

**D08. Land Trusts in Court: A Survival
Guide**

Saturday, October 28 | 10:30 a.m. - Noon

Room 605

Session Faculty:

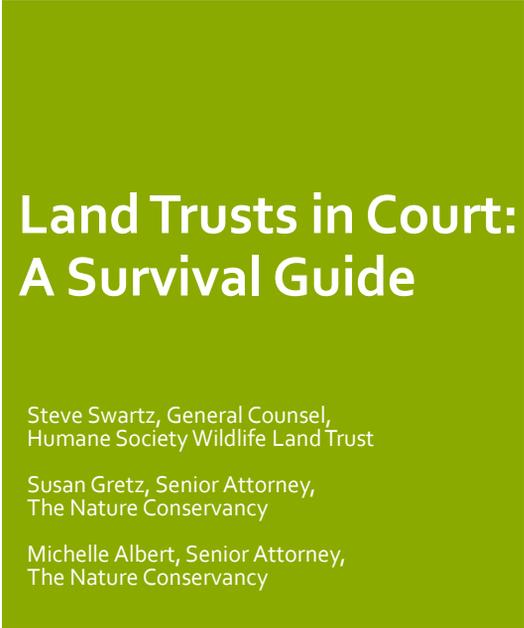
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Land Trusts in Court: A Survival Guide

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Goals of Session

(or what we promised LTA to get this accepted)

You will - HOPEFULLY:

- ❖ Better **understand the litigation process** from start to finish;
- ❖ Learn how to **best position your land trust for litigation**, including considerations on the retention of outside counsel, protection of privileged information, and preservation of evidence; and
- ❖ Understand how to **work with others involved in litigation**, including insurers, board members, adverse parties and outside counsel.



Themes Common to All Aspects of Litigation

- Preparation
 - Policies and Procedures
 - People
 - Pessimism
-

Litigation Avoidance

The best lawsuit is the one that is never filed.

Example: conservation easement enforcement action avoided. If land trust staff can sit down with the landowner to discuss the easement, the facts, and how to remedy it, you may avoid significant expense, damaged relationships and uncertainty regarding the outcome.

- › If there is a dispute, don't ignore it; conflict does not get better with age.
 - › Meet with other parties to attempt to control own fate rather than involve lawyers and the court system.
 - › BUT, work with an attorney to ensure that you are meeting IRS/LTA requirements and that sensitive information is not divulged in the process.
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On Policies and Procedures

Having them in place AND ensuring compliance helps in litigation:

- Land trust specific P&P such as baseline documentation and inspection frequency and reporting;
 - Governance documents; corporate registration
 - Solid business operating procedures on all aspects of the organization;
 - Maintaining comprehensive insurance and professional licenses;
 - Business records creation – routinely prepared and retained in the ordinary course of business;
 - Document retention/destruction policies – what you keep and for how long
 - Email policies – content, tone, distribution, retention and deletion
 - Personnel training and evaluation – to do job, follow policies, keep records
 - Open lines of communication with senior management and counsel
-

Insurance Coverage for Disputes

Types of Insurance Coverage that may come into play:

- Terrafirma
- Title Insurance
- General liability
- Directors and officers
- Employment practices
- Pollution liability

*Notify early! -- Lack of timely notice can be a basis for denial of coverage

Types of Litigation a Land Trust May Face

Contracts

- › Some contractors think because we are charities we won't enforce (or aren't entitled to enforce) contracts.
 - Query: is it private benefit to fail to enforce a contract?

Can be avoided by:

- Solid templates that clearly describe services to be performed, provide for right of termination, damages for breach, indemnities, etc.
- Close monitoring of performance by land trust staff
- Insurance requirements

*Your purchase and sale contract for land is a contract and, if written right, can help protect against damages due to later discovered environmental conditions.

Types of Litigation a Land Trust May Face

Title Disputes

- › Getting the Title Company to respond may be a challenge
 - › Anything in your title policy listed as an exception will be used to avoid coverage
 - › Carrier may just pay out on old policies where coverage amount is lower than costs of defense
-

Types of Litigation a Land Trust May Face

Boundary Disputes; Trespass

- › Best to try to avoid court action – you will continue to be neighbors
- › Prevention is to engage neighbors when surveying; if a neighbor has a valid claim to adverse possession, it may be best to quitclaim the disputed property to them.
- › May engage law enforcement in trespass by third parties

Types of Litigation a Land Trust May Face

Employment Disputes

- › Claims of discrimination, harassment
- › First step is administrative agency review, typically federal Equal Employment Opportunity Commission
- › If EEOC does not find a basis to enforce laws, it will issue the employee a Right to Sue letter;
- › Cases are fact intensive, expensive, difficult to resolve

****Good training on harassment and discrimination are key preventative steps***

Types of Litigation a Land Trust May Face

Will Contests and Estate Litigation

- › Some executors consider gifts to charitable organizations as optional – despite their fiduciary duty to beneficiaries of an estate.
- › We should respect deceased donor intent just as we pay heed to living donor intent – enforce your rights!
- › Estates require diligent inquiry and vigilance to ensure we receive
 - Notice of gifts – testamentary (through a will) or trust – and copies of the documents!
 - An inventory and accounting
 - Distributions – partial and final

Types of Litigation a Land Trust May Face

Will Contests and Estate Litigation

- › Issues that get litigated include:
 - Is the will valid?
 - Which will controls?
 - Competency to make a will?
 - Malfeasance by executor?
- › Prepare for claims of charity overreaching.

Types of Litigation a Land Trust May Face

Will Contests and Estate Litigation

Attitude of some executors and other beneficiaries relative to charitable gifts

Recent correspondence describing a conversation another beneficiary had with an executor of an estate, relative to a gift to TNC:

- He described the bequest to The Nature Conservancy as: ***ridiculous and excessive***, that it should be ***viewed as free money***.
- He stated that ***the charity doesn't need the money***, they ***don't care***; charities ***never appear in these cases***; and they'll ***take anything we offer them***.
- Finally, he suggested they arbitrarily amend the bequest to leave TNC about 5% of what the decedent/donor had provided for in his will.

Types of Litigation a Land Trust May Face

Personal Litigation and Other Torts

- › Accidents happen; insurance is key (general liability policy)
- › You are in for the amount of your deductible
- › Prevention through attention to safety

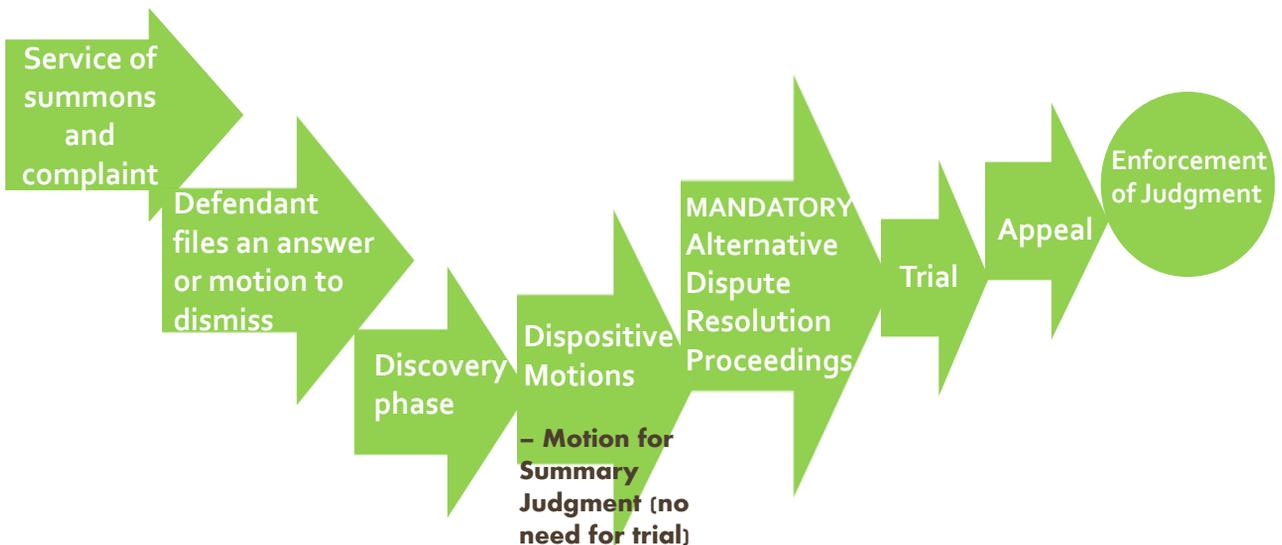
Types of Litigation a Land Trust May Face

Business Torts

› Tortious interference with contract

– if a landowner has an existing contract to sell property, your staff should not be talking with that landowner about possibly selling to the land trust!

Life-Cycle of a Lawsuit



Summons and Complaint

- May be through an officer designated agent for service of process (vs. vagaries of US mail)
- Summons compels a response within a specified time
- Complaint sets forth the basis for relief
- **What to do on receipt?**
 - Contact insurers -- there may be coverage under various policies
 - Engage counsel (more to come on that)
 - Notify senior management; general counsel

Summons and Complaint

- Does the Complaint name the Land Trust properly?
 - “kitchen sink” approach may ensnare a land trust when not really involved
 - Claims made can impact insurance coverage.
- What if a land trust director, officer, or employee is named as defendant?
 - > Do your bylaws provide for defense and indemnity?
 - Was the employee acting within scope of employment and not engaged in criminal activity

People – Your Lawyer

› Choosing the right lawyer is critical to success

Look for someone who knows and understands:

- The court, the judges, the jury pool
 - The **law** – don't hire a personal injury lawyer for a conservation easement dispute
 - **You as a client** – the lawyer should understand the land trusts' mission, non-profit status and conservation goals – this may be unfamiliar to a lawyer used to business litigation
 - Public relations impacts on the land trust
- › Good communication skills are a must -have.
- Red flag if you don't understand what the lawyer is telling you before you hire him/her.

People – Your Lawyer

Pro bono -- sounds like a great deal, but . . .

- Understand that most law firms have billable hour requirements for attorneys and pro bono time may not count. Your case may not be the priority you wish it to be. Ask the attorney whether the firm supports the pro bono engagement.
- You may prefer to be a paying client for matters that have real programmatic and economic impact on the organization.
- Board members who are lawyers – run, don't walk, away from this situation, tempting though it is.

People – Your Lawyer

Regardless of paid or pro bono, **set expectations:**

- Budget: what will the litigation cost in fees and expenses?
- Billing frequency and detail – typically monthly, itemized
- Who else will work on the matter? Number of people, expertise needed
- Responsiveness: both yours and theirs

People – Your Lawyer

Role of Insurer in Selecting and Managing

- Most insurance policies allow the insurer to select counsel
- Insurers generally have good relationships with established firms in the specialty areas needed.
 - But some insurance panel counsel may not have expertise in conservation matters.
- You are still the client of the attorney, but may need to assert your interests and stay engaged:
 - › Consider your deductible – demand a seat at the table for any settlement.
 - › Ongoing obligation to keep the insurer apprised of major developments.
 - › Insurer likely needs to approve any settlement, even within your deductible
 - › An insurer’s reservation of rights on coverage makes it more important to stay engaged.

Privileges!

Attorney Client Privilege

- Protects communications related to or constituting **legal advice**.
- Documents you might think or hope are privileged probably are **not**:
 - Not business advice
 - Not internal discussions
 - Not non-attorney board reports
 - Not donor information
 - Not personnel
 - And not the email inviting your lawyer to lunch in which you called the landowner a jerk.

Privileges!

Attorney Client Privilege (cont.)

- Attorney Client Privilege can be waived – either intentionally, or inadvertently – by sharing the communication with third parties or employees/agents of the client who do not have a business need to know the information. Must maintain confidentiality of these communications in order to preserve the privilege.
- Land Trust as the organization is the client.
 - It is the only entity that can waive the privilege.
 - And it can waive the privilege even if an officer or employee wishes it would not.

More on Privileges!

Attorney work product privilege

- Protects documents prepared in anticipation of (preparation for) litigation
- Be careful not to prematurely label documents as “work product.” if you’ve done so you have determined there is a reasonable likelihood of litigation, and should have issued a legal hold by the time anything is labeled in this way.

Discovery

- › After the complaint is answered, process called discovery begins.
- › What is it? Compelled exchange of information between parties
- › Theory is that if each side is fully aware of all facts they can better assess merits of the case, which will lead to settlement

Discovery

Includes:

- Rule-required mandatory disclosures
- Depositions (sworn testimony)
- Written answers to questions (interrogatories)
- Production of requested documents
- Requests to admit facts

Scope of Discovery

- › Assume that anything written down or recorded – on paper or electronically, that mentions any facts or circumstances touching on the conflict, the parties and staff involved, *will be discoverable*.
- › Most states have a rule adopting a very broad scope of discovery -- *“reasonably calculated to lead to the discovery of admissible evidence.”* i.e. you can discover matters even if they are inadmissible in court.

Scope of Discovery (cont.)

- › The relative new federal rule: FRCP 26(b)(1) introduces the concept of proportionality:

“Parties may obtain discovery regarding **any** nonprivileged matter that is **relevant** to any party's claim or defense and proportional to the needs of the case, considering 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 expense of the proposed discovery outweighs its likely benefit. **Information within this scope of discovery need not be admissible in evidence to be discoverable...**”

Duty to Preserve Documents and Information

- Need to understand how and where documents are maintained throughout the land trust organization so you can a) find them and b) keep them from being destroyed.
- Need to understand how your staff communicates – IM, Facebook, email, text, Skype for business – so you know where your records are.
- Need to implement a written Legal Hold – directive to preserve all documents and information related to a matter that issues from counsel to relevant staff.
- Traps for the unwary: system upgrades, swapping or reformatting computers or servers, departing employees, office cleanout

Duty to Preserve Documents and Information

– Learning the Term “Spoliation”

- › A court can sanction a party in litigation for not **timely implementing a legal hold and/or doing it incorrectly**.
- › The sanction is often that the judge will instruct a jury that they may infer that **the destroyed documents and information proved the other side’s case** (the so-called “adverse inference.”)

Duty to Preserve Documents and Information

– Learning the Term “Spoliation”

THE RULE: Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- | | |
|--|--|
| <p>(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or</p> | <p>(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:</p> <ul style="list-style-type: none"> (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment. |
|--|--|

E-discovery and ESI – Discovery of Electronically Stored Information (Such as Emails)

- Burdensome, expensive, problematic
- Illustration: email auto-deletion programs differ; staff subvert these programs in inconsistent ways; we do not know what we have.
- Requires correct and thorough implementation of your hopefully timely litigation hold

E-discovery and ESI – Discovery of Electronically Stored Information (such as emails)

- › Engage information technology staff to ensure it's done right
- › Follow up periodically to ensure continued compliance
- › Have a system for releasing holds so that staff comply with records retention/deletion schedule

An Aside- Guidance for Email: R-E-W-R-I-T-E!

***Not every email should be sent. Not every email received requires a response!**

- R** – Reflex Emailing (Am I reflex emailing?)
- E** – Expertise (Do I have the expertise to respond?)
- W** – Waiver of Privilege (Am I waiving privilege?)
- R** – Relevance (Is this email relevant to work and the topic at hand?)
- I** – Inappropriate (Is my email inappropriate?) – Always avoid profanity and vulgarity
- T** – Third Party Information (Does my email contain third-party information?)
- E** – Exaggeration/Embellishment (Am I exaggerating or embellishing?)
– Be simple and honest. Don't overstate or oversell

When Discovery Concludes . . . Summary Judgment

- › We have a good sense of the facts, “alternative facts,” and how witnesses will testify at trial.
- › If there is no dispute about facts that are material to the outcome of the case, why have a trial?

Examples:

- A now-former land trust employee knew of her alleged harassment five years before bringing an action in court; the statute of limitations for this legal action is 180 days.
- A landowner admitted in deposition that she harvested trees on her conservation-eased property without first obtaining the land trust's approval. The CE clearly requires such approval.

When Discovery Concludes . . . Summary Judgment

- › Mechanism by which these matters are resolved without trial is through summary judgment motion.
- › Motion can winnow down areas for trial (for example, damages only) and even if unsuccessful, educate judge about the law.
- › Vast majority (95%) of all civil cases settle. Can you rely on that statistic?
 - No! – Trial preparation is what puts you in the best position for a favorable settlement
 - Legal expense of impending trial factors into determination of settlement – consider avoided costs

When Discovery Concludes . . . Opportunity for Mediation

How?

- Court-encouraged or increasingly court-ordered – can continue up to and even into trial.
- Party-initiated
- Mediation
 - Involves a disinterested third party – often former judge or respected attorney in the field
 - Parties “present” their case to mediator through mediation statement and often some informal oral presentation – no formal live testimony and nothing under oath
 - Mediator may do shuttle diplomacy between conference rooms – all the parties and their lawyers are there but you may not meet the other side face to face
 - Must have settlement authority in hand

Settlement

Who decides?

- Executive level staff
 - Board may play a role
 - Never just your outside counsel
 - Generally not just the insurer
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Settlement

Settlement Terms

- Volunteer to draft terms of the settlement agreement or release – controlling first draft of document can frame the rest of the edits
 - Can be flexible within limits of mission
 - Court approval advisable
-

Settlement

Include:

- Full and final release and waiver of claims
- Confidentiality – or not?

If attempts to resolve fail . . . Oh @\$%, We're Going to Trial

Trial is a full court press by multiple parties!

- Witnesses need to clear schedule for preparation and testimony
 - Court schedules are in flux and witnesses may get bumped from day to day
 - Executive staff need to be available to approve (or not) last-minute settlement opportunities
-

If attempts to resolve fail . . .

Oh @\$%, We're Going to Trial

Back to People – think about your trial team

- Land Trust representative at counsel table – need to balance having someone who can assist trial counsel with someone who will be the positive face of the organization to the judge or jury for the duration of the trial.
 - Personality, demeanor, professionalism
 - Your experts – need for someone who knows the subject matter, has the relevant CV/Qualifications, can communicate effectively, and meshes well with the court they're in.
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People – the Judge and Jury

The Judge

- › Don't expect him/her to:
 - Understand land trusts or what a conservation easement is
 - Want to try the case – expect some form of mandatory alternative dispute resolution or informal cajoling
 - › Be prepared for a quietly – or even overtly – hostile judge.
 - › Do plan to ask the judge to approve any settlement
-

People – the Judge and Jury

The Jury

- › Understand your jury pool: education, employment, politics, community interest, knowledge of matter from media.
 - › Begin thinking about your perfect hypothetical juror . . . and your nightmare hypothetical juror. Refine that profile as discovery progresses.
 - › Don't expect a jury to understand what a conservation easement is without being educated
 - › Plan on framing your argument in a way that will best resonate with your likely jury.
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Post-Trial

- › Appeals (and post-appeal proceedings) are always a possibility; you may even settle after trial and judgment on the merits, simply to ward off an appeal.
 - › There will be a judgment that needs to be enforced; money judgments are not self-enforcing; may need to file a lien or renew judgment if not paid for 10 years.
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Post-Trial

Time for post-mortem:

1. What did we learn that will help us with the inevitable next case?
 2. What *facts* put us in a bad light? How can we remedy?
 3. What would we do differently now?
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