The Surveyor's Judicial Role

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County Engineers Association of Ohio

Presented by

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Biography of Gary R. Kent

Gary Kent is Director of Surveying for The Schneider Corporation, a land surveying, GIS and consulting engineering firm based in Indianapolis and with offices in Indiana, North Carolina and Iowa. He is in his 33rd year with the firm and his responsibilities include serving as project and account manager, safety, corporate culture, training, coaching and mentoring members of the surveying staff, and advising the GIS Department on surveying matters.

Gary is a graduate of Purdue University with a Bachelor of Science Degree in Land Surveying. He is registered to practice land surveying in Indiana and Michigan. Gary is chair of the committee on ALTA/ACSM Standards for ACSM/NSPS and is the liaison to NSPS/ACSM for the American Land Title Association. He is also past-president of the American Congress on Surveying and Mapping and a twice past president the Indiana Society of Professional Land Surveyors.

A member of the adjunct faculty for Purdue University from 1999-2006, Gary taught Boundary Law, Legal Descriptions, Property Surveying and Land Survey Systems and was awarded "*Outstanding Associate Faculty*" and "*Excellence in Teaching*" awards for his efforts. Gary is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is also an instructor for the International Right of Way Association.

Gary is in his twelfth year on the Indiana State Board of Registration for Professional Surveyors. He is frequently called as an expert witness in cases involving boundaries, easements and land surveying practice. He regularly presents programs across the country on surveying and GIS topics, and he also writes a column for *The American Surveyor* magazine.

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Synopsis

Only two persons can truly resolve a disputed boundary or title problem. Those persons do not include attorneys, title companies or surveyors. And, in a sense, they do not even include judges and juries - at least not of their own volition. This program explores the role that the professional surveyor can, and arguably should, take in helping property owners establish or maintain their common boundary in the location that they were perfectly satisfied with - at least until the surveyor showed up! We will look at the role of the surveyor as related to boundaries, not only from a statutory standpoint, but also as eloquently expressed by renowned Michigan Supreme Court Chief Justice Thomas Cooley in his seminal 1881 treatise "The Judicial Function of Surveyors." As a part of this, we will review the dynamic that exists between matters of title and matters of survey, including a close look at title insurance. We will also review several examples that demonstrate the problem, and offer an alternative to what is often the standard approach by surveyors. We will outline a new approach that has the surveyor helping property owners avoid the expense and angst of unnecessarily litigating boundaries when there has been acquiescence to an accepted line by both owners.

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The Role of the Land Surveyor in Boundary Determinations

The Regulation of Land Surveying

The definition of surveying in all states allows the registered surveyor to rely upon the work of unlicensed subordinates working under his or her direct supervision. There are relatively few registered surveyors in the United States (probably on the order of 40,000).

The practice of Land Surveying is, in all states, regulated by a state board. Some states, like West Virginia, Maine, New Hampshire and Indiana, have boards that regulate only Land Surveyors. Many other states, however, have "joint" boards that regulate more than one profession – typically engineering and surveying.

Surveying is part Science, part Law and part Art

The **science** aspect is generally the science of measurement – using angle measuring devices (theodolites, total stations), distance measuring devices (electronic distance measuring instruments, steel tapes) and GPS (global positioning system which uses satellites).

The **law** aspects relate to the interpretation and resolution of legal descriptions and boundaries. There are no statutes or legislated laws that tell surveyors how to determine boundaries; the rules for that are from a body of common law derived from hundreds of years of court cases related to boundary disputes and legal descriptions. Surveyors cannot make proper boundary determinations without studying and understanding what the "weight of authority" has been in case law.

The **art** aspect could be said to apply to the judgments and decisions in the field related to where, and to what extent, to look for evidence, and how that information is all presented. For example, having a gut feeling on where to dig to try and find a stone marker set in 1840, or how to most effectively run a survey line from one location across a ravine and river and through the trees to another location.

Surveying can also be seen as part "*doing*" and part "*thinking*." It's one thing to make a measurement; with today's technologies, virtually anyone can make very precise survey-grade measurements. But it's an entirely different thing to understand <u>where</u> to make the measurements from, and to what, and how to apply those measurements to the facts and evidence at hand so a defensible boundary opinion can be made.

The retracement of a boundary is the professional opinion of the surveyor. That opinion is based on the evidence available to the surveyor; and if that evidence changes, the opinion may well change. Evidence comes in many forms – from the writings, from what is found in the field, from verbal and written statements, from measurements and from historical information.

Two competent surveyors faced with the same evidence will generally come to the same opinion, although there are occasions when the surveyors will simply have differing opinions as to how to interpret or weigh certain pieces of evidence. This can result in the two surveyors arriving at different conclusions as to a boundary location. If the surveyors cannot resolve the differences satisfactorily, and if the affected owners are inclined to litigate, a final determination will be made by a court.

Definition of Land Surveying - Ohio

(F) "Practice of surveying" means any professional service that requires the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for the adequate performance of the art of surveying…[1].

Boundaries, "the Status Quo" and the Surveyor

> What constitutes the line, is a matter of law; where it is, is a matter of fact. *Smothers v. Schlosser*, 163 SE 2d 127 - NC: Court of Appeals 1968. [internal citations omitted]
>
> The vocation of a surveyor is limited to the ascertainment of definite lines. He may ascertain where the lines and corners specified in the description of the given tract of real estate actually are. He does not have the power to determine what the terms of such description ought to be. Where the line lies, and where its corners are, is a question, and on which the surveyor, on account of his superior facilities for doing so, may be called upon to officially determine. What the lines and corners are is a matter of law, which courts can alone declare. *Wilson v. Powell*, (1905) 37 Ind.App. 44, 70 N.E. 611.

With respect to boundaries, the surveyor deals with matters of survey, primarily location – the "where" of a boundary. Sometimes the boundary location is not in question – the deed description is unambiguous and there are no issues with the adjoiners. Many times, however, the description(s) require interpretation and/or extrinsic evidence to eliminate or resolve the ambiguities. Either way, we are in the realm of "where" - which falls in the authority of the surveyor on which to give an opinion based on his or her survey.

Alternatively, the law deals with "what" that boundary line is – in essence, what the boundary represents with respect to title (ownership). These concepts of "where" and "what" are often, however, not mutually exclusive. The best example of that is with unwritten rights.

Unwritten Rights – Title Doctrine or Evidence of Intent?

There are a number of means by which boundaries can be established by unwritten means. Yet each of these doctrines would seem to be contrary to the otherwise inviolate Statute of Frauds, which requires that conveyances of real property must be in writing. The courts have found a way around this conundrum; however, by determining that in some cases these doctrines do not necessarily transfer title, but rather merely fix what were otherwise uncertain lines.

In other cases, particularly when the intent of the words in the conveyance is exceptionally ambiguous, they may point to acquiescence, estoppel, parol agreement or practical location as the best evidence of that intent.

When applied in the former manner, these are simply title doctrines, the evidence of which surveyors normally locate, note and show as evidence contrary to the written title.

However, surveyors often neglect to recognize that when considered in the latter manner, this evidence can provide proper guidance when "trying" to resolve a particularly intractable boundary property. Rather, they will harken back to their comfort with mathematics and concoct a solution

[1] Ohio R.C. Chapter 4733 Laws, 4733.01 Professional engineer and professional surveyor definitions

that - relative to the long-standing lines of possession is entirely irrational - but provides a clear means by which they can justify their opinion: Math!

Adverse Possession

Everyone can agree that the doctrine of adverse possession falls in the realm of title, not survey. The necessary elements typically include all, most, or some version of, the following: adverse or hostile, open and notorious, visible, actual, exclusive and with a claim of right or color of title. Some states also require payment of the property taxes due on the area being claimed. The statutory period varies from 3 to 21 years depending on the state, with some states providing for shorter periods if the claimant can show color of title, that the taxes had been paid, and/or if the nature of the possession was especially open.

Courts do not look kindly on the doctrine of adverse possession which is why every single element most be proven - typically by "clear and convincing" evidence. Failure to prove only one of the elements is enough to defeat the entire claim. However, when a claim of unwritten rights is perfected in a court of law, it (1) confirms that the boundary of the ownership has changed from the original written title line, and (2) creates marketable title to the ownership line.

> A party who wishes to acquire title to real property by adverse possession must show exclusive possession and open, notorious, continuous and adverse use of such property for a period of twenty-one years. *Grace v. Koch,* 81 Ohio St.3d 577, 579, 692 N.E.2d 1009 (1988). The burden of proof is on the party attempting to establish title by adverse possession. Id. If the claimant fails to prove any required element by clear and convincing evidence, the claim must fail. Id. at 580. Ordinarily, the determination of whether these elements have been proven rests with the trier of fact. *Thomas v. Wise,* 6th Dist. Sandusky No. S-06-043, 2007-Ohio-3467, ¶ 13.
>
> In establishing the 21 year period necessary for title by adverse possession, a party may "tack" his or her period of adverse use with any period of adverse use by antecedent owners in privity. *Franck v. Young's Suburban Estates, Inc.*, 6th Dist. Ottawa No. OT-02-040, 2004-Ohio-1650, ¶ 23, citing *Zipf v. Dalgarn*, 114 Ohio St. 291, 297-298, 151 N.E.2d 174 (1926). Possession is never adverse or hostile if it is by permission of the owner. *Van Buren v. Worley*, 6th Dist. Lucas No. L-95-049, 1995 WL 704096 (Dec. 1, 1995), citing *Hinman v. Barnes*, 146 Ohio St. 497, 66 N.E.2d 911 (1946). Permission for the use of land may be implied from the facts and circumstances of each case. Id.

Acquiescence, Parol Agreement, Practical Location, Estoppel and Repose

As suggested above, with a few exceptions, the courts view other unwritten boundary doctrines - acquiescence, practical location and parol agreement - as being either manifestations of prior boundary line agreements or the best evidence of an otherwise ambiguous intent. This is contrary to adverse possession which arises out of contentious situations. Even the doctrines of estoppel and repose could be seen as representing boundary line agreements – in essence, inverse agreements, whereby the inaction of one party can be taken as an implied acceptance of a claim by an adjoiner.

Each of the various unwritten boundary doctrines has its own set of specific requirements that must be met in order for a court to perfect a claim of title. Some requirements are problematic in that they require a look inside the mind of the claimant; and some requirements are

counterintuitive. As an example of the former, in some states a claim of adverse possession is defeated if it can be shown that the claimant did not intend to possess someone else's land (i.e., it was 'by mistake"). With regard to the latter, in some states, a parol agreement between two parties to set a common line is not valid if there is no conflict in the written title or if a survey would have otherwise resolved the uncertainty.

Acquiescence

There are several theories that the doctrine of acquiescence is based on. One is the situation in which acquiescence is considered evidence of some prior oral agreement between two adjoining owners who were either uncertain or in dispute over the location of the true boundary. Long acquiescence to a line (usually a fence) by both parties is considered evidence of that parol agreement. In some states, definitive evidence of the dispute or uncertainty must be provided to prove boundary by acquiescence.

Another theory is simply that long acquiescence in a line, without objection by either party (for the statutory period, which can vary state-to-state), establishes the boundary.

Both of these theories seem to essentially rely on estoppel, whereby the adjoiners are prevented from disputing the line because of their - or their predecessors' - previous agreement, or because of their long acceptance to the line.

Finally, if a conveyance is made that mistakenly does not describe to an intended boundary, long acquiescence to the intended line can cause the line to move to the intended line.

> "The doctrine of acquiescence is applied in instances where adjoining land owners occupy their respective properties up to a certain line and mutually recognize and treat that line as if it were the boundary separating their properties." *Ballard v. Tibboles*, supra, at *5. The cases finding acquiescence typically involve a fence erected to demark the boundary between properties, although one case involved a state highway serving that purpose. *Burkitt v. Shepard*, 4th Dist. Pike No. 05CA744, 2006-Ohio-3673.
>
> Like a claim of adverse possession, a claim of acquiescence requires clear and convincing proof. *Thomas v. Wise*, 6th Dist. Sandusky No. S-06-043, 2007-Ohio-3467, ¶ 17. [2]

Acquiescence does not appear as an independent unwritten title doctrine in some states like North Carolina. In those states, acquiescence seems often to be inseparable from the doctrine of boundary by parol agreement (see below). Long acquiescence to a line may also be allowed as evidence of an otherwise ambiguous boundary.

Parol Agreement

In general, parol agreements to set boundaries between adjoining landowners have effect only when there is an uncertainty or dispute as to the true location of the line; however, the exact requirements vary state-to-state and the doctrine is more stringently viewed in some states.

> It is held that adjoining owners, uncertain of the true boundary line, may by parol agreement establish a boundary line, and the agreement is taken out of the statute of frauds if it is executed. 4 I.L.E. Boundaries, § 31, p. 198. "In the absence of fraud, when adjoining landowners agree as to their boundaries and take possession and make

[2] *ALLREAD v. Holzapfel*, 2013 Ohio 3269 - Ohio: Court of Appeals, 2nd Appellate Dist. 2013

improvements accordingly, each is estopped from ascertaining that such boundary is not the true one, even though possession is taken for less than the prescriptive period." 4 I.L.E. Boundaries, § 32, p. 200; *Seaver v. Vonderahe* (1920), 74 Ind. App. 631, 127 N.E. 206. *Scoville et al. v. Hawkins et al.*, 159 NE 2d 307 - Ind: Court of Appeals 1959.

Estoppel

Estoppel is rooted in the courts' propensity to prevent unjust enrichment.

> The doctrine of equitable estoppel is invoked when the following circumstances are present: (1) a false representation or concealment of material facts made with actual or constructive knowledge of the true state of facts; and (2) the representation is made to one who is without knowledge or reasonable means of knowing the true facts with the intent that he or she will rely upon it; and (3) the second party must rely or act upon such representation to his or her detriment. For silence to give rise to the application of the doctrine, there must not only be an opportunity to speak, but an imperative duty to do so. *Kline v. Kramer*, 386 NE 2d 982 - Ind: Court of Appeals, 3rd Dist. 1979. [internal citations omitted]

> The circuit court also concluded that even if the coparceners had not intended to include the interlock acreage in the partition of the Evans thirty-acre tract, Pocahontas had acquired title to it under the doctrine of estoppel by deed. In view of our resolution of the case, we need not discuss this alternative holding of the circuit court. FN 5, *Pocahontas Land Corp. v. Evans*, 332 SE 2d 604 - W Va: Supreme Court of Appeals 1985.

> The essential elements of the affirmative defense of equitable estoppel are (1) a false representation or concealment of a material fact, (2) a lack of knowledge of the true facts on the part of actor, (3) the intention that the false representation or concealment be acted upon, and (4) reliance upon the representations by the party to the whom representations were made, to the party's prejudice and injury. *City of Marshalltown v. Reyerson*, 535 N.W.2d 135, 137 (Iowa Ct. App. 1995).

Practical Location

Boundary by practical location does not appear as an independent unwritten title doctrine in some states, but it is addressed in other states. In those states, it seems to be a doctrine that relates to other unwritten boundaries such as those by acquiescence, parol agreement and estoppel.

> Where a fence has been treated and acquiesced in as the correct boundary line between adjacent owners for fifteen years the boundary line ought not to be disturbed even if there were some variance from the true line, and a long established fence is better evidence of actual boundaries settled by practical location than a survey made after the monuments of the original survey have disappeared. And where a boundary line has been recognized and acquiesced in for fifteen years it would not be disturbed by reason of new surveys." *Hanlon v Ten Hove*, 235 Mich 227, 230; 209 NW 169, 170 (1926)

> "A party can establish a boundary by practical location in three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by

acquiescing to that agreement; or (3) by estoppel." *Slindee*, 760 N.W.2d at 907 (citing *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977)).

To establish a boundary by practical location through acquiescence, "a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations," which is 15 years in Minnesota. "The acquiescence required is not merely passive consent but conduct from which assent may be reasonably inferred." *Id.* Besides arguing that respondents acquiesced in the gravel road as the boundary line because they knew about the garage, concrete slab, and shrubs on the land in dispute and did not object, appellants did not present any evidence of conduct on the part of respondents from which to infer that they acquiesced in the new boundary line. Accordingly, the district court did not err in determining that appellants failed to provide evidence of direct conduct, as opposed to mere passive consent, from which assent could be reasonably inferred.

To establish a boundary by practical location through express agreement, a person must prove that "an express agreement between the landowners set an `exact, precise line' between [their properties] and that the agreement had been acquiesced to `for a considerable time.'" "Without a specific discussion identifying the boundary line or a specific boundary-related action clearly proving that the parties or their predecessors in interest had agreed to a specific boundary, a boundary is not established by practical location based on express agreement." "[A]n express agreement requires more than unilaterally assumed, unspoken and unwritten mutual agreements corroborated by neither word nor act." Appellants argue that the district court "failed to recognize the specific boundary-related actions of the parties, including [their] maintenance of the yard up to the road, the construction of a garage, and the placement of a cement slab up to the road, all with no objection by [r]espondents." But again, appellants failed to present evidence that respondents agreed to the new boundary line beyond their passive failure to object to appellants' use of the disputed land.

Finally, to establish a boundary by practical location through estoppel, a person must show that "the parties whose rights are to be barred . . . silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute." "[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other." Because neither party claims to have had knowledge of the true boundary line between their properties prior to the 2001 survey, the district court correctly determined that appellants' estoppel claim fails as a matter of law.

Watkins v. Patch, Minn: Court of Appeals 2013 (Memorandum Decision, not for publication) [internal citations and quotation marks omitted]

Unwritten Rights and the Surveyor's Role

All of the doctrines that alter ownership by unwritten means represent matters of title, not survey. And title by unwritten means can only be perfected by a court. *If a surveyor decides to act on his or her 'opinion' that unwritten rights have operated and move a written boundary line to conform to that opinion, he or she has stepped over the line - out of survey and into title.*

However, no less than Thomas Cooley, Chief Justice of the Michigan Supreme Court in 1881, wrote:

> *"Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned…"*[3]

Thus, if the surveyor can bring the affected parties together and convince them to acquiesce to a long-established, and ostensibly a long-agreed upon line, then the surveyor might have 'cover' to survey to the agreed-upon line.

In such cases, however, it is virtually a given that the surveyor, after preparing such a survey, should also prepare descriptions and an exhibit showing and describing to the agreed upon line, and then go no further until the owners engage an attorney or attorneys to see that the proper written documents are prepared and recorded memorializing and providing notice of the agreed-upon line. Otherwise, what may have been an agreement in the moment could easily devolve into a dispute later and into which the surveyor will most assuredly be dragged into.

Additionally, there are very important, but not always obvious issues such as the treatment of mortgages, setback requirements, and jurisdictional regulations such as "lot line adjustments" that might affect - or be affected by - the new line and which must be properly vetted by an attorney.

Also, if the elements of whatever doctrine the surveyor relied on as the basis for his or her opinion were actually not met (including those elements that impossibly require one to climb inside the head of one or both of the parties), the surveyor is at great risk if the written title line was disregarded and there was actually no acquiescence by the parties to the surveyed line.

But the surveyor may be uncomfortable or concerned about violating standards, practicing law or determining a matter of title. Or perhaps, despite an attempt, the neighbor and client simply could not be convinced to agree to the line that represents the surveyor's opinion. Either way, the surveyor will be left with surveying to the written title line and showing any conflicts with adjoiners' deeds or with occupation/possession. Except in a few states, this is actually what is expected of surveyors, and/or required by state statutes or administrative code/rule (standards).

Either way, no matter what line the surveyor decides to go with, there must be clear communication of the necessary information so the client does not act ill-advisedly and cause a problem with an adjoiner. For example, perhaps there is a five foot overlap with an adjoiner and the client's written title line falls five feet over the neighbor's fence. If the surveyor deems it necessary to monument that location (or if the parties could not otherwise be brought to agreement), he or she had better clearly understand what is going on and advise the client accordingly. Why? Because the client will most assuredly assume that she owns to the rebar and take steps to exercise domain over to that line (5 feet over the fence) to the detriment of the adjoiner's rights.

Surveyors also need to be familiar with what their state courts have said about the nature of boundary line agreements.

[3] The Judicial Function of Surveyors, Thomas M. Cooley, 1881 (included later in this handout)

Marketable Record Title Acts

Marketable Title Acts exist in about 20 states under a variety of names. The purpose of these acts is to allow for the removal of potential title defects of 'ancient' origin by essentially enacting statutes of limitation that act to clear away obscure property rights that might otherwise cloud title.

Under a Marketable Title Act, it is possible to extinguish ancient interests, whether they are revealed in the present day or in the future, unless the holders of such interests act to protect their interests by recent recordation.

Marketable Title Acts vary substantively in the states that have them. Differences include the property interests that are subject to the act, the statutory period of limitation, the period of time allowed for recording of notices preserving rights, and exceptions contained therein.

According to one source, states that have some form of Marketable Title Act include Colorado, Connecticut, Florida, Kansas, Illinois, Indiana, Iowa, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

Marketable Record Title Act (Selected Sections) – Ohio

Section 5301.47 Marketable title definitions. [4]

As used in sections 5301.47 to 5301.56, inclusive, of the Revised Code:

(A) "Marketable record title" means a title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code.

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording," when applied to the official public records of the probate or other court, includes filing.

(D) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgagee, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(E) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(F) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

[4] Ohio Revised Code, Title 53 Real Property, Section 5301.47 Marketable title definitions.

Section 5301.48 Unbroken chain of title of record[5]

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.

A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in:

(A) The person claiming such interest; or

(B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Section 5301.49 Record marketable title[6]

Such record marketable title shall be subject to:

(A) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in section 5301.51 of the Revised Code;

(B) All interests preserved by the filing of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 5301.51 of the Revised Code;

(C) The rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title;

(D) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title or record is started; provided that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 5301.50 of the Revised Code;

(E) The exceptions stated in section 5301.53 of the Revised Code.

Section 5301.50 Interests prior to effective date of root of title[7]

[5] Ohio Revised Code, Title 53 Real Property, Section 5301.48 Unbroken chain of title of record

[6] Ohio Revised Code, Title 53 Real Property, Section 5301.49 Record marketable title

[7] Ohio Revised Code, Title 53 Real Property, Section 5301.50 Interests prior to effective date of root of title

Subject to the matters stated in section 5301.49 of the Revised Code, such record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. All such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Section 5301.51 Preservation of interest in land[8]

(A) Any person claiming an interest in land may preserve and keep effective the interest by filing for record during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in compliance with section 5301.52 of the Revised Code. No disability or lack of knowledge of any kind on the part of anyone suspends the running of the forty-year period. The notice may be filed for record by the claimant or by any other person acting on behalf of any claimant who is:

(1) Under a disability;

(2) Unable to assert a claim on his own behalf; or

(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(B) If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.

Section 5301.52 Notice of filing of claim of interest in land[9]

(A) To be effective and entitled to recording, the notice referred to in section 5301.51 of the Revised Code shall satisfy all of the following:

(1) Be in the form of an affidavit;

(2) State the nature of the claim to be preserved and the names and addresses of the persons for whose benefit the notice is being filed;

(3) Contain an accurate and full description of all land affected by the notice, which description shall be set forth in particular terms and not by general inclusions, except that if the claim is founded upon a recorded instrument, the description in the notice may be the same as that contained in such recorded instrument;

[8] Ohio Revised Code, Title 53 Real Property, Section 5301.51 Preservation of interest in land
[9] Ohio Revised Code, Title 53 Real Property, Section 5301.52 Notice of filing of claim of interest in land

(4) State the name of each record owner of the land affected by the notice, at the time of its recording, together with the recording information of the instrument by which each record owner acquired title to the land;

(5) Be made by any person who has knowledge of the relevant facts or is competent to testify concerning them in court.

(B) The notice shall be filed for record in the office of the recorder of the county or counties where the land described in it is situated. The recorder of each county shall accept all such notices presented to him which describe land situated in the county in which he serves, shall enter and record them in the deed records of that county, and shall index each notice in the grantee deed index under the names of the claimants appearing in that notice and in the grantor deed index under the names of the record owners appearing in that notice. Such notices also shall be indexed under the description of the real estate involved in a book set apart for that purpose to be known as the "Notice Index." Each recorder may charge the same fees for the recording of such notices as are charged for recording deeds.

(C) A notice prepared, executed, and recorded in conformity with the requirements of this section, or a certified copy of it, shall be accepted as evidence of the facts stated insofar as they affect title to the land affected by that notice.

(D) Any person who knowingly makes any false statement in a notice executed under this section is guilty of perjury under section 2921.11 of the Revised Code.

Section 5301.53 Certain rights not barred or extinguished[10]

(A) Any lessor or his successor as reversioner of his right to possession on the expiration of any lease, or any lessee or his successor of his rights in and to any lease, except as may be permitted under section 5301.56 of the Revised Code;

(B) Any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) Any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) Any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) Any right, title, estate, or interest in coal, and any mining or other rights pertinent to or exercisable in connection with any right, title, estate, or interest in coal;

(F) Any mortgage recorded in conformity with section 1701.66 of the Revised Code;

(G) Any right, title, or interest of the United States, of this state, or of any political subdivision, body politic, or agency of the United States or this state..

[10] Ohio Revised Code, Title 53 Real Property, Section 5301.53 Certain rights not barred or extinguished

Title Insurance

In the United States, the system of land tenure does not, in and of itself, provide for a definitive guarantee or even assurance of ownership, except in the half dozen states where title registration is available (and even in those states it is not required and is seldom used).

Thus we rely on title insurance companies to provide for the continuity, confidence and permanence in title that is necessary for a functioning society. Because the system does not inherently provide the necessary assurances, title companies conduct searches and risk analyses and then provide insurance, so conveyances, mortgages, and other actions and transactions involving real estate can take place generally without the concern or liability associated with finding that someone else owns the property that you paid for and thought was yours.

Because of its importance and ubiquity in real estate conveyancing title insurance is relatively heavily regulated in most states.

Title Insurance – Ohio (selected sections)

3953.01 Title insurance definitions[11]

As used in this chapter:

(A) "Title insurance" means insuring, guaranteeing, or indemnifying owners of real property or others interested in real property against loss or damage suffered by reason of liens or encumbrances upon, defect in, or the unmarketability of the title to the real property, guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing.

(B) "The business of title insurance" means the following:

(1) The making as insurer, guarantor, or surety, or proposing to make as insurer, guarantor, or surety, any contract or policy of title insurance;

(2) The transacting, or proposing to transact, any phase of title insurance, including solicitation, negotiation preliminary to execution, execution of a contract of title insurance, insuring, and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance;

(3) The doing or proposing to do any business in substance equivalent to any of the foregoing.

(C) "Title insurance company" means any of the following:

(1) Any domestic title guaranty company and domestic title guarantee and trust company to the extent that they are engaged in the business of title insurance;

(2) Any domestic company organized under this chapter for the purpose of insuring titles to real property;

(3) Any title insurance company organized under the laws of another state or foreign government;

[11] Ohio Revised Code, Title 39 Insurance, Section 3953.01 Title insurance definitions

(4) Any domestic or foreign company that has the powers and is authorized to insure titles to real estate within this state on December 12, 1967, and that meets the requirements of this chapter.

3953.07 Sound underwriting practices.[12]

No policy or contract of title insurance shall be written unless it is based upon a reasonable examination of the title unless a determination of insurability of title has been made in accordance with sound underwriting practices for title insurance companies and unless, on and after the effective date of this amendment, section 3953.29 of the Revised Code is complied with in connection with registered land. Evidence that a reasonable examination of a title has been made shall be preserved and retained in the files of the title insurance company or its agents for a period of not less than ten years after the policy or contract of title insurance has been issued. This section does not apply to a company assuming no primary liability in a contract of reinsurance and does not apply to a company acting as a coinsurer if one of the other coinsuring companies has complied with this section.

3953.11 Unearned premium reserve[13]

(B) Every title insurance company shall reserve, as the unearned portion of the original premium, an amount equal to ten per cent of the title insurance premium received or receivable by such company during the preceding calendar year for the issuance of policies insuring titles to property located in this state, and shall annually, on or before the first day of February, deposit with the superintendent of insurance an amount equal to such unearned premium reserve in cash or securities as specified in sections 3925.05 to 3925.08 of the Revised Code, provided that such deposit shall not exceed an aggregate amount of two hundred fifty thousand dollars. At the end of each year, the company shall withdraw from the reserve retained by it an amount equal to one-half of one per cent of the original premium until the total amount of the reserve has been withdrawn.

3953.12 Other reserves.[14]

(A) Each title insurance company shall at all times establish and maintain, in addition to other reserves, a reserve:

(1) Against unpaid losses;

(2) Against loss expense, and shall calculate such reserves by making a careful estimate in each case of the loss expense likely to be incurred, by reason of every claim presented, pursuant to notice from or on behalf of the insured, of a title defect in or lien or adverse claim against the title insured, that may result in a loss or cause expense to be incurred for the proper disposition of the claim. The sums of the items so estimated shall be the total amount of the reserves against unpaid losses and loss expenses of such title insurance company.

[12] Ohio Revised Code, Title 39 Insurance, Section 3953.07 Sound underwriting practices
[13] Ohio Revised Code, Title 39 Insurance, Section 3953.11 Unearned premium reserve
[14] Ohio Revised Code, Title 39 Insurance, Section 3953.12 Other reserves

(B) The amount so estimated may be revised from time to time as circumstances warrant, but shall be redetermined at least once each year.

(C) The amounts set aside in such reserves in any year shall be treated as an expense in determining the net profits for such year of any title insurance company.

It is important for surveyors to note that *a title commitment is not a statement as to the condition of title of a property.* It merely states the terms and conditions under which the insurer is will to issue the policy. The Revised Code of the State of Washington does a good job of pointing this out, viz.,

> (c) "Preliminary report," "commitment," or "binder" means reports furnished in connection with an application for title insurance and are offers to issue a title policy subject to the stated exceptions in the reports, the conditions and stipulations of the report and the issued policy, and other matters as may be incorporated by reference. The reports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. *The report is not a representation as to the condition of the title to real property, but is a statement of terms and conditions upon which the issuer is willing to issue its title policy, if the offer is accepted*.[15] [italicized highlight added]

Title Registration ("Torrens")

Torrens Title Registration is a system of registering land titles whereby the state essentially guarantees an indefeasible title to those included in the register. Once title to real estate is registered, it is transferred not by the traditional deed, but rather through the written registration.

In short, in an "abstract system" of title, the abstract is <u>evidence</u> of title. In the Torrens system, the Certificate of Title <u>is</u> the title.

The primary advantage of title registration is that it simplifies conveyances of real property and provides for a state guarantee as to the ownership of absolute title. It is very common in many parts of the world; however, in the United States the only states that provide for some form of title registration are Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Virginia and Washington. It is not widely used in any state and Illinois repealed its registration of title law a few years ago. At one time, twenty states had statutes authorizing title registration.[16]

Disadvantages of title registration include the time and costs involved in the preparation and review of a complete abstract of title and survey, and the remedying of any deficiencies.

Title Registration (selected sections) – Ohio

> <u>Section 5309.01 Registration of land title definitions</u>[17]
>
> As used in this chapter and Chapter 5310. of the Revised Code:

[15] RCW 48.29.010

[16] Reference is made to http://www.inversecondemnation.com/inversecondemnation/2010/04/land-court-schmand-court-state-disregards-torrens-title-claiming-unstated-preexisting-rights.html

[17] Ohio Revised Code, Title 53 Real Property, Section 5309.01 Registration of land title definitions

(A) "Certificate of title" includes all memorials and notations noted under a certificate of title.

(B) "Trust deed in the nature of a mortgage" is a mortgage and subject to the same rules as a mortgage.

(C) "Probate court" has the same meaning as in section 2101.01 of the Revised Code.

(D) "Registered land" means any land registered under this chapter and Chapter 5310. of the Revised Code.

(E) "Housing accommodations" and "restrictive covenant" have the same meanings as in section 4112.01 of the Revised Code.

Section 5309.09 Contents of application[18]

The application to register the title to land or to any interest in land shall be signed and sworn to by each applicant or by an authorized person for each applicant. In addition to any other appropriate, relevant, and material matter, the application shall set forth substantially all of the following:

(A) The full name, age, place of residence, and post-office address of the applicant or owner, the full name, place of residence, and post-office address of any person acting on behalf of the applicant or owner, the name of the applicant or owner as it appears in the muniments of title, whether the applicant or owner is now married or single and, if married, the full name of the applicant's or owner's spouse, whether the applicant or owner has been previously married and, if so, when and by what means the marriage relation was terminated and, if by divorce, dissolution of marriage, or annulment, when, where, and by what court the divorce, dissolution of marriage, or annulment was granted, and what interest in or lien upon the land described in the application a former spouse has; if the application is by a guardian or trustee, the name of the guardian or trustee, how, when, where, and by what court the guardian or trustee was appointed, the full name, nature of disability, and post-office address of the ward, and with whom the ward resides; or if made by a corporation, the names and addresses of its president, secretary, and managing officers, when and where it was incorporated, and its principal place of doing business;

(B) An accurate and full description of the land as it appears in the muniments of title of the applicant or owner, if it is there so described, or otherwise a pertinent description from which the land can be definitely and accurately located; and, in all cases, an accurate plat of the land that is drawn to a scale and shows the lines, corners, monuments, courses and distances, streets, public ways or places, highways, private ways, and adjoining lands with names of owners, streams, and other important objects connected with those lands;

(C) A description of the buildings and improvements on the land;

(D) The applicant's or owner's interest in the land, buildings, and improvements and the source of the applicant's or owner's title;

[18] Ohio Revised Code, Title 53 Real Property, Section 5309.09 Contents of application

(E) For what purpose the land, buildings, or improvements are occupied or used and, if occupied or used by any person other than the applicant or owner, the name, place of residence, and post-office address of each occupant or user and what interest each occupant or user has or claims in the land, buildings, or improvements;

(F) The nature, amount, date, maturity, and volume and page of record of all apparent or real liens, charges, and encumbrances of any kind on the land, buildings, or improvements or any part of the land, buildings, or improvements, including, but not limited to, mortgages, deeds of trust as security, mechanics' liens, judgments, decrees, and executions, home and foreign, the name, place of residence, and post-office address of each holder of the liens, charges, and encumbrances and of each person shown by the records or known to at any time have had an interest in any of the liens, charges, or encumbrances, and which of the apparent liens, charges, and encumbrances are clouds upon the applicant's or owner's title; and the style, docket number, and character of all suits pending by or against the applicant or owner or any of the applicant's or owner's predecessors in title in any court of record, the judgments in which might affect in any way the title of the applicant or owner to, or might become liens upon, the lands described in the application. On and after the effective date of this amendment, an application shall not set forth pursuant to this division any restrictive covenant that appears to apply to the land, buildings, or improvements or any part of the land, buildings, or improvements, if any inclusion of the restrictive covenant in a transfer, rental, or lease of housing accommodations, any honoring or exercising of the restrictive covenant, or any attempt to honor or exercise the restrictive covenant constitutes an unlawful discriminatory practice under division (H)(9) of section 4112.02 of the Revised Code.

(G) Whether any other person to the knowledge or information of the applicant or owner or as shown by the records has or claims any interest in the lands, buildings, or improvements, either in law or equity, apparent or real, or in possession, remainder, reversion, expectancy, or otherwise; the name, place of residence, and post-office address of each person of that nature and the nature of the apparent or real interest so held or claimed; and which of those apparent interests are clouds upon the applicant's or owner's title. On and after the effective date of this amendment, an application shall not set forth pursuant to this division any restrictive covenant that appears to apply to the land, buildings, or improvements or any part of the land, buildings, or improvements, if any inclusion of the restrictive covenant in a transfer, rental, or lease of housing accommodations, any honoring or exercising of the restrictive covenant, or any attempt to honor or exercise the restrictive covenant constitutes an unlawful discriminatory practice under division (H)(9) of section 4112.02 of the Revised Code.

(H) The name, place of residence, and post-office address of each owner and of each occupant of the adjoining lands so far as shown by the records and so far as the applicant or owner, upon diligent inquiry and research, is able to ascertain, and the extent and character of those adjoining lands;

(I) If this state, any political subdivision of the state, any public authority, or any public body corporate will in any way be affected by a decree of the probate court determining or ordering the title of the applicant or owner to be registered, the state, political

subdivision, public authority, or public body corporate shall be made a defendant to the application, and proper allegations shall be made as to its interest in the case.

(J) If the applicant or owner desires to have the boundaries of any street, public way, private way, or highway adjacent to or located within the land determined, a statement to that effect, describing the street, public way, private way, or highway, the proper public authority having charge and control of that street, public way, or highway, and the persons interested in that private way. The proper public authorities and interested persons shall be made defendants to the application and, as applicable, their places of residence and post-office addresses shall be given.

(K) Any further statements and allegations that are required by this chapter or Chapter 5310. of the Revised Code or that may be required by general or special rule or order of the court in which the application is filed;

(L) Any other material facts within the knowledge or information of the applicant or owner relating to the title or possession of the lands, buildings, or improvements, to any estate in the lands, buildings, or improvements, or to any lien, charge, or encumbrance on the land, buildings, or improvements. On and after the effective date of this amendment, an application shall not set forth pursuant to this division any restrictive covenant that appears to apply to the land, buildings, or improvements, if any inclusion of the restrictive covenant in a transfer, rental, or lease of housing accommodations, any honoring or exercising of the restrictive covenant, or any attempt to honor or exercise the restrictive covenant constitutes an unlawful discriminatory practice under division (H)(9) of section 4112.02 of the Revised Code.

(M) A prayer that all persons mentioned in the application, whether by name or other designation, and all other persons may be made and treated as defendants to the application and properly brought before the court, that the title of the applicant or owner may be settled and determined, that all clouds may be removed from the title, that the title may be ordered to be registered as set out in the application, and that all lesser or other estates and interests in and all liens, charges, and encumbrances upon the land or any part of the land may be settled and determined by the court and, subject to division (B) of section 5309.24 of the Revised Code, may be ordered to be registered.

Section 5309.09 Application referred to examiner of titles for investigation - report[19]

Immediately after the filing of the application to register the title to land or to any interest therein, the probate court or the court of common pleas shall enter an order referring it to one of the examiners of titles, who shall search the records and investigate all facts stated and all allegations made in the petition, or otherwise brought to his notice. Such examiner shall investigate particularly whether the land or any part thereof is occupied by, or is in the possession, actual or constructive, of any person other than the applicant and if so, by whom, the nature of the occupation or possession, and by what right; and whether the boundaries and monuments or objects called for marking such land, as shown by the record title, appear to be reasonably certain and definite. Such examiner shall file in the case a report on his investigation, concluding with a certificate of his opinion upon the

[19] Ohio Revised Code, Title 53 Real Property, Section 5309.09 Application referred to examiner of titles for investigation – report

title and the necessity for a resurvey of the land and giving the names, residences, and post-office addresses, if known or ascertainable by reasonable diligence, of any persons in addition to those named in the petition which in the opinion of the examiner are necessary or proper parties to a complete determination of the case and to the settling and determination by the court of all apparent or real interests in or liens or charges upon the lands described in the application or any part thereof. Such persons shall be made additional parties defendant to the application by amendment or by order of the court before the publication of the notice provided for in section 5309.15 of the Revised Code. The examiner may require the applicant to file with him affidavits or other evidence relating to the title. Every report of an examiner shall be based upon a personal inspection and examination of the record or of a certified copy of the record of every instrument or proceeding affecting the title to said land for a period of at least seventy-five years prior to the filing of the application if the record title extends back that far. The clerk of the probate court or the clerk of the court of common pleas shall give notice to the applicant or his attorney of the filing of such report. If the opinion of the examiner is adverse to the applicant, such applicant shall, except in cases provided for in section 5309.66 of the Revised Code, be allowed a reasonable time by the court in which to elect to proceed further or to withdraw his application. The election shall be made in writing and filed with the clerk.

5309.19 Order of default and decree of title and registration - final order. [20]

If no person appears and answers or files other plea to an application in a land registration case within the time allowed, after the appointment of a guardian ad litem and the filing of an answer by him as required in section 5309.17 of the Revised Code, the probate court or the court of common pleas may upon motion of the applicant, no reason to the contrary appearing, order a general default to be recorded and the application to be taken for confessed and a decree to be entered confirming the title of the applicant and ordering registration of such title. The court shall in no case, either upon default or after a hearing, make a final order directing the registration of title to land until there is filed in the case the certificate of an examiner of titles to whom the matter shall be referred for that purpose, stating that all necessary and proper persons to a complete determination of the case have been made parties and properly brought before the court, and that the entry of such order would be correct. The court shall not be bound by the report of such examiner but may require further proof. By the description in the application and published notice, "all persons having any interest in or lien upon the land or any part thereof," all the world, except defendants personally served, shall be regarded as having been made parties defendant and properly served.

5309.28 Holder of certificate of title holds free from encumbrances - exceptions. [21]

(A) Every applicant in a land registration case who, without fraud on the applicant's part, receives a certificate of title in pursuance of a decree of registration and every subsequent

[20] Ohio Revised Code, Title 53 Real Property, Section 5309.19 Order of default and decree of title and registration - final order.

[21] Ohio Revised Code, Title 53 Real Property, Section 5309.28 Holder of certificate of title holds free from encumbrances - exceptions.

purchaser of registered land who takes a certificate of title for value and in good faith shall hold the registered land free from all estates, encumbrances, and rights except those noted on the certificate and except any of the following estates, encumbrances, and rights that may exist:

(1) Liens, claims, or rights arising or existing under the laws or constitution of the United States that the statutes of this state cannot require to appear of record in the county recorder's office;

(2) Taxes and assessments levied by the United States, this state, or any taxing district of this state;

(3) Any highway, public way, or private way laid out or acquired by law or otherwise, unless the certificate of title states that the nonexistence of the way or the boundaries of the way, if any boundaries exist, have been determined by the court;

(4) Any lease for a term not exceeding three years, when there is actual possession under the lease;

(5) Right of appeal within thirty days after decree of registration;

(6) If there are easements or other rights appurtenant to a parcel of registered land that are not subject to section 5309.281 of the Revised Code and that for any reason have not been registered, those easements or rights shall remain appurtenant notwithstanding the failure to register them and shall be held to pass with the land.

(B) This section shall be printed or written on all duplicate certificates of title before delivery by the county recorder.

5309.29 Decree and certificate of title run with the land. [22]

The obtaining of a decree of registration and receiving a certificate of title is an agreement running with the land that the land shall, unless the owner complies with the provisions of section 5309.68 of the Revised Code or unless a resolution of abolition is implemented under section 5310.38 of the Revised Code, remain registered land and be subject to sections 5309.02 to 5310.21 of the Revised Code. Such agreement is binding on the applicant and the successors in title. All dealings with the land or any interest therein, after such land has been brought under such sections, and all liens, encumbrances, and charges upon such land shall be made only subject to such sections.

If any involuntary interest in registered land has come into existence by executory devise, executory limitation, or otherwise since the issuing of any certificate of title, the registered owner or the person claiming such interest may apply to the court by petition, to which all persons in interest shall be made parties and brought before the probate court or the court of common pleas, as provided in original registration or as in other civil actions, to have such interest registered. The court upon a hearing shall make such order as the case requires and direct the county recorder to make registration accordingly.

[22]Ohio Revised Code, Title 53 Real Property, Section 5309.29 Decree and certificate of title run with the land.

Recordation Statutes

Where there is a gap or overlap between properties – representing some sort of conflicting junior/senior rights - some surveyors will (and in some states, like New England and Texas, must) research the chain of title to attempt to determine which deed is senior. Surveyors need to recognize that this is an exercise in title, and not a matter of survey. In doing so, the surveyor is essentially deciding who "owns" written title to the area in question. However, the answer is not always clear by simply examining the written record. This is because the effect and order of recordation and the date of execution of conflicting deeds can differ from state to state and may be dependent on whether there was notice to subsequent purchasers of prior conveyances.[23] Another very simply way of saying this is that the first deed recorded is not necessarily the senior deed.

Race statute

Also known as the "Race to the courthouse." The rule that the document recorded first wins and will have priority over any later recordings.

- States that follow the Race statute: Delaware, Louisiana, and North Carolina. [One source found also included Maryland]

Notice statute

A later buyer who pays fair value for the property and does not have notice that there were any other earlier conflicting interests, wins and will have priority over any later recordings. If a prior interest records first, but not until after a subsequent purchaser paid fair value, that recordation has no effect.

- States that follow the Notice statute: Alabama, Arizona, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia.

Race-Notice statute

A later buyer who pays fair value, does not have notice of any other earlier conflicting interests, and records first, wins and will have priority over any later recordings.

- States that follow the Race-Notice statute: Alaska, Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio (regarding mortgages, Ohio follows the Race statute), Oregon, Pennsylvania (regarding mortgages, PA follows Race), South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. [Note one source found stated that Maryland is a race state]

[23] See http://www.legalmatch.com/law-library/article/recording-acts.html

Recordation Act – Ohio[24] (Race-Notice statute)

5301.01 Acknowledgment of deed, mortgage, land contract, lease or memorandum of trust

(B) (1) If a deed, mortgage, land contract as referred to in division (A) (21) of section 317.08 of the Revised Code, lease of any interest in real property, or a memorandum of trust as described in division (A) of section 5301.255 of the Revised Code was executed prior to February 1, 2002, and was not acknowledged in the presence of, or was not attested by, two witnesses as required by this section prior to that date, both of the following apply:

(a) The instrument is deemed properly executed and is presumed to be valid unless the signature of the grantor, mortgagor, vendor, or lessor in the case of a deed, mortgage, land contract, or lease or of the settlor and trustee in the case of a memorandum of trust was obtained by fraud.

(b) The recording of the [deed, mortgage or land contract] in the office of the county recorder of the county in which the subject property is situated is constructive notice of the instrument to all persons, including without limitation, a subsequent purchaser in good faith or any other subsequent holder of an interest in the property, regardless of whether the instrument was recorded prior to, on, or after February 1, 2002.

5301.25 Recording in county where real estate situated - survey form.

(A) All deeds, land contracts referred to in division (A) (21) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

There is a simple yet excellent diagram from The National Paralegal College (http://nationalparalegal.edu/) viz, http://nationalparalegal.edu/public_documents/courseware_asp_files/realProperty/RecordingSystem/NoticeandRace.asp that graphically depicts the effect of the three types of recording statutes.

Junior/Senior Rights

In most public land survey states and in many of the colonial states, surveyors do not routinely attempt to resolve junior/senior conflicts. Rather they simply report the potential conflict, which is what the ALTA/ACSM Standards require.

In some states like in New England and Texas; however, surveyors *must* attempt to 'resolve' junior/senior relationships in order to comply with their respective states' laws.

Some surveyors around the country, outside New England or Texas, would suggest that there is only one boundary; and in order to properly determine its location, the surveyor must resolve the junior senior relationship. This argument creates an interesting dichotomy in attitudes towards

[24] Ohio Revised Code, Title 53 Real Property

title. No knowledgeable surveyor would suggest that title should or could be resolved by a surveyor when it is potentially affected by unwritten rights (e.g., adverse possession, acquiescence) because they know it is the purview of the courts to ascertain whether or not such rights have been successfully achieved, and to perfect written title if they have.

Yet, most real estate attorneys would assert that resolving junior/senior rights is *also* a title issue, not a survey issue. The ALTA/ACSM Survey Standards ever since 1962 and in the 2011 version, in particular, also take this stance. When preparing an ALTA/ACSM Land Title Survey, the surveyor is to disclose the gap or overlap to the title company and client prior to delivering the final survey *"for determination of a course of action concerning junior/senior rights."* [25]

Aside from boundaries per se, surveyors *do* get indirectly involved in title when performing an ALTA/ACSM Land Title Survey. The primary purpose of the ALTA/ACSM Survey Standards is for the surveyor to locate and show those conditions observed that could adversely affect title to the property being surveyed. Such conditions would include potential prescriptive easements and adverse claims by others. By virtue of a proper and complete Land Title Survey, the title company is appropriately informed of such conditions and can, by virtue of listing them in the title commitment, likewise inform the interested parties, and help facilitate responses or solutions that will eventually aid in a successful real estate transaction.

The North Carolina Board of Examiners for Engineers and Surveyors has recognized the title nature of the junior/senior relationship and has emphatically warned surveyors to not even try to make such a determination unless they are totally certain.

Given that North Carolina is one of the three "race" states (See **Recordation Acts** above), it would seem possible that oftentimes in North Carolina surveyors *could* confidently make such a determination. Otherwise their Board admonishes them to not indicate that in an overlap situation one or the other line is more important than the other.

> Title issues cannot be determined by the PLS based upon the surveyor's research when there is a conflict as to matters affecting title to the property.
> * * *
> Any determination that impacts the title to any portion of the property must be agreed upon by the parties in appropriate legal documents or settled by arbitration or the courts by application of law. This is true for the application of junior/senior deed rights, since the property rights (title) have been placed in multiple parties. It cannot be a weighing of the evidence, but must be a determination of the Surveyor to full certainty as to the one line.
> * * *
> The Board's … interpretation is not meant to take away the Surveyor's right to interpret and apply the results of research to exercise professional judge[ment] as to surveying matters, but to avoid the Surveyor representing on the survey a professional opinion on title…

[25] 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Section 6.B.vii.

Junior/Senior Rights – Ohio

Ohio Administrative Code – Section 4733-37-02, Standards for Boundary Surveys. Research and Investigation

(A) The surveyor shall consult deeds and other documents, including those for adjacent parcels, in order to assemble the best possible set of written evidence of every corner and line of the property being surveyed.

(B) After all necessary written documents have been analyzed, the survey shall be based on a field investigation of the property. The surveyor shall make a thorough search for physical monuments, and analyze evidence of monumentation and occupation. In addition, the surveyor shall, when necessary, confer with the owner(s) of the adjoining property and the owner(s) of the property being surveyed.

THE [QUASI-]JUDICIAL FUNCTIONS OF SURVEYORS

Thomas M. Cooley, Chief Justice Michigan Supreme Court - January, 1881

[italicized and underlined highlights added]

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

In the State of Michigan all our lands are supposed to have been surveyed once or more, and permanent monuments fixed to determine the boundaries of those who should become proprietors. The United States, as original owner, caused them all to be surveyed once by sworn officers, and as the plan was simple, and was uniform over a large extent of territory, there should have been, with due care, few or no mistakes; and long rows of monuments should have been perfect guides to the place of any one that chanced to be missing. The truth unfortunately is that the lines were very carelessly run, the monuments inaccurately placed; and, as the recorded witnesses to these were many times wanting in permanency, it is often the case that when the monument was not correctly placed, it is impossible to determine by the record with the aid of anything on the ground, where it was located. The incorrect record of course becomes worse than useless when the witnesses it refers to have disappeared.

It is, perhaps, generally supposed that our town plats were more accurately surveyed, as indeed they should have been, for in general there can have been no difficulty in making them sufficiently perfect for all practical purposes. Many of them, however, were laid out in the woods; some of them by proprietors themselves, without either chain or compass, and some by imperfectly trained surveyors, who, when land was cheap, did not appreciate the importance of having correct lines to determine boundaries when land should have become dear. The fact probably is that town surveys are quite as inaccurate as those made under the authority of the general government.

Recovering Lost Corners

It is now upwards of fifty years since a major part of the public surveys in what is now the State of Michigan were made under authority of the United States. Of the lands south of Lansing, it is now forty years since the major part were sold, and the work of improvement begun. A generation has passed away since they were converted into cultivated farms, and few if any of the original corners and quarter stakes now remain.

The corner and quarter stakes were often nothing but green sticks driven into the ground. Stones might be put around or over these if they were handy, but often they were not, and the witness trees must be relied upon after the stake was gone. Too often the first settlers were careless in fixing their lines with accuracy while monuments remained, and an irregular brush fence, or something equally untrustworthy, may have been relied upon to keep in mind where the blazed line once was. A fire running through this might sweep it away, and if nothing was substituted in

its place, the adjoining proprietors might in a few years be found disputing over their lines, and perhaps rushing into litigation, as soon as they had occasion to cultivate the land along the boundary.

If now the disputing parties call in a surveyor, it is not likely that any one summoned would doubt or question that his duty was to find, if possible, the place of the original stakes which determined the boundary line between the proprietors. However erroneous may have been the original survey, the monuments that were set must nevertheless govern, even though the effect be to make one half-quarter section ninety acres and the adjoining seventy; for parties buy or are supposed to buy in reference to these monuments, and are entitled to what is within their lines and no more, be it more or less. While the witness trees remain, there can generally be no difficulty in determining the locality of the stakes. When the witness trees are gone, so that there is no longer record evidence of the monuments, it is remarkable how many there are who mistake altogether the duty that now devolves upon the surveyor.

It is by no means uncommon that we find men, whose theoretical education is thought to make them experts, who think that when the monuments are gone, the only thing to be done is to place new monuments where the old ones should have been, and would have been if placed correctly. This is a serious mistake. The problem is now the same that it was before: To ascertain by the best lights of which the case admits, where the original lines were. The mistake above alluded to, is supposed to have found expression in our legislation; though it is possible that the real intent of the act to which we will refer is not what is commonly supposed.

An act passed in 1869, Compiled Laws 593, amending the laws respecting the duties and powers of county surveyors, after providing for the case of corners which can be identified by the original field notes or other unquestionable testimony, directs as follows: Second. Extinct interior section corners must be reestablished at the intersection of two right lines joining the nearest known points on the original section lines east and west and north and south of it.

Third. Any extinct quarter-section corner, except on fractional lines, must be established equidistant and in a right line between the section corners; in all other cases at its proportionate distance between the nearest original corners on the same line. The corners thus determined the surveyors are required to perpetuate by noting bearing trees when timber is near."

To estimate properly this legislation, we must start with the admitted and unquestionable fact that each purchaser from the government bought such land as was within the original boundaries, and unquestionably owned it up to the time when the monuments became extinct. If the monument was set for an interior section corner, but did not happen to be at the intersection of two right lines joining the nearest known points east and west and north and south of it it nevertheless determined the extent of his possessions, and he gained or lost according as the mistake did or did not favor him.

Extinct Corners

It will probably be admitted that no man loses title to his land or any part thereof merely because the evidences become lost or uncertain. It may become more difficult for him to establish it as

against an adverse claimant, but theoretically the right remains; and it remains a potential fact so long as he can present better evidence than any other person. And it may often happen that notwithstanding the loss of all trace of a section corner or quarter stake, there will still be evidence from which any surveyor will be able to determine with almost absolute certainty where the original boundary was between the government subdivisions.

There are two senses in which the word extinct may be used in this connection: one is the sense of physical disappearance: The other the sense of loss of all reliable evidence. If the statute speaks of extinct corners in the former sense, it is plain that a serious mistake was made in supposing that surveyors could be clothed with authority to establish new corners by an arbitrary rule in such cases. As well might the statute declare that if a man loses his deed, he shall lose his land altogether.

But if by extinct corner is meant one in respect to the actual location of which all reliable evidence is lost, then the following remarks are pertinent.

1. There would undoubtedly be a presumption in such a case that the corner was correctly fixed by the government surveyor where the field notes indicated it to be.

2. But this is only a presumption, and may be overcome by any satisfactory evidence showing that in fact it was placed elsewhere.

3. No statute can confer upon a county surveyor the power to establish corners, and thereby bind the parties concerned. Nor is this a question merely of conflict between State and federal law; it is a question of property right. The original surveys must govern, and the laws under which they were made must govern, because the land was bought in reference to them; and any legislation, whether state or federal, that should have the effect to change these, would be inoperative, because it would disturb vested rights.

4. *In any case of disputed lines, unless the parties concerned settle the controversy by agreement, the determination of it is necessarily a judicial act, and it must proceed upon evidence, and give full opportunity for a hearing. No arbitrary rules of survey or evidence can be laid down whereby it can be adjudged.*

The Facts of Possession

The general duty of a surveyor in such a case is plain enough. He is not to assume that a monument is lost until after he has thoroughly sifted the evidence and found himself unable to trace it. Even then he should hesitate long before doing anything to the disturbance of settled possessions. Occupation, especially if long continued, often affords very satisfactory evidence of the original boundary when no other is attainable; and the surveyor should inquire when it originated, how, and why the lines were then located as they were, and whether a claim of title has always accompanied the possession, and give all the facts due force as evidence. Unfortunately, it is known that surveyors sometimes, in supposed obedience to the state statute, disregard all evidences of occupation and claim of title, and plunge whole neighborhoods into

quarrels and litigation by assuming to establish corners at points with which the previous occupation cannot harmonize.

It is often the case when one or more corners are found to be extinct, all parties concerned have acquiesced in lines which were traced by the guidance of some other corner or landmark, which may or may not have been trustworthy; but to bring these lines into discredit when the people concerned do not question them not only breeds trouble in the neighborhood, but it must often subject the surveyor himself to annoyance and perhaps discredit, since in a legal controversy the law as well as common sense must declare that a supposed boundary long acquiesced in is better evidence of where the real line should be than any survey made after the original monuments have disappeared. Stewart vs Carleton, 31 Mich. Reports, 270; Diehl vs. Zanger, 39 Mich. Reports, 601. And county surveyors, no more than any others, can conclude parties by their surveys.

The mischiefs of overlooking the facts of possession most often appear in cities and villages. In towns the block and lot stakes soon disappear; there are no witness trees, and no monuments to govern except such as have been put in their places, or where their places were supposed to be. The streets are likely to be soon marked off by fences, and the lots in a block will be measured off from these, without looking farther. Now it may perhaps be known in a particular case that a certain monument still remaining was the starting point in the original survey of the town plat; or a surveyor settling in the town may take some central point of departure in his surveys, and assuming the original plat to be accurate, he will then undertake to find all streets and all lots by course and distance according to the plat, measuring and estimating from his point of departure. This procedure might unsettle every line and every monument existing by acquiescence in the town; it would be very likely to change the lines of streets, and raise controversies everywhere. Yet this is what is sometimes done; the surveyor himself being the first person to raise the disturbing questions.

Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is an error in the street line, and that all fences should be moved, say one foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all the lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding someone to do so. We shall have a lawsuit; and with what result?

Fixing Lines by Acquiescence

It is a common error that lines do not become fixed by acquiescence in less time than twenty years. In fact, by statute, road lines may become conclusively fixed in ten years; and there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line as their boundary, and all concerned have cultivated and

claimed up to it. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of considerable time. The litigant, therefore, who in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied that acquiescence has fixed the rights of the parties as if it were at another. But he would do mischief if he were to attempt to establish monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him, and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule. It is not long since, that in one of the leading cities of the State an attempt was made to move houses two or three rods into a street, on the ground that a survey under which the street had been located for many years, had been found in a more recent survey to be erroneous.

The Duty of the Surveyor

From the foregoing it will appear that the duty of a surveyor where boundaries are in dispute must be varied by the circumstances.

1. He is to search for original monuments, or for the places where they were originally located, and allow these to control if he finds them, unless he has reason to believe that agreements of the parties, express or implied, have rendered them unimportant. By monuments in the case of government surveys we mean of course the corner and quarter stakes: blazed lines or marked trees on the lines are not monuments: they are merely guides or finger posts, if we may use the expression, to inform us with more or less accuracy where the monuments may be found.

2. If the original monuments are no longer discoverable, the question of location becomes one of evidence merely. It is merely idle for any State statute to direct a surveyor to locate or establish a corner, as the place of the original monument, according to some inflexible rule. The surveyor, on the other hand, must inquire into all the facts; giving due prominence to the acts of parties concerned, and always keeping in mind, first, that neither is opinion nor his survey can be conclusive upon the parties concerned; and, second, that courts and juries may be required to follow after the surveyor over the same ground, and that it is exceedingly desirable that he govern his action by the same lights and the same rules that will govern theirs.

It is always possible when corners are extinct that the surveyor may usefully act as a mediator between parties, and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgment, cannot on the basis of mere consent, be compelled to do so; but if

he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing; but this is not absolutely indispensable if they are carried into effect without.

. . .

I have thus indicated a few of the questions with which surveyors may now and then have occasion to deal, and to which they should bring good sense and sound judgment. *Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned*; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions. What I have said cannot contribute much to their enlightenment, but I trust will not be wholly without value.

A Statute of Limitation on Boundaries[26]

By Jeffery N. Lucas, PLS, Esq.
June 16, 2014

One of the things that has often fascinated me about the law as I continue to read and write about it is the concept of a statute of limitations. That after a certain amount of time something that was once a wrong, while it may not ever become a right, will eventually be forgiven and we can move on and not worry about it anymore. Limitations on negligence is a good example. To clarify, I am talking in the civil context and not the criminal.

I have often told surveyors that property law, especially boundary law, has built-in limitations periods. These are not statutorily enacted limitations, but court-made limitations. The most common in the boundary context are the so-called location doctrines; the common grantor doctrine, the doctrine of monuments, boundary by oral agreement, boundary by acquiescence, boundary by practical location, estoppel and the all-encompassing rule of repose. Most rules of repose are in the 20 to 30 year range.

Since *McArthur v. Carrie's Admr.*, 32 Ala. 75 (1858), this State has followed a rule of repose, or rule of prescription, of 20 years. This principle of repose or prescription is similar to a statute of limitations, but not dependent upon one, and broader in scope. It is a doctrine that operates in addition to laches. Unlike laches, however, the only element of the rule of repose is time. It is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence obscured. It operates as an absolute bar to claims that are unasserted for 20 years.[1]

Adverse possession is also a boundary establishment doctrine, but it is more than that. It will also settle the title question along with the location question. More than this, however, since it is always statutorily enacted it also serves as a statute of limitations.

Falling right on the heels of these doctrines are the fundamental principles of land surveying. You are either an original surveyor laying out original lines for the first time or you are a following surveyor whose only function is to retrace where these lines were originally laid out, not to correct them. As we all know, there is a lot more that goes into that discussion and I'm not going there with this column because I have other ground to cover.

The point to be made is that unlike a statute of limitations where a wrong may never become a right, in the boundary context a mistake in location will eventually be the correct location in due course because of the fundamental principles of land surveying and the built-in court-made limitations—if surveyors would allow this to happen.

[26] Reprinted by permission from the author and POB Magazine.

But many surveyors simply can't or won't allow this to happen and this is the point of this column and has been the point of several of my most recent columns—how can we work towards a practice model that maintains the status quo as opposed to constantly upsetting the applecart?

Good Public Policy

The reason we have statutes of limitation is that they fulfill valuable public policy needs. Life is too short, after a certain amount of time we need to be able to move on. Adverse possession says, in essence, if you aren't going to take care of your property we will give to somebody who is already doing that job. This goes back to the ancient idea that we do not want to see property go unused, especially if someone else is willing to use it and make it productive for society as a whole.

> As a matter of public policy and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into.[2]

I recently covered a statute of limitations case, guised as an easement case, for my monthly newsletter. It is a case I have covered in this column in the past, *H&F Land, Inc. v. Panama City-Bay County Airport and Industrial District*,[3] but this time around I had a totally different take-away given my somewhat recent interest in exploring ideas that could fundamentally change the way land surveying is practiced—hopefully for the better—and keep traditional land surveying relevant well into the 21st century.

The Marketable Record Title Act

The reason I first covered the case was because it dealt with the Marketable Record Title Act (MRTA) as it has been enacted in Florida. My most recent reason for revisiting the case was MRTA's impact on a common law way of necessity—an implied easement servicing a landlocked piece of property. As the Florida Supreme Court noted, MRTA is both a recording statute and a statute of limitations on old stale claims. The court gave us a basic explanation of MRTA:

> In landmark legislation fundamentally revamping Florida property law, the Florida Legislature adopted MRTA in 1963 for the purpose of simplifying and facilitating land title transactions. MRTA was designed to simplify conveyances of real property, stabilize titles, and give certainty to land ownership. MRTA is based on the Model Marketable Title Act, which was proposed in 1960 with multiple objectives: (1) to limit title searches to recently recorded instruments only; (2) to clear old defects of record; (3) to establish perimeters within which marketability can be determined; (4) to reduce the number of quiet title actions; and (5) to reduce the costs of abstracts and closings.[4]

Do you see what I see? The title attorneys and title companies got together and decided that they wanted a model law that would simplify the task of searching and insuring title. A process that would eliminate old problems, ensure marketability, reduce litigation and associated liability,

and reduce costs. Another thing that it does is it levels the playing field so that all of the title companies and title attorneys are working from the same basic parameters. It also establishes a correct answer. Couldn't the land surveying profession—the guys and gals in charge of the location question—use something akin to MRTA?

MRTA sets up something called the "root of title," which refers to the last title transaction creating the estate in question and which was recorded at least thirty years ago. Once there is a root of title it extinguishes all earlier claims in the record to the same property. In essence, this is now the superior conveyance. The public policy issue here are clear. Society hates ancient controversies and MRTA extinguishes them after 30 years.

Here's The Rub

I am almost loath to say what I'm about to say next because I know I am going to get the flaming-arrow e-mails, I can already hear the cries of heresy, the wailing and gnashing of teeth, and the inevitable lynch mobs gathering at the next conference I attend. This actually happened once. The only reason I was spared is that my wife was there and they took pity on her because they did not want her to see me dangling by the neck from a second-story balcony. But I digress.

Folks … after thirty years the location question should be a settled matter. I don't care if you find an original monument set by George Washington. If it doesn't match the status quo as has been established for the last thirty years, pull it up, take it home and put it on the mantel. Everybody else wants to move on save the land surveying profession. Life is too short and our standing in society is too precarious for us to continue to be the source of ancient controversies when it comes to boundaries. We need to be problem solvers not trouble makers.

One of the built-in rubs that we have within the land surveying profession, which is actually part of the land surveyor's DNA, is our never-ending search for ancient controversies. We are taught at the very beginning of our career that we must find the original monuments set by the original surveyor, no matter how long that takes or how long these monuments have come up missing. Even if the rest of the world has moved on, it seems the surveyor's duty is to remain focused on the past.

Another problem that we have, that is fairly wide-spread, is surveyors of the past did not do this work diligently. They didn't exhaust all measures to find missing original monuments. Shortcuts were taken, evidence ignored, math applied and new corners set. These new corners get accepted by the local landowners, improvements get built to them, new subdivisions hang off of them, reliance sets in, and then some county surveyor decides to dig up the intersection and finds the original sandstone monument six feet down and 8.25 feet away from the spike that was in the middle of the intersection and used by everyone for the last 60 years. To what end?

There Needs to be an End

We could use a model code similar to MRTA, except with a focus on settling the location question as MRTA settles the title question. Notwithstanding many of the obvious problems with accomplishing such a task (lawyers, guns and money, to name a few), the Model Marketable

Title Act was first promulgated in 1960. Last time I wrote about this I did an internet search to try and find out how many states had adopted the model act. At that time I read an article that said about 22 out of 50 states had adopted some form of the act. It only took 50 years to get that many jurisdictions onboard. I don' think we have that kind of time on our hands, at least I know I don't.

That does not mean that we could not use a MRTA type code as a model for what should be acceptable practice. A survey on the record that goes unchallenged for over thirty years should become the "root of location" and settle the question of location, extinguishing all previous surveys and boundary evidence to the contrary. Once it has reached this status, it should also settle all future location questions.

I certainly can't predict the future, but one thing I am fairly confident of is that our current practice model, which is let the chips fall where they may, will eventually bring an end to traditional surveying as we currently know it (that part of surveying that requires licensure). If that's all we have to offer there will be faster and easier ways to do it and the land surveyor's services will no longer be needed—after all—there *will* be an app for that.

Footnotes

[1] *McDurmont v. Crenshaw*, 489 So.2d 550, 552 (Ala.1986).

[2] *Id*. at 552.

[3] *Panama City-Bay County Airport and Industrial District*, 736 So.2d 1167 (Fla.1999).

[4] *Id*. at 1171.

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GARY KENT / PS

Reconnaissance

The Surveyor's Roles & Responsibilities

Ensuring the American Dream, Part 1

A few weeks ago, I appeared on NSPS Executive Director Curt Sumner's radio show (broadcast weekly on *AmericasWebRadio.com*) along with well-known author and speaker Jeff Lucas and noted New Jersey surveyor Bruce Blair. The theme of the program was to encourage professional surveyors to broaden their view and understanding of the role they can, and arguably should, play in helping resolve boundary and title problems between property owners.

In order to begin a conversation on this topic, we have to acknowledge two key points. First, is that there are only two persons who can truly resolve a disputed boundary or title problem. Those persons do not include attorneys, title companies or surveyors. And, in a sense, they do not even include judges and juries—at least not of their own volition.

No, the *only* persons who can resolve such conflicts are the two owners involved. And they can do it one of two ways: the painless, low-cost way—by agreement—or by the expensive, painful litigation path—which is when judges and juries get involved.

The second key point—one that I believe is completely indisputable and critically important that surveyors recognize—is that the average land owner believes what a surveyor does is "tell me what I own."

Of course, surveyors know that in the United States, they do not have the legal authority to determine ownership; but there is a distinct and serious disconnection when property owners think they do.

So if surveyors cannot determine ownership or resolve boundary and title problems, why promote the idea that they should take a more active role in doing just that? Michigan Supreme Court Justice Thomas Cooley in his seminal 1881 treatise entitled *The Judicial Functions of Surveyors* addressed this issue head-on by stating:

> It is always possible … that the surveyor may usefully act as a mediator between parties, and assist in preventing legal controversies by settling doubtful lines.

It is a well-known fact that surveyors, in the process of conducting boundary surveys, very frequently encounter and identify potential boundary and/or title conflicts. Such problems most frequently manifest themselves as deed overlaps, ambiguous descriptions, potential claims of unwritten rights (typically adverse possession, acquiescence and parol agreements, but also including estoppel), and simple boundary disputes.

> "The average land owner believes what a surveyor does is 'tell me what I own.'"

When faced with these problems, many surveyors go ahead and—based on the best available evidence—set corners representing their interpretation of where the record title lines and corners belong. The impetus for setting those corners, in many cases, may have been a state's regulatory standards, although doing so is also an expression of the surveyor's historical role. But, most often, setting those corners also results in lines that are contrary to what the owners—*before the surveyor showed up*—had *believed* to be their boundaries, and had *acquiesced* to.

In any event, the result is that one owner is inevitably left happier (and likely confused) and the other is left upset *and* confused. Why? Because the two owners believe the surveyor has just told them that one "*owns*" to the line marked—which, as often as not, is 5 feet over the fence and includes half of the neighbor's driveway. One or both owners are now poised to spend tens of thousands of dollars litigating something that—*until the surveyor showed up*—was a boundary that had been mutually acquiesced in. And perhaps worst of all is that the surveyor's guidance is often limited to the rather cavalier *"You need to contact an attorney."*

So, how do surveyors balance their responsibility to survey lines of written title, with the reality that in doing so they are often condemning owners to a litigation hell and neighborhood despair; all while keeping in mind that they themselves cannot determine ownership or resolve disputes? Join me next time when we will delve further into what Justice Cooley said, and explore how surveyors might apply 'early intervention.' ■

Gary Kent is Director, Integrated Services at The Schneider Corporation in Indianapolis. He is past-president of ACSM and chairs the ALTA/ACSM Committee for NSPS and the Liaison Committee for ALTA. He is on the Indiana Board of Registration and lectures both locally and nationally.

GARY KENT / PS

Reconnaissance

The Surveyor's Roles & Responsibilities

Ensuring the American Dream, Part 2

In Part One, I explained an initiative by a number of noted professional surveyors from across the country promoting the idea that surveyors should take an active role in the resolution and prevention of boundary disputes. In this column we will explore that idea in more detail.

There are at least two important issues that we need to study. The first is to understand how surveyors unwittingly and unintentionally encourage unrest and even litigation between neighbors. We will discuss that issue in this column. The second is to show surveyors that there are things they can lawfully do to help avoid the first; we will delve into that in my next column.

In addressing the first issue, I repeat the assertion made last time: the average land owner believes that surveyors have the responsibility and authority to determine ownership. We surveyors know this is not true, but we must recognize that clients think it *is* true! Thus, when we set corners based purely on written title, clients *believe* we have told them *what they own.*

I am not convinced that we surveyors need to clarify with clients what our authority regarding ownership actually is—at least at the front end—but we *must* recognize what they think because that should inform the decisions we make in the course of performing the survey. For example, if our work indicates that the corner will fall 5 feet over the neighbor's fence, I believe we should suspend our work right then. Why? Because it should be patently obvious that 'something' is wrong. That 'something' is generally one of four things.

The first is that we are simply in the wrong place because we did not find all of the appropriate evidence. In that case, we need to redouble our efforts to look for more and better evidence, and reanalyze our solution. If, however, we *still* end up with what appears to be a contrary boundary location, we should consider the next three scenarios.

The second possibility is that we are in the wrong place because—lacking good, solid, conclusive evidence—we concocted a purely mathematical solution based on our interpretation of the evidence. This is what some call mathematical "deed-staking." Such solutions are inevitably the result of one or more relatively arbitrary decisions. That's fine; it's what we surveyors do: form an opinion based on our interpretation of what we often know is imperfect and incomplete evidence. But when that interpretation and opinion results in a solution that is going to disturb what may be established rights, we should rethink the wisdom of continuing with it. Cooley addressed this, saying,

> *[I]t is known that surveyors sometimes … disregard all evidences of occupation and claim of title, and plunge whole neighborhoods into quarrels and litigation by assuming to establish corners at points with which the previous occupation cannot harmonize.*

The third possibility when a line or corner falls contrary to a line of possession or occupation (usually, but not always, a fence) is that one of the doctrines of unwritten title may have acted to move ownership from the written title line over to the fence. Adverse possession, acquiescence (called by a different name in some states), parol agreement, estoppel or practical location can operate to move an ownership line based on the actions of one or both of the owners.

Of course, surveyors do not have the legal authority to make boundary determinations based on unwritten rights, but they need to be well-versed enough in each of the doctrines to recognize the possibility—particularly when the respective owners have been peaceably occupying to the line of occupation. In this situation, as with the others, the surveyor has to consider alternatives to simply setting the corners, which will likely set the neighbors on the painful and expensive path to litigation. As Cooley said,

> *[The surveyor] would do mischief if he were to attempt to establish monuments which he knew would tend to disturb settled rights…*

The last possibility—one that is not entirely unrelated to the third—is that the fence does not, in the surveyor's opinion, seem to fit the criteria for one of the doctrines of unwritten title, yet the owners are happy with it.

So, based on one of those scenarios, we have temporarily suspended our work. What alternatives should we now investigate? And what can we do without violating our state's standards of practice or practicing law? Quite a lot … as we will find out next time. ■

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GARY KENT / PS

Reconnaissance

The Surveyor's Roles & Responsibilities

Ensuring the American Dream, Part 3

In the first two installments of this series, we looked at the background of the problem that boundary surveyors face and, more often than not, propagate. That misfortune is this: the irony of surveyors (1) ostensibly doing their job by retracing record descriptions and yet, in the process, (2) leaving clients and their adjoiners—if not entire neighborhoods—in confusion and despair, if not litigation.

Interestingly, the way out of this conundrum is the same whether surveyors arrive at their boundary solutions by the unfortunate practice of "fence line" surveying, by the equally egregious practice of mathematical "deed-staking," or by properly applying the applicable boundary law principles based on a thorough analysis of the facts and evidence.

Of course, we always hope and trust that surveyors resolve boundaries in consideration of proper training and experience, the local standard of care exercised by the prudent surveyor in the same circumstance, and any written standards that the jurisdiction has adopted, but the solution works regardless of the means that the surveyor employed.

The answer ties directly into the fact that only the two affected owners can resolve a boundary or title problem. And they have two choices: agreement or litigation. Hopefully, no one would suggest that litigation is the more desirable of the two, although if one or both of the affected landowners cannot, or will not, compromise, they will likely be destined for court.

Of course, sometimes the surveyor has been drawn into a situation by an owner or attorney long after the dye to a dispute has been cast, in which case, it is likely too late to foster an agreement (although there is nothing to prevent that discussion with the attorney and owner). Also, if the boundary is part of an ALTA/ACSM Land Title Survey, there will be a title company and normally several attorneys who merely need the surveyor to clearly present the facts so they can determine the means they deem most appropriate to get the transaction closed.

Otherwise, when the surveyor is "first on the scene" why provoke owners by setting corners and drawing plats/maps/plans that show lines and corners contrary to what appear to be long-standing and/or accepted boundaries? By stopping short of setting the corners, the chances for a successful agreement will be tremendously increased.

> "Setting a corner when it conflicts with possession will take the hidden, make it blatantly obvious, and sow the seeds of a dispute."

One might ask though, "*What about my state standards which require setting of corners?*" Remember, if there is a boundary or title conflict (and corners set contrary to established lines of possession *certainly* carry with them the beginnings of a contentious title problem or boundary dispute) the *only* people who can resolve it are the two owners. Setting a corner when it conflicts with possession will take the hidden, make it blatantly obvious, and sow the seeds of a dispute.

So, rather than merely set the corners and figuratively walk away, the surveyor should recognize the desirability of engaging the two affected owners in a conversation about the situation on the ground, what the records say, and the fact that only *they* can resolve the issue. The conversation should include the possibilities—agreement or litigation—and the potentialities. In order to have a chance at successfully leading owners to agreement rather than litigation, surveyors need a number of tools.

The first is a contract that spells out what the surveyor will do: retrace the boundary to a final resolution unless a title or boundary problem is revealed, in which case, the contract is fulfilled, pending resolution of the problem. The surveyor could then use a second contract under which he or she would work with the affected parties to try to help them come to agreement. If agreement is reached, the third step would be to undertake an engagement to write the descriptions and prepare the necessary plats, maps or plans to bring that agreement to fruition.

Of course, different jurisdictions have different requirements, of which the surveyor must be fully informed. Some will allow the simple exchange of deeds, while others may require a survey, lot line adjustment, administrative plat or resubdivision, etc. Also, surveyors must make it *very* clear that they cannot offer legal advice and that, at some point, it will likely be desirable, if not

necessary, to bring the owner's attorneys to the table to address the legal necessities (i.e., mortgages, title insurance, taxes, judgments, exchange of consideration, and preparation of any legal documents if the owners are unable or unwilling).

The second tool surveyors will require is twofold: (1) an interest in, and the ability to, engage with the owners on this sort of level, and (2) the training to facilitate an effective agreement. The former is contrary to the nature of most surveyors and will therefore take some practice to overcome. The latter can be gained through attending a course on alternative dispute resolution (there are many sources of such training), and anyone interested in becoming, for example, a mediator, should also review their state's related rules and laws.

Lastly, surveyors need to be very well-versed in the legal aspects of boundaries and unwritten rights. While they cannot give legal advice, they should understand the requirements of each type of unwritten right for their state (e.g., adverse possession, [recognition and] acquiescence, parol agreements, estoppel, and, in some states, common grantor doctrine and practical location, etc.). This knowledge will greatly assist them as they try to guide the owners to an agreement.

To summarize, we are not talking about surveyors retracing boundaries based on unwritten rights (which they do not have the authority to do), forcing owners into ill-advised agreements, or hiding the facts from them. What we are talking about is surveyors recognizing conflicts or potential conflicts early on, not unnecessarily and prematurely finalizing surveys and setting points that exacerbate those problems, and encouraging surveyors to work with the only people that can actually solve the problems—the affected owners.

Let's be the *facilitator* to *solutions* to the problems we find. As has been said many times, if all we find are problems, and if we offer no solutions, perhaps we are the problem! ■

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Alternate Dispute Resolution - Mediation

[See http://www.sconet.state.oh.us/JCS/disputeResolution/FAQ/default.asp]

What is mediation?

Mediation is a voluntary process in which a third party neutral, the mediator, assists the parties to a dispute in crafting a resolution that is acceptable to both sides.

Does the Supreme Court of Ohio certify or license mediators?

Neither the State of Ohio nor the Supreme Court of Ohio licenses or certifies mediators. The Supreme Court of Ohio Advisory Committee on Dispute Resolution has advised against certification and licensure because mediation research shows that there is no particular training or educational credential that ensures a good mediator. The Committee supports the use of a variety of approaches, such as training and mentoring, to ensure that mediators are highly skilled.

The Supreme Court of Ohio has established specific guidelines for qualifications for family court mediators. See Rule 16 of the Rules of Superintendence for Ohio Courts at **www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf#Rule16**. Courts may set additional qualifications for mediators in their local court rules.

Does the Supreme Court of Ohio certify mediation training?

The Dispute Resolution Section does certify 40-hour advanced family mediation training that is required under Rule 16 of the Rules of Superintendence for Ohio Courts. Certification of a Training Program does not allow individuals trained in that program to identify themselves as "Supreme Court certified mediators." Please note that Rule 16 certification does not provide Continuing Legal Education (CLE) credit. Forms for obtaining CLE approval are available at **http://www.supremecourt.ohio.gov/AttySvcs/CLE**.

Where do I get training if I want to become a mediator?

The Dispute Resolution Section Events Calendars can be found at **www.supremecourt.ohio.gov/JCS/disputeResolution**.

Training information may also be available from national dispute resolution organizations, such as the **American Bar Association**, the **Association for Conflict Resolution (ACR)**, the **Association of Family and Conciliation Courts**, and **Mediate.com**.

How do I get information about court-connected mediation in Ohio?

Rule 16 of the Rules of Superintendence for Ohio Courts sets forth some basic requirements for family mediators that are applicable to many kinds of mediation. Specifically, it requires that mediators who mediate allocation of parenting responsibilities have:

- a bachelor's degree or equivalent education,
- two years of professional experience with families, and
- Completion of a basic 12-hour mediation course (or equivalent mediation experience) followed by a 40-hour, specialized family or divorce mediation training. The Supreme Court of Ohio must certify the 40-hour course.

Local courts may require observation of and mentoring with experienced mediators, continuing education for mediators and that those mediators maintain malpractice insurance coverage.

National standards of practice for mediators and ethical guidelines can be found at the following Web sites:

Model Standards of Conduct for Mediators: **www.abanet.org/dispute/home.html**

Proposed Revised Model Standards of Conduct for Mediators (final draft) 12/29/04
http://moritzlaw.osu.edu/dr/msoc/index.html

Model Standards of Practice for Family Mediators:
www.afccnet.org

Information about trial and appellate court mediation in Ohio can be found at **http://www.disputeresolution.ohio.gov/nfpmap.htm**. Mediation is available for selected Supreme Court cases. For more information about the Mediation Section, call 614.387.9355.

How do I get a job as a mediator in Ohio?

Currently, the number of jobs available in mediation appears to be disproportionate to the number of practitioners and the high level of interest in those positions. The typical way to get a job is to obtain basic mediation training and begin practice in a community center, court program or other agency that offers mediation. These initial positions may be as volunteers or contract mediators.

ORC Chapter 2710: OHIO UNIFORM MEDIATION ACT (selected sections)

[See http://codes.ohio.gov/orc/2710]

2710.01 Definitions.

As used in sections 2710.01 to 2710.10 of the Revised Code:

(A) "Mediation" means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(B) "Mediation communication" means a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(C) "Mediator" means an individual who conducts a mediation.

(D) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(E) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(F) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, agency or instrumentality of the state or of any political subdivision of the state, public corporation, or any other legal or commercial entity.

(G) "Proceeding" means either of the following:

(1) A judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery;

(2) A legislative hearing or similar process.

(H) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(I) "Sign" means either of the following:

(1) To execute or adopt a tangible symbol with the present intent to authenticate a record;

(2) To attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

Effective Date: 10-29-2005

2710.02 Application of chapter.

(A) Except as otherwise provided in division (B) or (C) of this section, sections 2710.01 to 2710.10 of the Revised Code apply to a mediation under any of the following circumstances:

(1) The mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator.

(2) The mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure.

(3) The mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

(B) Sections 2710.01 to 2710.10 of the Revised Code do not apply to a mediation in which any of the following apply:

(1) The mediation relates to the establishment, negotiation, administration, or termination of a collective bargaining relationship.

(2) The mediation relates to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that sections 2710.01 to 2710.10 of the Revised Code apply to a mediation arising out of a dispute that has been filed with an administrative agency or court.

(3) The mediation is conducted by a judge or magistrate who might make a ruling on the case.

(4) The mediation is conducted under the auspices of either of the following:

(a) A primary or secondary school if all the parties are students;

(b) A correctional institution for youths if all the parties are residents of that institution.

(C) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under sections 2710.03 , 2710.04 , and 2710.05 of the Revised Code do not apply to the mediation or part agreed upon. However, sections 2710.03 , 2710.04 , and 2710.05 of the Revised Code do apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Effective Date: 10-29-2005

2710.03 Mediation communications privileged.

(A) Except as otherwise provided in section 2710.05 of the Revised Code, a mediation communication is privileged as provided in division (B) of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section 2710.04 of the Revised Code.

(B) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication. A mediator may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(C) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

Effective Date: 10-29-2005

2710.04 Waiver of privilege - privilege precluded.

(A) A privilege under section 2710.03 of the Revised Code may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and by whichever of the following is applicable:

(1) In the case of the privilege of a mediator, it is expressly waived by the mediator.

(2) In the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(B) A person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 2710.03 of the Revised Code, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(C) A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 2710.03 of the Revised Code.

Effective Date: 10-29-2005

2710.05 Exceptions to privilege - partial admission of nonprivileged communication.

(A) There is no privilege under section 2710.03 of the Revised Code for a mediation communication to which any of the following applies:

(1) The mediation communication is contained in a written agreement evidenced by a record signed by all parties to the agreement.

(2) The mediation communication is available to the public under section 149.43 of the Revised Code or made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) The mediation communication is an imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence.

(4) The mediation communication is intentionally used to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity.

(5) The mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

(6) Except as otherwise provided in division (C) of this section, the mediation communication is sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

(7) Except as provided in sections 2317.02 and 3109.052 of the Revised Code, the mediation communication is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates.

(8) The mediation communication is required to be disclosed pursuant to section 2921.22 of the Revised Code.

(9) The mediation communication is sought in connection with or offered in any criminal proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by the state or a child protection agency in which it is alleged that a child is an abused, neglected, or dependent child.

(B) There is no privilege under section 2710.03 of the Revised Code if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following:

(1) A court proceeding involving a misdemeanor;

(2) Except as otherwise provided in division (C) of this section, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(C) A mediator may not be compelled to provide evidence of a mediation communication referred to in division (A)(6) or (B)(2) of this section.

(D) If a mediation communication is not privileged under division (A) or (B) of this section, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under division (A) or (B) of this section does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Effective Date: 10-29-2005

2710.06 Communication or disclosure by mediator.

(A) Except as provided in division (B) of this section and section 3109.052 of the Revised Code, a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, department, agency, or officer of this state or its political subdivisions that may make a ruling on the dispute that is the subject of the mediation.

(B) A mediator may disclose any of the following:

(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) A mediation communication as permitted by section 2710.05 of the Revised Code;

(3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against abuse, neglect, abandonment, or exploitation.

(C) A communication made in violation of division (A) of this section shall not be considered by a court, administrative agency, or arbitrator.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 9/15/2014.

Effective Date: 10-29-2005

2710.07 Confidentiality of mediation communications.

Except as provided in sections 121.22 and 149.43 of the Revised Code, mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code.

Effective Date: 10-29-2005

2710.08 Inquiry by proposed mediator - disclosures - qualifications - impartiality.

(A) Before accepting a mediation, an individual who is requested to serve as a mediator shall do both of the following:

(1) Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation;

(2) Disclose any known fact described in division (A)(1) of this section to the mediation parties as soon as is practical before accepting a mediation.

(B) If a mediator learns any fact described in division (A)(1) of this section after accepting a mediation, the mediator shall disclose it to the mediation parties as soon as is practicable.

(C) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(D) A person that violates division (A), (B), (C), or (G) of this section is precluded from asserting a privilege under section 2710.03 of the Revised Code.

(E) Divisions (A), (B), (C), and (G) of this section do not apply when the mediation is conducted by a judge who might make a ruling on the case.

(F) Sections 2710.01 to 2710.10 of the Revised Code do not require that a mediator have a special qualification by background or profession.

(G) A mediator shall be impartial, unless after disclosure of the facts required to be disclosed by divisions (A) and (B) of this section the parties agree otherwise.

Effective Date: 10-29-2005

2710.09 Participation of party's attorney - withdrawal of mediator.

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded. A mediator may withdraw as mediator at any time.

Effective Date: 10-29-2005