

# Trial by Deposition

Lessons learned in the hot seat

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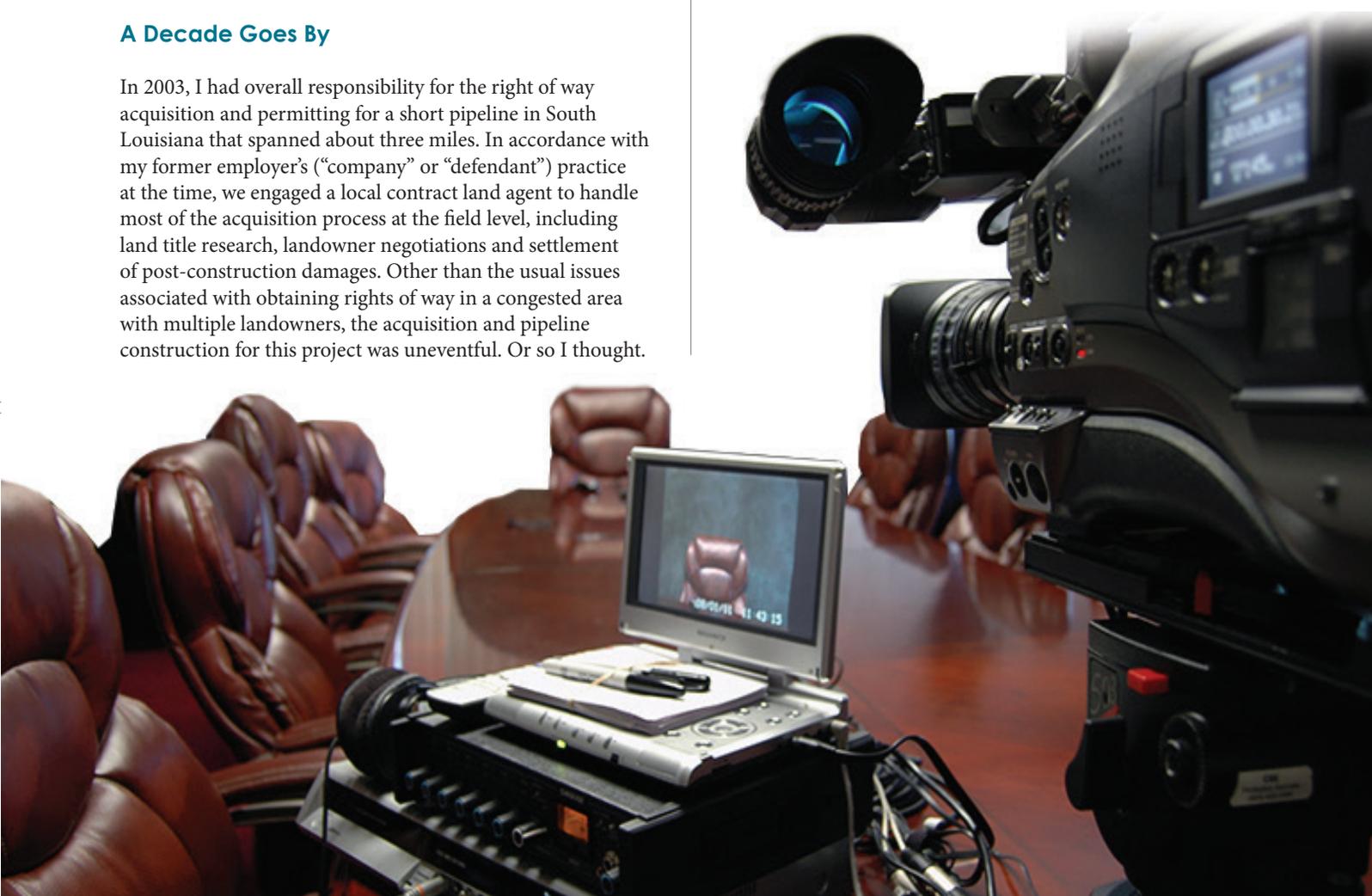
**F**or anyone engaged in right of way acquisition at a project oversight level, you may one day be called upon to provide testimony in connection with litigation. While this is usually related to an eminent domain action, your testimony may be required for any number of other purposes.

A few months ago, I gave a deposition that involved acquiring land rights to construct a pipeline. Although I spent a significant amount of time preparing for the interview, I experienced a few surprises during the actual event that I thought I would share.

## A Decade Goes By

In 2003, I had overall responsibility for the right of way acquisition and permitting for a short pipeline in South Louisiana that spanned about three miles. In accordance with my former employer's ("company" or "defendant") practice at the time, we engaged a local contract land agent to handle most of the acquisition process at the field level, including land title research, landowner negotiations and settlement of post-construction damages. Other than the usual issues associated with obtaining rights of way in a congested area with multiple landowners, the acquisition and pipeline construction for this project was uneventful. Or so I thought.

More than 10 years after the pipeline began operations, a lawsuit was filed. The complainant stated that the company failed to obtain a right of way from his client, who allegedly owned land that was crossed by the pipeline. It was a small parcel encumbered by a number of roads and railroad rights of way, some of which were obtained through expropriation, which arguably transferred fee simple interests to the owners of the rights of way. In any event, when negotiations failed to resolve the dispute, the attorney for the landowner filed a lawsuit against the company.



The plaintiff's attorney had been involved in an earlier lawsuit against the parent company of the defendant, and it had resulted in a multimillion-dollar judgment against the parent. In similar fashion, he sued the company for nearly \$100 million, an amount far in excess of the fair market value of the land rights that formed the basis of the dispute. The suit alleged, among other things, that the acquisition team intentionally avoided dealing with his client and consequently, the company was guilty of trespass and that damages should be based on the total revenues of the pipeline since it began operation.

### The Unexpected Scope

When my former employer contacted me about participating in the defense, I agreed to assist and was directed to provide my testimony in a deposition. Within a few days, two banker boxes arrived containing more than 1,700 pages of project-related correspondence, maps and documents for me to review in preparation for the deposition. Given that a decade had passed since this project concluded, I reviewed each folder in order to refresh my memory.

The deposition started at 8:30 am in Los Angeles where I lived at the time. One of the aspects of the process that you can control is ensuring that the deposition is on a date and at a location that is convenient for you. The attorney for the opposing side was present, along with their support staff and an expert in oil and gas land rights. A court reporter and video cameraman, along with my attorney, were also present. I was expecting a few hours of questioning.

Little did I know, but the ordeal was just beginning.

One of the first questions I was asked was whether I had discussed the case with my counsel (who represented the defendant) and whether she had helped me prepare for the deposition. There is nothing wrong with your attorney helping you prepare for the deposition, such as reviewing the paperwork and talking about what you will probably be asked to discuss. And although you have a right to have your attorney at the deposition, do not be surprised if they are mostly silent. This simply signals to the attorney for the other side that counsel has complete confidence in their witness' ability to handle the questions without the need to jump in or steer the conversation.

I went into the hearing believing that only the subject matter of the lawsuit would be discussed. Much to my surprise, one of the first exhibits produced was an extraneous note that I had written in 1978 that was completely unrelated to the case. The attorney asked me to tell them what was I thinking when I wrote the note. While trying to remain professional, I thought to myself, you've got to be kidding.

The reality is, you cannot assume that the inquiry will be restricted to the subject of the lawsuit or even be connected to that project. Although you can (and should) review the files associated with the project beforehand to familiarize yourself with what you think will be addressed, do not be

surprised if you are deposed in matters that are apparently insignificant, old, or entirely unrelated to the subject matter of the lawsuit. For instance, because the land expert for the other side specialized in mineral law, I spent a lot of time discussing the differences in servitude agreements and oil and gas leases.

Always keep in mind that it is perfectly acceptable to say you don't know the answer if you do not remember. You are under oath, and it is reasonable that you will not have total recall of all events that occurred years ago.

### Repetitive or Irrelevant Questioning

There were several instances where the opposing attorney held up a document and asked if I had seen it before and, if so, whether I remembered it. I did not want to guess, so when I was told that the attorney would be questioning me about the document, I asked to read it first. On average, it took me about 10 minutes to review each legal or title document, and at times, I felt like I was wasting everyone's time. But I knew that if I wanted to speak intelligently about the document, taking the extra time was definitely the prudent thing to do.

As the hearing went on, I found myself repeatedly testifying that I did not recall the specific details being asked. I kept thinking that I should have better recall. Of course, that is part of the opposing attorney's strategy—creating doubt. Being under oath, I was compelled to respond honestly, even if I kept repeating, "I don't recall" over and over during the course of the deposition. This is especially important when faced with those state of mind questions, like what I was thinking when I wrote that note back in 1978. The opposing attorney may try to imply that you had an ulterior motive or something to hide, especially if they can show that you handled things differently in one case than you did in another even if there was a valid reason for doing.

The opposing side wins a victory when you are confused, inconsistent and/or contradictory. You can reduce the likelihood by reviewing the pertinent



Despite reviewing more than 1,700 pages of project documentation, the opposing attorney continued to ask repetitive questions on unrelated topics.



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materials presented to you, taking the time to construct your thoughts before verbalizing your response, and stating that you do not know the answer if this is accurate.

### Addressing Internal Inconsistencies

It is not unusual that filing systems differ from one pipeline to another even if the operator is the same. The opposing counsel will assert that any variances in the filing procedures or document controls from one pipeline system to another are due to bad faith. For example, if there are field notes from the agent in some files, but not in the one that is subject to the litigation, the other side may assert that there has been an effort to hide information.

Variances in filings systems may be due to a number of factors. This is often the case when merging companies combine their respective right of way files. Local laws and regulations vary from one jurisdiction to another and this will influence what needs to be part of the land title research and what ultimately makes its way into the permanent right of way files. Also, the corporate protocol for what is included in the permanent files may have changed over the years, especially with the advent of new technologies.

The plaintiff’s attorney continued by pointing out that in some cases the company retained all chain of title documents, but in other cases it only kept a copy of the vesting deed. Referencing another project I had worked on in the 1980s, the attorney asked me to explain why the right of way files for that project included all of the supporting land documents (including liens, encumbrances, and

subordinations) and none were included in the files for the pipeline that was the subject of the lawsuit. Consistency is also required when determining what is transferred from the field files to the permanent files at the corporate level. As part of their internal operating procedures, companies need to determine whether they will retain all working drafts, which by nature are subject to change. And if there is a policy regarding disposing of non-critical information after a predetermined time, you need to adhere to that policy and apply it across the board. A good time to ensure that your files are standardized across systems is when they are converted to an electronic database.

Although there may be good reasons for content differences in the files from one project to another, you will likely be asked to explain why at the hearing, especially if the method for handling title reports/documentation looks inconsistent or irregular.

### Some Final Thoughts

For most projects, the requisite land title research often occurs at locations that are remote from the company’s offices. And while there are many benefits in having an experienced and versatile acquisition agent, land title research is one function that, in most cases, should be segregated and assigned to a specialist regardless of the scope of the project. A title specialist is better equipped to take advantage of the technological resources available, while ensuring compliance and documentation with standardized processes. Title specialists are especially skilled in determining whether legal support may be needed to help interpret difficult title issues

and bringing these issues to the client’s attention.

During my 12 hours of questioning, it didn’t take long before I began to feel like the subject of a criminal investigation. And when the questions were especially ridiculous or repetitive, it became harder and harder to keep from responding sarcastically. Even when the camera was off, I knew that anything I said could—and probably would—be taken out of context. My legal counsel encouraged me beforehand to take frequent breaks. If you find yourself in the hot seat for hours on end, short breaks can really help to renew your focus.

### In the End

The case was settled before it went to trial. Although I don’t know the exact figure, I understand that the settlement amount was considerably less than the plaintiff sought. The lawyers assured me that my time and efforts to assist them in preparing for the trial contributed to reaching the settlement.

This was only the second time in my career that I was subjected to a deposition of such intensity and duration. And while no amount of preparation beforehand would have made either experience pleasurable, just know that each of us has some level of control over the process. With some advance preparation and a little insight into what to expect, anyone can be better prepared for “their day in court.” ★



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