

SURVEYOR IMMUNITY
by
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The surveyor's skills are in great demand by a sophisticated society that requires order, clarity, and technical expertise. At the beginning of each survey, the surveyor steps off into the unknown — attempting to bring clarity to confused and often disputed boundaries. The surveyor is entrusted with performing a service that often lacks a clear and unimpeachable solution. Surveying, as in other professions, is not an exact science.

Advertisements on television and other mass media communications make it clear that if you choose the law firm featured in the advertisement, then for every perceived harm there will be a remedy (i.e., “the money you deserve”). Vindictive neighbors often view litigation like armies wage warfare – a surveyor is either a friend or enemy. The anger of the neighbor is often focused on the surveyor as the source of their boundary problem, the reason for the expenses they incurred in litigation, or the reason for their loss in litigation. It is not uncommon for surveyors to be sued or threatened to be sued by the neighbor. Fortunately for the surveyor, the law balances the neighbor's need for a remedy with the needs of society and the courtroom.

Public policy requires that witnesses not be intimidated or fear vexatious litigation when testifying or preparing to testify. Circumstances often arise where a surveyor is unable to prove beyond a reasonable doubt the basis for their opinion; yet, this should not stand in the way of offering the opinion when required to fairly try a boundary dispute where only a preponderance of evidence is needed. Surveying according to ancient landmarks and old deeds among vexatious neighbors is like sailing on the ocean, charting a path through unknown winds and tides. Surveying practice requires some privilege and immunity under such conditions or no surveyor would sail except upon the calmest seas and would run in fear of the slightest storm.

In such cases, there arises the sound public policy that where a cause of action would ordinarily lie, there shall be a privilege when communicating statements prior to or during a judicial proceeding. The common law has been codified in the RESTATEMENT (SECOND) OF TORTS § 588(b) (1976) Accordingly, allegations, opinions, and statements made by a surveyor in good faith and relevant to a disputed boundary involved or likely to be involved in litigation shall enjoy an absolute privilege. The protection is afforded in both criminal and civil proceedings. This privilege applies to arbitration matters as well.

A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding. RESTATEMENT (SECOND) OF TORTS § 588 (1976)

The privilege encompasses all statements made prior to or during the judicial proceedings. It is not necessary that the opinion be under oath or during an official proceeding. The protection is afforded when litigation is proposed or otherwise likely to occur (though more than a slight chance is required). Where a communication occurred prior to a proposed judicial proceeding, the privilege extends to those matters made in good faith and under serious consideration by a witness or possible party to the judicial proceedings.

The privilege is absolute. The exceptions are few and narrowly construed. It is immaterial that the testimony is irrelevant, incorrect, malicious, or spiteful so long as the information has some reference to the litigation or was prompted by counsel or needs of counsel, even if later judged to be inadmissible or incorrect. Redress lies only in contempt or perjury brought before the court.

Accordingly, while the surveyor should always tread cautiously when providing an opinion, where litigation appears imminent or is ongoing, the surveyor should not be intimidated into changing their opinion or avoid giving it under threat of a lawsuit by the opposing party.