1  EXPERT WITNESS TESTIMONY
   By Jeffery N. Lucas
   Professional Land Surveyor
   Attorney at Law
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   Comments? E-Mail: LucasAndCompany@bellsouth.net

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

3  JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony
   I. KNOW THE LAW THAT GOVERNS YOUR PRACTICE
   “It is a common maxim, familiar to all minds, that ignorance of the law will not excuse
   any person, either civilly or criminally.”

4  JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony
   Know the Law
   • Attorneys don’t always know the law either.
   • Attorneys don’t always understand the rules of evidence and procedure.
   • Attorneys don’t necessarily understand what we do.
   • Attorneys don’t necessarily know the elements of negligence.

5  JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony
   Know the Law
   • This includes Judges, who are also attorneys.
   • In boundary dispute cases the Judge is looking for a way out of the case. This is
     where the expert who knows the law of boundaries comes into play.
   • However, there is a fine-line between leading the Judge out of the case and telling
     the Judge what the law is.

6  JEFF’S 10 COMMANDMENTS
   Expert Witness Testimony
The Law That Governs Our Practice:
- Property Law
- Boundary Law
- Rules of Evidence and Civil Procedure
- Contracts
- Agency Law
- Torts

7 JEFF'S 10 COMMANDMENTS
Expert Witness Testimony
Torts We Can Commit:
- Negligence
- Slander of Title
- Fraud
- Trespass
- Conspiracy
- Others

8 JEFF'S 10 COMMANDMENTS
Expert Witness Testimony
There are Only Three Ways to Get Your Litigation Coast Back
- Written Contract that Allows for Litigation Costs
- Legislation that Allows for Recovery of Litigation Costs
- A Court-Made Rule that Allows for Recovery of Litigation Costs

9 BULL
v.
PINKHAM ENGINEERING
Vermont Supreme Court
752 A.2d 26
April 21, 2000

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

11 Bull v. Pinkham
"The trial court also found that professional survey standards require that a survey must verify the perimeter boundaries of the parcel to be surveyed. Defendant contends that this finding cannot stand because plaintiffs failed to present expert testimony to support it. In response, plaintiffs point to testimony indicating that defendant was
aware that preparing an accurate survey required researching the deeds of adjoining owners to verify the perimeter boundaries of the land to be surveyed.”


12 **Bull v. Pinkham**

“Given the nature of a survey, see Black’s Law Dictionary 1296 (5th ed.1979) (defining ‘survey’ as process by which ‘land is measured and its boundaries and contents ascertained’), we doubt that expert testimony is required to support the challenged finding. *Where a professional’s lack of care is so apparent that only common knowledge and experience are needed to comprehend it, expert testimony is not required* to assist the trier of fact in finding the elements of negligence.”


13 **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

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

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

14 **CUPP v. HEATH**

TENNESSE COURT OF APPEALS

AT KNOXVILLE

E2010-02364-COA-R3-CV

August 11, 2011

15 **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

III. THE JUDGE WANTS YOUR HELP

A judge sitting on the bench for 25 years may have only tried a handful of boundary dispute cases. Generally speaking, judges hate boundary dispute cases because it is not what they are used to. The judge is looking for someone to give them the answer to the problem.

16 **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Facts v. the Law

- The *jury determines the facts* in the case (or the judge sitting without a jury).
- This role is referred to as “the finder of the facts.”
- The *judge determines the law* and will instruct the jury as to what the law is.
- The jury applies the facts to the law and renders a verdict.

17 **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Facts v. the Law

- When testifying as an expert, there is a fine line between assisting the trier of the
facts (judge or jury) with a correct interpretation of the facts and telling the judge what the law is.

- Nobody tells the judge what the law is but there are ways to suggest what the law is.

18 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Talking about the Law
- Surveying principles dictate ...
- The rules of surveying say ...
- The principles of retracement surveying are ...
- The best available evidence suggests ...
- You can refer to surveying statutes and regulations that govern the practice.
- Never use the words like: “law,” “legal,” “legally,” or any other words that suggest you are giving a legal opinion.

19 BOAK v. BEAVER
MEADE COUNTY CIRCUIT COURT
46TH JUDICIAL CIRCUIT
Civil Action 10-CI-00269
September 10, 2015

“Mr. Smith testified that when a surveyor is required to re-trace a survey, he is required to first find the line and then measure it. A retracement of the survey does not mean that one measures to create the line, because the line is already there. Retracement surveys require the surveyor to find the line and then measure it.”
Boak v. Beaver, Civil Action 10-CI-00269 at 7 (Ky.46thCir.Ct.2015).

20 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
IV. BE A PART OF THE “LEGAL TEAM” OR DON’T DO THE CASE
If the attorneys aren’t going to treat you as a professional and let you sit at the table with the big boys, don’t agree to be an expert. You will be used and abused and may end up testifying against your better judgment.

22 LAWSON v. WINEMILLER
Court of Appeals of Ohio
1995 Ohio App. Lexis 2043
May 17, 1995

23 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
V. UNDERSTAND THE BASICS OF BEING AN EXPERT WITNESS
The essence of expert witness testimony is that it is opinion based testimony. If you
have no opinion or if your testimony is not deemed to be helpful, you may not testify as an expert of otherwise.

24 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Who can Testify

• Who can testify as an expert?

25 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 602. Need for Personal Knowledge
A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

26 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 615. Excluding Witnesses
At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

27 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 615. Excluding Witnesses
(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney;
(c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or
(d) a person authorized by statute to be present.

28 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 701. Opinion Testimony by Lay Witnesses
If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Federal Rules of Evidence

Rule 702. Testimony by Expert Witnesses

_A witness who is qualified as an expert_ by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge _will help the trier of fact_ to understand the evidence or to determine a fact in issue;

(b) the testimony is based on _sufficient facts or data_;

(c) the testimony is the product of _reliable principles and methods_; and

(d) the expert has _reliably applied the principles and methods_ to the facts of the case.

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Federal Rules of Evidence

Rule 703. Bases of an Expert’s Opinion Testimony

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

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Federal Rules of Evidence

Rule 704. Opinion on an Ultimate Issue

(a) **IN GENERAL—NOT AUTOMATICALLY OBJECTIONABLE.** An opinion is not objectionable just because it embraces an ultimate issue.

(b) **EXCEPTION.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for
the trier of fact alone.

33 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
Unless the court orders otherwise, an expert may state an opinion—and give the
reasons for it—without first testifying to the underlying facts or data. But the expert
may be required to disclose those facts or data on cross-examination.

34 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
Unless the court orders otherwise, an expert may state an opinion—and give the
reasons for it—without first testifying to the underlying facts or data. But the expert
may be required to disclose those facts or data on cross-examination.

35 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Rules of Evidence
"All relevant evidence is admissible, except as otherwise provided by the Constitution
of the United States, by Act of Congress, by these rules, or by other rules prescribed
by the Supreme Court pursuant to statutory authority. Evidence which is not relevant
is not admissible."

36 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Rules of Evidence
"'Relevant evidence' is defined as that which has any tendency to make the existence
of any fact that is of consequence to the determination of the action more probable or
less probable than it would be without the evidence."

37 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Rules of Evidence
"If scientific, technical, or other specialized knowledge will assist the trier of fact to
understand the evidence or to determine a fact in issue, a witness qualified as an
expert by knowledge, skill, experience, training, or education, may testify thereto in
the form of an opinion or otherwise."

38 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Rules of Evidence
“Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. This relaxation of the usual requirement of firsthand knowledge—a rule which represents a most pervasive manifestation of the common law insistence upon the most reliable sources of information—is premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.”

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

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

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

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

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Liability for Testifying
• It’s primarily emotional and professional.
• Whoever you’re testifying against will probably hate you the rest of their natural
Your professional reputation can go either way.
You will have limited immunity (or privilege) when testifying.
That doesn’t mean you might not be sued anyway.
Perjury is a crime.

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
The Litigation Privilege
“There is another class of privileged communications where the privilege is absolute. In this class are included slanderous statements made by parties, counsel, or witnesses in the course of judicial proceedings, and libelous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action.”
Walker v. Majors, 496 So.2d 726 (Ala.1986).

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
The Litigation Privilege
“In questions falling within this absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander.”
Walker v. Majors, 496 So.2d 726 (Ala.1986).

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
The Litigation Privilege
“This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or, at least, it does not protect slanderous imputations plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.”
Walker v. Majors, 496 So.2d 726 (Ala.1986).

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
The Litigation Privilege
“The law on privilege in Alabama has been restated several times, and we summarize it again, as we did in Webster v. Byrd. In defamation actions, the only absolutely
privileged communications recognized under the law are those made during legislative or judicial proceedings (or, in such situations as that dealt with in Webster v. Byrd, quasi-judicial proceedings), or contained in legislative acts of this state which are made under authority of law."

*Walker v. Majors*, 496 So.2d 726 (Ala.1986).

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48  **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

**Certificate of Merit**

- Some states have enacted the requirement of a “*certificate of merit*”; sometimes referred to as an “affidavit of merit,” “expert review,” “expert affidavit,” or some similar combination.

49  **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

**Certificate of Merit**

- Essentially, a certificate of merit is an affidavit prepared by a licensed professional that is required by a statute (or rule of court), to be filed in conjunction with a lawsuit against another licensed professional, like a surveyor, engineer, architect or medical practitioner. *The affidavit is used to support the “merit” of a complaint* filed against a licensed professional.

50  **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

**Certificate of Merit**

- A Connecticut Superior Court decision in 2012 (Dhiman v. Liberty Mutual) tells us that “at least twenty-five states” have enacted such statutes for *medical malpractice cases*. Finding out how many states have enacted similar statutes for land surveyors and engineers is a little more difficult. Some internet and legal research on my part indicates *that at least 11 states have similar statutes for land surveyors* and engineers.

51  **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

**Certificate of Merit**

- *My unofficial account* is that the states with some sort of certificate of merit requirement are Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, and Texas.

52  **JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

**Certificate of Merit**

- Oklahoma had a similar statute in 2011 that was apparently *ruled unconstitutional* by the Oklahoma Supreme Court in 2013 (*Wall v. Marouk*), but not without dissent.
That statute appears to have been repealed.

53 JEFF'S 10 COMMANDMENTS

Expert Witness Testimony

Certificate of Merit

- *In theory, the certificate of merit sounds good.* I can tell you from experience that it would be great to have a frivolous lawsuit filed against you thrown out before it even gets started. That is a major problem with lawsuits. It can still cost you tens of $1,000's to defend yourself against a nothing-burger.

54 JEFF'S 10 COMMANDMENTS

Expert Witness Testimony

License Requirements

- Do you have to be a licensed land surveyor to testify as an expert on surveying?

55 HANNEMAN v. DOWNER

Nevada Supreme Court

871 P.2d 279

March 30, 1994

56 Hanneman v. Downer

License Requirements

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

*Hanneman v. Downer, 871 P.2d 279 (Nev.1994).*

57 Hanneman v. Downer

License Requirements

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

*Hanneman v. Downer, 871 P.2d 279 (Nev.1994).*

58 Hanneman v. Downer

License Requirements

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

*Hanneman v. Downer, 871 P.2d 279 (Nev.1994).*

59 License Requirements
• There are some legislatively enacted exceptions to the "Daubert Rule."
• Alabama has one of those exceptions.

60 License Requirements
Section 34-11-1(7), Ala.Code 1975, as amended in 1997, defines “the practice of engineering” as:

“Any professional service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, testimony, investigation, evaluation, etc., etc. …

City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).

61 License Requirements
The Water Board moved to strike Hicks’s testimony. The Water Board pointed out that the engineering profession is governed by Title 34, Chapter 11, Alabama Code 1975 ("the Licensure Act"). The Licensure Act sets forth those acts constituting “the practice of engineering.” … The Water Board also pointed out that in 1997 the Alabama Legislature passed Act No. 97-683, Ala. Acts 1997, which amended, among other sections, § 34-11-1(7) to include the term “testimony” within the definition of “the practice of engineering.”

City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).

62 License Requirements
The Water Board argued that, as a result of that 1997 amendment, Alabama law prohibited anyone from testifying under oath regarding engineering matters unless they were licensed as a “professional engineer” by the Licensure Board. Because Hicks was not a licensed “professional engineer,” the Water Board argued, he was not qualified to testify as to the engineering matters at issue in this case.

City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).

63 License Requirements
We agree with the Hunters that, in addition to impacting the practice of engineering, the amendment to § 34-11-1(7), Ala.Code 1975, impacts upon and is germane to other subjects. Specifically, by adopting Act No. 97-683, the legislature superimposed the licensing requirement contained therein onto Rule 702, Ala. R. Evid. Before the adoption of Act No. 97-683, Rule 702 allowed trial courts wide discretion in determining when a proffered witness was qualified as an expert on all matters, including engineering matters.

City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).

64 License Requirements
However, after the adoption of Act No. 97-683, the trial court no longer had the discretion to allow testimony on engineering matters unless the witness was a licensed engineer in this State.

City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).
The Alabama Trial Lawyers Association filed a brief with the trial court as amicus curiae in support of the Hunters. City of Mobile v. Hunter, 956 So.2d 403 (Ala.2006).

So, where are we now?

Apparently, the Trial Lawyers got involved.

§ 34-11-1. Definitions
(13) PRACTICE OF ENGINEERING
d. The practice of engineering includes the offering of expert opinion in any legal proceeding in Alabama regarding work legally required to be performed under an Alabama engineer's license number or seal, which opinion may be given by an engineer licensed in any jurisdiction. ...

What about the Surveyors?

Apparently, the Board hasn't seen fit to afford the surveyors the same leeway.

§ 34-11-1. Definitions
(14) PRACTICE OF LAND SURVEYING
b. The term includes consultation, project coordination, including the coordination of technical submissions proposed by others, investigation, testimony, evaluation, planning, mapping, assembling, and interpreting gathered measurements and information relating to any one or more of the following: ...
Expert Witness Testimony
Excluding Witnesses
• Can you be excluded from the courtroom during the testimony of others?

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 615. Excluding Witnesses
At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party’s representative by its attorney; (c) a person whose presence a party shows to be essential to presenting the party’s claim or defense; or (d) a person authorized by statute to be present.

JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Federal Rules of Evidence
Rule 615. Excluding Witnesses
Advisory Committee Note:
Several categories of persons are excepted [from the rule]. ... The category contemplates such persons [not being excluded] as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.

VI. ASSUME THAT YOU WILL BE ASKED THE “ULTIMATE ISSUE” IN THE CASE
• The “Ultimate Issue” in any boundary dispute case is the location of the “property boundary” between the disputing parties.
• The “Ultimate Issue” in a negligence case is: “did the professional fall below the standard of care?”

The Ultimate Issue Rule
Federal Rules of Evidence
Rule 704. Opinion on an Ultimate Issue
(a) IN GENERAL—NOT AUTOMATICALLY OBJECTIONABLE. An opinion is not objectionable just because it embraces an ultimate issue.
(b) EXCEPTION. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

The Ultimate Issue Rule
South Carolina Rules of Evidence
Article VII. Opinions and Expert Testimony
Rule 704. Opinion on Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The Ultimate Issue Rule
Alabama Rules of Evidence
Article VII. Opinions and Expert Testimony
Rule 704. Opinion on Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact.

The Ultimate Issue Rule
Advisory Committee's Notes:
Evidence of an opinion that goes to an ultimate issue in the case is inadmissible, whether offered by a lay witness or by an expert witness. The basis for the preclusion is the fear that the admission of such an opinion will preempt the role and function of the factfinder. Rule 704 continues the preexisting principle that witnesses generally are precluded from giving opinions that involve legal definitions or conclusions.

The Ultimate Issue Rule
Advisory Committee's Notes:
The adoption of Rule 704 constitutes a rejection of the corresponding federal rule, under which the ultimate issue rule is abandoned. See Fed. R. Evid. 704(a). There is no intent that adoption of Rule 704 should abrogate preexisting case law liberalizing the application of the ultimate issue rule. See, e.g., Harrison v. Wientjes, 466 So. 2d 125, 127 (Ala. 1985); Boatwright v. State, 351 So. 2d 1366 (Ala. 1977).

The Ultimate Issue Rule
"Defendant's third assignment of error is that the trial judge allowed Plaintiff's expert witnesses to testify as to the ultimate issue of the case: whether Plaintiff's automobile accident caused his arthritic pain and disability. In Byars v. Mixon, 292 Ala. 661, 668, 299 So.2d 262, 268 (1974), we held that "[t]he fact that a question propounded to an expert witness will elicit an opinion from him in practical affirmation or disaffirmation of a material issue in a case will not suffice to render the question improper." Harris v. Wientjes, 466 So.2d 125 (Ala.1985).

The Ultimate Issue Rule
"The modern trend is in the direction of permitting experts to give their opinions upon ultimate issues whose final determination rests with the jury. Therefore, we find no reversible error in the testimony of these experts that Plaintiff’s automobile accident caused his pain and suffering."
Harris v. Wientjes, 466 So.2d 125 (Ala.1985).

The Ultimate Issue Rule

“Plats of both of Bence’s surveys were admitted into evidence. He was the only surveyor who did testify and the record shows that prior to the submission of the cause to the trial court, counsel for appellees stated to the court: ‘Judge, of course, we have gone to the expense of making a pretty thorough survey and tried to get the other parties to make another survey, so we might be able to get together and see who is right and who is wrong. They have refused to do it....’”

Jones v. Wise, 213 So.2d 914 (Ala.1968).

The Ultimate Issue Rule

“This was not denied by counsel for appellants. Bence’s was the only testimony and actually was the only evidence that stated the exact position of the boundary line.”

Jones v. Wise, 213 So.2d 914 (Ala.1968).

The Ultimate Issue Rule

“The only witness testifying that possessed the qualities of an expert as to any special qualifications was the licensed land surveyor, Bence. His testimony was to the over-all effect that he could not locate the boundary line between the parties from the various deeds of records available to him, and that he had to fall back on the physical facts as he found them existing at the time he physically inspected and surveyed the premises; which he stated is considered usual, accepted, authoritative, and recommended practice of land surveyors under such circumstances.”

Jones v. Wise, 213 So.2d 914 (Ala.1968).

The Ultimate Issue Rule

“Exhibit ‘A’ offered in evidence by the plaintiffs, is a plat or diagram made by the witness, Bence, in his survey, which he states is a true and correct plat or diagram of the surveyed boundary line separating the real properties of the parties to this suit, and showing the correct measurements of the lines and boundaries pertinent to this cause. This Court must give much credence to the uncontroverted testimony of an expert witness.”

Jones v. Wise, 213 So.2d 914 (Ala.1968).

The Ultimate Issue Rule

“A surveyor, shown to have experience as such, may testify as a witness to his survey and its correctness, whereupon the plat or map may be admitted in evidence in connection with his testimony. Calvert v. Bynum, 255 Ala. 172, 50 So.2d 731; Hill v. Johnson, 214 Ala. 194, 106 So. 814.”

Jones v. Wise, 213 So.2d 914 (Ala.1968).

The Ultimate Issue Rule

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


88 The Ultimate Issue Rule

“Rule 704, provides that opinion testimony ‘is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.’ This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact.”

*Green Hi-Win Farm, Inc. v. Neal*, S.E.2d 614, 616, 617 (N.C.App. 1986).

89 The Ultimate Issue Rule

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


90 The Ultimate Issue Rules

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


91 The Ultimate Issue Rules

Mississippi Rules of Evidence
Rule 704. Opinion on ultimate issue.
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

92 The Ultimate Issue Rule

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

**The Ultimate Issue Rule**

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

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

VII. KNOW AND UNDERSTAND THE “STANDARD OF CARE” FOR PROFESSIONAL LAND SURVEYORS
What a reasonably prudent surveyor would do under like of similar circumstances. The “reasonable practitioner” standard.

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Standard of Care
“It is the duty of a ____________ in his (her) profession to use that degree of knowledge, skill, and care ordinarily possessed and used by members of that profession, and to perform any service undertaken as a ____________ in a manner that a reasonably prudent land surveyor would use under the same or similar circumstance.”

*Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.*

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Standard of Care
“The standard of care by which the professional acts of surveyors are measured is a national standard, not a local or regional one. ... Whether a proffered witness is qualified to testify as an expert is a matter to be decided by the trial court in the exercise of its sound discretion.”


**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

Standard of Care
“In Illinois, the established standard of care for all professionals is stated as the use of the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances. [The] same general standard of care applies to all professionals, ... and requiring all professionals to apply same degree of
knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances."


98 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Standard of Care
"Surveyors are not insurers of the correctness of their findings but may be held liable for damages caused by breach of their duty to perform a survey with the care, skill, knowledge and diligence expected of a professional surveyor."


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

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

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


102 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
• Beyond a Reasonable Doubt (Almost Certain).
• Clear and Convincing (Highly Probable).
• Preponderance of Evidence (More than 50%, or the Greater Weight).
• Substantial Evidence (More than a Scintilla, Less than a Preponderance)
• Scintilla of Evidence (The Smallest Trace).

103 JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
You Must Win at the Trial Court Level
• The facts established at the trial court level will be the facts up on appeal. The appellate court will not overturn the trial court is the trial court’s ruling is
supported by *substantial evidence*.

104 **JEFF’S 10 COMMANDMENTS**

*Expert Witness Testimony*

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


105 **JEFF’S 10 COMMANDMENTS**

*Expert Witness Testimony*

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


106 **JEFF’S 10 COMMANDMENTS**

*Expert Witness Testimony*

Fed. Rules of Evidence

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

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

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

107 **JEFF’S 10 COMMANDMENTS**

*Expert Witness Testimony*

Fed. Rules of Evidence

Rule 802. Hearsay Rule

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

108 **JEFF’S 10 COMMANDMENTS**

*Expert Witness Testimony*

Can "Sonny-Boy" (in the present day) testify as to where George Washington set the corner in 1748?
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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

The surveyor’s criterion is the best available evidence that a reasonably prudent surveyor in like or similar circumstances would find.

There is always some evidence of a corners location, by definition, whatever that evidence is will be the best available evidence.

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

“The original location of monuments must always prevail, but that when those monuments have disappeared they must be established by the best evidence the nature of the situation is susceptible of. Extrinsic evidence, such as an old fence, may have so much greater probative force than more recent surveying measurements as to prevail over the latter as a matter of law.” Northrop v. Opperman, 2011 Wisc. LEXIS 4 (Wisc.2011).
Best Available Evidence

"After a surveyor has completed a comprehensive review of all available records, deeds and prior surveys, the surveyor begins the field survey. Once in the field, the surveyor has a duty to make a diligent search for all monuments referenced directly or indirectly in the deed or property description that either occur naturally or were put in place by prior surveyors or other persons."


115  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence

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


116  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence

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


117  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence

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


118  JEFF’S 10 COMMANDMENTS
Expert Witness Testimony
Best Available Evidence
“Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.”


**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

_Best Available Evidence_

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


**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

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

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

**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

_The Reasonably Prudent Practitioner_

“Jones contends that Hansen failed to establish the standard of care relating to the survey requested by Bell because he testified only what he would do under similar circumstances, not what a reasonably prudent surveyor would do. Testimony from an expert witness as to what he or she would do under similar circumstances is not sufficient to prove a standard of care.”


**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

_The Reasonably Prudent Practitioner_

“It is true that Hansen responded to several questions from Bell’s counsel by saying what ‘I’ or ‘we’ would have done. When asked about his use of the word ‘we,’ however, he said that he was referring to ‘surveyors in general,’ and in his previous answers he had been talking about ‘what surveyors normally do’”


**JEFF’S 10 COMMANDMENTS**

**Expert Witness Testimony**

_The Reasonably Prudent Practitioner_
“Hansen also confirmed that his answers were based on his opinion ‘with reasonable surveying certainty.’ While his testimony might have been a bit clearer, we are satisfied that it met the requirements.”


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JEFF’S 10 COMMANDMENTS

Expert Witness Testimony

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

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

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LARSEN v. RICHARDSON

MONTANA SUPREME COURT

2011 MT 195

August 16, 2011