1. DISCLAIMER

_I Am Not Your Attorney._

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2. JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony

   1. KNOW THE LAW THAT GOVERNS YOUR PRACTICE

   “It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”


3. JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony

   • Attorneys don’t always know the law either.
   • Attorneys don’t always understand the rules of evidence and procedure.
   • Attorneys don’t necessarily understand what we do.
   • Attorneys don’t necessarily know the elements of negligence.

4. JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony

   The Law That Governs Our Practice:
   • Property Law
   • Boundary Law
   • Contracts
   • Agency Law
   • Torts

5. JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony

   Torts We Can Commit:
   • Negligence
   • Slander of Title
   • Fraud
   • Trespass
   • Conspiracy
   • Others

6. BULL

   _v._

   _PINKHAM ENGINEERING_

   Vermont Supreme Court
Bull v. Pinkham

“There is a substantial body of case law which holds that where the wrongful act of one person has involved another in litigation with a third person or has made it necessary for that other person to incur expenses to protect his interests, litigation expenses, including attorney’s fees, are recoverable.”

*Bull v. Pinkham, 752 A.2d 26 (Vermt.2000).*

JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

2. WHEN TESTIFYING AS AN EXPERT BE SURE YOU BELIEVE IN THE CASE

Don’t be a hired “hitman.” Evaluate the case before accepting the assignment and be sure you can support your client’s position.

CUPP v. HEATH

TENNESSE COURT OF APPEALS

AT KNOXVILLE

E2010-02364-COA-R3-CV

August 11, 2011

JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

3. BE A PART OF THE “LEGAL TEAM” OR DON’T DO THE CASE

If the attorneys aren’t going to treat you as a professional and let you sit at the table with the big boys, don’t agree to be an expert. You will be used and abused and may end up testifying against your better judgment.

LAWSON v. WINEMILLER

Court of Appeals of Ohio

1995 Ohio App. Lexis 2043

May 17, 1995

JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

4. UNDERSTAND THE BASICS OF BEING AN EXPERT WITNESS

The essence of expert witness testimony is that it is opinion based testimony. If you have no opinion or if your testimony is not deemed to be helpful, you may not testify as an expert of otherwise.

JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

• Who can testify as an expert?
• Who can testify as an expert?

14  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
“Faced with a proffer of expert scientific testimony, then, the trial judge must
determine at the outset...whether the expert is proposing to testify to (1) scientific
knowledge that (2) will assist the trier of fact to understand or determine a fact in
issue.”

15  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
“This entails a preliminary assessment of whether the reasoning or methodology
underlying the testimony is scientifically valid and of whether that reasoning or
methodology properly can be applied to the facts in issue.”

16  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
“We are confident that federal judges possess the capacity to undertake this review.
Many factors will bear on the inquiry, and we do not presume to set out a definitive
checklist or test.”

17  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
• What is your liability for testifying in court?

18  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
• It’s primarily emotional and professional.
• Whoever you’re testifying against will probably hate you the rest of their natural life
  and beyond.
• Your professional reputation can go either way.
• You will have limited immunity (or privilege) when testifying.
• Perjury is a crime.

19  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
• Do you have to be a licensed land surveyor to testify as an expert on surveying?

20  HANNEMAN v. DOWNER
Nevada Supreme Court
871 P.2d 279
March 30, 1994

21  Hanneman v. Downer
“Moreover, the district court expressly disbelieved Downer’s testimony and relied
Moreover, the district court expressly disbelieved Downer’s testimony and relied instead upon the testimony of Neil Forsythe, a cadastral surveyor for the BLM, who indicated that the standard of care requires a surveyor to establish the four corners of a given section by identifying the location of the original survey monuments.”


Downer contends that Forsythe was not qualified to render an opinion as to the standard of care because he is not a licensed surveyor in Nevada. Downer’s contention lacks merit for two reasons: First, a person need not be licensed to qualify as an expert; rather, the witness must simply possess “special knowledge, skill, experience, training or education” relating to the subject matter. Forsythe, a BLM surveyor for over thirty-five years, was qualified to testify on the subject of surveying methods.”


Second, employees of the federal government who have been authorized under federal law to conduct surveys need not be licensed unless they are performing private surveys within the state.”


Can you be excluded from the courtroom during the testimony of others?

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or (d) a person authorized by statute to be present.

Several categories of persons are excepted from the rule. ... The category contemplates such persons [not being excluded] as an agent who handled the
Several categories of persons are excepted [from the rule]. ... The category contemplates such persons [not being excluded] as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.

27 JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

FEDERAL RULES OF EVIDENCE

Article VII. WITNESSES

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

28 JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

5. ASSUME THAT YOU WILL BE ASKED THE "ULTIMATE ISSUE" IN THE CASE

- The “Ultimate Issue” in any boundary dispute case is the “property” boundary between the disputing parties.
- The “Ultimate Issue” in a negligence case is “did the work fall below the standard?”

29 The Ultimate Issue Rule

Federal Rules of Evidence

Rule 704.

Opinion on Ultimate Issue. (a) Except as provided in subdivision (b), 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.

30 The Ultimate Issue Rule

West Virginia Rules of Evidence

Article VII. Opinion and Expert Testimony

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

31 The Ultimate Issue Rule

"In all courts, evidence is the purview of the jury (or judge as 'trier of the facts' if there is no jury); the law is always in the purview of the court. A Georgia decision permitted the surveyor to testify as to his opinion on the ultimate issue of the case without invading the province of the jury, so long as the subject matter was an appropriate one for opinion evidence. This is quite unusual. North Carolina still retains the majority approach in that the expert land surveyor cannot give an opinion as to where a true
for opinion evidence. This is quite unusual. *North Carolina still retains the majority approach* in that the expert land surveyor cannot give an opinion as to where a true boundary line is located, for that decision is the ultimate fact in issue to be determined by the jury from the evidence presented during the trial.”

### The Ultimate Issue Rule

“Rule 704, provides that opinion testimony *is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.* This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact.”
Green Hi-Win Farm, Inc. v. Neal, S.E.2d 614, 616, 617 (N.C.App. 1986).

### The Ultimate Issue Rule

“No witness can give opinions on the ultimate fact that is being tried. Permitting an expert to tell the members of the jury what they must decide is usurping their exclusive rights. ... The surveyor is more or less limited in the responses to the questions asked.”

### The Ultimate Issue Rules

“A Mississippi court ruled on the question of whether the surveyor could be asked, ‘Where is the true line?’ The court replied: *This is not a matter about which they could give their opinion.”*

### The Ultimate Issue Rules

Mississippi Rules of 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.

### The Ultimate Issue Rule

Mississippi Rules of Evidence
Commentary to Rule 704.
Rule 704 abolishes the “ultimate issue rule” which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it ‘invades the province of the jury.’

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ultimate issue rule. An opinion is no longer objectionable solely on grounds that it ‘invades the province of the jury.’

37 The Ultimate Issue Rule
Mississippi Rules of Evidence
Commentary to Rule 704.
The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time.

38 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
6. KNOW AND UNDERSTAND THE “STANDARD OF CARE” FOR PROFESSIONAL LAND SURVEYORS
What a reasonably prudent surveyor would do under like of similar circumstances. The “reasonable man” standard.

39 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Standard of Care
“It is the duty of a land surveyor in his (her) profession to use that degree of knowledge, skill, and care ordinarily possessed and used by members of that profession, and to perform any service undertaken as a land surveyor, in a manner that a reasonably prudent land surveyor would use under the same or similar circumstance.”
Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.

40 GRAVES v. DOWNEY
Supreme Judicial Court of Maine
885 A.2d 779
November 22, 2005

41 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
7. KNOW AND UNDERSTAND THE EVIDENCE STANDARDS THAT WILL BE USED IN COURT
What a reasonably prudent surveyor would do under like of similar circumstances. The “reasonable man” standard.

42 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
“PRINCIPLE 5. Evidence is not proof. Evidence leads to proof. A consideration of all evidence and conclusions to be drawn from evidence, in accordance with the law of evidence, may produce proof.”
JEFF’S 10 COMMANDMENTS
Expert Witness Testimony

Beyond a Reasonable Doubt (Almost Certain).

Clear and Convincing (Highly Probable).

Preponderance of Evidence (More than 50%, or the Greater Weight).

Substantial Evidence (More than a Scintilla, Less than a Preponderance)

Scintilla of Evidence (The Smallest Trace).

Fed. Rules of Evidence
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 the person 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.

Fed. Rules of Evidence
Rule 802. Hearsay Rule
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. Rules of Evidence
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:
(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.
community, and reputation as to events of general history important to the community or State or nation in which located.

48 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
• The surveyor’s criterion is the best available evidence that a reasonably prudent surveyor in like or similar circumstances would find.

49 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
• There is always some evidence of a corners location, by definition, whatever that evidence is will be the best available evidence.

50 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
“The surveyor must find the best available evidence that determines the location of the deed on the ground. In those areas in which there is widespread obliteration and loss of evidence, it may become necessary to accept evidence of an inferior type, such as hearsay and reputation, but whatever is accepted, it must be the best of that found after an extensive and complete search of the record, the ground, and adjoiners is complete.” Evidence and Procedures at 39.

51 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
“The original location of monuments must always prevail, but that when those monuments have disappeared they must be established by the best evidence the nature of the situation is susceptible of. Extrinsic evidence, such as an old fence, may have so much greater probative force than more recent surveying measurements as to prevail over the latter as a matter of law.”

52 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
“After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons.”

53 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
"Monuments have special significance because monuments indicate the location of property at issue on the ground. The search for monuments must continue until the monuments are located or until there is an explanation for their absence. If necessary, the surveyor should consult former surveyors, landowners, residents, or other knowledgeable parties to determine monument sites or obtain other information tending to show where a piece of property should be located."


"Testimony of neighbors and informed residents concerning boundaries is an important source of information for resurveys. As stated in one treatise, ‘a diligent, thorough, and complete search for all evidence is the fundamental essence of land surveying.’ Through these investigative efforts, the surveyor attempts to reach his or her goal: the ‘location of land boundaries in accordance with the best available evidence’ even though the best evidence may be ‘mere hearsay or reputation.’"


"For a corner to be lost it ‘must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information.’ (Citation omitted). The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position."


"Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location."


"There is no clearly defined rule for the acceptance or non-acceptance of the testimony of individuals. It may be based upon unaided memory...or upon definite notes and private marks. The witness may have come by his knowledge casually or...had a specific
of individuals. It may be based upon unaided memory...or upon definite notes and private marks. The witness may have come by his knowledge casually or...had a specific reason for remembering. **Corroborative evidence** becomes necessary in direct proportion to the uncertainty of the statements advanced.”


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58 □ **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

8. WHEN TESTIFYING AS AN EXPERT, YOU HAVE TO TESTIFY FOR THE COMMUNITY NOT AS AN INDIVIDUAL

The courts aren’t interested in what you would do, they want to know, with “reasonable probability,” what the prudent surveyor would do.

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59 □ **BELL v. JONES**

District of Columbia Court of Appeals

523 A.2d 982; 1986 D.C. App. LEXIS 495

December 31, 1986

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60 □ **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

9. WHEN PROVIDING EXPERT WITNESS SERVICES, MAKE SURE YOUR TESTIMONY WILL BE CREDIBLE

Two mistakes I see land surveyors make all of the time: (1) they start the boundary dispute without ever visiting the property themselves; and (2) they don’t make credible witnesses because their testimony seems nonsensical or simply unbelievable to the courts.

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61 □ **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

10. YOU MUST WIN AT THE TRIAL COURT LEVEL

The facts established at the trial court level will be the facts up on appeal. The appellate court will not overturn the trial court if the trial court’s ruling is supported by substantial evidence.

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62 □ **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

“It is axiomatic that the credibility of a witness and the weight to be given to a witness’s testimony are issues within the province of the jury. This principle applies even when one party classifies the witness’s testimony as self-serving, contradictory, vague, or argumentative. These are factors to be considered by the jury when making its determination of the overall credibility of the witness.”


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63 □ **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

“In considering whether the judgment of the trial court is against the manifest weight of the evidence, the appellate court is guided by the presumption that the findings of
“In considering whether the judgment of the trial court is against the manifest weight of the evidence, the appellate court is guided by the presumption that the findings of the trier-of-fact are correct. As long as the judgment is supported by some competent, credible evidence going to all the essential elements of the case, the judgment will not be reversed by a reviewing court as being against the manifest weight of the evidence.”