EVALUATION OF DATA

LECTURE OUTLINE

I. RECORDING/PRESERVING QUALITY EVIDENCE

1. The best time to secure credible and high quality evidence is prior to the eruption of a land boundary controversy.

2. The threat of suit establishes motives to distort, cover up, exaggerate and fabricate.

3. Devices versus Documents: iPhone, secret pocket digital recorder, speaker phone by office conference, statement signed by party or witness, summary letter, memoranda signed by adversary party against whom evidence will be used at trial, picture, video, diary notes, field notes, calendar notes.

4. Prepare your documents or memos at or near the time of the event being recorded or preserved. Date and time the document and entry made by hand.

5. A trial judge views evidence prior to a controversy more credible. It is generally given more weight.

II. PERMISSION TO RECORD CONVERSATION versus SECRET RECORDING

1. Permission to record is unnecessary if you are a party to the discussion or conversation.

2. Avoid committing a crime known as "eavesdropping" or "wiretapping". RSMo. §542.422. The victim can recover attorney's fees and damages.

3. Do not store a voice activated recording device in a car or office and later retrieve the hidden device to listen and preserve recorded evidence.

4. Protocol should be explained to the recipient of the call and it is far better to obtain permission on audio recording device.

5. You can generally record conversation without consent or knowledge of the person being recorded – it is sharp practice but it is ethical.

6. Statements are, of course, not under oath. In trial the person can "explain" why he/she said certain facts.

7. Before recording, prepare a summary of points you wish to make during the conversation and try not to sound like an "interviewer" with a script.

III. DEPOSITION PRIOR TO LAWSUIT

1. Supreme Court Rule allows for the deposition of key surveyor, witness or potential party to be taken prior to the filing of the lawsuit.

2. The purpose is to preserve "under oath" evidence that may later be lost due to age, incapacity or the deponent (person to be deposed) being out of the country or beyond the power of subpoena. A Missouri litigant can subpoena any person "found" in Missouri. Travel expenses must be advanced. You cannot serve a valid subpoena out of state.

3. In our high tech world you can now skype or video out of state depositions with minimal costs and avoiding travel. Make certain all your exhibits are sent well in advance of the deposition so they can be used at trial.

SUPREME COURT RULE 57.02 DEPOSITIONS BEFORE ACTION

A person who desires to perpetuate testimony of any person regarding any matter that may be cognizable in any court of Missouri may file a verified (under oath) Petition in the Circuit Court in the County of the residence of any expected adverse party (the party to be sued).

The Petition shall be captioned in the name of the Petitioner and shall show:

1. That the Petitioner expects to be a party to an action cognizable in a court of Missouri but is presently unable to bring it or cause it to be brought;

2. The subject matter of the expected action and the Petitioner's interest therein;

3. The facts desired to be established by the proposed testimony and the reasons for desiring to perpetuate it;

4. The names or a description of the persons expected to be adverse parties and their addresses so far as known; and

5. The names and addresses of the persons to be examined and the substance of the testimony that is expected to elicited from each.

The surveyor needs to explain to the trial attorney why such testimony is critical and indispensable. The party being deposed, if friendly to your client's cause, should be thoroughly prepared to answer all anticipated questions.

If a true adverse witness situation exists, the surveyor and attorney need to prepare an exam together that will "lock in" the evidence and testimony that is beneficial to your case.

IV. SPOLIATION OF EVIDENCE: How did that monument "walk away"?

1. General Rule: Spoliation is the destruction or significant alteration of evidence. Baugher v. Gates Rubber Company, Inc., 863 S.W.2d. 905, 907 (Mo. App. E.D. 1993). In Missouri, if a party has intentionally spoliated evidence, indicating fraud and a desire to suppress the truth, that party is subject to an adverse evidentiary inference. *Id.* (citing Brown v. Hamid, 856 S.W. 2d. 51, 56-57 (Mo. 1993)). Not concerned with whether the opposing party suffers prejudice as a result of the destroyed evidence, but doctrine works only to punish the spoliator. See Pomeroy v. Benton, 77 Mo. 64, 86 (1882). ("It is because of the very fact that the evidence of the Plaintiff, the proofs of his claim are the muniments of his title, have been destroyed, that the law, in hatred of the spolier, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong.") Specifically, the spoliation doctrine and the resulting inference punishes the spoliators by holding them to admit that the destroyed evidence would have been unfavorable to their position. The adverse inference, however, does not prove the opposing party's case. Instead, the spoliator is left to determine whether any remaining evidence exists to support his or her claim in the face of the inference. See Furlong v. Stokes, 427 S.W. 2d. 513, 519 (Mo. 1968); and Garrett v. Terminal R. Ass'n of St. Louis, 259 S.W. 2d. 807, 812 (Mo. 1953). Since the doctrine of spoliation is a "harsh rule of evidence", prior to applying it in any given case it should be the burden of the party seeking its benefit to make a *prima facia* showing that the opponent destroyed the missing evidence under circumstances manifesting fraud, deceit or bad faith" Moore v. General Motors Corp., 558 S.W. 2d. 720, 735 (Mo. App. Ed 1977) "mere negligence is not enough"; Brissette v. Milner Chevrolet Co., 479 S.W. 2d. 176, 182 (Mo. App Ed. 1972).

   However, under certain circumstances, the spoliator's failure to satisfactorily explain the destruction of the evidence may give rise to an adverse inference against the spoliator. Brown v. Hamid, 856 S.W. 2d. 51, 57 (Mo. 1993). In

other circumstances, "it may be shown by the proponent that the alleged spoliator had a duty, or should have recognized a duty to preserve the evidence" Morris v. JCPenney Life Ins. Co., 895 S.W. 2d. 73, 77-78 (Mo. App. W.D. 1995). Schneider v. G. Guilliams, Inc., 976 S.W. 2d. 522 (Ed. 1998) was of first impression where the spoliation doctrine was applied to a non-party to the lawsuit that had destroyed the evidence involved. In this case, the proponent of the doctrine failed to show that a party in bad faith directed, encouraged or in any other way took part in destroying evidence. The retained expert had discarded evidence and there was no evidence in the record manifesting bad faith or an intent to defraud on the part of the party and, therefore, the application of the spoliation doctrine was inapplicable. There may be certain circumstances where the spoliator is not a party but a third person or agent of a party may give rise to the spoliation doctrine. In conclusion, if there is any indication of connivance to destroy the important evidence between the party and the spoliator/agent, the court may apply the doctrine to penalize the party.

2. Impact on your client's case: Easier to make your case against the spoliator, i.e. satisfy your burden of proof.

3. Perpetrator is punished: Jury will be told!

4. All negative inferences will be drawn by the Judge and used against your client who destroyed the evidence, or deliberately had his agent do so.

5. Classic event: I did not know I couldn't bulldoze the ancient fence line in the dark of night!

V. JUDGE v. JURY

1. How does a lay person juror "think" and "analyze" as contrasted to that of a Judge? Who should hear my case?

2. Judges have a notion of avoiding disruption in boundary relocation and minimizing controversy that will impact all landowners in the area.

3. A basic finding by the Judge is made after determining the credibility of one surveyor against another surveyor or one witness against another.

4. For a Judge to find your witness not credible makes a strong case for the winning party and minimizes the chance of a successful appeal.

5. The surveyor should realize that the Judge may not be extraordinarily familiar with surveying law and principles.

6. "Learned Treatises" can be very valuable in cross-examination of an expert/surveyor witness.

7. Prior to trial, the surveyor and lawyer should review areas of survey law that pertains to the main issues in the case.

8. A surveyor/expert always wants to know "What questions will I be asked?" Not only on direct exam but on cross examination.

9. Master explaining away the "weak" part of your case. Being surprised while on the stand testifying is not the "best" time to concoct a story.

VI. THE DOCTRINE OF ADVERSE POSSESSION

1. Google Earth requires a foundational witness to show date of photo and the procedures to obtain the photo image.

2. Witnesses testify as to use of property and whether or not all elements of the doctrine of adverse possession are proven to exist continuously for the 10-year statutory period.

3. A surveyor can testify as to his personal observations and conditions of the property as to "line of possession" or "evidence of possession".

VII. SENIOR RIGHTS VERSUS JUNIOR RIGHTS (SUBORDINATE)

1. First deed/conveyance out of a tract/parcel is "senior" and superior to subsequent or later conveyances.

2. "More or less" is a caveat or warning.

3. "Junior" deed or "subordinate" deed only conveys the actual or residual property that remains outside of the original tract.

VIII. RESOLVING AMBIGUITIES IN LEGAL DESCRIPTIONS

1. In preparing legal descriptions, seek to avoid inconsistency. However, if an inconsistency appears, several legal maxims are helpful to the trial court.

2. The court first seeks to determine the parties' intent with a particular view to that of the Grantor, which is the "pole star" of construction. Holland v. Holland, 509 S.W. 2d 91, 94 (Mo. 1974). When this approach fails, the court will look to various subsidiary rules of construction, such as:

   (a) Monuments prevail over boundary line designations; Houska v. Frederick, 447 S.W. 2d 514, 518 (Mo. 1969).

   (b) Acreage calls are descriptive only and not controlling. Cantrell v.McDonald, 412 S.W. 2d 403, 408 (Mo. 1967).

   (c) Specific descriptions control over general descriptions; Snadon v. Gayer, 566 S.W. 2d 483, 488 (Mo. 1978); Boxley v. Easter, 319 S.W. 2d 628, 633 (Mo. 1959).

   (d) Conveyance by reference to non-navigable water conveys to center thereof, absent contrary intent; Wallis v. St. Louis County, 563 S.W. 2d, 93, 97 (Mo. App. 1978); Appeal after remand 621 S.W. 2d 720 (Mo. App. 1981) See discussion at 621 S.W. 2d at 723.

   (e) The practical construction placed upon the words by the parties is evidence to determine the meaning of an ambiguity. Snaydon, Supra. at page 491.

IX. LINES OF POSSESSION; HOW DO YOU PROVE AGE?

1. Fence: Wooden posts vs. steel posts vs. row trees.

2. Fence line: Barbed wire or chicken coop

3. Fence line: Meandering wire or cable from tree to tree

4. Crop line

5. Hedge

6. Rock fence stacked at edge of adjoining fields – gradual growth

7. Tree line adjacent to crop field

8. Railroad ties

9. Electric fence

10. Woven wire

11. Rebar and cable

12. Ditch, culvert

13. Convenience fence along curvy, steep creek bank, to prevent cattle loss between adjoiners

X. CHAIN OF CUSTODY AND FOUNDATION FOR ADMISSION IN EVIDENCE OF HOW LONG FENCE WIRE HAS BEEN EMBEDDED IN TREE

1. How long has that fence been up?

2. Photograph general area

3. Photograph tree in question showing embedded wire that can be sacrificed

4. Photograph after trunk is exposed with main trunk in ground and top cut off

5. Photo the segment trunk sitting on top of main trunk

6. Blow up picture with number of rings capable of being counted by trier of fact

7. Photograph confirming number of rings beyond embedded wire or cable

8. Best evidence: Mark and label a 4" part of the tree trunk as a trial exhibit showing embedded barbed wire deep into the trunk.

9. Prepare photo summary of other trees with embedded wire

XI. VIEWING THE PROPERTY, MONUMENTS, CORNERS AND BOUNDARIES WITH THE TRIAL JUDGE

1. In some instances, the Judge will, on his own motion (called *Sua Sponte*) direct that the property in question be examined by the parties, the surveyors and the respective attorneys. In some instances the viewing is before the evidence and in others, it can be after the trial in question.

2. The Trial Judge sets the rules as to who may attend and who may discuss matters while the property is viewed. The court generally wants the attorney to agree to the procedure to be followed when examining the land.

3. The Judge typically asks questions to one or both of the attorneys and typically takes notes and may even photograph the monuments or evidence of possession, etc.

4. Generally, there is no record made for the court reporter does not personally attend the property examination and viewing.

5. If the two attorneys involved representing a Plaintiff and a Defendant cannot answer the question posed by the Trial Judge, the attorneys may approach their clients to see if an evidentiary stipulation can be entered into between the parties as to a certain aspect of the evidence.

6. The property viewing truly assists the Judge in determining the factual issues and will assist the court in rendering a more accurate and fair decision.

7. See Missouri Supreme Court Rule 58.01 which states: Any party may serve on any other party a request to permit entry upon designated land or other property in a possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, and photographing, testing or sampling the property or any designated object or operation thereon, within the scope of Rule 56.01(b). This Rule 58.01 does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

8. In a jury tried case, the jurors are specifically precluded from visiting the property in question. If they do so without court authority, that generally allows the Trial Judge to declare a "mistrial". If the attorney, surveyor or party to the lawsuit is at blame for orchestrating the fact that a juror visits the property in question, that party can be charged with all of the court costs related to the new trial and the juror fees for attendance.

XII. HEARSAY

1. An out of court statement, made in court, to prove the truth of the declarant's statement.

2. There are over 40 exceptions to the hearsay rule.

3. Several exceptions to the hearsay rule have been carved out over the history of Missouri "common law" and by statute which pertain to surveyors, title to land, land boundaries, and ancient documents.

BASIC HEARSAY EVIDENTIARY RULES:

1. A party plaintiff can repeat in Court the remarks of a party defendant.

2. A defendant can repeat the remarks of the plaintiff.

3. Plaintiff's witnesses can only repeat the remarks made in their presence of the adversary defendant.

4. You cannot call a witness in your own case to testify as to what remarks were made by your own party.

STATEMENTS OF THE SURVEYOR:

1. Is the Surveyor the agent or representative of client?

2. Are remarks of surveyor binding on his client?

3. Common Law Rule:

   A statement of an agent/employee may be received in evidence as an admission against his/her principal, if relevant to the issues involved, where the agent, in making the statement, was acting within the scope of his/her authority.

   It is not necessary that the employee/agent possess executive capacity or have an execute position with the principal.

   See Bynote v. National Supermarket's Inc., 891 S.W.2d. 117, 123-124 (Mo. Banc 1995)

EXCEPTIONS TO THE HEARSAY RULE BY STATUTE AND BY COMMON LAW

1. Certain types of ancient documents

2. Under certain conditions and situations, remarks of a dead person, Decedent, if an owner by deed in chain of title

3. Missouri also allows the admission of evidence of declarations as to the existence of particular facts relating to the boundaries of land if made by a person who is on, or in possession of, the land at the time he spoke and who has knowledge of the matters of which he speaks, even if such statements do not qualify as admissions by a party opponent. Lemmon v. Hartsook, 80 Mo. 13, 22-23, (in addition, declarations by the possessor of land, though not admissible to prove title, or admissible to prove the nature and character of the declarant's possession and the intention with which possession was taken. White v. Wilkes, 391 S.W. 2d. 260, 261 (Mo. 1965). (Quoting White v. Wilkes, 357 S.W.2d. 908, 912 (Mo. 1962)). Stephens v. Fowlkes, 338 Mo. 527, 92 S.W.2d. 617, 620 (1936); Ortmeyer v. Bruemmer, 680 S.W.2d. 384, 391 (Mo. W.D. 1984).

XIII. EXCEPTION 14: RECORD OF DOCUMENT AFFECTING AN INTEREST IN PROPERTY

RSMo. §490.360 makes records of deeds in the Recorder's Office "*prima facie* evidence" of the execution of such writing.... and of its genuineness and time of record; provided, the said record thereof shall have been made at least ten (10) years next before... offered in evidence.

Blackburn v. Spence, 384 S.W. 2d. 535, 539 (Mo. 1964) (*In dicta,* the court stated RSMo. §490.360 makes the record of the deed *prima facie* evidence of the execution and of its genuineness and time of record).

The language of the Statute is not clear as to whether the record of the deed or the deed itself is evidence of execution of the real estate instrument. The Statute technically makes reference to the instrument itself being offered into evidence ("such writing, instrument or deed, and a certified copy thereof, and of the time of its record, shall be *prima facie* evidence..."). However, the Statute has been interpreted to make the record admissible. See Blackburn v. Spence, Supra at 539.

XIV. EXCEPTION 15: STATEMENT IN DOCUMENT AFFECTING AN INTEREST IN REAL ESTATE

Various Statutes make matters contained in documents purporting declaring affect an interest in property admissible. See, RSMo. §490.280 (instruments made under law later repealed are admissible as evidence); RSMo. §490.290 (deed acknowledged under former law admissible if recorded within one year from its date and 20 years from the date offered into evidence; RSMo. §490.300 (deed acknowledged or approved and recorded, though not recorded within one year from the date thereof or not recorded more than 20 years prior to offer, may be read in evidence where the court has satisfied the "person who executed the instrument is the person therein named as Grantor"); RSMo. §490.320 (copy of Deed in court transcript admissible upon proof of necessary circumstances); RSMo. §490.380 (Deeds recorded more than 30 years before March 28, 1874, may be received in evidence); and RSMo. §490.410 (instruments acknowledged or approved may be read in evidence without further proof).

Recitals in deeds as to heirship are not included within this section because RSMo. §490.370 requires the maker of a recorded Deed be unavailable before receipt of recitals as to heirship contained in such deed. Such recital, however, would be subject to consideration for admission under the exception known as "statement of personal or family history excepted from hearsay rule where declarant in unavailable."

PRACTICE TIP:

If you are in court testifying and you researched the land records, you had best be allowed to rely on that document to support your "opinion".

XV. EXCEPTION 16: STATEMENT IN ANCIENT DOCUMENT

Ancient documents are an exception to the hearsay rule, when properly authenticated (which also may arise by qualification pursuant to the authentication arm of the ancient document's rule, or pursuant to statutory authentication of execution, e.g., RSMo. §490.360 and §490.380).

A deed does not need to be recorded to pass or convey good title! [Except a Beneficiary Deed].

It is also a familiar rule of evidence that the recitals in ancient documents are evidence of the facts stated therein..." Anderson v. Cole, 234 Mo. 1, 5, 136 S.W. 395, 396 (1911) (a recital of consideration in deed was evidence of the payment of value for the land). The document must be more than 30 years old. Davis v. Wood, 161 Mo. 17, 30-33, 61 S.W.

695, 697-99 (1901). See also Brown v. Weare, 348 Mo. 135, 152 S.W. 2d. 649, 653 (1941) (Recital of consideration in 55 year old deed refuted contingent grant was voluntary).

To be admissible, the document must be free of suspicion on its face and be found in proper custody. Kansas City v. Scarritt, 169 Mo. 471, 487, 69 S.W. 283, 286-87 (1902) (Deed over 50 years old and coming from proper custody "needed no other proof than that it carried on its face"); Davis v. Wood, Supra, 161 Mo. at 27, 61 S.W. at 698 (Deed found in possession of one owner in chain of title, and signatures verified as much as possible).

The rule making ancient documents admissible is not applicable to what is only a copy of an ancient document, in that the threshold authentication of the document is not supported by the authentication arm of the ancient document's rule. Bell v. George, 275 Mo. 17, 32-33, 204. S.W. 516, 520 (1918) (uncertified plat, not purported to be original, inadmissible). See also Laclede Land & Improvement Company v. Goodno, 181 S.W. 410, 413 (Mo. 1915) (record copy of deed not an ancient document).

Missouri Courts have not expressly refused application of the rule to document statements other than recitals in deeds; but, there is authority that recitals in a deed which are unnecessary to the deed are not made admissible by the ancient document's rule. Laclede Land & Improvement Company v. Goodno, Supra, at 413-14. In LeBourgeoise v. Blank, 8 Mo. App. 434, 441-42 (E.D. 1880) it was held that a "survey" made at least 50 years earlier was competent proof of land boundaries recited therein.

XVI. AUTHENTICATION OF ANCIENT DOCUMENTS

Before any document may be admitted under the Ancient Document Rule, as an exception to the hearsay rule, it must be properly authenticated.

To establish the authenticity of any ancient document, the document:

1. Must have been in existence for 30 years or more;

2. It must have been found in proper custody i.e., in a place consistent with its genuineness;

3. It must not have a suspicious appearance; and

4. There must be, if it purports to convey land, some other attendant circumstances corroborating its genuineness – either possession of the land, or some other item of corroboration. Davis v. Wood, 161 Mo. 17, 61 S.W. 695 (1901).

5. It is a familiar rule of evidence that recitals in an ancient document or evidence of the fact stated therein. Anderson v. Cole, 234 Mo. 1, 136 S.W. 395 (1911).

6. Under the general rule of admitting ancient documents in evidence without direct proof of their execution (i.e. how the document was signed, notarized, etc.), a deed which appears to have been in existence for more than 30 years, which is valid upon its face and free from suspicion, and which comes from proper custody, is admissible without the usual regular proof of its execution. Brown v. Oldham, 123 Mo. 621, 27 S.W. 409 (1894).

7. An exception to the rule requiring, as a condition of its admissibility, the authentication of a map or plat, generally by the person making it, exists where the map or plat is an ancient one. An original map or plat, over 30 years old, found in proper custody, authorized and recognized as an official document, free on its face of suspicion is admissible in evidence as an ancient document.

XVII. EXCEPTION 18: LEARNED TREATISES

Missouri, like the great majority of American jurisdictions, views treatises and similar published works as inadmissible hearsay when offered as evidence of the facts stated in them. Superior Ice & Coal Co. v. Belger Cartage Service, Inc., 337 S.W.2d. 897, 905-906 (Mo. 1960) (Trial court property ruled that witness could not read from book on fire protection); Coats v. Hickman, 11 S.W.3rd, 798, 803 (Mo. App. W.D. 1999); Kelly v. St. Luke's Hospital of Kansas City, 826 S.W. 2d. 391, 396 (Mo. App. W.D. 1992). (No error in refusing to allow expert witness, during his direct examination, to introduce the contents of a medical article "to prove the truth of the matter asserted in the article. The Missouri Supreme Court has recognized 'that texts books on technical subjects are not themselves direct and independent evidence'." (Quoting Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W. 2d. 481, 489 (1948)). However, statements in such materials are admissible if offered for a non-hearsay purpose.

If statements from a treatise or similar source are contained in the expert's own treatise, or, are read to an expert witness, and agreed to by the witness, they become evidence of the facts. Berring v. Jacob, 595, S.W.2d. 412, 413 (Mo. App. E.D. 1980) (Upholding procedure whereby medical texts were read to witnesses on cross examination and the witnesses were then asked if they agreed with the statements in the materials; jury was instructed that statements not agreed to were not evidence).

Statements in a treatise may also be referred to by an expert on direct examination as data or background on which he bases his opinion; when so used they are hearsay and not substantive evidence of the facts they assert. Byers v. Cheng, 238 S.W. 3rd 717, 729 (Mo. App. Ed. 2007).

A party has the option of using a treatise on cross-examination to test, impeach or discredit an expert's testimony by reading from the treatise and inquiring of the witness

whether he agrees with the statements read. Gridley v. Johnson, 476 S.W. 2d. 475, 481 (Mo. 1972); Faught v. Washam, 365 Mo. 1021, 291 S.W. 2d. 78, 84 (1956).

The exact language of the text must be used; paraphrasing is not permitted. Foster v. Barnes-Jewish Hospital, 44 S.W. 3rd 432, 438 (Mo. Ed 2001).

A party seeking to use a treatise or article on cross examination must first lay a proper foundation by establishing its authoritativeness through judicial notice, a concession by the witness, or testimony of other experts in the field. Embree v. Norfolk & Western Ry. Co., 907 S.W. 2d. 319, 325 (Mo. App. Ed 1995).

Even if use of a particular treatise or article is proper, statements in such material may not themselves be put before the jury as independent evidence of the facts they assert. Ellison v. Simmons, 447 S.W. 2d. 66, 70-71 (Mo. 1969).

PRACTICE TIP:

If you are a designated expert witness and called to the stand you had best be familiar with the legal or survey principles that have a direct bearing on a key issue in the case.

XVIII. EXCEPTION 20: REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY

This exception to the hearsay rule provides that reputation testimony as to land boundaries or events of general history is not subject to the objection of hearsay. The Supreme Court of Missouri has recognized an "exception to the hearsay rule which admits hearsay if it relates to an ancient matter of public or general interest and if the evidence appears to be in the nature of a tradition or community reputation with reference to a fact or matter relevant to the controversy." Baugh v. Grigsby, 286 S.W. 2d. 798, 803 (Mo. 1956) (Testimony as to boundary properly excluded because "[i]t was a statement which involved only the individual credit of the asserter," and did not take the form of reputation testimony.

Exception for statements as to real property boundaries is limited to where knowledgeable declarant is shown to be deceased in receipt of such statements of living declarant was error. Sinopole v. Morris, 743 S.W. 2d. 81, 86-87(Mo. App. Ed. 1987)

Missouri Court have expressed a willingness to allow the use of reputation evidence to prove the previous use of a road (Jordan v. Parsons, 239 Mo. App. 766, 199 S.W. 2d. 881, 884-86 (1947)). As well as to prove title to land, Southern Reynolds County School District R-2 v. Callahan, 313 S.W. 2d. 35, 38-39 (Mo. 1958) and the location of public and private boundaries. State v. Kurtz, 221 Mo. App. 114, 294 S.W. 117, 120-121 (1927); Baugh v. Griggsby, 286 S.W. 2d. 798, 802-803 (Mo. 1956).

One case suggests that such evidence is admissible only if (1) the persons who made the declarations that convey the reputation in question are dead and (2) the declarations were made before the present litigation began. Jordan, *Supra*.

XIX. SURVEY FRAUD

DORSEY v. RYAN
442 N.E. 2d. 689 (Ill. App. 1982)

Dorsey (Plaintiff) and Ryan (Defendant) are neighbors enjoying a boundary dispute.

> Dorsey's property is: "Beginning at the Northeast corner of the West Half of the Southwest Quarter of said Section 7, and running thence West 80 rods, thence South 44 rods, thence East 80 rods, and thence North 44 rods to the place of beginning, containing 22 acres, more or less.

The Court case resolved around the location of the west quarter-corner of Section 7. In Illinois, a Commissioner of three land surveyors can be appointed to determine the location of loss, obliterated or disputed corners when the adjoining land owners are unable to agree. In this case, one surveyor was appointed by the court to find or re-establish the west quarter - corner.

The court appointed surveyor testified that he "searched" for but did not find either the southwest corner or the northwest corner of Section 7. The case is silent about his efforts to locate the quarter corner in question. The inference is that the court appointed surveyor used little effort to locate the critical corner.

To the West, in the next range, the surveyor testified that he found a stone at the southeast and the northeast corners of Section 12. These stones had been set by a county surveyor and used by others subsequently. Those were sometimes referred to as "locally accepted corners" or "corners of common report".

The GLO notes and plat indicated that the East line of Section 12 was 80 chains (5,280 feet). However, the actual distance between the stones was 5,208.28 (basically a chain short).

As shown in the diagram, the GLO notes indicate the location of the Southwest and Northwest corners of Section 7, relative to the corners of Section 12. The GLO notes indicate that Section 7 was a little over one chain long. However, by utilizing the stones to locate the corners of Section 7, the resulting distance was a perfect 80 chains. The Surveyor testified that he searched a little more along the range line to find the missing chain, but to no avail. The court noted that this search was confined to one or two sections, not the entire range line.

The Surveyor set the Southwest and Northwest corners of Section 7, based on the stones and GLO record relationship between Section 12 and 7, then set the Quarter - Corner in question by measuring 2,640 feet north from the southwest corner of Section 7, a corner that the Surveyor had set.

This obviously resulted in Dorsey (plaintiff) being out of place by 35 feet (half a chain). The trial court focused in on the Surveyor's almost exclusive reliance on the stones which had not been proven to be anything relative to the original GLO corners. The Appellate Court stated: "The Surveyor seems to have placed reliance on the Section corners of Section 12 in the Township adjacent to Section 7, though the evidence clearly shows that these corners were neither original corners nor in agreement with the original field notes... This we conclude was improper." "Improper" is best entitled "incompetence". The Appellate Court further noted the Surveyor's total disinterest in the testimony of locals. "The testimony of the Surveyor is silent on efforts to take the testimony of knowledgeable landowners." Ignoring relevant

evidence in rendering a decision on original corner locations is tantamount to a half-truth, most leading as to material facts, leaving a false impression, not the whole truth or even concealment, in other words, this is fraud.

XX. HOW TO ASSIST THE TRIER OF FACT (JUDGE or JURY)

1. The Surveyor is the "know it all"; certainly not the trial attorney or the judge.

2. Some Circuits have certain types of cases assigned to Judges that handle a particular type of case (i.e. medical malpractice, criminal, real estate, etc.)

3. The attorney can steer the case by making contact with the Court Administrator and explaining the type of case for the Administrator can assign the case to a Judge that specializes in that particular type of law.

4. A litigant has a certain amount of time to disqualify a Judge. Each party has the right to disqualify one judge at any time within thirty (30) days from the date the Judge is assigned to the case and does not have to give a reason.

5. Judges may also be disqualified "for cause" which means that the Judge has a particular connection with a litigant or star witness.

6. The following are some trial practice tips provided to me by a local trial judge:

   (a) All negotiations to settle should occur well in advance of the trial date. Judges are aggravated over having "last minute" negotiations to settle a land dispute.

   (b) The trial attorneys should review proposed exhibits in advance of trial in order to reach a stipulation as to admissibility and to select exhibits that will be admitted into evidence without excessive duplication.

   This would apply to documents in a chain of title, original and retracement surveys or drawings, overhead photography of landscape from google or other photographs of "lines of possession".

   (c) Judges appreciate seeing overhead drawings and pictures showing the record boundary line according to the Deed with an overlay of the boundary lines claimed so that the areas in dispute are clearly shown.

(d) The drawings or survey plats should also have landmarks which will be referred to in the testimony of witnesses such as gates, posts, tangible objects on the ground, etc.

(e) When a Judge begins work on his decision, the Judge prepares what is called "Findings of Fact, Conclusions of Law and Judgment". The findings of fact start with early predecessors and track their way historically to current owners and litigants. The Judges do not like starting out with current owners and going backwards in time.

(f) Testimony as to title history for each parcel at issue should be given in chronological order from the earliest relevant date as to who held title and how that title was held, through each transaction/conveyance up to the present owners or litigants and that testimony should be clearly supported by deeds, names, dates and relevant details.

(g) Issues should not be confused and issues should be discussed with each witness one at a time, without jumping back and forth.

(h) Obviously, testimony should be given and should include who, what, why, where and how as to each contested issue.

(i) The trial attorneys should prepare an adequate pre-trial brief with case law and statute supporting the positions that will be taken during trial.

(j) Attorneys should present good photography and photographic exhibits to avoid having the Judge to walk the property as is allowed by Supreme Court Rule. The trial judge is concerned that it makes it difficult to create an "adequate record" of what the Judge observes during the visit to the boundary line or property in dispute. Make certain that each witness that testifies is familiar with the facts in issue and can clearly relate observations by relating to a plat or photograph of the boundary line or area in dispute.

(k) Have the plat marked with a number and connect it with a photo of that area bearing the same number.

XXI. WHY THE APPLICATION OF GLO PROPORTIONING IS FRAUDLENT OUTSIDE OF THE PUBLIC

GLO/BLM instructions are executed in a vacuum with regard to title or ownership. However, GLO Surveyors are instructed to observe and protect bona fide rights.

Surveyors with extensive experience working in the non-federal arena are especially cautioned that the stability envisioned by this statutory scheme may be different from the concept of stability described in common law boundary cases. Stability of boundaries in the non-federal arena is often given as the guiding principle behind boundary resolution theories such as adverse possession or acquiescence, etc.

The BLM recognizes that different rules apply to the non-federal "arena".

It is common knowledge that "double proportion" will neither place a mark in its original position as set, nor, place a mark in its position indicated by the numbers on the GLO plat. This method is merely an equitable distribution of the alchemy between field measurements, platted returns and original monuments.

The GLO/BLM surveyor, having no other option after an exhaustive retracement effort, has the luxury of "erasing the blackboard" in order to resolve the problem. Proportioning is the prescribed method of witchcraft that they are instructed to follow.

The reason that GLO/BLM surveyors can use proportioning is because they are working with land under a single common ownership. Thus, no conflict is created among a multitude of owners.

Private surveyors perform a similar action through a local subdivision "plat amendment" process. Generally, there must be a common ownership or a merger of title in order to execute an amendment to a plat. This is consistent with title because the owners intend to only reaffix or move proposed boundary lines within their own holdings.

Township plats and GLO notes typically indicate the smallest division measured on the ground was the 640 acres "section" of land. The four corners of each section were set as well as midpoints on the exterior to delineate the "quarter sections". The dash line drawn between these quarter corners on the plat indicate that the lines were protracted or, in common parlance of our time, "calculated".

Aliquot parcels of 160 acres or less may have been conveyed (or patented) without original evidence of the boundary on the ground.

Thus, the GLO/BLM intended for the local surveyor to finish the job of subdividing the section. Next, that the common property corner set in good faith, relied upon as the corner in longstanding and harmoniously identified by the owners is the true "center of section".

Last, there is a potential bomb at the intersection of lines precisely run between the corner corners. GLO/BLM rules only apply when there is no opportunity to conflict with the established title to land (i.e. within the public domain).

Because a new position is created by proportioning, the resulting line through bona fide rights may have a far reaching impact to the established harmony among otherwise amicable landowners.

Some material facts representative of proportioning in the "non-federal arena" are:

1. A position is mechanically computed without regard for *bona fide* rights and occupation;

2. The computed position most likely will not coincide with an original position previously set on the ground;

3. The method is prescribed for use in the "federal arena";

4. Stability of boundaries in the non-federal arena is often given as the guiding principal behind boundary resolution theories.

The use of proportioning is core knowledge to a minimally competent surveyor. Thus, the use of proportioning:

(a) Is a knowingly misrepresentation of longstanding and accepted boundaries outside of the federal arena;

(b) Conceals facts that occupation and testimony may reveal; and

(c) Creates a substantial and unjustifiable risk of harm to others by a conscious disregard for or indifference to that risk.

XXII. EVIDENCE OF OCCUPATION:

Fence line surveyors v. Deed line surveyors

Essentially the disagreement centered on the question of whether "record title" or "occupation" should prevail when the two disagreed.

That ongoing argument deprived the profession of an accepted standard of care. Some surveyors simply located, mapped and monumented the lines of occupation; the adversaries conducted no records research, simply locating, mapping and monumenting the description in their client's Deed.

The profession should focus on the Surveyor's duty to his or her client and to the public with that duty being: to collect, preserve and present all of the evidence which could have an effect upon the boundary, in addition to, collecting evidence of possession and use.

TRIAL TIP: Fill your file with deeds, maps, diagrams, plats, GLO notes, etc., for it proves your efforts.

Simply stated, the possession lines do not agree with written or deed lines, the relationship with written or deed lines to that of the possession lines must be shown. MO Minimum Standards.

The duty to collect, preserve and present the evidence of title does not depend upon the question of acceptance or rejection of such evidence; nor does it depend upon the question of encroachment; and, the duty exists without regard to the relative evidentiary weight assigned. Thus, no matter how "the boundary question" is answered (record, title, occupation, both, neither) and whether or not the evidence is used as a basis of that boundary, the surveyor is obligated to show the occupation/use by their client or by his/her adjoiner. Moreover, the obligation includes locational data pertaining to that evidence at the same level of accuracy/precision as all other evidence of title.

Due in part to the sheer volume of litigation, field trips by the trier of fact (judge/jury) are somewhat rare in city court but more fashionable in rural counties.

The trial court relies on the parties and their lay and expert witnesses to collect, preserve and present all relative evidence. Missouri provided its surveyors with the "right of entry upon or to rural property" and imposed upon the owner or tenant a duty to provide reasonable access without undue delay. The surveyor is, of course, immune from trespass.

The following terminology is useful:

Evidence: Testimony, writings, material object or other things, presented that are offered to prove the existence or non-existence of a fact.

Relevant Evidence: Evidence, including that which pertains to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact of consequence to the matter being decided.

Record Title: Real property rights evinced by one or more documents entered in the public land records.

Fence: A structure or partition erected for the purpose of separating two contiguous estates.

Illustration 1: A common situation where the fence crosses the record title line (RTL) but deviates from it by small amounts on each end.

If the record title line was monumented or mapped as the boundary, the fence could well be used as evidence of the owners' intent to hold to that line and support the surveyor's professional opinion.

If the fence was a block wall with cap stones, it is quite possible that the record title line (RTL) would continuously be on top of them, merely running from one side of the cap stones to the other. It would be hard to imagine that a trial court would instruct the parties to remove the "encroaching" wall and erect one on the "true line".

Illustration 2: A situation wherein the improvements parallel the RTL but remain entirely on one side of the RTL. The court is much more likely to see the evidence of a *deminimus* deviation from the RTL as a claim to it than as a recognition/assertion of a different line.

For example, the brick walkway and patio are significant investments and since the edge of those improvements parallels and nearly coincides with the RTL, it would support an opinion that the RTL would constitute the boundary.

While the evidence shows an absolute deviance from the RTL, the difference is so small as to be meaningless to a trier of fact.

PRACTICE TIP:

Advise client that if fence or object is placed touching the RTL, the neighbor may attach his barrier or fence. Thus, stay off the true RTL.

Illustration 3: Fence is deviating from the lot line per the subdivision plat.

If the original surveyor marked the corner 1 foot east of its intended location and the original purchaser relied upon that, the fence constitutes evidence of the record title (monuments, prevail over the plat/deed).

If, however, the fence was constructed without reference to an "original monument", then the original purchaser must have made the mistake and the plat/deed represents the record title.

Whenever a fence line and the record title line (deed/plat) are not coincident, the Surveyor should ask:

(a) Who built the fence;
(b) When was it built;
(c) Why was it built;
(d) How have the parties treated the fence since it was built.

The evidence, the thorough and complete answers to these questions, is vital since it potentially affects the legal and/or equitable rights of the landowner and may therefore form the basis of the court's ultimate decision.

Illustration 4: The RTL is more than five feet from a parallel hedge.

The presence of a recreational vehicle parked between the RTL and the hedge, as well as the presence of oil stains or lack of grass could be pivotal. Is there a fence in addition to the hedge? Was it permissive use? Is there rent paid for parking? Surveyor is responsible to gather all of the evidence that could affect the boundary.

Illustration 5: Two parcels were created by a Last Will and Testament with the Deed from the Testator calling for 400 feet. Since parcels were created simultaneous, the RTL would be split.

One parcel was sold and the new Grantee/Owner ordered a survey revealing that the Lot is actually 391 feet wide due to the fact the diverted from the RTL.

A preliminary analysis could lean toward an internal boundary at the mid-point, each parcel being considered simultaneously created thus they would share the excess/deficiency proportionally.

The Surveyor gathering all of the evidence would ask:

1. Who built the fence;
2. When was it built;
3. Why was it built;
4. How have the various parties treated the fence since it was built;
5. Are there other improvements.

XXIII. BOUNDARY BY ACQUIESCENCE AKA PRACTICAL LOCATION

A boundary line may not be established by acquiescence unless there is some contention between the landowners over the location of the line as a result of which a boundary is established in which the landowners subsequently acquiesce. Harris v. Divine, 272 S.W.3rd, 478, 486 (Mo. App. 2008); Shoemaker v. Houchen, 994 S.W. 2d. 40, 46 (Mo. App. 1999); Aley v. Hacienda Farms, Inc., 584 S.W. 2d. 126, 128 (Mo. App. 1979).

Direct evidence is not required to show an agreement fixing a boundary line, such an agreement may be inferred from the acts, conduct and from the long acquiescence of the parties. Shoemaker at page 45; Tillman v. Hutcherson, 348 Mo. 473, 154 S.W. 2d, 104, 107 (1941).

Practical location is one member of a group of principles (also including boundary by acquiescence, adverse possession and estoppel) by which the trial court attempts to fix disputed boundaries on the ground.

When doubt exists as to a dividing line between adjacent owners, the contemporaneous and subsequent acts of the parties in establishing or recognizing line as intended by the deed are admissible and of probative force, and acts of adjoining landowners showing the practical construction placed by them upon conveyances affecting their properties are often of great weight. A boundary clearly and convincingly established by "practical location" may prevail over contrary results of a survey.

It has also been stated that when a disputed or uncertain boundary line is fixed by "practical location" it is binding, not by way of transfer of title, but by way of estoppel. The erection of a fence may be evidence of the true location of the boundary line which it was intended to make, an acquiescence in it for a reasonable length of time may become binding on the adjacent landowners, although no adverse possession for the statutory period is proved.

Perhaps the original surveyor of a deed legal description marked boundary lines concurrently with the execution of the deed, but the marked lines are clearly at variance with the legal description in the deed. Alternatively, the parties may be in doubt as to the true location of the boundary line and might have come to an agreement as to the location of the line in question, (possessing, acquiescing and/or agreeing to the presumed line for some period of time, possibly that period required for a claim by prescriptive right).

Two adjoining parties may mark on the ground what they presume to be the actual monuments or bounds called for in their respective deed descriptions some time after the deeds are executed. Or perhaps all evidence of original corner monumentation has disappeared, and ancient fences or other lines of possession are presumed to constitute the best available evidence of the original boundary line.

In one ancient case, property was conveyed by a description so vague as to possibly render it void; no survey was made and the description merely stated "40 acres of land" to be carved out of a 400 acre parcel.

At trial it was admitted that the parties to the original conveyance went out on the land at the time of the sale, and with the presence of witnesses, and there was a mutual agreement at that time to propose lines and corners. The deed was not written for several years when the tract had been occupied for that same period of time. A later survey determined that the 40-

acre tract was actually only a 31-acre tract based upon monumentation and lines of possession.

The trial court found that during the ownership of the land fences were built upon the lines thus indicated by the parties and were maintained ever since. "The parties by this practical location assented to by both, fixed their lines, which were left indefinite in the written contract".

In any application of "practical location", that approaches the realm of parol conveyance of land, the owners may run afoul of the statute of frauds.

When original landmarks are no longer discoverable, the question is where they were located and upon that question the best possible evidence is usually to be found in the "practical location" of the lines, made at a time when the original monuments were presumably in existence and probably well known.

As between old boundary fences and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are.

When questions arise as to the true location of a boundary line, the practical location thereof by the persons interested becomes of highest importance. Is a well settled rule of law, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long period of years will not be disturbed. This doctrine has been adopted a rule of repose with a view of quieting titles and preventing litigation.

In all cases where the boundary is open, and visibly marked by monuments, fences or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties nor their grantees to depart from such line.

The principle of practical location may also be raised when considering those cases where an easement of indeterminate location has been granted yielding another approach to a solution for the wide spread problem of floating or blanket easements. Court rulings of this type take on aspects of "estoppel".

Where the grant of an easement of way does not definitely locate it, it has been consistently held that a reasonable and convenient way for all parties is thereby implied in view of all of the circumstances.

It is a settled rule of law that where there is no express agreement with respect to the location of a way granted (easement) but not located, the practical location and user of a reasonable way by the grantee, acquiescing by the grantor or owner of this servient estate,

sufficiently locates the way, which will be deemed to be that which was intended by the grant/deed of easement.

XXIV. FOUNDATION FOR ADMISSION OF A SURVEY

In Weber v. Johannes, 673 S.W. 2nd 454, (Mo App 1984) it was stated:

1. The survey was made by or under the supervision of a licensed surveyor;

2. With proper qualifications and a foundation for the admission of the survey was laid confirming:

   (a) The years of experience

   (b) The surveyor was registered

   (c) The surveyor was familiar with the land

   (d) The deed records were all reviewed

   (e) With compliance with MO Minimum Standards (Chapter 60, RSMo.)

XXV. WHAT OPINION MAY BE GIVEN BY THE SURVEYOR

In Blumenthal v. Roll, 24 Mo., 113, 117 (1856) the Court held:

The opinion of a surveyor as to the proper location of a concession or grant in INADMISSIBLE IN EVIDENCE to determine location.

The Court held was that a competent surveyor should NOT be allowed to give his opinion as to the location of a boundary, BUT SHOULD STATE THE FACTS, leaving the trier of fact (Judge or Jury) to draw proper inferences from those facts.

XXVI. ARE YOU A "DEED-STAKER"

The term "deed-staker" is a colloquialism for a land surveyor who ignores all other evidence of the location of property lines, except for the bearings and distance in the deed.

The most common example of the deed-staker mentality is the continual need to subdivide a section over and over again, every time a survey of an aliquot part is conducted.

There is nothing in the Federal Law or the State Manual that requires this conduct.

The only result of continually subdividing and re-subdividing a section and pro-rating supposed "lost" corners is that the property boundaries and the section corners will continually move over in time as is shown in the case of Butler v. Coyle, (an unpublished case from Washington).

The deed-staker's school of thought requires that the bearings and distances in the deed be staked out upon the ground even when the results are ridiculous. Called for monuments are to be ignored if they do not conform to the bearings and distances. The idea that a section corner has moved over time is completely ignored even when it is known that the existing section corner was recently set as in the case during 1982. See Adamson v. Innovative Real Estate, 284 S.W. 3rd 721 (Mo. App. 2009). The deed staker proclaimed the long accepted corner as lost and prorated in a new location.

In Butler v. Coyle, both parties traced their title back to a common grantor, Reforestation, Inc. This, of course, implicates the common grantor doctrine and the doctrine of monuments, in that the called for monument in both deeds for the common boundary between what later became the Butler and Coyle properties was the "Lane Road" referred to and in existence at the time of the original conveyance.

The bearings and distances shown in both illustrations are the same bearings and distance that describe the centerline of "Lane Road" in both deeds.

Both deeds began at the northwest corner of Section 5, proceeded by bearing and distance to the centerline of "Lane Road", and then two courses along the centerline terminating at the centerline of Corkscrew Canyon Road.

Both parties at trial stipulated that "Lane Road" had been in the same location since 1961.

Butlers purchased the property first, but in the Spring of 2007, Coyle bought her property. Butlers were in peaceful possession in conformance with the road as the boundary between the two properties.

In October of 2007, Coyle hired a surveyor (we will call him the "expert", for his expert measurement skills), to survey the boundary line between Coyle's property and Butler's property in anticipation of erecting a fence.

Expert began his survey at the then existing Northwest corner of Section 5, which testimony in that case indicated was set in 1982, 32 feet East of the old existing section corner location, because the 1982 Surveyor considered the corner "lost" and that surveyor prorated in the new location.

This new corner was also set subsequent to the subdivision of the property by Reforestation, Inc. and the description for "Lane Road".

Expert puts the property line between Coyle and Butler as shown in Diagram 2 and war commences.

To Expert's credit, the surveyor revealed the discrepancy to both Coyles and Butlers and tried to get them to agree to the road as the boundary.

The only problem is that the line put on the ground by expert is a complete fantasy.

The Appellate Court stated:

At trial, Expert could identify no reason why he relied on the metes and bounds description from the deeds rather than the actual centerline in depicting the boundary line between the Coyle and Butler properties.

The surveyor hired by the Butlers (we will call him "Retrace" for his ability to retrace the existing boundaries) testified that Expert's survey "should have reflected the actual centerline of the road as the boundary, because the road, being a monument, ordinarily takes precedence over an inconsistent metes and bounds description in a deed".

With regard to the northwest corner of Section 5 that was set for the first time by 1982 survey in a place where it never existed before, Retrace testified that it was improbable that the 1982 Surveyor had re-established the Northwest corner at precisely the same point as its earlier location.

Retrace also noted that Expert's survey did not terminate at the centerline of Corkscrew Canyon Road. Expert's survey never will because all evidence that contradict's the measurements in the deed are to be ignored.

The main issue: Whether the road, as a monument, takes precedence over course and distance.

The Appellate Court in its opinion stated: "In cases of conflicting calls in a Deed, the priority of calls is:

1. Lines actually run in the field;
2. Natural monuments;
3. Artificial monuments;
4. Courses;
5. Distances; and
6. Quantity or area."

The only guaranteed result of prorating a “lost” section corner is that you will never be in the original corner position.

The process is not designed to do that. It is designed for an equitable distribution of uncertainty based on new measurements and new math from what, in most cases, in the real world (meaning private practice) or other re-set section and quarter section corners, not original GLO positions.