# Missouri Society of Professional Surveyors

# Spring Workshop

**May 1-2, 2025**

The Lodge of Four Seasons
Lake Ozark, MO 65049

# "What Happens When You're Sued"

# "Different Ways to Solve Boundary Disputes"

AND

# "Boundary Disputes"

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# 2025 - MISSOURI SOCIETY OF PROFESSIONAL SURVEYORS – Lake of the Ozarks

MY BACKGROUND – INCLUDING SURVEYING (1967)

## What Happens When You're Sued

Notify insurance co asap, Attorneys involved: yours, one appointed by insurance co. & theirs.
Depositions: What is it, what information is needed or required to present to attorney, What will deposition information be used for and how long do you need to have information available, Be sure to get copy of deposition and read it all – mistakes and mis quotes need to be fixed and how will it be used for or against later
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### "The Rookie Mistake"

There's this new intern working for a surveying company. During the first week on the job, he's sent out to help an old-timer with a big boundary survey.
The intern's got all the gear, trying to impress, says, "I already marked the corners and set the stakes."
The old-timer looks over the map, raises an eyebrow, and goes, "Son, you just put a retirement home in the middle of a drainage easement."
The intern panics. "Should I go fix it?"
The old guy chuckles. "Nah, let the lawyers figure it out. We just locate the lines—they're the ones who get paid to pretend they "don't exist."

# I. Section 327.272 RSMo. Practice as Professional Land Surveyor Defined

1. A professional land surveyor shall include any person who practices in Missouri as a professional land surveyor who uses the title of "surveyor" alone or in combination with any other word or words including, but not limited to "registered", "professional" or "land" indicating or implying that the person is or holds himself or herself out to be a professional land surveyor who by word or words, letters, figures, degrees, titles or other descriptions indicates or implies that the person is a professional land surveyor or is willing or able to practice professional land surveying or who renders or offers to render, or holds himself or herself out as willing or able to render, or perform any service or work, the adequate performance of which involves the special knowledge and application of the principles of land surveying, mathematics, the related physical and applied sciences, and the relevant requirements of law, all of which are acquired by education, training, experience and examination, that affect real property rights on, under or above the land and which service or work involves:
   1) **The determination, location, relocation, establishment, reestablishment, layout, or retracing of land boundaries and positions of the United States Public Land Survey System;**
   2) **The monumentation of land boundaries, land boundary corners and corners of the United States Public Land Survey System;**
   3) The subdivision of land into smaller tracts and preparation of property descriptions;
   4) The survey and location of rights-of-way and easements;
   5) Creating, preparing, or modifying electronic or computerized data relative to the performance of the activities in subdivisions (1) to (4) of this subsection;
   6) Consultation, investigation, design surveys, evaluation, planning, design and execution of surveys;
   7) The preparation of any drawings showing the shape, location, dimensions or area of tracts of land;
   8) Monumentation of geodetic control and the determination of their horizontal and vertical positions;
   9) Establishment of state plane coordinates;
   10) Topographic surveys and the determination of the horizontal and vertical location of any physical features on, under or above the land;
   11) The preparation of plats, maps or other drawings showing elevations and the locations of improvements and the measurement and preparation of drawings showing existing improvements after construction;
   12) Layout of proposed improvements;
   13) The determination of azimuths by astronomic observations.
2. None of the specific duties listed in subdivisions (4) to (13) of subsection 1 of this section are exclusive to professional land surveyors unless they affect real property rights. For the purposes of this section, the term **"real property rights"** means a recordable interest in real estate as it affects the location of land boundary lines. The validity of any document prepared between August 27, 2014, and August 28, 2015, by a provider of utility or communications services purporting to affect real property rights shall remain valid and enforceable notwithstanding that any legal description contained therein was not prepared by a professional land surveyor.

3. *Professional land surveyors shall be in responsible charge of all drawings, maps, surveys, and other work product that can affect the health, safety, and welfare of the public within their scope of practice.*
4. Nothing in this section shall be construed to preclude the practice of architecture or professional engineering or professional landscape architecture as provided in sections 327.091, 327.181, and 327.600.
5. Nothing in this section shall be construed to preclude the practice of title insurance business or the business of title insurance as provided in chapter 381, or to preclude the practice of law or law business as governed by the Missouri supreme court and as provided in chapter 484.

# II. Presentation Outline: Responding to Litigation for Professional Negligence

1. **Introduction**
    1) **Purpose of Presentation**
        - To inform surveyors about how to effectively respond if sued.
    2) **Importance of Understanding Legal Procedures**
        - Protecting professional reputation and financial stability.
2. **Overview of Litigation in Surveying**
    1) **Common Causes of Action**
        - Negligence
        - Breach of contract
        - Fraud and misrepresentation
3. **Immediate Steps Upon Receiving a Lawsuit**
    1) **Do Not Panic**
        - Importance of staying calm and collected.
    2) **Review the Lawsuit Document Carefully**
        - Key components to look for: claims made, deadlines for response, etc.
    3) **Preserve Evidence**
        - Importance of storing relevant documents, communications, and work products. (including electronic data)
        - **Spoilation of evidence** refers to the intentional or negligent destruction, alteration, or failure to preserve evidence that is relevant to pending or anticipated litigation. This can occur when a party does not take reasonable steps to maintain evidence, leading to the inability to use that evidence in legal proceedings, potentially harming the other party's case. **Courts may impose sanctions for spoilation, which can include adverse inference instructions, monetary penalties, or even dismissal of claims or defenses.** The principle emphasizes the obligation of parties to preserve evidence that could be pertinent to litigation, ensuring fairness and integrity in the judicial process. **Missouri Rules of Civil Procedure**. Specifically, Rule 56.01(b) pertains to the discovery of documents and tangible things. While it does not explicitly

mention spoliation, it establishes the duty of parties to preserve relevant evidence during litigation.

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*Rule 56.01(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:*

*(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter, provided the discovery is proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.*

*Information within the scope of discovery need not be admissible in evidence to be discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

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4. **Seeking Legal Counsel**
    1) **Importance of Consulting an Attorney (insurance counsel first)**
        - Choosing a lawyer experienced in professional liability or surveying issues.
    2) **Preparing for Your Initial Consultation**
        - Documents to bring with you: contracts, correspondence, and the lawsuit itself.
5. **Developing Your Defense Strategy**
    1) **Possible Defenses to Consider**
        - Compliance with industry standards
        - Lack of negligence.
    2) **Engaging Expert Witnesses – usually lawyer selected**
        - How expert testimony can bolster your defense.
6. **Communication during Litigation**
    1) **Managing Client Relationships**
        - Keeping clients informed without compromising your legal position.
    2) **Media Communication**
        - Guidelines for interacting with the media, if applicable.
7. **Appearing in Court**

1) **Understanding Court Procedure**
   - Overview of what to expect during hearings and trials.
2) **The Role of Your Attorney in Court**
   - How your lawyer will advocate for you.

8. **Preventing Future Litigation**
   1) **Importance of Continuing Education**
      - Staying updated with laws and regulations relevant to surveying.
   2) **Risk Management Practices**
      - Implementing best practices to minimize the risk of litigation.

# III. Segments of a Lawsuit

1. **Drafting the Petition**
   1) **Complaint/Petition**
      - The lawsuit begins with the preparation and filing of a petition (or complaint) that outlines the plaintiff's claims against the defendant.
      - The petition typically includes:
        - A statement of jurisdiction.
        - A clear and concise statement of the facts.
        - Legal claims (causes of action) based on those facts.
        - A demand for relief or specific remedies sought (e.g., damages, injunctive relief).
2. **Filing the Petition**
   1) **Court Filing**
      - The petition must be filed with the appropriate court, accompanied by any necessary filing fees and required forms.
   2) **Case Number Assignment**
      - Upon filing, the court assigns a case number for the tracking of all documents and proceedings.
3. **Service of Summons**
   1) **Issuance of Summons**
      - A summons is issued by the court, directing the defendant to respond to the petition.
   2) **Service of Process**
      - The summons and petition must be served on the defendant in accordance with jurisdictional rules, which may involve personal service, substituted service, or service by publication.
   3) **Proof of Service**
      - The plaintiff must file a proof of service with the court, demonstrating that the defendant has been properly notified of the lawsuit.
4. **Defendant's Response**
   1) **Answer**
      - The defendant has a specified period (usually 30 days) to file an answer to the petition, admitting or denying the allegations and asserting any defenses or counterclaims.

2) **Motions**
    - The defendant may also file pre-answer motions, such as motions to dismiss for lack of jurisdiction or failure to state a claim.

5. **Discovery Phase**
    1) **Discovery Requests**
        - Both parties engage in discovery, exchanging information relevant to the case, which may include:
            - Interrogatories (written questions).
            - Requests for production of documents.
            - Depositions (sworn testimony taken outside of court).
    2) **Discovery Disputes**
        - Any disputes regarding discovery can lead to motions to compel or protective orders.
6. **Pre-Trial Motions and Conferences**
    1) **Summary Judgment Motions**
        - Parties may file motions for summary judgment to resolve the case or specific issues without going to trial.
    2) **Pre-Trial Conference**
        - The court often conducts a pre-trial conference to discuss the progress of the case, set a trial date, and address any outstanding motions or issues.
7. **Jury Trial Presentation**
    1) **Selecting a Jury**
        - If a jury trial is requested, jury selection occurs, including **voir dire** "vwar deer" to assess jurors' qualifications and potential biases.
    2) **Opening Statements**
        - Both parties present opening statements outlining their cases to the jury.
    3) **Presentation of Evidence**
        - The plaintiff presents evidence first, followed by the defendant. This may include witness testimonies, documents, expert opinions, and physical evidence.
    4) **Closing Arguments**
        - After evidence presentation, each party delivers closing arguments summarizing their case and persuading the jury.
8. **Jury Deliberation and Verdict**
    1) **Jury Instructions**
        - The court provides the jury with legal standards and guidelines for deliberation.
    2) **Deliberation**
        - The jury discusses the evidence and reaches a verdict, which is then presented to the court.
9. **Final Order of the Court**
    1) **Judgment**
        - The court issues a final judgment based on the jury's verdict or the court's decision in a bench trial. (30+10 days) = Finality unless Post trial Motion
    2) **Post-Trial Motions**

- Parties may file post-trial motions, such as motions for new trials or motions to amend the judgment.

3) **Appeals**
   - If dissatisfied with the outcome, parties may have the right to appeal the decision to a higher court.

# IV. Licensing and Designations

1. Surveyors in Missouri must be licensed and may have additional certifications that relate to specialized surveying practices. The Missouri Division of Professional Registration oversees licensing of Architects, Professional Engineers, Professional Land Surveyors, and Professional Landscape Architects (you're part of a myriad of people that also includes embalmers and tattoo artists)
2. These designations help ensure that surveyors adhere to the required standards and regulations for their specific type of work, providing clarity and professionalism in land surveying practices.
3. In Missouri, the standard of care for a land surveyor is generally defined as the level of skill, care, and diligence that a reasonably competent surveyor would exercise under similar circumstances. Specifically, surveyors are expected to adhere to industry standards and practices, ensuring accuracy and reliability in their surveying work. This standard of care is often based on the assumption that surveyors are knowledgeable about relevant laws, regulations, standards, and best practices in surveying.
   1) **Key Points Regarding Standard of Care:**
      - **Reasonable Competence**: Surveyors should perform their duties with the competence expected of a similarly trained and licensed professional in the industry.
      - **Due Diligence**: Surveyors must conduct thorough research, including title searches and an examination of existing records, to gather the necessary information before conducting a survey.
      - **Compliance with Regulations**: Adherence to state laws and regulations, as well as industry standards set forth by professional organizations, is paramount.
      - To uphold the standard of care, Missouri surveyors should ensure they are aware of current best practices and are diligent in their work. Familiarity with both state statutes and case law can help in guiding surveyor conduct and mitigating liability risks. Surveyors should also consider consulting their liability insurance provider or legal counsel for further insights on maintaining compliance with industry standards and best practices.
   2) **General Legal Framework:**
      - **Surveying Standards**: Established professional surveying practices typically emphasize beginning surveys at section corners or lines to ensure accuracy in referencing legal descriptions, as this helps define property boundaries in accordance with the Public Land Survey System (PLSS).

- **Admissibility of Surveys in Court:** The admissibility of surveys as evidence is subject to rules regarding relevance, reliability, and the qualifications of the surveyor. The Missouri courts consider the context in which the survey is presented rather than mandating a specific starting point.
- **Professional Definition of Hearsay:** Hearsay is an out-of-court statement made by a person, which is being offered in court to prove the truth of the matter asserted in that statement. Under the Federal Rules of Evidence and most state rules, hearsay is generally *inadmissible* due to concerns about reliability and the inability to cross-examine the original speaker. The rationale behind this rule is that statements made outside of the courtroom lack the necessary safeguards of evidence, such as the opportunity for questioning and the ability to assess the credibility of the person making the statement. However, there are numerous exceptions to the hearsay rule, allowing certain out-of-court statements to be admitted into evidence under specific circumstances, particularly when they bear significant reliability and relevance.

4. In Missouri, as in other jurisdictions, surveyors can purchase various types of professional liability insurance to protect themselves against claims related to their work, including claims for improper conduct or malpractice. Understanding the differences between a "claims made" insurance policy and other types of professional liability insurance is crucial for surveyors seeking appropriate coverage.
    1) **Claims Made Insurance Policy**
        - **Definition:** A claims made insurance policy provides coverage for claims that are made against the insured during the policy period, regardless of when the incident that gave rise to the claim occurred, as long as the incident is after the policy's retroactive date.
        - **Key Features:**
            - Coverage Trigger: The policy must be in effect at the time the claim is reported to be covered. This means that if a claim arises from an event that occurred during the policy period, but the claim is not made until after the policy has expired, the surveyor will not be covered unless they have tail coverage.
            - Tail Coverage: When a claims made policy is canceled or expires, tail coverage can be purchased to extend the reporting period for claims that arise from incidents that occurred during the original policy period.
        - **Advantages:**
            - Typically, claims made policies are less expensive initially than occurrence policies.
            - They can provide more specific coverage tailored to recent work.
        - **Disadvantages:**
            - The insured needs to maintain continuous coverage, as any gaps can leave them unprotected for claims arising from prior work.

2) **Occurrence Insurance Policy**
   - Definition: An occurrence policy provides coverage for incidents that happen during the policy period, regardless of when the claim is made. If the claim is related to work performed while the policy was in effect, it will be covered.
   - **Key Features:**
     - Coverage Trigger: Coverage is triggered when the incident occurs, not when the claim is filed. This means that if a surveyor performed work during a policy period and a claim arises years later, as long as the policy was in force during the relevant time, it should cover the claim.
   - **Advantages:**
     - Provides long-term peace of mind since incidents are covered no matter when the claim is filed, even if the insurance policy has lapsed.
   - **Disadvantages:**
     - Typically, it is more expensive and can limit coverage over time, especially as new policies are issued.
3) **Other Types of Insurance Policies**
   - Professional Liability Insurance: This encompasses both claims made, and occurrence policies specifically designed for professionals to protect against negligence, errors, and omissions in their professional services.
   - General Liability Insurance: Unlike professional liability insurance, general liability covers claims for bodily injury or property damage related to business operations but does not cover professional errors.

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*327.371. Surveyors exempt from trespass but liable for damages*

*A professional land surveyor licensed pursuant to the provisions of this chapter, together with such professional land surveyor's survey party, who in the course of a land survey finds it necessary to go upon the land of a party or parties other than the one for whom such professional land surveyor is making the survey shall not be guilty of trespass but shall be liable for any damage done to such lands or property.*

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   - Errors and Omissions (E&O) Insurance: Specifically designed for professionals, this insurance is similar to professional liability insurance, protecting against claims of negligence related to advising or providing a service.

5. For surveyors in Missouri, understanding the differences between **claims made** and **occurrence insurance policies** is crucial when selecting malpractice insurance. Those considering a **claims made policy** should be mindful of the importance of maintaining continuous coverage and the potential need for **tail coverage** when shifting to a new insurer. **Consulting with an insurance professional experienced in professional**

**liability coverage can provide valuable insights tailored to individual needs and risks in the surveying profession.**

6. In Missouri, it's important for surveyors to have a clear policy regarding the closing and destruction of file documentation to ensure legal compliance, ethical standards, and the protection of client information. Here's a suggested policy outlining best practices for closing and destroying file documentation for surveyors:
    1) **Policy for Closing and Destroying File Documentation**
        - **Purpose**
            - This policy establishes the procedures for closing, archiving, and destroying file documentation related to surveying activities, in compliance with legal and professional standards.
        - **Scope**
            - This policy applies to all employees, partners, and agents involved in surveying services within the firm.
        - **File Retention Period**
            - General Retention: Survey files, including contracts, correspondence, field notes, survey plats, and legal documents should be retained for a minimum of 10 years from the date of the project's completion.
            - Extended Retention: Files related to projects involving real property disputes, litigation, or claims may be retained for a longer duration, typically until the resolution of the matter plus an additional 5 years.
        - **Closing File Documentation**
            - Review & Complete: Before closing a file, ensure all documents are completed, signed, and organized. This includes confirming that all deliverables have been provided to the client.
            - Final Communication: Notify the client in writing that their file will be closed. Include a reminder of the retention period and advise them of any relevant information regarding their rights to access the files.
            - Archiving: Transfer closed files to a secure storage area, either physical or digital, for the duration of the retention period. Ensure that the storage method complies with data protection regulations.
        - **Destruction of File Documentation**
            - Destruction Method of Physical Documents: Shred paper files to prevent unauthorized access to sensitive information.
            - Destruction Method of Digital Files: Permanently erase digital files using data-wiping software that meets industry standards to prevent recovery.
            - Documentation of Destruction: Maintain a log of any files that have been destroyed, including the file name, destruction date, method used, and personnel involved in the destruction. This log should be kept for internal record-keeping and verification.
    2) **Compliance with Legal and Regulatory Requirements**

- Legal Hold: If any legal action, investigations, or claims arise, files relevant to these matters should **NOT** be destroyed until all legal obligations are fulfilled.
- Confidentiality: Ensure that all personnel adhere to confidentiality and non-disclosure agreements regarding client information throughout the retention and destruction processes.

3) **Training and Awareness**
   - Provide regular training to staff regarding the importance of file retention and destruction policies, legal requirements, and best practices for protecting sensitive information.
4) **Review and Update of Policy**
   - This policy should be reviewed and updated every 2 years or sooner as needed to ensure continued compliance with changes in laws, regulations, or professional standards.

# V. Deposition Instructions

## 1. Overview

As part of the pre-trial procedure, an attorney has the right to take a deposition. A deposition is the taking of **sworn testimony** by a potential witness in a trial. It is utilized to preserve testimony for a trial and to prepare for trial. A deposition can be utilized as evidence in a trial absent any objections to the respective portions of the deposition. A deposition is utilized to avoid surprise at the trial, and to preserve testimony while it is still fresh (since the trial is often months after the deposition). If a witness cannot be present at trial, the deposition can be read into evidence at the trial. A deposition can also be utilized to impeach a witness if his testimony is different during trial. Many of the questions will not be admissible during a trial, but you still have to answer, because the answer may help the attorney prepare their case for trial.

At the deposition, there is **no judge or jury**. After the deposition, a transcript of the deposition is made and a copy is provided to the attorneys and clients, with the original filed in court.

A deposition is often used to determine the strength of a case and for settlement. This is a first attempt to evaluate the witness to determine his credibility and truthfulness and how the witness will influence the case.

The attorney representing the deponent (if a party to the suit) will usually advise the deponent as to deposition rules, opposing counsel style, possible questions, and possible problems, and review the complaint. Some of the issues discussed are listed below. Prior to the deposition, the witness should review the complaint, his prior statements, admissions, interrogatories, and bills and injuries if a personal injury case. The witness should review all facts and notes so that he is not required to use notes during the deposition. The witness should revisit the scene of an accident or incident to review the situation.

The attorney will usually discuss the room layout and sitting arrangements. Usually, the attorney for the deponent will sit adjacent to the deponent. Opposing counsel will be seated across from the deponent. The court reporter will usually be seated with the opposing counsel.

A deposition usually begins with the court reporter administering an oath to the deponent (person being deposed). After that, the attorney that requested the deposition usually begins by introducing the persons present and rules for the deposition. The requesting attorney will then ask questions of the deponent followed by the opposing counsel.

2. **Rules for Depositions**:
    1) **Tell the truth**. Never lie during a deposition. You are sworn to tell the truth. The attorney may ask you if you were prepared by the opposing counsel and what documents you looked at. If you are asked what you have discussed with the opposing counsel, this can be objectionable, as it could violate attorney-client privilege or could violate attorney work product rules.
    2) Before answering, **understand the question**. Make sure you understand the question, or you can be set up for an inaccurate answer. If you don't understand, ask. Listen to the question, not the tone with which it is asked (can be a trick). Don't anticipate the question or interrupt the question. Make sure your answer is your answer, not the answer the attorney is attempting to get you to answer.
    3) **Don't guess** about an answer, or if you do, let the attorney know that it is a guess. If guessing tell your thought process so as to get as near to the truth as possible. Be precise. If you do not know the answer, say so. Avoid excessive use of "in my opinion" or "I'm not sure" as it leads to an impression that you are not a credible witness. If you do not remember an answer, say so.
    4) **Take your time** answering. Take as much time as you need to answer. Taking a second or two to answer allows the opposing attorney to object if necessary and allows you to provide a thoughtful answer. **If the deposition is not videotaped, the transcript does not reveal that you thought for several seconds before answering.**
    5) **Answer the question asked**. Don't volunteer information not asked for. Think about the answer to ensure that you are answering the correct question. Never attempt to be helpful or teach the attorney about a subject. Don't attempt to persuade the attorney that he is wrong, and you are right. That just provides more information to the attorney. The most common mistake is to volunteer information. Answer the question and then stop. Do not fix the question if you think it, is a bad question. Answer the question asked.
    6) You are **entitled to a fair question**. If the definition of words is unclear, interrogate the interrogator. "What do you mean by....?"
    7) **Answer audibly**. Head nods are not able to be put onto the transcript. Answer yes or no, not uh huh or nu huh.
    8) **Be relaxed**. Prior to the deposition, do whatever you need to do to relax.
    9) Be **wary of questions** concerning distance, speed, or time. This can lead to speculation. If you are guessing, say so. Be wary of questions summarizing your opinions or earlier testimony especially if it is not totally accurate. The attorney can ask you "loaded" inaccurate questions, so listen carefully for any misstatements. Be very wary of questions that start, "Don't you agree" or "Isn't it true". Be wary of compound questions. If you are confused by a complicated question, ask to clarify the question. Mark your diagrams carefully and describe for the reporter where and what you are pointing to or describing.

10) **Do not look to your attorney** for assistance in your answer. You must provide the answer, not your attorney.
11) Be **courteous**, but firm. Answer questions respectfully and do not lose your temper. Use courtroom decorum and especially if the deposition is videotaped, don't look bored, annoyed, distressed, or use annoying gestures or nervous habits. Your personal behavior, personality, and personal issues will be scrutinized by the attorney. Do not get upset. Don't be cocky but be confident. Never lose your temper as it could be a test. Avoid jokes and wisecracks.
12) Some attorneys will be **confrontational**. Do not argue or lose your temper. Your attorney may not object or fight the confrontation as part of his tactics, instead of yielding the battle to fit the opposing attorney's tactics.
13) **Admit if you have talked to lawyers**. However, the conversation may be objected to.
14) **Do not try to help** the case by exaggerating or not telling the truth. Always tell the truth.
15) **Do not bring papers** with you to the deposition. The first question will usually be if you brought any papers, and the papers or notes can be examined and admitted into evidence.
16) **Listen to the objections**. In most cases, you will still have to answer the question, as the objection is for the judge in admitting that portion of the deposition into evidence. Objections made by counsel must be answered unless privileged or a violation of a court directive. Counsel may object, but the person still has to answer. The objection is to be put on the record, so the issue can be raised before the court for a decision if that portion of the deposition is to be shown to the court. Remember, your attorney cannot coach you how to answer, by objecting.
17) **Anticipate and prepare for difficult questions**. Think about difficult questions in advance. Review your answers to interrogatories and requests for admissions as they are probable questions. Do not memorize your story, however.
18) **Dress as for court**. If the deposition is videotaped, you want to look presentable if the deposition is utilized in court. Your appearance can be determinative to the jury as to whether you are credible or not. Wear clean, neat clothing. Be clean and well groomed.
19) **Do not smoke, chew gum** or tap fingers, play with pencils, etc.
20) **Speak clearly and slowly** to allow accurate transcription of the deposition.
21) Get **adequate rest** before the deposition. Get a good night's rest.
22) Don't feel compelled to answer, just because there is a **long silence**. A long silence is often utilized to encourage someone to speak and give up information. Remember patience is a virtue. After a long silence, the silence can become more uncomfortable to the attorney and could unnerve him instead of you.
23) If you are given **a document**, read it entirely before answering. As long as questions are asked about a document, refer to the document. If the document is taken away, but questions are asked about it, get a copy to refer to while answering. Never answer a question about a document unless the document (the complete document) is in front of you. Study the document before answering, and answer only if there is a complete document in front of you.

24) If you are **interrupted** by the attorney when answering a question, continue to complete your answer.
25) **Do not promise** to obtain additional information or do something after the deposition. If asked, state that you will discuss this with your attorney.
26) **Correct prior answers** if you determine that they were inaccurate.
27) **Do not assume false facts**. If a hypothetical question is inaccurate answer only if your attorney tells you to answer, and only if there are sufficient facts, circumstances, and conditions to allow an accurate response. If not, then tell the attorney that there are not sufficient facts to make an opinion and answer under oath.
28) If asked the same question over and over, answer truthfully and give **exactly the same answer**. You can say, "same question, same answer...."
29) **Testify from your own knowledge**, not someone else's. Do not assume facts.
30) If you are responsible for an action, **take responsibility** and do not attempt to cover up. Remember you are under oath.
31) **Ask for a break** if you need one, or if you need to talk to your attorney. If you do talk to your attorney, there can be a chance that the conversation can be overheard, and a question asked about the conversation. If asked about the discussion with your attorney, an objection can be raised, but if asked if your attorney told you how to answer, the answer should always be "no."
32) **Do not make concessions** to the attorney questioning—that will only prolong questioning since you agree with him.
33) If you are **injured**, be prepared to show the injuries suffered. For personal injuries, be prepared to discuss lost wages, medical bills, injuries.
34) Be careful with **off the record statements**. Attorneys may make off the record statements, but you can be asked on the record about off the record statements.
35) **Do not exaggerate**. Tell the truth. Do not try to hide the truth or divert the attorney from the truth. Assume that the attorney has done his homework and will catch you if you lie or exaggerate.
36) **Don't box yourself in**. Do not make definitive limiting statements that limit your future answers, such as "That's the whole story" or "Nothing else happened." Avoid words such as **always, all, never, and ever.**
37) **Do not waive your signature** on a deposition. Read it entirely and sign before it is filed with the court. Correct any mistakes. Discuss errors with your attorney, but your attorney cannot tell you how to answer. As you review the document, make notes about errors. Think through errors before making corrections on the errata sheet. Remember you can correct errors on the errata sheet, but the original answer is not deleted from the transcript.
38) After the deposition, if you **discover errors or additional information**, inform your attorney.
39) Be truthful, honest, earnest, and fair, and treat all parties with respect, and you will be successful in your deposition.

# VI. Different Ways to Solve Boundary Disputes

Agreement, Trial, Arbitration and Adverse Possession

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**"The Confession"**

A surveyor walks into a confessional booth.
He says, "Father, forgive me. I've lied to people."
The priest says, "Go on, my child."
The surveyor says, "I've told developers their plans would fit. I've told homeowners their neighbor's fence was probably legal. I've even said, 'I'll have it done by Friday."
There's a long pause.
Finally, the priest sighs and says, "That's not a confession—that's just the job.

1. **Understanding Arbitration, Mediation, and Other Methods of Dispute Resolution**
    1) 435.350. RSMo — Validity of arbitration agreement, exceptions
    2) A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Contracts which warrant new homes against defects in construction and reinsurance contracts are not "contracts of insurance or contracts of adhesion" for purposes of the arbitration provisions of this section.
2. **Introduction**
    1) **Purpose of the Discussion**
        - To discuss the importance of alternative dispute resolution (ADR) methods in surveying and construction-related disputes.
    2) **Overview of Topics to be Covered**
        - Define arbitration, mediation, and other dispute resolution methods.
3. **Definitions**
    1) **Arbitration**
        - A formal process where a neutral third party (the arbitrator) makes a binding decision based on the evidence and arguments presented.
    2) **Mediation**
        - A collaborative process where a neutral third party (the mediator) facilitates communication and negotiation to help parties reach a voluntary agreement.
    3) **Other Methods of Dispute Resolution**
        - Methods such as negotiation, conciliation, and mini trials.
4. **Key Differences Between Arbitration and Mediation**
    1) **Decision-Making Authority**
        - Arbitration: Arbitrator makes a binding decision.
        - Mediation: Mediator assists parties in reaching their own agreement.
    2) **Formality of the Process**
        - Arbitration: More formal, similar to a court proceeding; rules of evidence may apply.

- Mediation: Informal; flexible procedures tailored to the parties' needs.

3) **Outcome and Enforcement**
   - Arbitration: Binding decisions enforceable in court (with limited grounds for appeal).

---

*Uniform Arbitration Act (435.350 to 435.470)RSMo*

*435.385. Award*

*1. The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.*

*2. An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.*

*435.400. Confirmation of an award*

*Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 435.405 and 435.410.*

---

   - Mediation: **Non-binding**; agreements reached are dependent on mutual acceptance by the parties.

4) **Duration and Costs**
   - Compare typical timelines and costs associated with each method.

5. **Advantages and Disadvantages**
   1) **Pros of Arbitration**
      - Speed, confidentiality, expertise of arbitrators, and finality of decisions.
   2) **Cons of Arbitration**
      - Limited avenues for appeal, potential for being as costly as litigation, and less control over outcomes.
   3) **Pros of Mediation**
      - Greater control for parties, potential for win-win outcomes, cost-effective, and preserves relationships.
   4) **Cons of Mediation**
      - Non-binding nature might lead to unresolved disputes, reliance on cooperation, and possible power imbalances between parties.
6. **Other Methods of Dispute Resolution**
   1) **Negotiation**
      - Direct discussions between parties to resolve disputes without third-party involvement.
   2) **Conciliation**
      - Involves a neutral third party who meets separately with each party to facilitate an agreement, providing suggestions and recommendations.

3) **Mini-Trials**
   - A private trial where each party presents a shortened version of their case to a neutral third party or panel who gives an advisory opinion.

7. **Choosing the Right Method of Dispute Resolution**
   1) **Factors to Consider**
      - Nature of the dispute, desired outcomes, relationship between parties, time, and costs.
   2) **Hybrid Approaches**
      - Exploring combined methods, such as starting with mediation followed by arbitration if unresolved.

In instances where direct negotiation proves unproductive, parties can consider engaging in a mediation process. Mediation involves a neutral third party who facilitates discussions between the disputing parties, helping them identify their interests and explore possible solutions. The mediator's role is to encourage open dialogue and assist in finding common ground, making the process less confrontational and more cooperative. Mediation can often lead to a resolution in a more timely and cost-effective manner than traditional litigation, allowing parties to maintain control over the outcome.

In summary, effective negotiation methods and concerted efforts toward resolution play a vital role in dispute resolution. By employing strategies such as interest-based and principled negotiation, enhancing communication, and considering mediation, when necessary, parties can work collaboratively to resolve their disputes amicably. These approaches not only help in reaching agreements but also contribute to preserving relationships and fostering a positive atmosphere for future interactions.

# VII. Arbitration and Mediation Organizations in the Central Midwest

1. **American Arbitration Association (AAA) - St. Louis Office**
   1) While a national organization, AAA has a local office in St. Louis, Missouri, providing comprehensive arbitration and mediation services tailored to the needs of the Midwest region.

**JAMS** - ***Local Solutions. Global Reach.***™
190 Carondelet Plaza | Suite 1450 | St. Louis, MO 63105
P: 314-334-5267 | F: 314-944-5054
**www.jamsadr.com**

2. **Missouri Bar Association - Dispute Resolution Section**
    1) This section of the Missouri Bar focuses on promoting alternative dispute resolution methods, providing resources and training for attorneys and practitioners in Missouri.
3. **St. Louis County Bar Association - Mediation Program**
    1) Provides mediation services and resources for members, focusing on local community disputes and offering training for new mediators.
4. **Mediation and Conflict Resolution Services (MCRS) - Missouri**
    1) Offering mediation services, MCRS provides conflict resolution resources for individuals, businesses, and organizations across Missouri.
5. **Kansas City Metropolitan Bar Association - Alternative Dispute Resolution (ADR) Committee**
    1) Promotes the use of ADR processes, including arbitration and mediation, and hosts events and training in the Kansas City area.

# VIII. Methods of Negotiation

1. Negotiation is a fundamental process through which parties seek to resolve their differences and come to mutually acceptable agreements. It involves direct dialogue and communication between the parties involved, allowing them to express their interests, positions, and concerns.
    1) One popular method of negotiation is **interest-based negotiation**, which focuses on the underlying interests and needs of each party rather than their initial positions. This approach encourages collaboration and creativity, leading to innovative solutions that satisfy the core interests of both sides. By prioritizing understanding over adversarial tactics, interest-based negotiation fosters a more cooperative environment, which can be particularly effective in maintaining ongoing relationships.
    2) Another effective negotiation strategy is **principled negotiation**, popularized by the book "Getting to Yes" by Roger Fisher and William Ury. Principled negotiation encourages participants to focus on four key principles: separating people from the problem, focusing on interests rather than positions, generating a variety of options for mutual gain, and insisting on the use of objective criteria for decision-making. This method allows parties to navigate complex disputes methodically, seeking common ground while minimizing personal conflicts. By emphasizing fairness and mutual benefit, principled negotiation not only aims for a resolution but also enhances the likelihood of a durable agreement.
    3) The **Anatole-Rapoport method of negotiation**, developed by the renowned psychologist and mathematician Anatole Rapoport, emphasizes a constructive and reciprocal approach to conflict resolution. Central to Rapoport's methodology is the principle of understanding the opponent's

position before making one's own proposals. This process begins with accurately articulating the other party's perspective to ensure that their concerns are genuinely acknowledged. By demonstrating a commitment to understanding the interests and motivations of the other side, negotiators foster an atmosphere of respect and collaboration, which can help de-escalate tensions and create a foundation for productive dialogue.

4) Rapoport's approach also advocates a **structured negotiation process** that includes establishing clear objectives while remaining open to alternative solutions. He introduced the concept of the "Mutual Gains" framework, which encourages parties to look for win-win scenarios where both sides can benefit. This contrasts with traditional adversarial negotiation styles that often focus on competitive tactics. Rapoport's method emphasizes the importance of empathy, active listening, and the development of trust, enabling participants to explore creative solutions that satisfy the underlying interests of both parties. By prioritizing cooperation and understanding over confrontation, the Rapoport method cultivates a more amicable and effective negotiation environment, ultimately leading to more durable and satisfactory agreements.

**Equally opposing and equally forgiving!**

*Founder & Expert Negotiator*
*Author, International Speaker, Trainer Marty Latz*
*https://www.expertnegotiator.com/about-marty-latz/*

# IX. Efforts Toward Resolution

1. In addition to negotiation methods, there are various efforts that parties can undertake to promote resolution. One such effort is effective communication, which involves active listening, empathy, and openness to understand the perspectives of others. By fostering an environment where all parties feel heard and respected, communication can significantly reduce misunderstandings and tensions, paving the way for collaborative problem-solving.

2. Preparing for negotiation is also a critical step towards achieving a successful resolution. Parties should gather relevant information, clarify their goals, and anticipate the needs of the other side. Ensuring that all parties enter negotiations with a comprehensive understanding of the issues at hand can lead to more productive discussions and reduce the likelihood of protracted disputes.
3. Pre-brief all issues for the Mediator!

## X. Q&A Session

1. Open the floor for questions to clarify concepts or provide examples related to the audience's experiences.

## XI. Boundary Disputes

By **adverse possession** – plats, By agreement or purchased property, small lots, large lots – which is required, **Deeds to transfer property – recorder of deeds, Plats to revise property lines** – recorder of deeds, Deeds of new parcels – recorder of deeds, Monument new boundary
Stanley D. Schnaare, JD, The Schnaare Law Firm

**"Walks into a Bar"**
A civil engineer, an architect, and a surveyor walk into a bar.
The bartender looks up and says, "What is this—some kind of boundary dispute?"
The surveyor smiles and says, "Relax, I've already staked my claim. The other two are just guessing."

## XII. Adverse Possession *(Excerpted from Thomson Reuters Westlaw – Missouri Practice Series – Real Estate Law – Transactions and Disputes ©2024)*

**66:1. Overview**
"Adverse possession is a peculiar concept that is entrenched in Missouri jurisprudence, as it is in the laws of most, if not all the states. If possession is nine-tenths of the law, adverse possession supplies title that is the missing tenth part. In simplified terms, adverse possession is a doctrine which transfers legal title in real estate from the true record owner to a party who brazenly maintains "hostile"[1] possession of such property for a requisite statutory period and who otherwise meets the requirements of this doctrine. **At the moment that the 10-year limitations passes, the adverse possessor acquires indefeasible title, divesting the record owner of his or her title.** Subsequent abandonment of possession by the adverse possessor does not defease the title of the adverse possessor (absent a subsequent 10-year period of adverse possession by original

owner or another party, provided that possession itself meets the elements of adverse possession.).[1.50]

At first blush, the doctrine seems incongruous. It violates several premises that are the cornerstones of the American system of land titles. Adverse possession sanctifies private appropriation of property without compensation. It runs counter to the policies underlying the recording acts. The doctrine takes precedence over record ownership as indicated by the official public records. It encourages and rewards ambiguity in relationships between neighbors. An individual who has undisputed record title to real estate may not have any actual title whatsoever if another has actually adversely possessed the land for ten years. This militates against blind reliance on the land records. Title held by adverse possession generally does not appear of record in any manner, although it may be apparent upon due inquiry by the purchaser of the property.

Against this indictment, judges, lawyers and clients should remember the policy behind the doctrine: it is basically a statute of limitations to sue for trespass and 10 years is a very long time to allow adverse use of one's property.

At any rate, in recognition of the darker aspects of adverse possession, the courts have circumscribed its application. In practice in Missouri today, it is seldom used as an instrument of outright fraud or oppression, at least in the reported cases. Adverse possession claims often arise in cases of mistaken boundaries between adjoining properties. If neighbors observe a physical boundary which differs from the actual boundary of the respective tracts to which each has legal title, then a claim of adverse possession may result. If the encroaching neighbor possesses his encroachment for the statutory period, his adverse occupancy can prevail over the record title. It is immaterial that each landowner is honestly mistaken in believing that boundary is coincidental with the boundary of record. Adverse possession can arise even though the possessor is under an incorrect assumption that the physical boundary is the same as that shown of record. Weaver v. Helm,[2] emphasizes this point:

**The intent to take away from the true owner is not relevant to the issue of hostile possession. It is the intent to possess not the intent to take away from the true owner that governs.**[3]

In this respect, there is one subtle, albeit critical distinction. If the possessor intends to claim only to the boundary of his property as shown on his title, regardless of the location of a fence which is mistakenly thought to be the boundary, then the recorded deed description will prevail. On the other hand, in a more aggressive situation, where the possessor intends to possess to the physical boundary, regardless of niceties of the legal title, this hostile intent will prevail.[4]

There are literally hundreds of reported adverse possession cases, and **both claimants and record-owners have a smorgasbord of precedents from which to choose.** For the most part, the precedents are hopelessly subjective, non-intuitive even to attorneys, and redundant, as will be seen below. The subjective nature of adverse possession litigation places a premium on trial skills and particularly on cross-examination. The attorney advising any client in this area would be aggressive to predict other than a 50–50 likelihood of a given outcome.[5]

The hopelessness of trying to apply factual precedent in cases of adverse possession has been expressed well by one court as follows:

The lion's share of [plaintiff's] brief consists of comparing the evidence she produced at trial to evidence adduced in cases where similar evidence was found sufficient to sustain a judgment for adverse possession. ... Such comparisons are of little or no value here because the reviewing court in those cases was required to accept as true the evidence favorable to the judgment and disregard all contrary evidence and inferences.[6]
The lesson in all these cases is that the practitioner must win the case at the trial court level, where credibility of witnesses must carry the day and will be deferred to by the reviewing court.[7]

### 66:2. Statutory basis for adverse possession

Although there is a substantial judicial gloss circumscribing Missouri's doctrine of adverse possession, the concept is actually based upon a statute, V.A.M.S. § 516.010. This statute is couched in typical language used in statutes of limitations. It has survived in its present form since 1939. It provides:
No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or nonresident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question, within ten years before the commencement of such action.
Missouri's adverse possession statute, V.A.M.S. § 516.010, uses language similar to typical statutes of limitations found elsewhere in chapter 516. However, it goes beyond the other statutes. It does not merely bar a remedy after expiration of ten years, it actually results in a transfer of land titles. Not only is V.A.M.S. § 516.010 used as an affirmative defense to actions brought by dispossessed record owners of real estate, it creates an independent cause of action upon which to base a quiet title suit either as a claim or counterclaim.[1]
An action to quiet title, even though it may arise or be based upon actions described in the 10-year adverse possession statute (V.A.M.S. § 516.010, discussed above), is a separate cause of action under V.A.M.S. § 527.150. A claim for slander of title may nevertheless be subject to the 10-year statute of limitations in the adverse possession statute.[1.50]
The fact that an adverse possessor is unsure of his title and seeks to fortify it by obtaining quitclaim deeds or the like does not necessarily vitiate the unappreciated or misunderstood title held by adverse possession.[2] On the other hand, acts which are antithetical to possession but which a court finds not mere fortification of title, such as filing a mechanics' lien claim on the property being possessed, will result in a failure of the hostility element.[3]

### 66:3. Elements of Adverse Possession

The courts in Missouri generally list five elements which must exist for 10 years before occupancy will trigger a transfer of title under the doctrine of adverse possession. It is said:
To establish title by adverse possession, one must prove each of its elements by a preponderance of the evidence. The elements of adverse possession are: (1) hostile possession and under a claim of right; (2) actual possession; (3) open and notorious

possession; (4) exclusive possession; and (5) continuous possession for a period of ten years.[1]
Such a listing of elements results in some redundancy.[2] In particular, the same facts are often proof of the elements of actuality, hostility, exclusivity and notoriety.[3] Nonetheless, the cases prefer to deal with each of these elements individually, as will we.
Title by adverse possession may be acquired as joint tenants if possession by them is exclusive for the statutory period.[4]

### 66:4. Hostile Possession and the Defense of Permission

The first of the five elements of adverse possession is that the possessor's possession be "hostile".[1] The requirement that possession be "hostile" is most important in emphasizing the "adverse" character of adverse possession.[2] **A lessee or a life tenant may enter into actual, exclusive, continuous, open and notorious possession for a period of over ten years. Nonetheless, such possession is not hostile and as such does not give rise to a transfer of title by adverse possession. The same is true of any possession that commences with the owner's consent. As it is said, "permissive possession is inimical to adverse possession".[3]**
A court is more likely to find that the element of hostility of possession has not been met when claimants are family members.[3.50]
Often property is occupied by one of several joint owners. In some cases, the owners who are out of possession take little interest in the property. It is difficult to sustain an adverse possession claim against a co-tenant. The law seeks to protect such persons by raising a presumption that possession of one co-tenant is consistent with title.[4] In order for one tenant to dispossess the others he must clearly manifest the exclusive character of his claim. The applicable standards are set out in *Allen v. Allen*[5]:
A cotenant claiming adverse possession must show the actual knowledge of the real owner that he claims in opposition and defiance of his title, or he must show such an occupancy and user, so open and notorious and inconsistent with, as well as injurious to, the rights of the true owner, that the law will authorize, from such facts, the presumption of such knowledge by the true owner. It is not the mere occupancy or possession which must be known to the true owner to prejudice his rights, but its 'adverse' character. "Permissive possession is not adverse possession and if possession in its inception is permissive, it so remains until the hostile claim is brought home to the true owner and thereafter continues for such time as will satisfy the statutory requirements in time."[6]
The proper approach, couched in terms of a presumption as between co-tenants, is set out in *Bass v. Rounds*,[7] as follows:
However, some "acts of ownership" on the part of one co-tenant are not necessarily inconsistent with the continued ownership of the other co-tenant. A tenant-in-common is presumed to hold possession for his co-tenants. To overcome this presumption, he must show acts which constitute a disseizin or a repudiation or a denial of the rights of his co-tenants, which show an intention to hold adversely to the co-tenant, and which are totally irreconcilable with a recognition of the rights of the co-tenant.[8]
*Possien v. Higgins*[9] analyzes the situation where a party, who has rightful temporary possession, claims adverse possession to acquire permanent fee title. In Possien, the plaintiff in possession was a widow in possession of her husband's property under a statutory right of quarantine. This right of possession continued for ten years until

August, 1959 when the quarantine lapsed. Since her occupancy was rightful until 1959, the widow's claim for adverse possession did not commence until 1959. Accordingly, the widow's adverse possession only continued for six years, four years shy of the minimum period for adverse possession. The only way the period of adverse possession could commence during the widow's rightful possession would have been for the widow to [a] "affirmatively disavow any claim of right of possession of the land as the widow" and [b] provide "notice of such disavowal of title ... to the heirs".[10] In Possien the court determined that the widow failed to prove compliance with this standard. Accordingly, it refused to permit her claim.

There is also a presumption that a grantor who stays in possession of land after his grant holds in subservience to the grant. This concept is ably described as follows in *Hood v. Denny*:[11]

It is true that a grantor may reacquire title from his grantee by adverse possession. This is true whether title is transferred for valuable consideration or fraudulently to avoid the grantor's debts. However, continued possession of the transferred property alone will not ripen into a claim of adverse possession, the rule being that following delivery of the deed a grantor continuing in possession must by words, acts or conduct notify the grantee that he is claiming title and possession against the covenants of the grantor's deed, the presumption being that he holds possession in subservience to the covenants. It is not a mere occupancy or possession which must be known to the true owner to establish title by adverse possession, but one which is in opposition to his rights and in defiance of, or inconsistent with, his title.[12]

The limits of this presumption are explored in *Joy v. Hull*,[13] which emphasizes that it is rebuttable and only applies as between grantor and grantee.

It is not uncommon that claimants in adverse possession suits state that they thought their true deeded record line was located on property actually in record ownership of their neighbor. This raises a subtle distinction. If claimants' occupancy of their neighbor's land was wholly subordinate to the record title, then there is an argument that claimants' adverse possession claim fails for lack of hostility. On the other hand, if claimants erroneously thought both (a) the disputed land belonged to them, and (b) intended to own it regardless of the record ownership, there is a better chance that their possession meets the hostility requirement. *Watson v. Moore*,[14] discusses this type of situation at length. It concludes that the trial court could properly conclude that occupant's possession was adverse. It holds that occupant's testimony that she thought she was occupying property she owned fell short of an admission that she lacked hostile possession. In the appellate court's language:

Thus, when [adverse possession claimant] testified she intended to own only what her "legal description" provided, the trial court could have reasonably construed that testimony to mean [adverse possession claimant] believed her deed described all land east of the fence line and she intended to claim all of it, but claimed no land west of the fence line.

The trial court obviously understood [adverse possession claimant's] testimony that way. As reported earlier, the trial court found: "[adverse possession claimant] claimed ownership of all land up to the extended boundary fence line."[15]

Litigants and their counsel in adverse possession cases should understand these distinctions. One court has characterized the basis of the doctrine of adverse possession

as "the intent to possess" and not necessarily "the intent to take" something away which belongs to another.[16]

The grant of permission to get to a disputed tract may not destroy the hostility as to possession of the tract itself.[17] Permissiveness is a very murky and subjective defense.[18] Permissiveness as to a part or as to access to a disputed tract, may not defeat hostility as to the disputed tract itself, the question being one of intent.

### 66:5. HOSTILE POSSESSION—CLAIM OF RIGHT

**The cases that discuss the hostility requirement in connection with the phrase "claim of right" can be confusing.** Some cases use these terms conjunctively, some disjunctively. We have found no case which discusses the significance of this potential distinction.[1] The disjunctive seemingly permits adverse possession if a possessor's occupancy is "hostile" (presumably meaning in defiance of the true owner's rights), or if the possessor's occupancy is under a "claim of right" (presumably an assertion by the possessor that he is entitled to possession). The use of the conjunctive would support an argument that both are requirements.

A third group of cases treats the terms "hostile" and "under claim of right" as if they were synonymous. These cases discuss the requirement for a finding of adverse possession in terms such as "the possession must be hostile, that is, under a claim of right".[2] A fourth group of cases refers to claim of right as an example of hostile possession. These cases list the ingredients for adverse possession as including a requirement that there be possession which is "hostile, i.e., under a claim of right".[3]

The interjection of the phrase "claim of right" clouds the issue of adverse possession in Missouri. Some states clearly include the "claim of right" as a sixth prerequisite to adverse possession. Missouri cases which list the elements of adverse possession are fairly uniform in stating that adverse possession requires five elements.[4] They generally do not embrace "claim of right" as an independent sixth element. We would favor greater care when using the phrase "claim of right" to discuss the requirements for adverse possession in Missouri. As previously indicated, many of the cases use the phrase as further explication of the word "hostile". In fact, it serves more to obfuscate. In most cases the use of the phrase is mere surplusage.

*Porter v. Posey*,[5] offers an excellent discussion of the meaning of "hostile" possession without mentioning "claim of right". Porter also analyzes how this requirement fits with the other elements of adverse possession, as follows:

> **Hostility of possession does not imply ill will or acrimony. Moreover, to prove hostility, an expressed declaration of hostility need not be made. Hostile possession is simply an assertion of ownership adverse to that of the true owner and all others; i.e., "the claimant must occupy all land with the intent to possess it as his own and not in subservience to a recognized superior claim of another". . . .** Thus, as with other elements of adverse possession, the element of hostility is founded upon the intent with which the claimant held possession, and since the elements of adverse possession are not mutually exclusive, acts which are open and notorious, supporting a claim of ownership, may and often do logically satisfy the element that the claim be hostile.[6]

The state of mind of the claimant and the requirement of "claim of right" does not mean that the claimant have a good faith belief he has actual legal title to the property. "Whether a claimant believes he does or does not have title to or other legal claim to the

disputed property is not the proper inquiry ... the intent that must be demonstrated is solely the intent to occupy ..." Good faith is not required, nor does the court "attempt to peer into the mind and make contingent the claimant's proof of hostility on why he is claiming ownership over the land."[6.50] Thus, many cases state, somewhat in contradiction to the named "hostility" element, that the claimant need not have malice, hostility, intent or even indifference to the actual state of title.[6.75]

This passage from Porter suggests that most possessions which are hostile will also be open and notorious. Equivocation can destroy an adverse possession claim for lack of hostility.

*Brinner v. Huckaba*,[7] is a case in which the court concluded that the claimant failed to prove requisite hostile possession for the requisite period. The appellate court mentions "claim of right" as a necessary element to adverse possession in the beginning of the legal analysis in its opinion. Its analysis of the requirements for a finding of hostility of possession are then consistent with a number of the cases cited in this section, without additional discussion of the meaning or intent of the concept of "claim of right".

In many adverse possession cases, the concept of claimant fault plays a role, impliedly, if not expressly. In one case, laches was asserted by the record owner against the adverse possession claimant, arguing that the claimant reasonably should have ordered a survey before adversely possessing the record owner's driveway for 47 years.[8]

### 66:6. HOSTILE POSSESSION—TRESPASS

*Wilton Boat Club v. Hazell*,[1] appears to question whether an intentional trespasser can possess land adversely. In Wilton the court defines a "squatter" as a person:

entering upon lands, not claiming in good faith the right to do so by virtue ... of some agreement with another whom he believes to hold the title.[2]

Wilton then goes on to cite approvingly an Arkansas case to the effect that a "squatter" as so defined can never gain prescriptive title to land, regardless of how long he holds title, because his possession is never adverse. The court does not justify this position by logic or citation to Missouri law. It does, however, list the following as the five elements necessary to prove adverse possession:

First, the possession must be hostile, and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and fifth, it must be continuous.[3]

**The court does not say so, but one suspects that the court found a squatter to be lacking any "claim of right". If this is the basis for the court's decision, it would seem even more questionable.** A squatter's possession can certainly be hostile, in the sense that it challenges the owner's ability to possess, if not his right to possess. Similarly, Wilton's definition of a "squatter" does not seem to preclude such a person from meeting the standard of actual, open and notorious, exclusive, continuous possession. The fact that it may not be under claim of reasonable legal right should be irrelevant. Finally, labeling as a squatter is consistent with the view of adverse possession as a statute of limitation–that is, a period of time within which to sue to redress a wrong.[4] In any event, Wilton has not been specifically and expressly overruled.[5] The more logical view is that anyone can obtain title by adverse possession if he meets the five requirements.[6]

One court has characterized the nature of possession, for purposes of the adversity requirement of a prescriptive easement, as "wrongful."[7] The court stated that the use or possession must be " 'wrongful, or may be made by [the owner] wrongful, as to him.' "[8] The court characterized the essence of adversity as "non-recognition of the owner's authority to prohibit the use."

### 66:7. HOSTILE POSSESSION—INFERRED BOUNDARIES

There is an independent doctrine that is occasionally cited in adverse possession suits, which allows for adverse possession even when the requisite hostile intent is not proven. **If two adjoining neighbors recognize and observe a common boundary line that does not coincide with the record boundary line and do so for a period in excess of ten years, then this fact may substitute for specific intent to possess adversely.** If the boundary is observed by acquiescence for a sufficient period, then the ten-year adverse possession period will commence to run. In essence, this doctrine creates a period of limitations of indefinite duration that arises in case of joint recognition of boundary lines that differs from the record title. This doctrine has no applicability where the possessor holds in subservience to the owner's title. If a landowner permits another to occupy his property, as in the case of a landlord-tenant relationship or a joint owner in possession, the possession may never become adverse, so long as the possessor acknowledges that his possession is subservient to the record owner.

The "doctrine" of boundary by acquiescence can hardly be found except in relation to claims of adverse possession. When the two concepts are discussed in the same case, it may be said that "the importance of establishing acquiescence in the boundary as a boundary might be overlooked ... First, because a claim for boundary by acquiescence does not, in itself, impact title to land, such a claim—even if successful—cannot create a defect, lien, or encumbrance upon title ... ."[0.50]

*Scott v. Rorebeck*,[1] sets out the doctrine as follows:

Although defendants did not rest their counterclaim on that inferred agreement, they were obligated in supporting their claim to title by adverse possession to prove that their occupancy was hostile to any claim by owners of the south tract and was under a claim of right. That claim, as discussed below, rested in fact on the inferred agreement demonstrated by the long acceptance of the fence line as the boundary.

Apparently, the same result can be reached by presumption. This route is announced in Evans v. Wittorff,[2] as follows:

A general doctrine has been stated that long acquiescence in a fence as a boundary line will warrant a presumption that it is the true line. Acquiescence for a length of time is evidence of a parol agreement that the line so delineated is to be considered the boundary line. And, where the line has been acquiesced in for a great number of years by all the parties interested, "it is conclusive evidence of an agreement to that line." The boundary line thus agreed upon should be considered the true one.[3]

The length of time to create the inference is unclear, although it should be sufficient time to satisfy the court that the parties acquiesce in the line.[4]

*Shoemaker v. Houchen*,[5] further explores the "murky" doctrine of acquiescence.

Acquiescence adds a measure of complexity to an adverse possession claim. Shoemaker addresses a claim for adverse possession by a property owner seeking to expand its boundary into a tree line up to a barbed wire fence. The trial court entered

judgment for plaintiffs. It quieted title in plaintiffs to the contested strip and awarded them trebled damages for destruction of trees on the strip. The trial judge based its ruling upon its conclusion that the parties had established the line under the doctrine of acquiescence. The appellate court concluded that the doctrine of acquiescence had not been pled nor tried without objection. In this case, the appellate court concluded that, even if a boundary by acquiescence were proven, there was no sufficient evidence of adverse possession. When claiming adverse possession of a line adopted by acquiescence, once acquiescence is shown, the period of adverse possession may begin thereafter, and the elements of adverse possession as to the tract bounded by acquiescence must continue for the requisite period.

While the existence of an ancient fence is helpful to an adverse possession claim, it is not conclusive. According to *Payne v. Payne*:[6]

Defendants also argue that the old "historic" fence had become the boundary between their land in Section 28 and Tract "A" by acquiescence. We cannot agree. It is true, as this court held ... that when owners of adjoining land occupy their respective properties up to a certain line which they mutually recognize and acquiesce in for a long period of time, they may be precluded from claiming that the line acquiesced in is not the true boundary. Nevertheless, naked possession by the respective parties, unaccompanied by any act by either party tantamount to a claim of title, such as cultivation or cutting timber, is not sufficient to show an agreement to regard a particular fence as a boundary.

Payne makes it simple. Just when you think you understand, you do not. A version of Murphy's Law holds that for every rule there is a subtle distinction which will work an exception in the rare case, whether or not you understand it.

*Weis v. Alford*[7] shows how undefined is the boundary between adverse possession and boundary by acquiescence. In Weis, the court reversed a summary judgment for adverse possession and easement by prescription and held that a boundary by acquiescence had not been established. Citing Shoemaker, the court cited the three elements of boundary by acquiescence as:

(a) mutual conduct or acts of the adjoining landowners evidencing recognition of the dividing line as the boundary,

(b) occupation and use by the parties up to the dividing line, and

(c) continuation of the mutual acts and occupation and use for a sufficiently long period of years to show the parties' mutual acceptance of the dividing line as the boundary.[8]

Missouri courts continue to struggle to apply the doctrine of boundary by acquiescence, which apparently survives—if in the analysis, and not in the actual application.

In *Ferguson v. Hoffman*,[9] the court stated that "acquiescence itself does not give title but does set a boundary." The court also stated that the fixing of the boundary, pursuant to the acquiescence, starts the clock for the running of adverse possession. In Ferguson, the acquiescence occurred long before the plaintiff took title to the property, but was nevertheless relevant in fixing the physical location of the boundary.[10]

A quiet title dispute based upon interpretation of a latent ambiguity in a legal description may also be resolved as an adverse possession dispute.[11]

### 66:8. ACTUAL POSSESSION—GENERAL

The second of the five requirements for adverse possession is that the possessor maintain **"actual" possession for a period of ten years.** Actual possession is obviously one of the

key ingredients to a claim of adverse possession. Unlike some of the elements of adverse possession, one has an intuitive concept of actual possession.

*Edmonds v. Thurman*,[1] citing from an earlier case, addresses the concept as follows:

Two concepts are relevant in determining whether a claimant has established his actual possession of the land claimed. They are his present ability to control the land and his intent to exclude others from such control. . . . Where the claimant occupies land without color of title, in order to prevail, he must show physical possession of the entire area claimed. . . . A mere mental enclosure of land does not constitute the requisite actual possession. . . . Rather, there must be continual acts of occupying, clearing, cultivating, pasturing, erecting fences or other improvements and paying taxes on the land. The performance of all or any combination of these acts of occupancy serves as evidence of actual possession but is not conclusive. . . . Each case must be decided on its own peculiar facts.[2]

Obviously, these elements are but a few of the indicia of actual possession. Virtually any act relating to property that is consistent with ownership is relevant to prove possession. Examples include:

(a) Use as a typical backyard;[3]
(b) Collection of insurance proceeds;[4]
(c) Collection of rents from the property;[5]
(d) Cultivation of the property;[6]
(e) Payment of taxes on the property;[7]
(f) Clearing the property;[8]
(g) Planting trees;[9] and
(h) Repairing fences.[10]

Actual possession may be shown by an ability to control land, depending on the nature and location of the property.[11]

### 66:9. ACTUAL POSSESSION—COLOR OF TITLE

There are two special doctrines that affect the degree of activity necessary to sustain a massive finding of actual possession as to a given tract of land. These are the color of title rule and the wild lands exception.

In many states, but not in Missouri, there are different periods for adverse possession depending upon whether the possessor acts under "color of title". In Missouri, the existence of color of title has no effect on the requisite time of possession. In Missouri, possession must generally continue for ten years, regardless of whether or not the possessor has "color of title". However, color of title may affect the extent of property that is subject to possession.

**Generally, if a person enters into actual possession of part of a tract as to which he has color of title, with intent to possess the full tract, his possession will extend to the full tract of property described in the instrument which provides him with the color of title. On the other hand, if a person enters into possession of a small portion of a tract as to which he has no colorable title claim, then his possession will only extend to that portion of the property that he actually controls.** In Forester v. Whitelock,[1] the court characterizes the issues as follows:

As we understand Plaintiffs' argument, they say the occasional use of the lower field ... for agricultural purposes does not rise to the level of actual possession. . . . [A]ctual

possession results from a claimant showing "his present ability to control the land and his intent to exclude others from such control." ... Furthermore, a claimant who occupies land without color of title ... must show physical possession of the entire area claimed, i.e., mere mental enclosure of the land does not constitute requisite actual possession. . . . Any combination of continuing acts of occupying, clearing, cultivating, pasturing, erecting fences or other improvements, and paying taxes on the land serves as evidence of actual possession, but is not conclusive.[2]

Color of title is of particular importance where the boundaries of the property being possessed are unclear. If the boundaries of a person's possession are so indefinite as to belie description of the area possessed, his claim of title may fail as to the entire tract.[3] A person who possesses a tract of property under color of title can argue that actual possession of an indefinite portion of the property is referable to the entire tract he holds under deed. As such, the claim is less vulnerable to attack on grounds of indefiniteness.[4]

This special rule affecting land held under color of title is required by specific statutory mandate. V.A.M.S. § 516.040 provides:

The possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract.

Court decisions discussing color of title in recent decades have not discussed the statutory precedents to the doctrine. Perhaps this is because the language of this section is not particularly helpful to an understanding of its application.

In *Moran v. Roaring River Development Co.*,[5] the court stated in reference to V.A.M.S. § 516.040:

This statute has been interpreted to extend actual possession of a portion of a tract of land to a constructive possession of the entire tract as described in the instrument which provides the basis for color of title. . . . And this court has held that "less weight of evidence" is required to support an adverse entry by one with color of title than "a bare entry by an intruder under no claim of right."

*Bass Pro Outdoor World, L.P. v. Wilson*,[6] addresses color of title briefly. In acknowledged dictum, it concludes that possession of a portion of a tract in the name of the entire tract under a deed with an imperfect description, where the possession includes typical acts of ownership, constitutes possession of the entire tract imperfectly described.[7]

### 66:10. ACTUAL POSSESSION—COLOR OF TITLE—HOW CREATED

Color of title can arise in a variety of ways. Essentially, any grantee of a deed that is ineffective to convey the property described in the deed has color of title as we use the term.[1] There are numerous reasons why a deed might be ineffective to convey title. For instance, a deed would be void if the grantor in the deed lacked ownership in the property. Alternatively, the grantor might lack legal capacity to convey title. In either case, such a deed could bestow color of title on the grantee without actually transferring the property.

In Land Clearance for Redevelopment *Authority v. Zitko*,[2] the deed under which the possessor claimed to have color of title was absolutely void because it was granted by a corporation which had forfeited its corporate charter in Missouri. The court noted that a deed from a corporation that has lost its charter was absolutely void. Nonetheless, it

found that such a deed did provide color of title. It quoted an earlier case in this regard as follows:

Although the instrument under which color of title is claimed may be actually void and convey no title, if it purports on its face to convey the title to the land in question by appropriate words of transfer, it will constitute color of title.[3]

Although color of title can arise in the case of a void deed, it cannot be created by a sham deed delivered for the sole purpose of creating color of title.[4]

It is usually significantly easier to make a case of adverse possession when one has color of title. One suspects, without being able to prove it, that the more technical the defect in the instrument creating color of title, the easier the burden of showing adverse possession.

### 66:11. Actual possession—Wild lands

The significance of "wild lands" in Missouri law of adverse possession is unclear.[1] We have thought that the effect of a showing to satisfy that lands subject to characterization as wild land was opposite to the effect of a finding of "color of title". We have thought, based upon *Conran v. Girvin*,[2] that Missouri cases required a higher level of possessory activity in order to sustain a finding of adverse possession of "wild lands", as opposed to normal property.[2.50]

The rationale for such a doctrine would make sense. Wilderness properties, such as remote tracts of the Missouri Ozarks and remote river bottoms may have little economic usefulness. Some landowners go for years without traversing the full extent of their holdings of such lands. Requiring greater activity to take such property would protect the owners of such tracts from wholesale forfeiture of their property to adverse possessors. A further reason such a doctrine would have appeal is because of the uncertainty of boundaries of remote tracts. Wild lands are often unfenced and unsurveyed. This is particularly true in Missouri, where many counties maintained open range until relatively modern times. It would be considered unfair by many to permit the loss of such property by anything short of unequivocal possession.

The name of the exception is descriptive of its application. Dudeck v. Ellis,[3] describes a typical tract of **"wild land" as follows:**

**The land had not been cultivated, and clearing was necessary to use and possession because the land was covered with vegetation consisting of cottonwoods, vines and weeds. Some of the trees were as large as six or seven inches in diameter and the land itself was rough.**[4]

*Kline v. Bourbon Woods, Inc.*,[5] undercuts the benign rationale suggested for wild lands as stated above. It suggests that a lesser standard of notoriety will apply to "rough and wooded" land, at least as to the "open and notorious" requirement for adverse possession, than would be true of other property.

*Edmonds v. Thurman*,[6] **agrees that it takes less of a showing of possession to prove a case of adverse possession of wild lands than it would of cultivated property.** The court states:

[T]he disputed tract of land is, as the numerous photographs show, wild and undeveloped land. The intent to take actual possession of such land requires less actual exercise of ownership by affirmative act than is required when the land is suitable for cultivation.[7]

This latter approach to the impact is cited with approval in the later case of *Cunningham v. Hughes*.[8]

*Flowers v. Roberts*,[9] weighs in with an interesting discussion of the significance of dealing with wild lands in the context of a long narrow strip of land located in Reynolds County, Missouri. Flowers acknowledged precedent suggesting that a higher level of actual possession may be necessary to sustain a finding of actual possession of wild lands. Nonetheless, it refused to apply this rationale to support its reversal of the trial court's finding of adverse possession.[10] Instead, Flowers concluded that plaintiff's adverse possession claim failed as a matter of law, due to an insufficient showing of openness and notoriety. According to the court, the open and notorious requirement is the same for wild lands as it is for any property.[11]

### 66:12. Open and notorious

**The requirement that an adverse possession be "actual" is closely allied to the requirement that it be "hostile". Hostility also has a kinship to the "open and notorious" requirement. The more "open and notorious" an unpermitted occupancy is, the more likely that it will be considered "hostile".[1]**

The term "open" suggests that possessory acts must be undertaken without subterfuge. The term "notorious" suggests that the possessor's acts of possession are common knowledge in the community. The requirement that possession be "open and notorious" thus suggests a two-pronged inquiry. Presumably, since both terms are used almost interchangeably and are treated as but one element, occupancy which meets either requirement to a sufficient degree will satisfy this condition. The more "open" and obvious the occupancy is, the less it will be necessary to prove that it is notorious. Conversely, if the occupancy is so "notorious" that every neighbor is fully aware of the occupancy, then it should not be overly necessary to show that it was open.[2] Several cases have defined the phrase "open and notorious" by the phrase "conspicuous, widely recognized and commonly known".[3] The exchange of phrases increases the clarity of the concept only marginally.

Although the "open and notorious" requirement seldom defeats a claim for adverse possession, it did just that in *Moore v. Dudley*.[4] In Moore, the appellate court affirmed the trial court rejection of a claim as open and notorious:

> The trial court found the [claimants] posted signs, blazed and painted trees, cleared underbrush, graded rough roads, hunted, rode horses, and drove vehicles on the property. Open and notorious possession is required to give the owner actual or constructive notice of the claim. . . . The court found there were no buildings or houses near the property, the Moores never raised crops or cattle on the land. They never claimed or paid taxes on the land, nor did they fence the property. Family members and some family friends knew about the claim, but [claimant] did not contact [owners]. She offered no other evidence of notice to the public concerning her claim.[5]

We believe this decision to be more solicitous than most for the record owner against claims of adverse possession.

*Five Twelve Locust v. Mednikow*,[6] is a case with unusual facts which explores certain aspects of the open and notorious requirement. It considers an adverse possession claim in the context of two adjoining office buildings in downtown St. Louis. The first building, The Hunleth Building, was built in about 1870. A second building, The Oriel, was erected

some twenty years later in 1891. In 1949, the owner of the Hunleth leased it so that it could be razed, with the lessee to build a new bank building on the site. When the lessee razed the Hunleth Building, the parties discovered that The Oriel Building encroached upon the leased property at several points. The footings supporting the Oriel's east wall encroached upon the Hunleth tract below grade. The upper floors of The Oriel also encroached in a "Leaning Tower of Pisa" effect. The lessee claimed that these encroachments interfered with its planned structure. Accordingly, the owner of the Hunleth property brought a claim to compel the removal of the Oriel's encroachments. The Oriel owners defended by claiming title to the encroachments by adverse possession. The Hunleth owners asserted a number of defenses to the claim of adverse possession, including the claim that the encroachment was not "open and notorious". The evidence showed that the ground level encroachment was only a few inches and that the leaning overhang was only ascertainable by survey. There was no independent discussion of the footings which were below grade and so clearly invisible. The court was more struck with the fact of the Oriel's presence of 60 years than it was with any notion that the possession was not obvious. Indeed, the court seemed to reverse the normal rationale for the requirement that occupancy be open and notorious. Rather than requiring that the possession be sufficiently obvious to provide notice to the owner, the court seemed to require that the owner exercise "proper diligence" to learn of the encroachment.[7]

Mednikow makes a further observation of interest. While we have suggested that the "hostile" requirement is similar to the "open and notorious" requirement. Mednikow states that this latter requirement may in fact be coextensive with the requirement of "actual" possession. The court stated:

[S]ince the requisites of "actual" possession are usually defined with reference to the sufficiency of such acts to affect the owner with notice of the adverse claim, it would seem questionable whether there can be any "actual" possession which is not at the same time "visible" and "notorious".[8]

The open and notorious requirement is, in and of itself, unlikely to result in any failed possessions if the Mednikow logic prevails. Nonetheless, cases continue to cite the requirement that possession meet an independent standard of being "open and notorious".[9]

**Some practitioners have considered advising clients to record a claim of possession, perhaps under the theory that recordation, by constituting constructive notice, is "open and notorious." (By this logic, the claimant should deliver the notice to the owner at the burden property.)** While this question was not answered directly, in *Snow v. Ingenthron*,[10] the court affirmed a finding of adverse possession, in which part of the evidence was that the claimant recorded a quit claim deed and an affidavit of adverse possession stating the basis for his own seller's claim of adverse possession over the years. In Snow, however, there were additional facts constituting "open and notorious" possession, including maintenance and repair of a fence and replacement of a dock, among other things. We do not believe that recordation, standing alone, would qualify as "open and notorious" possession because, of course, recordation does not itself constitute possession. Similarly, payment of property taxes (or not) is another piece of evidence that is often proffered in adverse possession or prescription disputes, but it has been held that such payment "is but one factor for consideration."[11]

The issue of whether a use is "open and notorious" is often analyzed as an issue of notice—itself a term of art with many generations of legal precedent in various contexts. In *Soderholn v. Nauman*,[12] the defendants in an adverse possession case claimed that the claimants were barred by the fact that the claimants took title to their own property by a deed from the same grantor who conveyed title to the defending parties' property. The court discussed the issue of notice of the claimants' use in the context of the defendants' claim that the use was not sufficiently hostile, having its inception from a common grantee. The defendants had argued that, as a matter of law, a grantor's successor, also a member of the grantor's family, is precluded from claiming hostility as to the grantee's successor.[13] The court rejected the argument, stating that hostile possession cannot commence absent sufficient notice, but that that rule only applies between the original grantor and grantee and not between their grantees or successors.[14] In sum, a successor of a grantor was entitled to claim adverse possession because the successor of the grantee acquired notice of the hostile possession.

### 66:13. EXCLUSIVITY

According to *Whiteside v. Rottger*:[1]

**Exclusive possession for purposes of adverse possession means that the persons possess the land for themselves, not for others.**[2]

In *Wilton Boat Club v. Hazell*,[3] a loosely knit group of 18 commercial fishermen and boat owners claimed title to several areas fronting the Missouri River. Plaintiffs used this property to moor their boats. Plaintiffs acknowledged that other members of the public also used the property. The court denied their claims for adverse possession because of lack of exclusivity. The court noted:

[A]s a general rule, exclusive possession of an adverse claimant cannot be based on use or occupation in common with neighbors, third persons, or the public generally; but two or more persons claiming as cotenants may as such have such a joint possession as will ripen into title. . . . It is our view that it would be possible to have a group which is so cohesive and strongly organized that the joint possession of its members could ripen into a cotenancy title.[4] In this case, however, the evidence does not indicate that plaintiffs had any such organization prior to 1968. If they considered themselves to be a group it was very informal.[5]

The Wilton rationale relates the test of exclusivity to an inquiry that has a logical connection with a commonly accepted meaning of the word "exclusive". It fails to discuss the concept of possession based upon occupancy by agents, tenants and the like. The requirement for exclusivity of possession effectively thwarts adverse possession in many neighborhood or public use situations. The fact that one landowner possesses property belonging to his neighbor will not constitute adverse possession if the possession by the true owner and the ersatz possessor is joint.[6]

*Machholz–Parks v. Suddath*,[7] explores the exclusivity requirement in greater detail than is typical, in the context of possessor's motion for summary judgment, which the court found wanting for failure of exclusivity. The court's discussion posits:

**The element of "exclusive possession" means that the claimant must show that he held possession of the land for himself, as his own, and not for another. . . . To meet this burden, a claimant must prove that he wholly excluded the owner from possession for the required period. . . .** This does not mean that mere sporadic use,

temporary presence, or permissive visits by others (including the title holder), will defeat a claim of exclusive possession. . . . However, the burden remains on the claimant to prove that the ground was not open to the use of others and was not jointly possessed with others.[8]

Collecting rent has long been recognized as an indicia of possession for purposes of adverse possession.[9] In such a case, the landlord has by definition transferred possession to the tenant. Nonetheless the tenant's possession supports his landlord's claim of adverse possession. This shows that constructive possession does not obviate a claim for adverse possession.[10] The fact that corporations can acquire title by adverse possession is further proof that possessory acts of one person can inure to the benefit of another.[11] This is necessarily the case, since corporations have no corpus and can only act through the intermediacy of others.[12]

### 66:14. CONTINUOUS POSSESSION

**Possession qualifying for adverse possession must extend for ten years, but must also be "continuous."[1] This raises an obvious practical problem. How can one prove that one was in continuous possession of property for ten years running? The law does not require uncertain proof.** Once adverse possession is shown, absent contrary evidence, it is presumed to continue.[2]

This is an appropriate division of the burden of proof. If an adverse possession claimant can prove the elements for adverse possession of property at a point in time more than ten years past from the date of the litigation, the law will presume this possession continued. The burden of proof then shifts to the other party, who can present evidence of reentry and defeat the presumption of continuity of possession.[3]

*Rector v. Missouri Dept. of Natural Resources*,[4] points out several important limitations to the presumption of continuity. No presumption arises where evidence is reasonably available as to the true facts. Likewise, it may not exist where the acts initially relied upon to show the possession are not, by their nature, continuous. Continuous possession does not mean that the possessor must physically plant himself on property for ten years without moving. As noted above,[5] the means of achieving actual possession are varied and flexible. In this respect it is helpful to recall the definition of possession discussed earlier. Possession requires the ability to control property by the possessor, coupled with an intent to control the property. For possession to be continuous, these two elements must continue without effective challenge for ten successive years. Temporary absence of physical presence without intention to abandon possession will not violate the continuity of possession, but "sporadic" occupancy will.[6]

When a true landowner files an action to quiet title to property subject to an adverse possession claim, that action establishes a bright-line ending date against which to measure whether adverse claimant has ten continuous years of possession. *Moore v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*,[7] suggests that other acts constituting reentry, short of filing quiet title, may also interrupt ten years of allegedly continuous possession.

Continuous possession need not be constant possession. In *Leonard v. Robinson*,[8] the court rejected a claim of adverse possession, and held that use of a tract for "occasional hunting, hiking and other recreational activities" did not rise to the level of continuous use.[9]

### 66:15. TACKING OF POSSESSION AS BETWEEN GRANTOR AND GRANTEE

Adverse possession claims are often prosecuted by persons who are deed owners of land adjacent to the property they are claiming by adverse possession. In actuality, the adverse possessor often believes he has record title. When a landowner is mistaken as to his record boundary such that he is openly possessing land beyond that shown on his deed, he may never actually realize that the boundary he recognizes on the ground is different from that shown on his deed. If such is the case, the landowner inevitable will deed his property to a purchaser using the same incomplete legal description. However, his adverse possession rights (a claim) run with this record title. As seller, he assumes that he is conveying the entire possessed tract, even though the deed only describes the property to which the seller had record title. (All of this is obviated, however, by a competent survey.)

There are a number of cases that discuss this situation in the context of a seller who has possessed a tract adjoining property to which he holds record title for less than ten years. **The purchaser from such seller may try to support his adverse possession claim by "tacking" the seller's period of possession to the purchaser's period in order to create an aggregate possession that is continuous for ten years.**[1]

*Heigert v. Londell Manor, Inc.*,[2] provides unusually extensive review of tacking of possession between grantor and grantee. It is generally quite sympathetic to tacking. It holds that the same rules apply in those instances where the prior owner has already possessed a disputed tract, thereby accomplishing acquisition of title, as apply in those instances where prior owner's possession is less than ten years and must be added to possession of the grantee to make up the ten continuous years.[3] According to Heigert, it is not necessary that there be a written instrument between successive possessors in order to permit the tacking of the possession of one on to the possession of another. **However there must be a conveyance or intent to convey by the prior possessor to the subsequent possessor.**[4] Intent to convey will typically exist where the grantor conveys and the grantee enters into possession of property within an enclosure which also encloses the land not described in the deed, which is subject to the possessory claim. According to Heigert:

Intention by implication [to permit tacking] is also shown when the undescribed disputed land adjoins the described deeded land and the undescribed disputed land runs up to an obvious boundary such as a fence.[5]

The problem is obvious. If the courts follow the normal rules that a deed only conveys the property described in the deed, it would often violate the intent of the parties and create absurd results. Public policy favors reasonable land boundaries. If little strips of adversely-possessed property remain in the ownership of an original possessor, it would create a balkanization of land titles. Courts avoid this result by purporting to analyze the intent of the parties. If they find the seller "intended" to convey the adversely possessed property to his buyer, then they award the disputed piece to the buyer. Unfortunately, there is no wholly satisfactory method of determining an individual's intent."

### 66:16. POSSESSION AS AGAINST GOVERNMENT AND PIOUS USES

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possessor often believes he has record title. When a landowner is mistaken as to his record boundary such that he is openly possessing land beyond that shown on his deed, he may never actually realize that the boundary he recognizes on the ground is different from that shown on his deed. If such is the case, the landowner inevitable will deed his property to a purchaser using the same incomplete legal description. However, his adverse possession rights (a claim) run with this record title. As seller, he assumes that he is conveying the entire possessed tract, even though the deed only describes the property to which the seller had record title. (All of this is obviated, however, by a competent survey.)

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ROBERT A. DOBBS, ET AL., PLAINTIFFS/RESPONDENTS,
V.
ROBERT KNOLL, ET AL., DEFENDANTS/APPELLANTS.
NO. ED 79798.
OCT. 22, 2002.MOTION FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED DEC. 18, 2002.APPLICATION FOR TRANSFER DENIED JAN. 28, 2003.

***Synopsis***

Homeowners of three residential lots brought action against subdivision trustees to quiet title to portion of common ground abutting their respective lots under claims of adverse possession. The Circuit Court, St. Louis County, Kenneth M. Romines, J., vested title to common ground to homeowners and trustees appealed. The Court of Appeals, William H. Crandall, Jr., P.J., held that: (1) evidence supported determination that homeowners' possession of common ground was actual, exclusive, open and notorious, hostile, and continuous for requisite ten years, and (2) trustees had sufficient notice regarding homeowners' use of property.

Affirmed.

The evidence established that plaintiffs were husbands and wives, Robert A. Dobbs and Melvia Dobbs, Preston Koprivica and Iris Rose Koprivica, and Peter Walker and Kathleen J. Walker. Each of the couples owned and resided in homes situated on three separate lots in the Kehrs Mill Farm Subdivision (hereinafter subdivision), located in Chesterfield, St. Louis County, Missouri. When the subdivisionwas originally developed, common ground identified as "Community Area and Easement" was included in the plat and described in the subdivision trust agreement and indentures. The indentures also provided that all subdivision residents could use the common ground, subject to the certain rules and regulations. Some of the common ground was located immediately behind plaintiffs' lots along the north boundary lines of their respective lots, between their lots and Kehrs Mill Road.

The Dobbses purchased lot 37 in the subdivision in 1988. It was known as *180 15723 Cotting Court. When they bought the property, they were told that their lot was enclosed by the fence that was in place at the time. They maintained the area inside the fence, including, but not limited to, cutting the grass, landscaping, spraying, and removing trees. They treated all of the property inside the fence as their own. In 1992, the trustees informed them that the fence was outside the boundaries of their lot and encroached onto the common ground along the north edge of their lot. The trustees requested that they move the fence back to their property line. They refused. In Count I of this action, the Dobbses want title to the strip of common ground enclosed within their fence quieted in them on the basis of adverse possession.

The Koprivicas purchased lot 39, commonly known as 15719 Cotting Court, in 1973. They were the original owners and were aware that property contiguous to their lot was common ground from the time they moved onto the property. Yet, they treated that property as part of their own backyard. Among other things, they planted grass seed, trees, and a vegetable garden. They watered the area and installed a sprinkler system in 1989. They stacked wood and allowed their grandchildren to play in the area. They landscaped the area to such an extent that access to their property from Kehrs Mill Road was difficult. In Count II of this action, the Koprivicas requested

the trial court to quiet title to that portion of common ground in them on the basis of adverse possession.

The Walkers purchased lot 38, known as 15721 Cotting Court, in 1974. Their lot was fenced along their property lines. Yet, from the beginning, they treated the common ground in the back of their lot, yet outside their fence, as their own. Among other things, they put in grass, gardens, railroad ties, a vegetable garden, trees, a birdbath, and a bird feeder. They cut the grass in that area. They planted a row of holly bushes, which made access to the common ground difficult. In Count III of this action, the Walkers requested the trial court to quiet title to the disputed property in them on the basis of adverse possession.

311 S.W.3D 798
SUPREME COURT OF MISSOURI, EN BANC.
STATE EX REL. BILLIE BARKER, TRUSTEE OF THE MARY ALMOND LIVING TRUST, RELATOR,
v.
THE HONORABLE DAVID B. TOBBEN, RESPONDENT.
No. SC 90407
APRIL 20, 2010.

***Synopsis***

Background: Alleged adverse possessor filed action to quiet title with respect to property titled to a living trust. Successor trustee filed counterclaim for quiet title injunctive relief, ejectment, trespass, conversion and punitive damages, and requested a jury trial. The Circuit Court, Jefferson County, David B. Tobben, J., sustained possessor's objections to trustee's request for jury trial, and entered order severing possessor's quiet title claims from trustee's counterclaims. Trustee petitioned for writ of prohibition to prevent the court from enforcing the order denying her request for a jury trial on possessor's quiet title action. Preliminary writ of prohibition was granted.

Holdings: The Supreme Court, Richard B. Teitelman, J., held that:

1 trustee was entitled to a jury trial on quiet title claim, but

2 trial court could, if necessary, elect to hold a separate proceeding on trustee's request for injunctive relief.

Permanent writ granted.

Attorneys and Law Firms

*799 Stanley D. Schnaare, Steven A. Waterkotte, The Schnaare Law Firm P.C., Hillsboro, for relator.

William L. Sauerwein, Sauerwein, Simon & Blanchard P.C., St. Louis, for Gloria Kappler.

Opinion

RICHARD B. TEITELMAN, Judge.

Billie Barker, as successor trustee of the Mary Almond Living Trust, has filed a petition for a writ of prohibition to prevent the trial court from denying her request for a jury trial in the underlying quiet title action. A preliminary writ was issued. The preliminary writ is made permanent.

Facts

Gloria Kappler, as trustee of the Gloria J. Kappler Living Trust, filed suit against Barker to quiet title with respect to property titled to the Mary Almond Living Trust. Kappler's quiet title action was premised on claims of adverse possession and boundary by acquiescence. Kappler requested relief in the form of a decree of ownership, a survey of the property and an order ejecting the record owners from the property.

Barker filed a counterclaim for quiet title, injunctive relief, ejectment, trespass, conversion and punitive damages.1 Barker requested a jury trial. Kappler objected to a jury trial on the ground that her quiet title action was equitable in nature. Kappler also waived her right to a jury trial and filed a motion to sever her quiet title action from Barker's counterclaim for trespass.

The circuit court sustained Kappler's objections to Barker's request for a jury trial. The court entered an order severing Kappler's quiet title claims from Barker's counterclaims, but providing for a jury trial on the issue of damages in the event Barker prevailed.

*800 Barker filed a petition for a writ of prohibition to prevent the court from enforcing the order denying her request for a jury trial on Kappler's quiet title action. This Court entered a preliminary writ in prohibition instructing the trial court to refrain from further action until further notice. Barker argues that the circuit court's order violates her state constitutional right to a jury trial on legal claims.

# XIII. Deeds

1. **General Warranty Deed**
    1) The most commonly used deed in Missouri, the warranty deed provides the highest level of protection for the buyer. With this deed, the seller guarantees they hold clear title to the property and have the legal right to sell it. If any issues arise with the title (e.g., claims of ownership by someone else), the seller is responsible for resolving the problem. A General warranty deed offers both a "general" and "special" form of protection, with the general warranty deed covering all past issues, not just those arising during the seller's ownership.
2. **Special Warranty Deed**
    1) This deed is similar to the warranty deed, but it only guarantees that the seller has not done anything to impair the title during their ownership of the property. In other words, it doesn't offer protection against any title issues that existed before

the seller took ownership. It's commonly used in commercial transactions or when a seller doesn't want to be liable for past issues with the property.

3. **Quitclaim Deed**
    1) A quitclaim deed offers the least protection to the buyer. The seller transfers whatever interest they have in the property, but they do not guarantee that they own the title or that it's free from any claims. Essentially, the seller is "quitting" any claim they might have on the property, leaving the buyer to sort out any issues. Quitclaim deeds are often used in situations where the transfer is between family members, in divorce settlements, or in situations where the seller doesn't need to provide guarantees, like correcting title issues.
4. **Deed of Trust**
    1) While not exactly a deed used to transfer ownership in the traditional sense, a deed of trust is used in Missouri in connection with real estate loans. When a borrower takes out a mortgage, the deed of trust is recorded to secure the loan. It involves three parties: the borrower (trustor), the lender (beneficiary), and a trustee who holds the legal title to the property until the loan is paid off. Once the debt is settled, the deed of trust is released.
5. **Missouri Beneficiary Deed**
    1) A special type of deed that allows real property to transfer automatically to a named beneficiary upon the death of the current owner—without going through probate. It's often used as a simple estate planning tool.
        - **Key Features of a Missouri Beneficiary Deed:**
            - Non-Probate Transfer:
                i. The most significant feature is that the transfer of ownership bypasses probate court. This simplifies the process for the beneficiary and can save time and money.
        - **Retains Owner Control During Lifetime:**
            - The property owner keeps full control of the property while they're alive. That means they can:
                i. Sell it
                ii. Mortgage it
                iii. Change or revoke the beneficiary deed
                iv. Do anything they want with the property, without needing the beneficiary's consent.
        - **Takes Effect Only Upon Death:**
            - The deed has no legal effect until the owner's death. The beneficiary has no rights or claim to the property while the owner is alive.
        - **Must Be Recorded before the death:**
            - To be valid in Missouri, the beneficiary deed must be recorded with the county recorder's office in the county where the property is located before the property owner's death. If it's not recorded before the owner dies, it's not effective.
        - **Can Name One or Multiple Beneficiaries:**

- The deed can name one or more beneficiaries, and you can even designate successor beneficiaries (i.e., backups) in case the primary one dies before you.
- "LDPS lineal descendants per stripes "

- **Revocable and Flexible:**
  - You can revoke or change the deed at any time before your death by:
    i. Executing a new beneficiary deed, or
    ii. Recording a formal revocation.
    iii. **Example:** Let's say Jane owns a house in Springfield, Missouri. She wants her son to inherit it when she dies but doesn't want him to deal with probate. Jane executes and records a beneficiary deed naming her son. She continues to live in the house, pays taxes, even refinances the mortgage—all without her son's involvement. When Jane passes away, the house automatically transfers to her son, without going through court.

6. **Trustee's Deed**
   1) A trustee's deed is used when a trustee sells a property in the course of administering a trust. This deed conveys the title of the property from the trust to the new owner, but it may or may not come with guarantees depending on the terms of the trust. The trustee's role is to act in the best interests of the beneficiaries of the trust.

Each type of deed has specific uses and implications for the parties involved, particularly with regards to the extent of protection offered. In Missouri, it's always advisable to review the deed type in detail to understand the rights, obligations, and potential risks involved with a real estate transaction.

## BONUS HUMOR:

### "Goes to a Therapist"

A surveyor goes to a therapist.
He says, "Doc, I think I've got a problem. I measure everything. My house, my yard, even my relationships."
The therapist asks, "How long have you been doing this?"
The surveyor replies, "About 1,320 feet… give or take."
Thanks for listening – enjoyed being here.

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