Testifying as an Expert
NJSLPS 2015 Half Day Session

Brief Description:
This workshop is designed to familiarize the surveyor with the unique requirements for "Expert Witnesses" in litigation. Not all professionals should or do qualify as experts. The discussion will focus on the issues that differentiate experts from the "garden variety" professional and will offer suggestions for how to be an effective and credible witness.

This presentation will increase the surveyor's awareness of the rules of evidence and the precedents that have been established by the Common Law system. This session is ideal for those who are interested in serving as an "Expert" or for anyone who may wish to become better prepared for the legal process.

Where Do Experts Fit?
- Judicial System is an "Adversary System"
  - Resolution of a Defined Dispute
  - Search for Truth Gleaned from Sworn Statements
  - Evidence is Introduced through Sworn Testimony
  - All Physical Evidence is part of Testimony of some witness
  - All testimony (except Experts) is recollection of remembered perceptions
  - Expert Testimony is Opinion derived from Special Knowledge of the Expert Witness (Based on perceived or assumed facts)
Functions of Key Parts

- Of Adversary System
  - To render a fair conclusion of disputes by application of the law to the facts established by evidence
- Of Attorney
  - To present all of the evidence and the law favoring the party he represents
- Of A Witness
  - To testify truthfully to recalled memories of perceptions (Expert Testimony is the exception)
- Of The Jury
  - To determine the accuracy of the testimony and from that establish the facts
- Of The Judge
  - To make the system work

Generic Litigation with Expert Involvement

- Complaint
  - Define Problem
  - Consider Solutions
  - Identify Parties
  - Determine Form of Action
  - Involve Expert(s)?
- The Answer
  - Consider Necessary Details of Response
  - Necessity of Cross-Complaint
  - Consider Counter Claim
  - Involve Expert(s)?

Generic Litigation with Expert Involvement

- Pre-Trial Matters
  - In Place of Discovery
  - Summary Judgment
  - Motion to Dismiss
  - Pre-Trial Order Signed
- Discovery
  - Depositions
  - Interrogatories
  - Requests for Admission
  - Request to Inspect the Property
  - Identify Witnesses: Lay and Expert
Generic Litigation with Expert Involvement

- The Trial
  - Opening Statement
  - Direction
  - Common Errors
  - Direct Examination of Witnesses
  - Lay or Expert
    - Cross Examinations
    - Possible to Discredit
- Closing Argument
- Charges to Jury
- Verdict by Jury or Ruling by Judge
- Appeal To Higher Courts

PRESENTATION ELEMENTS

1. Why use experts
2. Types of Experts
3. Who sets the requirements
4. What is expected of experts
5. Requirements for being an expert
6. Qualifying Experts
7. Practical suggestions for experts
8. Actual situations
9. Daubert experts
10. Experience & the courts
11. Suggestions
12. Resources (Attached)

Why Experts?

TO PUT YOUR EVIDENCE BEFORE THE TRIBUNAL IN A MANNER SO THE EVIDENCE WILL BE BELIEVED AND YOUR SIDE WILL PREVAIL.
The Team
In 1912 Mulford recognized the team as the attorney and the surveyor.

To bring capabilities that ordinarily would not be routinely available.

To bring a degree of knowledge in a particular area.

To use experts as a “hired gun” giving you a “leg up” with the court system.

To seal testimony.

The best reasoning is to look at the “Rules of Evidence.”

THE TESTIMONY OF THE EXPERT AND THE RULES OF EVIDENCE ARE TIED TOGETHER.

MOST STATES PATTERN THEIR LOCAL RULES OF EVIDENCE AFTER THE FEDERAL RULES OF EVIDENCE.

IT’S SOMETHING LIKE THIS...
Before 1975 every court had its own rules, as did every state. Congress dictated the federal courts develop their own rules that would apply to federal courts only. The Federal Rules of Evidence were originally enacted in 1975. However, the long and rocky road to codifying a uniform set of Federal Rules of Evidence started officially almost 50 years ago in March 1961. At a special session in mid-March, the Judicial Conference of the United States approved a proposal to start an Advisory Committee on Rules of Evidence. That meeting in 1961 was far from the first time such an idea was proposed. It was earlier proposed in 1938, when former Attorney General William D. Mitchell suggested that an “advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.” In the next 20 years most of the leading law schools supported such a move. Later in 1958 the Judicial Conference established a Committee on Rules of Practice and Procedure. In 1961, the Committee on Rules of Practice and Procedure requested, and the Judicial Conference approved, the creation of an Advisory Committee.
The special committee surveyed the history of evidence law in the civil, criminal, admiralty, and bankruptcy fields. The survey found several peculiarities in the history of evidence law through the country’s formative years. For example, until 1933, the federal courts hearing a criminal case used the rules of evidence governing the state where the federal court sat. However, they had to apply the state rules as they existed in 1789, when the federal courts were created. If a state joined the union after 1789, the court had to utilize the state evidence law as it existed when the state joined the union. In bankruptcy law, the Competency of Witnesses Act governed; that is, unless the case involved the examination of “a bankrupt and his wife.”

**THE QUESTION IS WHY ARE THEY TIED TOGETHER?**
If the witness were to read the Federal Rules casually one would get the impression that nothing has changed in the courts with witnesses. THIS IS WRONG. For the first time in federal legal history the Federal Rules identified what were the responsibilities and criteria for witnesses in federal courts. The six rules cover nearly all aspects of witness testimony in the federal courts. Molded in these rules are historic principles of common law governing testimony of witnesses. The expert should understand these rules in order to be an effective witness.

These rules were created as a supplement to historic common law, and in a few instances modified, replaced or clarified some historic principles. The Federal Rules are not complete in themselves. The areas concerning experts were thoughtfully considered by the drafters & were accepted. Subsequently many states adopted these Rules by modifying them or accepting them in Toto.
Every state & every federal judicial district as well as the Supreme Court had their own rules.

These Rules started with

“In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”

The Rules and the expert are intimately tied to each other. The Rules define who can be a witness as well as to what they can testify to. They also (for the first time in writing) identify the requirement for witnesses.
ARTICLE VI. WITNESSES

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness' competency regarding a claim or defense for which state law supplies the rule of decision.

THE KICKER IS

Rule 601 as submitted to the Congress provided that 'Every person is competent to be a witness except as otherwise provided in these rules.' One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision.
RULE 602
NEED FOR PERSONAL KNOWLEDGE

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’ own testimony. This rule does not apply to a witness’ expert testimony under Rule 703.

SO THAT SENDS US TO 703

Rule VII

OPINIONS
AND
EXPERT TESTIMONY

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.
The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.
Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.

AND

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. The expert may also find that depositions may be required. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
What’s Missing?

REGISTRATION

A very few states have added their own requirement to keep “foreign” experts from testifying and require registration in that state.

I believe this is wrong & can be overturned— but it will require a battle.

All you need are two things:

1. MONEY
2. STANDING
Facts or data upon which expert opinions are based may, under this rule, be derived from three possible sources.

1. The first is the firsthand personal observation by the witness, with opinions based thereon by evaluation of the observations as traditionally allowed.

2. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705.

3. The third source contemplated by this rule consists of presentation of data to the expert outside of court and other than by his own perception.

In this respect the rule is designed to broaden and expand the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a surveyor in his own practice bases his opinion on information from numerous sources and of considerable variety, including statements by other surveyors, clients, and friends, reports and opinions from others, including technicians and other surveyors, records, and photographs and reports. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The surveyor who makes professional decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

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**THE EXPERT**

- Consultant Expert: Does not have to be identified, Does not have to tell the court their opinion
- Testifying Expert: Must be identified, Must Tell Opinion, Subject to Cross Examination
Suggestions to the Would Be Expert

Have a personal interview with attorney and client.
Don’t overstate your qualifications.
Don’t call yourself and expert.
You’re knowledgeable and trained.

The **EXPERT** as a **CONSULTANT**

For the Plaintiff
1. This expert should be the first person engaged.
2. Can help attorney to decide if it is a “good case.”
3. If so, then the expert can identify issues & make suggestions.
   (If no expert’s opinion is identified, the case may be dismissed.)
The **EXPERT** as a **CONSULTANT**

For the Defendant
1. This expert should be the first person engaged after the Complaint is received.
2. It can help attorney to decide if it is a "good case" & prepare the answer & defenses.
3. Failure to raise all defenses or counter claims or joiners can be devastating.

The attorney may use the consultant expert in the capacity of discovering and suggesting non-discoverable evidence.

Non testifying experts usually do not have to be identified.

In 1977 Graham wrote:

*One of the most effective techniques to hinder or avoid discovery is to postpone until the last moment the selection of an expert to testify at trial.*

The Only Person who can establish you as an expert is

**THE JUDGE**
In making the selection; the attorney should ask the expert for a biography. See if a compromise is possible. Check his/her ability to communicate. See how the expert appears in public. Make certain the experts actual qualifications are as good as the “paper qualifications.”

If Accepted
Identify your Responsibilities...
IN WRITING

And then–
Get either a non-refundable or refundable retainer. Work from the retainer and when exhausted you can bill for more.
This is the main criteria your attorney should consider in selecting you.
Prior expert experience.
Keeping current.
Willing to be available for the entire case.
Have staff to complete client’s needs.
Have prior litigation experience.
Be able to communicate orally & in writing.
Be able to recommend research information to your attorney.

Insist on a personal interview with attorney & client.
Listen!!!!!!! To the attorney & client. Get their viewpoints.
Define what your charges will be.
Identify who is in charge.
Identify what you will do & be responsible for.
Identify what records you will maintain.(draft reports, notes)
Provide attorney with list of books you use & rely on.

**WARNING**
IT MAY BE THE OPPOSING ATTORNEY CONTACTS YOU AND EXPLAINS THE CASE. YOU TURN HIM DOWN.
THEN YOUR ATTORNEY CONTACTS YOU AND YOU ACCEPT . DO NOT GET INVOLVED WITH A CONFLICT OF INTEREST PROBLEM.
To Assure you get paid

Get a retainer—either refundable or non-refundable
Work from the retainer
YOU HAVE TO REMEMBER
YOUR CAPABILITIES & knowledge are
YOUR POT OF GOLD

TESTIMONY

Under the FRE 803 the guides for the expert to formulate A BASIS OF OPINION are the facts or data in the particular case upon which an expert bases an opinion. These decisions or opinions can be predicated or influenced by any type of evidence experts use in formulating their opinions. Such evidence as informal reports, summaries, notes, statistical data, hearsay, so long as it relates to the problem, data that other experts relied on, including depositions.

Once your position is settled then we look at the other aspects.
Find out if you will be a testifying witness.
OR
You will be their expert in court.
Plan on the following. The opposition will want a complete CV and then a DEPOSITION.

Find out who will be the opposing Expert(s) and research what they have done and take an unbiased view.
**A SPECIAL NOTE TO CONSIDER**

There may be instances when both parties will contact you to be their expert. One side wants your opinion before the court and the other side to keep you from testifying. Usually the other side will reimburse more to keep you from testifying. **PERSONALLY I SEE NO ETHICAL DILEMMA IN ACCEPTING THAT EMPLOYMENT.**

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**WHAT IS THE CLIENT BUYING?**

YOUR

**TIME**

NOT YOUR

**TESTIMONY**

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**The Deposition**

The Deposition is a discovery tool, usually used by the opposing attorney as a “fishing expedition.” Historically few attorneys conducted depositions. But the new generation love them because they want the other side to do the work and to build up their fees.
IF THEY WANT YOUR DEPOSITION

Insist the other party pay your fees and expenses.
Ask them to pay you at the end of the deposition.
HAVE THE CHECK READY

Depositions In General

Usually, Depositions are taken by the opposing attorney, by notice to you or your attorney.

NEVER NEVER NEVER NEVER NEVER
ATTEND A DEPOSITION WITHOUT YOUR ATTORNEY.

WHY DEPOSITIONS?

Prior to the FRE there were unwritten steps an attorney had to perform before a deposition could be used in court. Now under FRE 613(a) this is all changed.

Subdivision (a). The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, 52 Cornell L.Q. 239, 246–247 (1967); McCormick §28, 4 Wigmore §§1259–1260. Both oral and written statements are included.
Rule 613. Witness' Prior Statement

- (a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness’ prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party’s attorney.

- (b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness’ prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party’s statement under Rule 801(d)(2).

Uses of Depositions

1. Trial testimony
2. Admissions
3. Impeachment of prior inconsistent statement
4. Refreshing recollection
5. Past recollection recorded
6. Guiding the witness
7. Cure a selective memory
8. Impeachment
9. Basis for expert testimony

You should be served by a Subpoena to tell that you are going to be deposed. You can tell them where you want it. MAKE IT DIFFICULT on them.

The person requesting the Deposition usually pays. Ask them to have your payment ready when you finish.

Two types of Subpoenas. Know the difference:
   - bring yourself
2. Subpoena duces tecum.
   - bring yourself & all your documents.

READ THE DOCUMENTS
NEVER

If your deposition is taken never waive reading it.
You have the right to have a copy of your Deposition to read and correct
BUT
You cannot change the essence of it. You can only correct errors. SAY
“I do not waive reading my deposition.”

THE TRIAL

After the deposition the opposing attorney or your client may decide not to continue.

BUT REMEMBER if you continue
In the court room you are on foreign soil. The court room is the attorney’s playground.
If possible, have you designated as a necessary participant. Then you can remain in the courtroom. Many attorneys will evoke the “Rule of sequestration.”(That is you cannot hear any other person’s testimony.)
A Personal Opinion

Since your testimony has been “sealed” with the deposition — You are committed to your opinion.

You should be able to hear the opposing witnesses to evaluate their testimony.

NOW THE TRIAL

Most litigating attorneys wholly agree the most difficult part of a trial is the examination of their own expert’s DIRECT TESTIMONY and the CROSS EXAMINATION of the opposing expert witness.

THE TRIAL

The following apply at trial or at depositions.

First impressions are important.
Enter the deposition or courtroom with dignity.

Dress appropriately — No field clothes

1. TAKE OFF YOUR HAT
DO NOT DRESS LIKE A HOBO
OR ELVIS IMPERSONATOR.
II. TELL THE TRUTH.
REMEMBER YOU TOOK AN OATH TO TELL THE TRUTH.
III. DO NOT BE AN ADVOCATE.
TRY TO PROVE THE OPPONENTS CASE AS HARD AS YOU TRIED TO PROVE YOURS.
IV. BE CASE SELECTIVE.
ONLY TAKE THOSE CASES YOU ARE COMFORTABLE WITH. DO NOT GO BEYOND YOUR CAPABILITIES.
V. BE PREPARED
VI. RESPECT THE COURTROOM

VII. TESTIMONY– DIRECT EXAMINATION
VIII. TESTIMONY– CROSS EXAMINATION

LISTEN
TO THE ENTIRE QUESTION
THEN ANSWER

IX. FOLLOW THE JUDGES ORDERS
X. DON'T LEAVE LOOSE ENDS.

How about a true tale?
Several years ago this little “ol” grandmother was subpoenaed to testify at trial on a murder case.

PROSECUTOR : Do you know me?
WITNESS: Yes, I do know you, Mr. Williams. I’ve known you since you were a boy, and frankly, you have been a big disappoint to me. You lie; you steal and you cheat on your wife. Also you manipulate people, talk about them behind their backs. You think you are a big shot. You don’t have the brains of a monkey to realize you will never being more than a two bit shyster lawyer and a paper pusher.
**YES, I KNOW YOU...**

Foolishly he then asked

Do you know the Defendant’s Lawyer?

She replied

Yes, I do. I’ve known Mr. Bradley since he was 7 years old. He too is a bigot, he has a hidden drinking problem, he is unable to build a relationship with any woman. He has been married twice, and is having sex with three women, one of whom is your wife. Yes, I know him.

He was **STUNNED**

He then pointed to the other attorney & asked

PROSECUTOR: Mrs. Allen, do you know the defense attorney?

Taking a deep breath she responded;

"I've know Mr. Bradley since he was a boy. I have found him a bigot, he is lazy, and also has a serious drinking problem. I do know he is one of the worst lawyers in the county. Not to mention he has cheated on his wife with three women in town, one of them was your wife.

**YES, I KNOW HIM.**

Flabbergasted the Judge called both attorneys to the bench and said

**IF EITHER OF YOU TWO FELLOWS ASK HER IF SHE KNOWS ME...**

**I WILL PUT BOTH OF YOU IN JAIL WITH NO HOPES OF PAROL.**

**MORAL OF THIS STORY:**

**NEVER ASK A QUESTION YOU DO NOT KNOW THE ANSWER.**
EXAMPLE

Q: DO YOU KNOW YOUR NAME?
A: YES
YOU ANSWERED THE QUESTION. YOU KNOW YOUR NAME.
BUT HERE IS WHAT HE SHOULD HAVE ASKED.
Q: WHAT IS YOUR NAME?
A: MY NAME IS

1. Do not mingle with the opposing party.
2. Only Bring to court what the attorney suggested.
3. Sit quietly and TRY to make no distractions.
4. Sit where your attorney can contact you.
5. Bring a pad and pen to make notes for the attorney.
6. DO NOT MAKE FACIAL GESTURES.

7. HAVE A GLASS OF WATER AVAILABLE.
8. USE THE REST ROOM BEFORE YOU TESTIFY.
9. SPEAK UP.
10. USE PROPER ENGLISH.
11. DO NOT TRY TO THINK AHEAD OF THE LAWYER.
12. BELIEVE IN YOUR CLIENT’S CASE.
13. NEVER TESTIFY WITHOUT GOING TO THE FIELD.
14. BEFOREHAND SEE THE OPPOSING ATTORNEY & JUDGE AT WORK.
15. KNOW YOUR CASE.
16. KNOW YOUR OPPONENT’S CASE.
17. ON CROSS—COUNT TO 5—THINK—ANSWER.
18. PAUSE BEFORE YOU ANSWER—GIVE YOUR ATTORNEY A CHANCE TO OBJECT.
19. IF YOU NEED NOTES—BRING THEM.
20. PLAN WHAT YOU WILL BRING TO THE BOX.
21. GO OVER USING VISUAL AIDS BEFORE TESTIMONY.
22. SPEAK IN A CONVERSATIONAL TONE.

AND FINALLY

23. IF YOU DO NOT UNDERSTAND THE QUESTION. SAY SO.
24. A SUITABLE ANSWER IS “I DON’T KNOW.”
25. YOU HAVE THE RIGHT TO FINISH ANY QUESTION ASKED BY THE OPPOSING LAWYER.
26. YOU WILL BE ASKED: “Are you being paid for this testimony?”
   OF COURSE YOU ARE BEING PAID FOR YOUR TIME, —SAY SO.
27. AND FINALLY
   LISTEN-PAUSE   LISTEN-PAUSE

ON DIRECT & CROSS

QUESTIONS ASKED BY YOUR ATTORNEY TAKE YOUR TIME TO RESPOND
ANSWER WHAT IS ASKED.
IF YOU ARE HAVING PROBLEMS GO TO THE LATRINE.
DO NOT SAY: HONESTLY; BELIEVE ME; TO TELL THE TRUTH
DON’T BE NERVOUS.
1993  The year that changed the experts

Prior to 1993, the test for expert testimony was the Frye Test that was a USCA decision handed down. Defendant was convicted of second degree murder and argued on appeal that the trial court erred by refusing to allow an expert witness testify as to the result of a systolic blood pressure deception test taken by defendant. The court affirmed defendant’s conviction. The court held that defendant failed to establish that the test was demonstrative and not merely experimental. The systolic blood pressure deception test had not gained the requisite standing and scientific recognition among psychological and physiological authorities at the time of trial to justify the introduction of expert testimony regarding the test.

The opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it. When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.
While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Then in 1995: DAUBERT

Petitioners appealed an order from the United States Court of Appeals for the Ninth Circuit, which affirmed the trial court’s grant of summary judgment for respondent drug company. Petitioners challenged the finding that its experts’ opinions were inadmissible as unreliable where opinions were based on recalculations of study data and such recalculations had not been subjected to peer review or published.
The court must interpret the legislatively enacted Federal Rules of Evidence as it would any statute. “Relevant evidence” is defined as that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401. The Rules’ basic standard of relevance thus is a liberal one.

Nothing in the text of Fed. R. Evid. 702 establishes "general acceptance" as an absolute prerequisite to admissibility of scientific evidence.

Today’s Standard
Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge under Fed. R. Evid. 702 that will assist the trier of fact will be whether it can be (and has been) tested. Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry. Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.
BUT---- IT CAN BE FUN—INTERESTING AND EDUCATIONAL.

In 1912 A.C. Mulford stated the two traits that surveyors must possess are

   PATIENCE & COMMON SENSE
To these I would like to add one more, that is
   HONESTY

ONE LAST PRINCIPLE...AS DECREED BY WILL ROGERS

   NEVER PASS UP A CHANCE TO SHUT UP.

THE END
REALLY, THE REAL END
DEPOSITIONS AND THE SURVEYOR

BY

WALTER G. ROBILLARD, RLS, Esq.

Today, depositions are one of the most important forms of discovery in a trial and also a means of preserving testimony or in some instances they may provide as a "fishing expedition" for the opposing party to find out more about you or your case in which you are testifying. Some people use the term deposition to include an affidavit, but they are not the same. An affidavit is nothing more than a written declaration of facts, made voluntarily, and confirmed by an oath of the party making it. It is not considered as a part of the judicial process.

A deposition is testimony given, out of court, under oath, but with the approval and sanction of the court. It is an extension of the power of the court. It is done upon request of an attorney on a witness, usually an adverse witness, and with the full power and authority of the court. A deposition is usually taken by an attorney on an adverse party.

Depositions are used for many purposes, before, during and after trial. Such uses may include finding out more or unknown facts about the case from the opposing side, or they may be used in cross-examination or to discredit testimony. They may also be used, if permitted to supplement or act in the place of a witness who is unable to be available at the trial.

SCOPE OF THE DEPOSITION:

Depositions are and can be expensive. Some attorneys abuse
the deposition process with unusually long and time consuming depositions, that are nothing more than a harassing maneuver. Some courts are very liberal with depositions, while some are very restrictive. It is important for the person being deposed to know the rules of discovery. And it is very important for the attorney to also know those same rules but to know the opposing attorney and witnesses. It is very important that by having a basic knowledge of the rules of discovery, the attorneys must follow the rules. The Federal Rules of Evidence, Rule 32 comments on the use of depositions in court. Rule 32 (a) (1) states "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the person being deposed as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

The individual attorney and surveyor must understand that each court may have some local rule or modifications that may be very important. In one state, two Federal District Court permit unlimited length of depositions while the third limits a deposition to four hours for each dependant. The trial judge may also set the rules or parameters for each deposition. In one instance when there were over 50 listed witnesses, the judge limited total deposition to six hours of actual, clock, time.

As can be seen the court have a wide latitude or discretion to determine the scope of discovery, including depositions.

The attorney who deposes a witness must be quick and agile on his legal feet. Depositions require great legal skill on the behalf of the attorney, but can be devastating on the behalf of the witness. Questions must be planned and orchestrated. The opposing
attorney must be quick to prepare the witness and to make certain that as little harm as possible is done at the deposition.

The forester must be totally prepared for a deposition, in that one should understand the purposes and the depth of the deposition.

When you have been asked to be deposed, either as a party or as a witness, the following are general instructions that may be helpful to you as a witnesses or as a party. Certain portions are applicable only to a witness who is to be questioned about personal involvement in the pending litigation. The attorney personally should review the facts of the case with the witness before the deposition, but there is no reason or requirement that it be done. The witness may find that he/she has never talked to person about the case in question.

First, any person being deposed should never attend the deposition without being accompanied either by the client’s attorney or by a personal attorney. The person should review certain procedures and know proper conduct.

WHAT IS A DEPOSITION

A deposition is the taking of oral testimony of a party or witness, under oath, before the actual trial. A court reporter will be present to record all of the lawyers' questions and the answers or responses, which later will be typed and presented in booklet form. If the trial warrants it, one may find that the deposition may also be video taped. If a deposition is video taped then be prepared for extensive fatigue due to lights. Many of the taped
depositions require floodlights and this could add possible fatigue. Remember no longer will only the words be recorded, but your actions, gestures, facial expressions and complete body language will be seen by those who use the deposition.

HOW CAN YOUR DEPOSITION BE USED

You are being examined, and your conduct and appearance as well as your answers will be used by attorneys for both parties to evaluate the case before trial and, it may be used as a possible settlement tool for both sides. In the event of trial it may be used as testimony or it may be used for impeachment on cross-examination to try to discredit your testimony by showing that it is inaccurate, untrue or is completely different than what you said on other occasions. It will be used in an attempt to possibly discredit you.

REVIEWING AND CORRECTING YOUR DEPOSITION.

Although you will have a opportunity for review and for making corrections to your deposition, numerous corrections that would go to the "meat" of the testimony would seriously undermine your credibility at trial. Therefore, you should avoid the need for any major changes. If it occurs to you that during the deposition you may have made a mistake, then you should take immediate action to inform the attorney questioning you, and correct the discrepancy before you go any further.
YOUR PERSONAL DRESS AND APPEARANCE.

One is always perceived by the first impression. Your personal dress and appearance will affect the other side's evaluation of the testimony you will give, both at the deposition and before a jury. Your dress should be appropriate to your position, and your work, especially if the deposition calls for it to be video taped.

As a professional you should dress in a professional manner, in that field clothes and boots should be avoided, yet you should not look as if you are attending a wedding or a funeral. My personal belief is that a nice appearance is an attribute and the forester can gain many "points" simply by dressing properly.

CONDUCT DURING THE DEPOSITION.

One cannot give individuals check lists of what to do and what not to do, but following are some suggestions that are tried and proven.

a. Always sit up straight. Do not slump in your chair.
b. Avoid unnecessary gesturing. Gestures are not recorded, except on video tape. 
c. Speak up. Do not mumble. 
d. Give positive answers. Do not nod your head for an answer.
   Give yes or no, not uh-huh.
e. Do not chew gum or smoke, or chew finger nails or toothpicks.
f. Remain calm. Do not lose your temper. That is what the attorney wants.
g. Be courteous.
h. No joking or wisecracking. Remain free from trivia.
i. Consider the occasion solemn and avoid getting "chummy" with
opposing counsel. He is not your friend. Remember that.

BEING TRUTHFUL IS THE KEY

First, last and at all time, be truthful in your answers. This means not only refraining from telling a deliberate falsehood, but also means being accurate. Do not guess at your answers. If you do not know the answer, admit you don’t know. You are not there to remember all of the facts, you are there to report only on those facts that you remember. If your memory is weak on a matter but you feel you should know the answer, admit nonetheless that you do not recall.

UNDERSTANDING THE QUESTION.

If you do not understand the question, ask that it be repeated or rephrased. Admit that you do not understand it and ask for an explanation.

LIMITING ANSWERS TO QUESTIONS

Do not answer beyond the question being asked. Do not try to anticipate the "line of questioning". After you have answered the specific question, stop talking and wait for the next question, even if the lawyer pauses as though waiting for additional explanations.

VOLUNTEERING INFORMATION.

Many favorable parts of your case may not be gone into. Don’t feel compelled to volunteer the information. Your case is not being
tried; only your deposition is being taken. If you are asked if you have the time, the proper answer would be "yes" or "no". If you respond by telling what time it is, you would be volunteering information. At the time of your trial your attorney will fully develop all the favorable matters.

DO NOT EXAGGERATE.

Do not exaggerate either your complaints or any point that you are trying to make. It will invariably be turned around and used against you. When questioned about injuries to various parts of your body, freely admit the parts that are not injured. But do not fail to state your true and legitimate pains and problems. This is not the place to be brave about all your injuries either. Be truthful.

PERSONAL BACKGROUND WILL BE EXPLORED.

While many such matters will not be admissible in trial, the opposing attorney is nonetheless entitled to inquire on deposition about such personal things as:

1) marital history
2) educational background
3) religious affiliation
4) employment history (including reasons for changing employment)
5) personal and family income
6) previous residences
7) any arrests or criminal convictions
8) driving record
PREVIOUS CLAIMS OR LAWSUITS.

Generally the only way a previous claim or lawsuit might become admissible at trial is for you to fail to make a disclosure when asked about them on your deposition. That can cause serious problems later. Be certain to discuss this with your attorney before your deposition.

QUESTIONS REQUIRING SPECIAL CAUTION.

-- Questions that assume a fact.

This is the old "when did you stop beating your wife" question. Many questions innocently asked may mistakenly assume a fact you don’t agree with. Be alert to such an assumption on the part of the lawyer asking the questions and promptly advise him that you cannot answer the question asked in that way.

-- Questions in the alternative.

Sometimes a question is asked in the alternative such as "Was the traffic heavy or light". Such a question assumes it is one or the other and in fact it may be somewhere in between. A question such as "was it blue or green" denies any other alternative and can thus be misleading to the witness.

- Paraphrasing by the lawyer.

Some attorneys attempt to summarize a witness’ testimony on a particular subject and repeat it back and ask the witness if that is what he is saying. It is rarely summarized exactly as you said it, and just a missing word or two can make a big difference. Listen carefully to such restatement of your words and resist giving an unqualified "yes" when you are asked if that is what you
have said.

-- Time, speed, distance questions.

Rarely can an accurate estimate be made of time, speed and distance in an event that occurs in a split second such as an auto collision. Be sure your estimates are reasonable if you are able to estimate. If your estimate is a very rough estimate, say so. If you can't make an estimate, say so. Bad estimates can be used against you very effectively, so be very careful.

WHO HAVE YOU TALKED TO ABOUT YOUR CASE?

Do not be defensive and guarded if you are asked who you have talked to about your case. It is perfectly natural and proper to have discussed your case with your attorney, family and similar people. It is equally appropriate that you might have visited the scene of the collision or other event with your attorney, reviewed the deposition questions beforehand, or looked at photographs and the police report of your collision and even have taken measurements and viewed photographs or videotape.

PREVIOUS WRITTEN STATEMENT.

If you have previously given a written or oral recorded statement about how you were injured to the other side, you can expect to be questioned about it.

SKETCHING A DIAGRAM OF THE SCENE OF THE COLLISION.

You may be asked to draw a diagram of a collision or other scene. It will be helpful to have visited the scene to orient yourself and refresh your memory on details and distances. Again,
bad diagrams can be used against you very effectively, so be careful.

OBJECTIONS TO DEPOSITION QUESTIONS.

Never ask your lawyer during the deposition "Do I have to answer that question". If the question is objectionable (which is rare in depositions), your attorney will object without your having to ask.

QUESTIONS BY YOUR ATTORNEY.

In most cases your lawyer will not have any questions to ask you. If erroneous information or impressions have been given during your testimony, your attorney may decide to correct the record, but that is about the only reason for such questions by your own lawyer.

QUESTIONS CONCERNING THE MANAGEMENT OF THE LAWSUIT.

The opposing attorney may ask whether you are willing to be examined by a doctor of their choice, sign an authorization permitting them to obtain tax returns, etc. These questions are more appropriately addressed to your attorney, and while you may want to make it clear that you have no objections to doing so, your answer should be conditioned on its being approved by your attorney or simply refer to your attorney for an answer if your attorney has not already spoken up about the matter.
CHECKLIST TO PREPARE CLIENT/WITNESS FOR DEPOSITION

Scope of Coverage: This is a checklist for quick reference to aid in your personal preparation of a client or witness for deposition. For an explanation of the items contained on this list see the section entitled "Preparing the Client/ Witness for Deposition".

1. DEPOSITION
   -- What is it
   -- How it will be used
   -- Opportunity to correct
   -- Dress and appearance
   -- General demeanor

2. ANSWERING THE QUESTIONS
   -- Necessity of being truthful
   -- Understanding the question
   -- Limiting answer to question
   -- Do not exaggerate
   -- Volunteering information

3. PERSONAL BACKGROUND QUESTIONS WILL BE EXPLORED
   -- Must answer
   -- Much of information will not be admissible

4. QUESTIONS REQUIRING SPECIAL CAUTION
   -- Questions that assume a fact
   -- Questions in the alternative
   -- Paraphrasing by the interrogator
   -- Time, speed and distance questions

5. WHO HAVE YOU TALKED TO ABOUT YOUR CASE

6. PREVIOUS WRITTEN STATEMENTS

7. SKETCHING A DIAGRAM OF COLLISION SCENE

8. OBJECTIONS TO DEPOSITION QUESTIONS
9. QUESTIONS BY YOUR ATTORNEY

10. QUESTIONS CONCERNING MANAGEMENT OF LAWSUIT

As a final note, a deposition can be the climax of a work project that was well done and one in which you can cause the opposing party to have second thoughts about pursuing the litigation, or it can be an experience that will always keep occurring, especially at night in the form of a nightmare.
EXPERT WITNESS DEPOSITION PREPARATION--CHECKLIST

1. Be prepared to review your qualifications, background, achievements, writings, experience, etc. in detail.
2. Is there anything unfavorable in your background that would tend to discredit your opinions, etc.
3. Any previous writings that may appear to be in conflict with opinions in this case.
4. Be prepared to list all information and materials upon which your opinions are based.
5. Opinions must be based upon reasonable probability.
6. Be prepared to explain what assumptions you have made and why.
7. Be prepared to defend both your assumptions and your opinions.
8. You will be asked to explain why you were hired to testify in this case. That is, what specific issue were you asked to address or what were you asked to do. DO NOT GO BEYOND THOSE.
9. Prepare to explain your fee and expense arrangements in this case. YOUR TIME IS FOR SALE NOT YOUR OPINIONS.
10. Avoid contact with the other attorneys. They are looking for any way they can find to impeach you. They are not your friends.
11. When asked questions your answers should be as affirmative as the subject matter reasonably permits. Correct any mistakes as they occur to you. Remember that as a general rule, one cannot ask you leading questions. You need to be responsive and helpful toward my questions in getting your information to the jury.
12. When the opposing lawyer is examining you, do not answer "yes"
or "no" unless that clearly is your answer. If an answer must be conditioned or explained then do so, but avoid being too argumentative or appearing to be a smart alec about your answers. Avoid exaggerations.

13. Avoid involvement in arguments between the attorneys over objections. Remain silent until you have been instructed as to what you are supposed to do.

14. The rules do not permit the other attorney to abuse you. Let your attorney judge the difference between abuse and tough questions and make the necessary objections. You are required to answer tough questions if they otherwise conform to the rules.

15. Answer all the questions that you can, and "I don’t know" or "I don’t remember" are acceptable answers, if true.

16. Review as the expert witness the particular checklist that relates to your specialty.

17. You should be prepared to explain how much or what percentage of your consultation work has been for the plaintiff and how much has been for the defendant.

18. The interrogator sometimes uses obscure technical terms to throw the expert off guard. You should be willing to readily admit unfamiliarity with such a term and/or ask the attorney to define or explain the term he is using.

19. If asked whether you would do the act that the plaintiff or injured party did, you should be aware that this asks you to abolish from your mind all the information you have about the case and all the considerations of which you are aware, and
thus you are being asked to speculate. On the other hand, it is unfair for you to appraise or critique the plaintiff’s conduct because of your superior knowledge, experience and involvement in this case. DO NOT get into discussions of who is right!