

Extrinsic Evidence

A surveyor is often required to rely on information that is properly classified as extrinsic evidence. This includes plans, field notes, aerial photographs, parol testimony, and possession boundaries. This workshop will focus on the admissibility, scope, and practical use of extrinsic evidence in determining boundaries.

by

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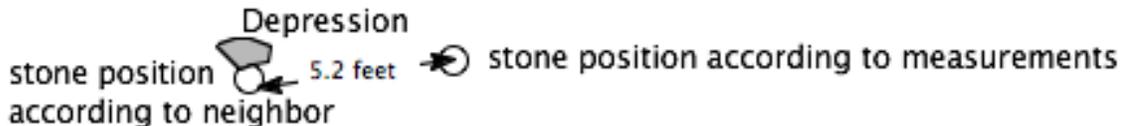
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Evidence

Scenarios

1. A surveyor uses a 1930 aerial photograph showing a fence line to locate a 1900 boundary that is described as “along a fence.”
2. A surveyor search reveals two springs that are approximately 150 feet apart. The deed calls for the “Sawyer Spring.” Several local customers sitting at the lunch counter in the one and only restaurant in the area state the easterly spring is the “Sawyer Spring.” When asked how they know the easterly spring is the “Sawyer Spring” they say “everyone” knows the easterly spring to be the “Sawyer Spring.” The westerly spring is about five feet closer to the deed distance of 210 poles.
3. The deed calls for a sugar maple as the corner. The neighbor claims the deed is mistaken and a marked oak that falls near the deed distance is the actual corner meant to mark the corner. There is a maple stump near the oak tree.
4. The deed calls for the boundary to be “N78 ½ degrees East, 210 poles to a stone...”. The surveyor locates the former position of the stone based on measurements. The neighbor claims the surveyor is mistaken and indicates the former position of the stone was at the edge of a depression. The neighbor claims the corner stone was pulled out of the ground by the tree roots when a large oak tree was uprooted in a storm.



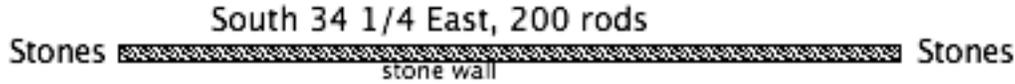
Client's Property

Neighbor's Property

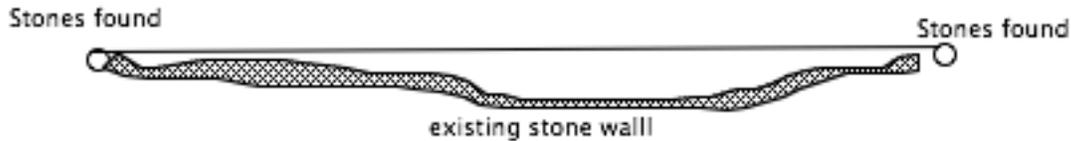
5. A 1940 deed calls for a red maple. Two large red maples are growing close together. Three 65 +/- year old blazes are on the northerly maple.
7. An 1884 deed calls for a “stone” to mark the corner. One surveyor claims the original stone is a stone existing on the top of the stream bank. Another surveyor claims the original stone is a stone located in the center of the stream. The local historical society contains all the survey records of Jacob Leids (1840-1890). An 1883 plan prepared for the common grantor found in Leids’ records show the corner to be a “stone on the bank”
8. A 1920 operative deed calls for the boundary to be S34° 15’E, 200 rods. The

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1920 deed goes on to cite the source for the description as “according to a survey by Jackson Speers dated October 1920.” A survey plat dated October 1920 is located at Amanda Jackson Kreul’s house (great granddaughter of Jackson Speers). The plan shows the following:

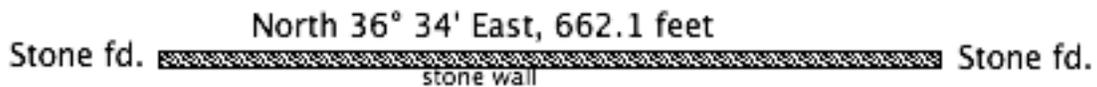


The surveyor discovers the following:

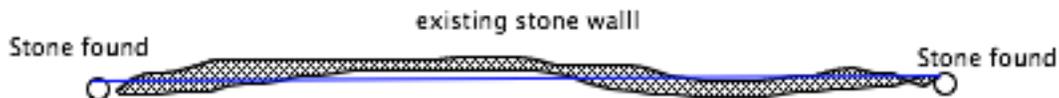


9. The client’s deed calls for “along lands of William Saucier...” The neighbor’s deed calls for “along lands of Jacob Zigler...” The client tells you that the client’s grandfather told the client that William Saucier told the grandfather that Saucier built a fence on the boundary shown to him by the common grantor. This was told to the client by his grandfather when he used to help his grandfather fix the fence. The client was 12-14 years old at the time he helped his grandfather fix the fence. The remains of the fence still exist.

10. A 1935 deed calls for the boundary to be “...stone; thence North 32 ½ degrees East 40 rods to a stone...” A recorded 1950 retracement survey shows the following:



Your retracement survey shows the following:



11. A will probated in 1943 calls for the following: “my property to be divided between my two children.” The surveyor located the property corners to the original property and also located a fence built around 1944 that had been assumed to be the division line between the children. Both properties are now owned by people not related to the testator. The client wants to subdivide her property.

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12. A deed calls for a power line “across the grantor’s property.” The utility company refuses to provide a width to the easement. Utility policy manuals filed with the utility commissioner call for the width for this voltage of power lines to be 75 feet wide.

13. A surveyor has surveyed lot 3 in the Talmar Hills subdivision that was originally surveyed by Daniel Woods in 1960. All the corners are shown to be monument by “i.p.” according to the Woods’ plan. There is a boundary dispute between the surveyor’s client and the client’s neighbor. The neighbor maintains that an existing pin is the original corner marker. The surveyor maintains the original corner marker is a one-inch iron pipe. The surveyor’s opinion is based on over 20 years of experience with Woods’ survey work where Woods has always used one-inch pipe. How can the surveyor rely on the knowledge about Daniel Woods monument preference at trial?

14. A 1920 deed calls for the corner to be a “marked oak.” An unrecorded 1946 retracement survey displays “existing marked oak – dead” at the corner. The client maintains the corner is monumented by a large oak (without markings). Approximately five feet away is the barely discernable remains of an oak stump.

15. A surveyor performed a survey 15 years ago retracing a boundary that is now being litigated. At the time of the retracement survey the surveyor prepared a survey report. The survey report was not mentioned on the plat. It was given to the client who has since lost or misplaced the copy. The surveyor has a copy in the client’s file. Given the numerous surveys that have occurred and the length of time that has passed since the survey of the litigated boundary, the surveyor cannot

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remember many details from 15 years ago. Can the surveyor refer to the survey report at trial. Can the report be admitted into evidence? Would it make any difference if the surveyor does a report for every survey? Would it make a difference if the surveyor only had a worksheet with scribbled notes rather than a report?

16. Janet, a local surveyor, has all the original survey records of Harry Lewen (1890-1930). Janet uses the records for her client's work exclusively and will not provide copies of Lewen's plats to other surveyors. During a deposition, Janet produces a partial copy of a 1910 Lewen plan to show an 1870 deed distance of 121 rods is actually $121 \frac{1}{2}$ rods according to the 1910 retracement survey by Lewen. The ink on most of the Lewen plat is faded and the handwriting is poor. It almost appears that someone has traced over the original writing of the bearing and distance to make it more clear in the copy. Can the opposing side demand to see the original? Can the Lewen plan be used to show that the boundary should be $121 \frac{1}{2}$ rods rather than 120 rods? Can the Lewen plan be used to show the position of the missing original monument should be set at $121 \frac{1}{2}$ rods rather than 121 rods? If Janet refuses or fails to provide the original, what recourse would the other side have?

17. There is a dispute between two lot owners regarding their common boundary. The original operative deeds describe the corner monument to be a "pin." At the site there exist two pins 2.5 feet apart. One pin is one-half inch in diameter. The second pin is one inch in diameter. During the trial, one surveyor testifies that the original surveyor always used one-half inch diameter pins to mark his corners. May the opposing side introduce a plan by the original surveyor showing a lot 15 miles from the disputed parcel that states on the plan that the original surveyor set "1 inch diameter pins" at these corners?

Evidence Notes

Burdens:

1. Burden of Proof: The plaintiff has the responsibility meet the burden of proof. In other words, the defendant has no obligation to present evidence.
2. Burden of Coming Forward: Once the plaintiff has met the burden, the burden of coming forward with evidence will sometimes shift (e.g. after the plaintiff has met the evidence necessary to show adverse possession, the defendant has the burden of showing the plaintiff's use was by permission).

Evidence Required For a Decision:

1. Criminal Cases: Proof beyond a reasonable doubt (highest)
2. Civil Cases:
 - Boundaries: preponderance of evidence required (lowest)
 - Reformation of a Deed/Contract: Clear and convincing (medium)

Evidence-Considerations:

1. Admissibility:
 - a. Hearsay Exception
 - b. Does not violate a rule (e.g., Parol Evidence Rule)
2. Credibility:
 - a. Recorded: Recorded records are given greater weight than unrecorded records
 - b. Unrecorded Records: Unrecorded records are used when recorded records cannot supply the answer or are vague.
3. Principles:
 - a. Other writings or records called for in the recorded document carry the same weight as the recorded document and are considered a part of the record.
 - b. That which is clear cannot be made unclear by language or documents not mentioned in the recorded document.
 - c. Parol evidence can never dispute valid written evidence
 - d. Extrinsic evidence may be used to explain that which is not clear or a latent ambiguity such as the meaning of words and conditions at the time of conveyance.
 - e. No particular words are necessary to transfer property. The description merely has to identify the property, not precisely define the property.
 - f. Deeds stand as a whole and the parts cannot be separated.
 - g. A deed is merely evidence of title not proof of title.

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Parol, Hearsay, & Common Report:

1. Definitions:
 - a. Parol evidence is oral testimony
 - b. Hearsay evidence is an out of court statement used to prove the truth of the matter asserted.
 - c. Common report is evidence that is known and accepted by several people (a community).
2. Principles:
 - a. Title to land can never be proven by parol, hearsay, or common report
 - b. Evidence to title can be provided by parol, hearsay, or common report
 - c. Considerations when using Parol, Hearsay, & Common Report:
 - Better evidence is not available
 - It does not contradict valid written evidence
 - The person relaying it is impartial and would not be affected by the outcome of the decision
 - The person would or has some particular way of knowing the facts
 - The disposition of the person when the statement was made
 - The present disposition of the person

Extrinsic evidence: Evidence outside the writings (deeds) – including parol (verbal) statements, actions of the parties, memoranda of negotiations, unrecorded documents, historical documents and private plans.

1. Extrinsic evidence may clarify that which is unclear but may not alter that which is clear.
2. Extrinsic evidence may be used to clarify an unclear or ambiguous deed.
3. Extrinsic evidence may be relied upon to clarify a specific call or term in a deed.
4. Extrinsic evidence may be used to explain an error in a deed (but not show the deed is in error).
5. Extrinsic evidence may be used to locate a missing monument.
6. Acts of the parties to a deed at the time of the conveyance or subsequent to the conveyance may provide evidence of a deeded boundary location.
7. Evidence commonly relied upon by surveyors may be used to evaluate the meaning or intent of a deed description.

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Federal Rules of Evidence

(For State Rules see http://expertpages.com/news/state_rules_of_evidence.htm)

Rule 702. TESTIMONY BY EXPERTS If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. BASIS OF OPINION TESTIMONY BY EXPERTS The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. OPINION ON ULTIMATE ISSUE Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

(a) Disclosure of Underlying Facts. The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(b) Objection. An adverse party may object to the testimony of an expert on the ground that he does not have a sufficient basis for expressing an opinion. He may before the witness gives his opinion be allowed to conduct in the absence of the jury a voir dire examination directed to the underlying facts or data on which the opinion is based. If a prima facie case is made that the expert does not have sufficient basis for his opinion, the opinion is inadmissible unless the party offering the testimony first establishes the underlying facts or data.

Rule 801. DEFINITIONS The following definitions apply under this article:

(a) Statement. A "statement" is

- (1) an oral or written assertion or
- (2) nonverbal conduct of a person, if it is intended by him as an assertion.

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

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

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

- (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

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- (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition; or
 - (B) one of identification of a person made after perceiving him. A prior consistent statement by the declarant whether or not under oath, is admissible only to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
- (2) Admission by Party-Opponent. The statement is offered against a party and is
- (A) his own statement, in either his individual or a representative capacity or
 - (B) a statement of which he has manifested his adoption or belief in its truth, or
 - (C) a statement by a person authorized by him to make a statement concerning the subject, but not to the principal or employer himself, or
 - (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, but not to the principal or employer, made during the existence of the relationship, or
 - (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admissible, the memorandum or record may be read into evidence but shall not be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Business. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regular conducted business, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the

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recording of documents of that kind in that office.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admissible, the statements may be read into evidence but may not be received as exhibits.

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

Rule 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

Rule 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General Provision. The requirement of authentication or identification as a condition

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precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(7) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilations. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

Rule 902. SELF-AUTHENTICATION Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Rule 1002. REQUIREMENT OF ORIGINAL To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

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Rule 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in Control of Opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. PUBLIC RECORDS The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. SUMMARIES The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.
