

LAND SURVEYORS AS EXPERT WITNESSES IN REAL ESTATE LITIGATION MATTERS IN SPAIN

IZVEDENIŠKA DEJAVNOST NA PODROČJU NEPREMIČNIN V ŠPANJI

*Natalia Garrido-Villén, Alberto Antón-Merino, José Luis Berné Valero,
Carmen Femenia Ribera*

UDK: 349.4 : 528(460)

Article classification according to COBISS: 1.04

ABSTRACT

This article describes expert opinion and expert reports commonly requested by courts and lawyers in those technical disciplines related to real estate, within the framework of the current Spanish legislation. As established in Spanish Civil Code Article 348 "property means the right to possess, enjoy and dispose of anything of value with no limitations other than those established by law. In addition, the owner is entitled to claim property ownership as its holder and its possessor". This regulation has resulted in many litigation proceedings in Spain. Performance appraisal reports can be of aid to non-judicial experts and lawyers in relation to technical issues and can at times be decisive.

IZVLEČEK

V članku predstavljamo delo izvedencev in najpogostejše primere izdelave izvedeniških poročil, ki jih v skladu s sedanjó špansko zakonodajo zahtevajo sodišča in odvetniki od tehnične discipline, povezane z nepremičninami. Po določbi 348. člena španskega državlanskega zakonika je »lastnina pravica do neomejenega uživanja in upravljanja stvari, razen v primerih, ki jih določa zakon. Poleg tega ima lastnik pravico, da zahteva stvar od imetnika oziroma nosilca.« Posledica tega pravila so številni pravni spori v Španiji. Poročila o ocenjevanju uspešnosti na tem področju so lahko v pomoč izvensodnim strokovnjakom in odvetnikom v zvezi s tehničnimi vprašanji in so včasih celo odločilnega pomena.

KEY WORDS

expert activity, real estate, expert reports, surveying.

KLJUČNE BESEDE

izvedeniška dejavnost, nepremičnine, izvedeniška poročila, geodetske meritve

1 INTRODUCTION

Due to a number of reasons, which will be further described in the present article, many conflicts related to real estate can be solved using topographical or geodesic techniques. Judges may require expert evidence, i.e. an expert report elaborated by an expert on the subject.

Evidence is the proof of the existence of a fact, or the truth of a statement, aimed at attaining the judge's psychological conviction regarding specific procedural data (Guasp, 1990). Expert evidence can be defined as a means of indirect evidence of a scientific nature which is intended to enable the judge, who is not familiar with certain fields of human knowledge, to value and appreciate technical facts which have been brought into the legal process by other means. In this way, the judge can be aware of their scientific, artistic or technical significance, provided

that such special knowledge be useful, helpful or appropriate for the verification of any disputed fact in the trial (Sierra, 2000). Expert evidence is an essential phase of the proceedings by which the court must be convinced of the veracity of the allegations expressed by the parties in the proceedings (Cortés et al., 1996).

First of all, it should be noted that acting as an expert is incompatible with the status of judge in the same trial and with the position of party. The expert is thus a third party or outside person with expertise, with or without a professional degree, and who brings his knowledge to the proceedings. The expert is brought to the proceedings exclusively by virtue of his artistic, scientific or technical knowledge, regardless of the way in which his knowledge was acquired, or of being in possession of an official degree, although the law logically prefers graduates (article 340.1 Code of Civil Proceeding, hereinafter LEC). There are as many experts as careers, excluding the legal career. The expert is, in fact, the person who, not being a party, issues statements about data which had already acquired a procedural nature during the observation period. These two circumstances distinguish expert evidence from confession or interrogation on the parties' part, in accordance with the terminology used by the existing Procedural and Testimony Evidence Law (Garcíandia, 1999).

The main purpose of this paper is to gather information about expert activities on real estate in Spain. The applicable legislation will be considered and some real cases will be presented as an illustration.

2 APPLICABLE LEGISLATION

The basis for the intervention of experts in the proceedings is the need for technical expertise required by judges to carry out their duties; this need specifies the function and purpose of the expert's involvement in the proceedings, articulated through expert evidence (Garcíandia, 1999).

In this sense, expert evidence is considered as a means of evidence, both in the Civil Proceeding Act Law 1881 and in the current Procedural Civil Law (Articles 578.5 and 610 to 632 and 299.4 and 335 to 352, respectively).

2.1 Provision of Expert Evidence

Litigants can have their own expert or experts if necessary or convenient to defend their rights. The general principle is that litigants must include the expert opinion in the claim or in the defendant's plea (Montero et al., 2000). This obligation shall not arise for the plaintiff if it is proven that he has not been allowed for the purpose of defending his rights. As for the defendant, he shall not enclose the expert opinion if he proves that he is unable to request or obtain it within the period for reply in writing; otherwise, the defendant shall have the same obligations as the plaintiff.

Expert evidence shall be given in writing, including all other documents, instruments or materials, unless this is not possible, in which case the evidence shall include the necessary indications.

Should the parties be unable to provide opinions given by the experts appointed by them, they shall provide the ones that they wish to be taken into account.

In the relevant stage of the proceedings, the parties can request the experts to appear in court to explain or to provide their opinions and to answer questions, objections or proposals for correction.

Under exceptional circumstances expert opinions are provided on the basis of court proceedings following the lawsuit. This happens when the development of the trial shows the need to provide such advice due to the allegations made by the defendant or additional arguments. If the Court deems it necessary, such a claim shall be authorised.

In cases of free legal aid and if so requested, the parties may request the Court to appoint the experts, if deemed necessary for their claims. The Court shall do so if deemed appropriate and useful. This opinion shall be at the expense of the requesting party (Sierra, 2000).

2.2 The two types of expert evidence

The Civil Proceeding Act in force articulates a dual system for the introduction of expert evidence in civil proceedings (art. 335). Firstly, the legislation allows the parties to provide, early in the proceedings, the opinions of the experts appointed by them (art. 336). Secondly, it allows for the possibility of the judge's appointing an expert who shall issue his relevant opinion (art. 339).

These two forms of expert evidence are compatible with each other. Art. 335 LEC establishes that the parties may bring to the trial the opinion of an expert who possesses the necessary expertise; the parties can also request an opinion of an expert appointed by the judge, when the law contemplates it. Such cases are envisaged by Art. 339 LEC, which allows the parties to seek court-appointed experts when provision of expert evidence is deemed suitable for their best interest. Consequently it could be understood that the law allows requesting expert appointment by the court, even if an opinion on the same question has been previously provided (Font, 2000).

2.2.1 Opinion provided by the parties

This modality strengthens the role of parties in the evidentiary phase, leaving in their hands the appreciation of the need for technical knowledge so that the judge can adequately assess the relevant facts in the lawsuit. Consequently, when the plaintiff and the defendant deem it appropriate to argue their claims, they shall be able to extra-procedurally commission expert opinions to be valued as expert evidence in the trial (González and Iglesias, 2000).

Appointment of experts

When the parties provide expert opinions at the beginning of the trial, the appointment of experts is a private extra-procedural activity. Thus it is of no legal interest as it is the parties who must find the expert who has, in their view, the suitable knowledge to clarify the facts. The law requires that these experts have professional degrees or specific knowledge in the field under consideration. Paragraph 1 of Art. 335 establishes that the parties may bring to the proceedings the opinions of the experts who have relevant knowledge (González and Iglesias, 2000).

Expert opinion submission

The parties will submit the expert opinions at different stages of the process depending on the type of proceeding and its phases.

In the case of ordinary proceedings, the expert opinion must be submitted with the lawsuit or the defendant plea, (Art. 265.1.4 and 336.1 ° LEC).

In the case of oral proceedings, the expert opinion must be submitted with the lawsuit or at the hearing (Articles 265.4 and 336.1 LEC). That is, the plaintiff shall provide opinions that relate to events alleged in its lawsuit and the defendant shall provide opinions that relate to events which relate to allegations in the lawsuit and in the defendant's plea.

In those cases in which the parties are unable to provide expert opinion in the lawsuit or the defendant's plea, the litigants are required to express in writing any opinion which should be used in their defence in the trial and submit them for transferral to the other party, as soon as possible, and in any case before the start of the pre-trial hearing of the ordinary proceeding or the hearing of oral proceedings in accordance with Art.337.1 LEC.

Form and contents of the expert's report

The legislation obviously does not regulate the form and contents of an expert's report provided by a party. That is, experts are allowed to submit their opinions together with any instrument that may enable the judge to acquire better understanding of the issues described in the technical report.

However, the report should include a detailed description of the object of expertise, a list of the technical methodologies used by the expert and results, as well as the conclusions reached.

2.2.2 Expert evidence performed by a court-appointed expert

This type of expert evidence is conducted by an expert appointed by the judge. It is an alternative way to that discussed in the previous section and although in theory it should not be so, in practice this method usually provides greater independence and objectivity to the process.

Proposal and admissibility of expert evidence

The presence of court-appointed experts proceeds in the following cases according to Art. 339 LEC:

Firstly, if either party is entitled to legal aid, it will suffice to ask for judicial appointment of an expert, as is established in the Legal Aid Act (Article 339.1 LEC).

Secondly, even if they are not entitled to legal aid, any party can ask for judicial appointment of an expert at various stages of the process:

- In the lawsuit or the defendant's plea in the case of an ordinary proceeding. In oral proceedings in the lawsuit or in the hearing, as long as the litigants deem it suitable or necessary to their interests (Article 339.2 LEC).

- In the hearing prior to the ordinary proceeding, the plaintiff may apply for judicial appointment of the expert to issue report on allegations made by the defendant's plea. This also can be made by the plaintiff in the hearing of oral proceedings.
- In the previous hearing of the ordinary proceeding in the case of allegations or complementary claims allowed in the previous audience of ordinary proceedings (Article 339.3 LEC). Specifically, Article 427.4 of LEC allows the parties to attend the hearing and then make the corresponding request.

However, these are not the only requirements established by the legislation for judicial appointment of the expert.

If the expert's opinion is requested as a result of allegations that were made from allegations and plans in the previous hearing prior to the ordinary trial or in view of the oral proceedings, then "both parties should agree with the subject of the expertise and accept the expert opinion of the court-appointed expert" (art. 339.3.1 and 2nd LEC) (Font, 2000).

Appointment of experts

Number of experts

In accordance with Art. 339.6 LEC, the court shall appoint a single expert for each issue or set of issues which are the subject of expertise. In case of evidence extension and only when the subject of expertise is diverse another expert shall be appointed (Font, 2000).

Conditions for experts

As established in Art. 340.1 LEC court-appointed experts must hold the official degree corresponding to the subject matter of the evidence. Only if the matter in question were not covered by an official professional degree, would the expert be appointed from among persons knowledgeable in those subjects.

Appointment systems

In accordance with Arts. 339 and 340 LEC, the modes envisaged by the legislation for expert appointment are the following:

Firstly, the judge shall be bound by the agreement of the parties on the specific person or entity deemed suitable for the drafting of the report (art. 339.4 LEC).

Secondly, when there is no agreement between the parties, the expert shall be appointed by draw (Art. 339 LEC) to be conducted in accordance with the procedure laid down in Art. 341 LEC.

The procedure is as follows: every January, the court shall require of the professional association and / or academy or association of experts a list of the associates who are willing to act as expert witnesses.

Once the list is sent to court, the first appointment shall be made by draw, to be held in the presence of the Clerk of Court and thereafter the remaining appointments shall be made following this list serially (Art. 341.1 LEC).

Thirdly, the last system for appointment of an expert is the parties' consent in those cases where, because of the uniqueness of the subject matter expertise, there is only one knowledgeable person in the field. That person shall be appointed only when the parties jointly agree (Article 341.2 LEC).

Expert appeal. Acceptance of the office and appointment

In accordance with Art. 342 LEC, the judge shall communicate the appointment to an expert witness within five days following the appointment, whatever the appointment procedures may have been. The judge may require the expert to state whether he accepts the office or not within five days.

Once the appeal is made, the expert may take several courses of action:

Firstly, he may accept the appointment. This is the normal and usual attitude, as the expert has requested to be included in the corresponding list. Once the appointment is accepted and in accordance with Art. 342.1 LEC, the expert shall be appointed and swear under oath or promise to tell the truth, acting as objectively as possible, without favouring or harming either party, and being aware of the criminal sanctions in which he may incur if he breaches his duty as an expert witness (Article 355.2 LEC). In addition, at this time experts shall apply for funding.

In this act, and though not specified in the law, the subject matter of expert opinion evidence and the submission deadline must be specified (Font, 2000).

Secondly, the expert witness may decline due to any cause of abstention envisaged by the law, as Art. 105 LEC forces him, in this case, not to accept the office. In this case, the expert shall be replaced by a substitute in accordance with the replacement procedure specified in Art. 342.2 LEC, which is discussed below.

Thirdly and finally, the designated expert may not accept the appointment, and must provide a justified cause which is regarded as sufficient by the judge (Art. 342.2 LEC). That is, the expert's free non-acceptance is not envisaged, but rather it is subject to the submission of a sufficient reason to the judge.

If the court considers the cause provided to be sufficient, the court shall proceed to the expert's replacement, always by the following person in the court list, designating the next person in the list and so on, until the appointment can be made (Article 342.2 LEC).

Report drafting

Prior to the issuing of the report, the judge-appointed expert shall, when necessary during his investigation, perform the actions required by the nature and characteristics of the object of expertise.

The law says that the expert actions shall be performed, if possible, in the court head office. However, often these actions have to be performed outside the local courthouse, as in the case study under analysis.

The subject matter of expertise evidence should be made available to the expert and the party interested in the expert's opinion can provide the expert with the object to be examined. However, difficulties can arise when the subject of expert examination is not available to the interested party but to the opposite party or a third party. In these cases, the new law, like the previous one, remains silent on the matter. However, as the object of expert recognition is a piece of real estate that cannot be moved to the court facilities, the expert can obtain a legal credential addressed to the person who can facilitate access to the property. Even the judge may order the entry into the location, as in the case of a judicial recognition (Art. 354.1 ° LEC) (Font, 2000).

With regard to the presence of the parties and their advocates during the expert investigation, the legislation states that it should not "prevent or hinder the work of the expert and can guarantee the impartiality of the expert opinion" (Art. 345.1 LEC). This happens more often than not: the lawyers try to influence, although subtly, the expert's report. Therefore, at the request of the parties, the judge shall decide what is appropriate according to the legal standard (Lorca, 2000). If the decision is affirmative, the expert himself shall directly notify the parties at least forty-eight hours in advance, of the day, hour and place of his operations.

Once the necessary expert investigation is performed, the expert shall issue the corresponding opinion to be presented in court at the specified time (Art. 346 LEC).

With regard to the form of the report, the legislation specifies only that it must be in writing (Art. 346 LEC) although there is the possibility of submitting documents, instruments or materials supporting the expert's opinion (González and Iglesias, 2000). (Art. 336.2 LEC). Nor does the law refer to the content of the opinion, but we understand that it must follow the layout outlined in the analysis and the opinion submitted by the expert appointed by the parties.

2.3 Expert report fees

Two types of expert report fees can be distinguished:

- Expert report provided by the parties: fees are negotiated with the party that requested the report
- Expert report performed by the court-appointed expert.

The charging of fees for the drafting of expert reports is regulated in Art. 342 LEC, Section 3 of the civil proceedings. This article guarantees payment of expert witness fees (López, 2010).

The same article points out that, once the expert is appointed, he may claim, within three days of the appointment, the allocation of funds necessary to issue his opinion. The funding is stipulated by the court and the expert shall claim the payment from the party who has proposed the expert evidence, from the Consignment and Deposit Account.

Non-payment of the fees shall have two consequences: first, the expert shall be exempt from the obligation to issue an opinion and, second, and of undeniable importance, the party shall be unable to appoint a new expert (Dominguez, 2002).

If the expert witness had been appointed in agreement and one litigant fails to make the corresponding payment, the other litigant shall be offered the opportunity to provide the missing

amount, or recover the amount deposited, in which case, the expert be exempted from issuing the opinion, and there shall be no new appointment.

Experts may charge very large amounts, in which case the court itself or the parties may challenge the payment and the court can reduce it. Generally the provision is a partial amount of the total fees.

Regarding the settlement of fees, after testifying (usually after ratification, clarification and explanation of expert opinion), experts can submit it to the court and demand payment from the party that proposed the expert, with no need to wait for the proceedings to end and regardless of the court decision regarding costs at the end of the proceedings (Art. 241.2 LEC).

Once there is an irrevocable judgment or order that imposes costs to one of the parties, the experts involved in the trial who still remain unpaid by a party may submit to the Clerk of Court or Tribunal a detailed bill for their fees and a detailed bill for their justified covered expenses (Art. 242.3 LEC) for inclusion in cost taxation. It is advisable for the expert to follow up the matter in the Clerk of Court or Tribunal.

2.4 Expert's liability

The expert witness may incur in criminal or civil liability, regardless of the disciplinary liability which might be claimable.

2.4.1 Civil liability

Civil liability is to be responsible for debts or wrongdoing against another private party. This might be the case because of the nature of the original agreement, because it is stipulated by law, because it falls under the contract provisions, or because of the events, even if in their realization there is neither fault nor negligence on the part of the party under obligation to satisfy.

Liability involves the payment of legal damages. The purpose of this reaction, which is equivalent to the suppression of damage, is achieved by the law, by transferring the burden of damage to a different person other than the injured party; the other party is forced to bear the legal reaction, regardless of their wish and situation: this is precisely the responsibility (Garcíaandía, 1999).

The expert shall be responsible for any damage to the parties or to any third parties due to a lack of due diligence in the execution of the expert testimony for example due to negligence or inexcusable ignorance, like in the case of loss or deterioration of the object entrusted for evaluation, the completion of the expert examination without due care or the drafting of a report with evident or inexcusable mistakes (Martínez, 1999).

Civil liability can be of two types, contractual liability or non-contractual liability. Expert's civil liability generally suits better the non-contractual liability regime (Garcíaandía, 1999), as the acceptance of the judicial order does not create any legal relationship between the expert and the parties and thus the parties cannot demand the repair of damage on the basis of a non-existent contract (González and Iglesias, 2000).

In the case we are dealing with, the opinion of the court expert should be taken into account by the judge in order to settle a dispute. When it can be proven that said unlawfulness has influenced the judge's decision, the responsibility can then be shifted onto the expert witness. The party aggrieved by this court decision must prove, firstly, the influence that the irregularly executed opinion has had upon the judge's decision and, secondly, that his harm has been derived from that judicial decision, in which case there shall be a civil liability or compensation for the damage caused.

For all the aforementioned reasons, it is highly recommended, if not practically essential, that civil liability insurance is contracted to cover any possible negligence in the domain of expert work.

2.4.2 Criminal liability

In performing his function, the expert may incur in the following conduct, which constitutes a criminal offense:

Firstly, bribery can arise "in those cases where a person, to one's own advantage or to that of a third party, requests or receives, in person or by proxy, a gift or present or accepts an offer or promise in exchange for performing a wrongful act or an act or omission constituting a crime, or for abstaining from doing an act that should be practiced, all in the performance of his duties" (Garcíaandía, 1999).

Secondly, when an expert engages in any conduct that constitutes a criminal offense such as perjury, as established in the Art. CP 459 as follows: "The sentences of the preceding articles shall be imposed to the experts or interpreters who maliciously fail to be truthful in their opinions or translations, who shall also be punished with the penalty of special disqualification from a profession or occupation, public employment or office, for a period of six to twelve years" However its practical application is more difficult, given that in many cases it shall be difficult to spot falsity as this requires technical and highly-qualified knowledge. Moreover, said unsustainable opinion must be maliciously motivated, which requires considering the possibility that the error is simply due to the expert's negligence, lack of ability or training, or low skills, which, without prejudice to the responsibility that might be claimed of the civil jurisdiction, excludes the application of the Criminal Code.

Thirdly, Art. CP 460 includes a second criminal behaviour and punishes the expert who, without substantially failing to be truthful, modifies the truth through reluctance, inaccuracies or the silencing of relevant facts or information known by him, with a penalty ranging between six to twelve months and suspension from public office, profession or occupation ranging between six months and three years. Also in this case it is necessary for the expert to act maliciously.

Finally, Arts. CP 558 and 633 envisage any behaviour which involves public nuisance or causes mild to severe disturbances during hearing at a tribunal or court. The expert who performs, in word or deed or in writing, actions that go against the respect and obedience due to the courts, and go so far as to disturb public order, shall be arrested and brought to whatever court must hear the case (Garcíaandía, 1999).

3 LAND SURVEYORS AS EXPERT WITNESSES IN REAL ESTATE LITIGATION

Once the legislation on expert witnesses has been reviewed, in this section the main geodetic and cartographic works performed by land surveyor expert witnesses are described.

3.1 Deed of sale

The deed of sale is a document in which a change in ownership of a certain real estate is recorded and authorised by a notary public, who will sign with the grantor or grantors, besides giving faith about legal capacity of the content and the date on which it took place, as shown in Figure 1.

There are many court cases in which the subject of dispute goes through determining real estate ownership.

3.2 Historical Land Registry Records

When the ownership is not completely defined in the deed of sale it is very useful to study the history of a property registration at the Land Registry.

According to Art. 605 of Civil Code “The Land Registry includes the registration or annotation of acts, deeds and contracts concerning ownership and other real rights over real estate”. In this way there is a historical record of the real estate owners and divisions, as shown in Figure 1.



Figure1: Land Registry record of a rural property in the municipality of Godelleta (Valencia - Spain)

3.3 Field measurements taken with topographic instruments

In most cases, the expert has to take field data to compare his measurements with other type of graphical documents. Field data are recorded with topographic or geodetic instruments such as total station or GNSS equipment depending on location. Figure 2 shows the taking of data of a property boundary by means of GNSS techniques.

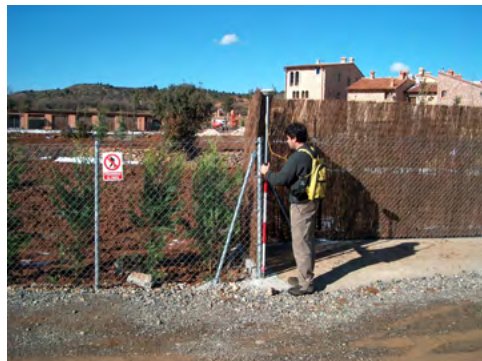


Figure 2: Field measurements of a fenced property in San Agustín (Teruel – Spain) taken with topographic instruments

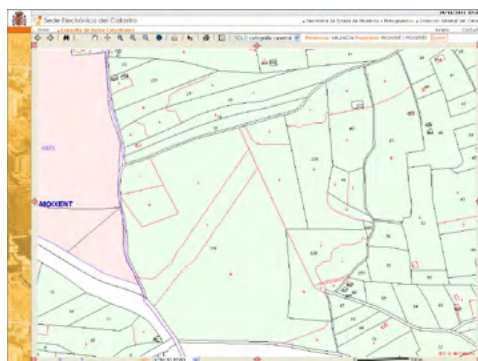


Figure 3: Current Cadastral Cartography of the municipality of Moixent (Valencia - Spain)

3.4 Cadastral Cartography

Article 1 of the Spanish law 48/2002, of December 23rd, of Real Estate Cadastre (<http://www.catastro.meh.es>) says: “Real Estate Cadastre is an administrative registry of the Economy and Treasury Department in which all rural, urban and special property goods are described. It is regulated by the Real Estate Cadastre Act. The inscription in this registry is mandatory and free, unlike the Land Registry” (Berné et al, 2008).

For land surveyors, the Real Estate Cadastre is the only complete and spatially continuous cartography of Spain that includes property boundaries. Cadastral cartography is available in digital format through the Internet (Figure 3).

However, as the primary objective of the Spanish Cadastre is tax collection, it is highly inaccurate, which together with the fact it has no connection with the Land Registry creates numerous problems.

3.5 Historical Cadastral Map

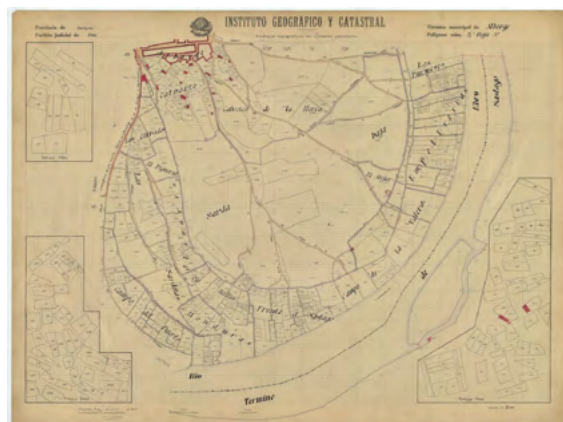


Figure 4: Old cadastral map, year 1928. Municipality of Alborge (Zaragoza - Spain)

Sometimes it is difficult to determine the property lines and boundaries as well as other relevant details of a real state property only from the Land Registry and current Cadastral data. Then, the land surveyor can consult the old cadastral maps that are kept in the archives of the Cadastre, copies of which can also be bought in paper format. See an illustration in Figure 4.

3.6 Historical Aerial Photography

Similarly, to investigate about possible changes in the property lines of a real estate property over time old aerial photographs can be of great help to determine property lines prior to the boundary dispute.

In Spain, historical aerial photographs of US Photogrammetric Flight 1956 are available from the IGN (National Geographic Institute). One of the photograms is shown in Figure 5. A cooperation agreement between the United States and Spain signed in 1953, allowed the U.S. Air Force to photograph in detail the Spanish territory. The flight took place between 1956 and 1957. These are the first aerial photographs available across the country, scale=1:33,000, taken at 5,000 meters above the ground, with a metric camera and 23x23 acetate negative, equivalent to about 42 square kilometers, in photograms of about six kilometers per side.

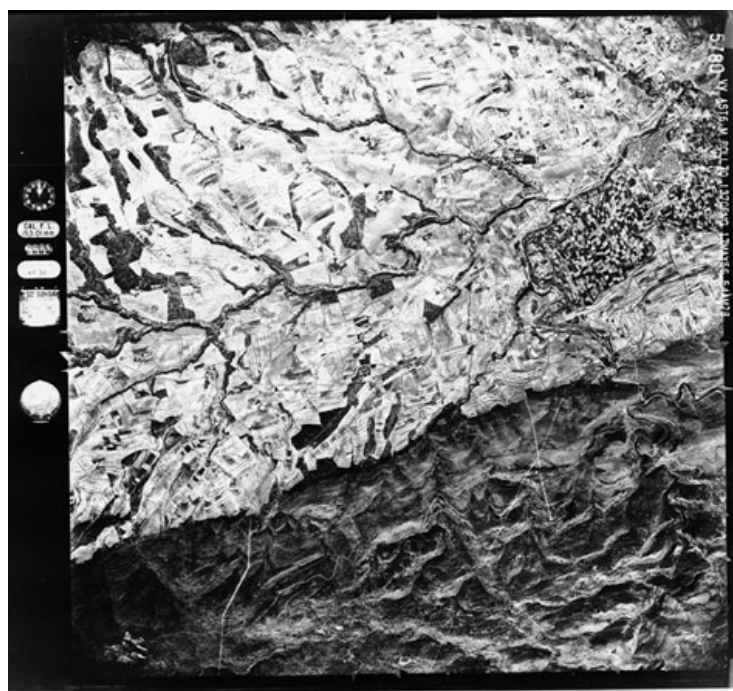


Figure 5: Historical aerial photography. US Flight 1956 of the area of Ontinyent (Valencia - Spain)

3.7 Physical evidence on the ground

As discussed in section 2.2.2 about report drafting, for expert evidence the land surveyor has to take measurements of the existing in-site boundaries and verify the state of boundary markers

that may help determine property limits. One example is setting boundary lines between municipalities, which generates numerous legal problems in Spain..

3.8 Testimony of elderly people

In cases where the property subject of expertise has changed substantially over time, besides registration records, historical cadastral cartography and aerial photographs, the testimony of the elderly people can be of aid in identifying changes in property boundaries.

3.9 Matching project drawings with physical data

When a project is materialized on the ground, the final result may present differences with the original drafting and this leads to future legal disputes. In such cases an expert report is necessary to adjust the original project, whether expropriation, urbanization, etc., with the current state of the terrain. Figure 7 shows an expropriation map that was not correctly materialized on the ground and resulted in several legal disputes.



Figure 7: Expropriation map for the construction of a road in Castellon de la Plana (Spain)

4 MOST COMMON CASES IN REAL ESTATE SURVEYING

In this section we shall briefly describe the most common cases which may require expert testimony of land surveyors whose skills fall within the scope of real estate surveying.

There are many sources of information, which obviously must be studied separately and thoroughly. However, in most expert reports, the key to reach a conclusion is obtained by establishing the geographical relations between the various sources, especially cartographic sources: on-site measurements, cadastral mapping, aerial orthophotography, urban planning information, etc... This process is usually performed by means of a CAD or GIS software tool.

4.1 Boundary Survey and Setting

Landmark setting is the formal act of distinguishing the boundaries of a property. According to Art.385, 386 and 387 of the Spanish Civil Code, the owner is entitled to delimit his property, citing the owners of the neighbouring properties. The same right shall correspond to those who have real rights. The boundary shall be in accordance with the owners' deeds, and, in the absence of deeds, with what proves ownership. Should the deeds not determine the boundary or area belonging to each owner, and the matter cannot be resolved by means of the possession or other evidence, the landmark setting shall be performed by distributing the land which is subject to dispute in equal shares. Should the deeds for the surrounding area cover a greater or lesser area than that comprised by the entirety of the land, the increase or decrease shall be proportionally apportioned (Sierra, 2000).

According to Art. 388 of the Civil Code, the owner can place boundary markers such as fences, walls, ditches and so on, without prejudice to the easements established therein (Sierra, 2000).

Demarcation is used to physically determine the boundaries of the property. It follows and is a consequence of land partition. Data sources are shown in Table 1 in order of importance.

4.2 Plot measurement

In some cases, the object of the dispute is not the boundaries of the property, but the surface area or the shape of the plot (such as setbacks of buildings or existing fences). Data sources are shown in Table 1.

4.3 Identification of the actual property lines of a real estate

This refers to the identification of a particular property of which only old Land Registry information is available but not its mapping. In these cases, the sources to consider are shown in Table 1 in order of importance.

4.4 Double registrations in Land Registry

A double registration takes place when a single property is registered in two different and mutually independent folios in the Land Registry. This phenomenon also takes place when two properties overlap or one of them is included in a larger one.

This problem arises mainly because historically register descriptions did not include mapping information and it was not necessary to indicate their correspondence with the cadastral numbering. The geographical descriptions to locate the properties were based only on the indications of the neighbours and, occasionally on some geographical feature such as a road, a ravine, etc. Double registrations in the Land Registry were common. Nowadays the problem has virtually disappeared with the compulsory cadastral reference when registering the property in the Land Registry office. Data sources are shown in Table 1 in order of importance.

4.5 Measurement and landmark setting of easements

In the Law and in real estate, easements is a limited right, which confers on the owner of the dominant plots rights over another person's land (denominated *servient plot*). There are many types of easements, the most common being right-of-way easements, utility easements, sea-land easements light and sight easements, aqueduct easements, party-wall easements, beam easements, etc.

In many cases the intervention of an expert is necessary to verify whether a certain easement is observed, and to prevent the infringement of the rights. Data sources are shown in Table 1 in order of importance.

4.6 Correspondence between urban plans and actual property lines

Inconsistencies generally occur between urban planning and the relevant municipal general plans, which may result in serious property disputes, both over the original plots (which may be more or less affected) and over the resulting plots after the re-parcelling. Data sources are shown in Table 1 in order of importance.

4.7 Expropriation

As established by the Spanish Civil Code in Art. 349, no person shall be deprived of their property except by the competent authority and justified by public utility, always following a suitable compensation. When this requirement is not fulfilled, the Judges shall protect and, where appropriate, restore possession to the dispossessed complainant (Sierra, 2000).

On many occasions errors occur when expropriating land for public works. These errors are often due to differences between the existing documents and the actual property lines. Data sources are shown in Table 1 in order of importance.

	4.1	4.2	4.3	4.4	4.5	4.6
Deed of sale	2	-	2	2	2	3
Land Registry	1	-	1	1	1	2
Field measurements	3	1	4	-	4	4
Cadastral Cartography	5	-	7	6	7	8
Historical Cadastral Cartography	7	-	8	7	8	9
Historical Aerial Photography	6	-	6	5	6	7
Physical evidence	4	-	5	4	5	6
Testimony	8	-	3	3	3	5
Project overlapping	-	-	-	-	-	1

Table 1. Sources for every type of expert report, in order of importance.

5 CASE STUDIES

Ordinary Judgment No. 1062-2009. District Court No. 4 of Orihuela (Alicante) May 2012

In 2006, the high-point of the real estate boom in Spain, in the municipality of La Granja de Rocamora (Alicante), a rural area was reclassified as urban by an Integrated Action Plan (PAI) in the outskirts of town.

In 2008, the plaintiff purchased one of the plots included in the PAI. Three months after, the owner of a neighbouring property located outside the PAI (defendant), put a fence on his property invading nearly half of the plaintiff's plot.

At the hearing, as there were conflicting expert reports from the parties, the judge decided to order a judicial expert report. The report involved:

- Taking measurements in the field in order to check if the plot matches the PAI
- Taking measurements of individual plots and fencing in order to verify their correspondence with the project and quantify the area if invaded.
- Matching and identification of Land Registry titles of existing plots and their exact location on the ground.
- To carry out the expert report the following actions were performed:
 - Field planimetric survey of the properties involved and urban elements like sidewalks, building facades and other geographic features. The work was performed with a GNSS RTK, and in areas without enough satellite coverage, a total station was used.
 - Overlay of the various maps involved in the litigation: surveyed properties, historical and current cadastral cartography, maps attached to property deeds and urban development project. The historical orthophoto maps of 1956 were also used to analyse the historical evolution of property ownership in the area.
- From the preceding actions and the study of the documentation of the court file the report's author comes to following conclusions.
 - The plaintiff is right in his claims, as the fence invaded 654 m², 47% of the surface of the plot acquired within the PAI.
 - The defendant is also right as regards property boundary, because the fence accurately marks the boundary lines specified both in the cadastre and in the deed.
 - The contradiction is explained by the fact that when performing the PAI, the boundaries of the original estates were incorrectly defined, so that the project of urban planning did not consider the disputed area of the estate of the claimant and included part of its surface.

Ordinary Procedure 311-2009. Contentious Administrative Court No. 5 of Valencia. May 2011

In 1995, the Urban Land Subdivision Compulsory Project of the Execution Unit N 3 was executed in Riba-Roja de Túria (Valencia - Spain). It is a residential area, 16 kilometres far from the city of Valencia.

The plaintiff in this case was a company which had been awarded two parcels of 4678 m² situated on the northern edge of the Enforcement Unit. The lawsuit was based on the allegations that the area of the plots was smaller than indicated in the project.

The expert report aimed to determine the actual area of the plots and the difference between true boundaries and Land Subdivision Project, as well as the boundaries of the allocated estates.

To carry out the expert report the following actions were performed:

- Planimetric Survey of the estates involved and other geographic features. The work was performed with a GNSS, RTK.
- Overlay of surveyed elements and the Land Subdivision Project.

Based on the findings resulting from the preceding actions together with the analysis of the documentation existing in the court file the expert report came to the following conclusions:

- The plaintiff is right in his claims, since the surface area of his plots is 715 m² less than that stipulated in the Project.
- To carry out the demarcation of allotted plots, the conclusion was that there was an error in the demarcation of the north boundary in the project. This boundary matches with the boundary line between the municipalities of Riba-roja de Túria and l'Eliana. This is a common case of litigation in Spain as a consequence of poor demarcation of administrative boundaries, especially in urban areas located between municipal boundaries

6 CONCLUSIONS

Expert's activity can be approached from two distinct viewpoints in the doctrine of the various legislations. Sometimes the expert shall be treated as an adjunct or complement to the court and other times as a subject of evidence.

In the first case, the expert is not a subject of evidence because he doesn't provide the facts on which the sentence shall be founded, but rather complements the court's ability to judge, on the basis of some given facts. He complements the court's capacity of judgement by providing an experiential knowledge that the court lacks or is unable to apply (Ortells, 2012). The expert is thus an assistant in the judge's work.

The second approach regards the expert as a subject of evidence, and is based on the idea that there is a translation process in the expert evidence - taking events to judicial notice -, if we consider the extra-judicial law (experiential knowledge) as a fact that must be brought to the court's knowledge (Ortells, 2012). That is, by regarding experiential knowledge as a fact, expert's activity would be based on proving this fact and therefore would be an evidence means.

However, as noted in the introduction, although expert opinion is a means of evidence and helps the judge in his duties, expert opinion also plays an important role before beginning the legal process.

Literature and reference:

- Berné Valero, J. L., Femenia Ribera, C. and Benítez Aguado, E. (2008). *Catastro en Espana, Valencia (Spain): UPV.*
- Cortés Domínguez, V., Gimeno Sendra, V. and Moreno Catena, V. (1996). *Derecho Procesal Civil. Madrid (Spain): COLEX. EDITORIAL CONSTITUCION Y LEYES, S.A.*
- Domínguez Díaz, G. (2002). *La provisión de fondos del perito (art. 342.3 LEC) o la vulneración del derecho a la Tutela Judicial Efectiva. Revista internauta de práctica jurídica, N°. 10. Accessed on November 18, 2011 www.ripj.com.*
- Dirección General del Catastro. *Catastro inmobiliario. Accessed June 23, 2010. http://www.catastro.meh.es/esp/ usos_utilidades.asp*
- Font Serra, E. (2000). *El dictamen de peritos y el reconocimiento judicial en el proceso civil. Madrid (Spain): La Ley.*
- Garcíaandía González, P. M. (1999). *La peritación como medio de prueba en el proceso civil espanol. PhD thesis. Universidad de la Rioja, Spain.*
- González Pillado, E. and Iglesias Canle, Inés (2000). *La prueba pericial en la nueva Ley de Enjuiciamiento Civil. Revista jurídica galega. Accessed February 14, 2011. <http://www.rexurga.es/pdf/col166.pdf>*
- Guasp, J. (1990). *Estudios Jurídicos. Madrid (Spain): EDITORIAL CIVITAS, S.A.*
- Lorca Navarrete A. M. (2000). *Tratado de Derecho Procesal Civil. Parte General. El nuevo proceso civil. Madrid (Spain): DYKINSON, S.L. - LIBROS*
- López Ramos, Pau (2010). *Tutela judicial efectiva y poder judicial. Jornadas sobre la Prueba Pericial topográfica. Valencia, Spain.*
- Martínez Calcerrada, L. (1999). *La responsabilidad civil profesional de los teleinformáticos, auditores de cuentas, periodistas, arquitectos-peritos, médicos, médicos-peritos y de los peritos judiciales en general. Especial estudio de la responsabilidad civil de médicos, administradores, consejeros de sociedades mercantiles y de los abogados. Madrid (Spain): Editorial Colex, S.A.*
- Montero Aroca, J., Gómez Colomer, J.L., Montón Redondo, A and Barona Vilar, S. (2000). *El nuevo proceso civil (Ley 1/2000). Valencia (Spain): Tirant lo Blanch.*
- Ortells Ramos, Manuel (2012). *Derecho Procesal Civil. Pamplona (Spain): Editorial Aranzadi, S.A.*
- Sierra Gil de la Cuesta, I. (2000). *La prueba pericial en la nueva ley de Enjuiciamiento civil.- La nueva regulación del dictamen pericial. Asociación de peritos colaboradores con la administración de justicia de la Comunidad Valenciana. Accessed on October 11, 2011.*

Received for publication: 6 June 2012

Accepted: 19 Oktober 2012

Dra. Natalia Garrido Villén, Universitat Politècnica de València

Department of Cartographic, Geodesic, and Photogrametric Engineering

Camino de Vera, 14 - 46022 - Valencia - Spain

e-mail: ngarrido@cgf.upv.es

Alberto Antón Merino, Albireo Topografía

Maestro Vicente Alonso, 28 - 46110 - Godella - Spain

e-mail: alberto@albireotopografia.es

Dr. José Luis Berné Valero, Universitat Politècnica de Valencia

Department of Cartographic, Geodesic, and Photogrametric Engineering

Camino de Vera, 14 - 46022 - Valencia - Spain

e-mail: jlberne@cgf.upv.es

Dra. Carmen Femenia Ribera, Universitat Politècnica de València

Department of Cartographic, Geodesic, and Photogrametric Engineering

Camino de Vera, 14 - 46022 - Valencia - Spain

e-mail: cfemenia@cgf.upv.es