared to conceptualize the mathematics, statistical uncertainties, and breadth of subject matters involved in boundary locations. As a consequence, attorneys make a poor showing, litigation drags on unexpectedly, expenses increase markedly, and unfounded decisions are commonplace. The time and money spent to resolve a few square feet of contested ground is often ludicrous — at times dwarfing the original purchase price of the entire parcel. Attorneys are not known for having an inclination toward preventing a foolish client, otherwise competent, from spending money on legal frivolities arising from the client's own makings. Nevertheless, a clear conscience requires a warning of some sort as to what can be expected.

It is strongly recommended that clients be counseled on using alternate dispute resolution to solve their difficulties early in the case before formal litigation commences. Mediation and arbitration are the two most likely avenues to pursue. A strong recommendation by both opposing attorneys followed by agreement on a competent mediator or arbitrator will often lead to a speedier, less costly, and more equitable outcome for their clients. If litigation has already commenced, timely petition and appointment of a referee will often save the court and attorneys considerable effort and frustration that litigation would cause. For example, a competent surveyor serving as an arbitrator will not only provide a well reasoned decision but will be able to gather a great deal of information in the field and courthouse using their own resources.

4. **Evaluate the Surveyor(s) and Work Products** — Many are the surveyors who attempted to save the client some money and does half the service and causes the dispute or at least raises an ongoing dispute to a higher level of intensity. There are several aspects of a surveyor and the surveyor's work that an attorney should carefully examine.

Is the surveyor a competent surveyor? This basic question is often overlooked because few attorneys realize that licensing surveyors is a relatively recent enactment and certainly not foolproof. There are numerous surveyors practicing or formerly practiced that have never had to take a test or prove their competency in order to obtain their surveyor's license. Before continuing, it must be stressed that not all surveyors who were licensed without examination or other proof of competency are poor surveyors. On the contrary, some of the finest surveyors in this state were licensed in this manner. While most surveyors licensed at the present time must generally pass an examination, there are still no uniform requirements for a formal education - although some surveyors do have a formal surveying education or education in a related field.

Has the surveyor done a competent job in this situation? While the surveyor may under ordinary circumstances be a well-respected and competent practitioner, there will always be a time when every surveyor provides less than noteworthy services. What professional will freely admit that all services were above reproach? The chance of inadequate services is often increased due to the client's frugality when shopping for surveyors. Thinking all surveyors will provide the same quality of service, the client often chooses the surveyor by the estimate the surveyor gives over the phone. The many parables about government work and low bidders seems to have been lost or forgotten by cost conscience landowners. It is the dismay of many experienced attorneys who take a case only to realize immediately prior to trial that their client has chosen a surveyor or entered into a contract where price alone was considered rather than quality services. It is often a wise option for attorneys to have an unknown surveyor's work examined by a respected surveyor before attempting to make diamonds out of mud.

In closing this analysis of the surveyor's capability, it would not be fair for surveyors to shoulder all responsibility for substandard performance. More times than good conscience should allow, attorneys have allowed litigation to begin or continue where adequate investigation was not conducted. All surveyors have stories of calls from an attorney seeking services or an expert the day before trial. There are also numerous times when the client's attorney has never sought to speak to the surveyor until the week before trial or, in some cases, the day of trial. Also, there are frequent cases where the boundary dispute goes to trial, each side equally burdened by incompetence and the decision made based on the lessor of two evils. In some cases, several thousand dollars have been expended before it is discovered the current description had a scrivener's error that should have been easily discovered upon a reasonable search of the historical records.

Is the surveyor a good witness? There are numerous surveyors who are competent and respected practitioners that do not portray confidence and knowledge in stressful situations. The terror of sitting in the witness stand coupled with the hostile demeanor of the attorneys and judge often leave surveyors struggling for simple thoughts, stumbling over words, grasping for answers, spitting out nonsensical responses, shaking uncontrollably, and sweating profusely. Many are the attorneys who left a courthouse convinced not only that the surveyor had botched the survey and testimony but must have committed all the unsolved crimes in the area given their demeanor on the stand. It is not uncommon for the incompetent surveyor to be a more credible witness based solely on their demeanor rather than their proficiency in surveying.

6. **Evaluate the Case** — After the evaluation of the client's surveyor and the survey, the attorney should have a cursory concept of the case and the client's chances of winning. At this point many attorneys stop and do their client an injustice. The evaluation is not done and further investigation is ignored. Discovery in boundary line disputes is often haphazard or cursory. Every attorney has reasons for omitting discovery options in boundary disputes. There is always the cost and expense that is involved. Discovery has been said to be akin to taking a sleigh ride on the client's wallet. Also relevant is the tit-for-tat that can quickly escalate as each side tries to get one up on the other. There are also expectations that settlement will occur without additional work. In all honesty, settlement frequently does occur although it is questionable whether it occurs out of the client's desire to end the litigation or the attorneys desire to be rid of a difficult case. In a few cases, there is the concern that any discovery will disclose how tenuous each side's case really is. Often, the client is more interested in the chance rather than the likelihood of winning. The seed that lands on the dessert has no less reason to want to bloom than the seed that lands in the fertile garden soil.

There are methods that can be used to keep the intensity, cost, and hostility attenuating discovery to a minimum. One option is to simply ask for the surveyor's documents. Current surveying standards generally require a surveyor to provide a plan, report, and description. (Although these documents may be waived by the client.) Even when available, the contents and format of the documents are often left to the surveyor's discretion. Field notes and work sheets should also be obtained. Often a critical review of these documents by an outside surveyor employed by the attorney will reveal many weaknesses, problems, and strengths the attorney's limited background would not perceive.

Another recourse is to agree on a set of duplicate questions each side will ask the other side's surveyor in a deposition. Certainly such agreements will level the playing field and keep a civil behavior among attorneys.

Of great aid to the attorney seeking to discredit the other side's surveyor is the published surveying standards. These standards are so detailed in some aspects and vague in others that they leave most surveyors with some deficiency and the attorney with a great deal of potential to exploit. Although, the attorney is cautioned to refrain from inattentive use since the shoe that fits one side's surveyor often fits the other side's surveyor just as well.

It is worth plugging once again for the use of a knowledgeable referee to avoid a great deal of discovery. A knowledgeable referee can quickly focus on the gist of the problem, ask the pertinent questions, and apply the relevant law with a speed and precision that is both alarming and exhilarating depending on which side the decision falls upon.

7. **Meet Often as Possible and Prepare** — Each attorney obviously has their own manner of preparing an expert witness to fit their style of direct examination and meet their client's interests. The attorney should use an expert to provide, organize, and present relevant material for the client's side and review material of the opposing party (look for weaknesses and strengths). In at least one meeting between the attorney and surveyor the following should occur:

- educate the attorney on the subject matter,
- review background and resume,
- review possible questions,
- focus and condense testimony,
- work on vocabulary for understanding,
- decide on demonstrative evidence,
- organize and integrate demonstrative with testimony, and
- dress/presentation, and
- coaching. Coaching should not deal with what to say but how to say it.
- appearing confident,
- eye contact,
- avoiding nervous mannerisms,
- using facial expressions and body language,
- speech patterns (tone, inflections, pauses, etc.)
- voice projection,
- non-nutritive words (e.g. "I think," "kind of," "I guess," "sort of"), and

- demeanor.
- Review trial procedures