

**D09. Land Trusts in Court: A Survival Guide**

**Saturday, October 19 | 10:30 a.m. - Noon**

**Room 206**

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Rally 2019: The National Land Conservation Conference  
Raleigh, NC



**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.

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**Themes Common to All Aspects of Litigation**

- Preparation
- Policies and Procedures
- People
- Pessimism

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## 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

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## 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

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## Types of Litigation a Land Trust May Face

- Contracts
- Title Disputes
- Boundary Disputes/Trespass
- Employment Litigation
- Will Contests and Estate Litigation
- Personal Injury/Torts
- Business Torts

(Not discussing conservation easement enforcement here as this topic is covered in other sessions at Rally.)

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## 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.

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## 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

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## 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

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## 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*

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## 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

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## 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.

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## Types of Litigation a Land Trust May Face

### Personal Injury 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

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## 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!

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## Life Cycle of a Lawsuit

- Service of Summons and Complaint
  - Answer or Motion to Dismiss
  - Discovery
    - Motion for Summary Judgment
    - Alternative Dispute Resolution
    - Trial
    - Appeal
    - Enforce Judgment

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## Summons and Complaint

- **How?** Typically through a 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 and type of relief sought
- **What to do on receipt?**
  1. **Contact insurers** -- there may be coverage under various policies. Type of claims made can impact insurance coverage
  2. **Engage counsel (more to come on that)**
  3. **Notify senior management; general counsel**

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## Summons and Complaint

### Should the Land Trust Be Named as a Party to the Lawsuit?

- "Kitchen Sink" approach may ensnare a land trust when not really involved

### What if a Land Trust Director, Officer, or Employee is Named as a Defendant?

- Do your bylaws provide for defense and indemnity?
- Was the D,O or employee acting within scope of employment and not engaged in criminal activity?

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## People – Your Lawyer (Choose Wisely)

### Look for Someone who Knows and Understands:

- **The Court, Judges, and 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 trust's 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**
- **And Has Good Communication Skills** -- Red flag if you don't understand what the lawyer is telling you before you hire him/her.

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## People – Your Lawyer

### To Pay or Not to Pay? Pro Bono Sounds Like a Great Deal, but . . .

- Most firms have billable hour requirements and pro bono time may not "count." Your case may not be the priority you wish it to be.  
**TIP:** Ask whether the firm supports the pro bono engagement.
- There may be advantages to being a paying client for matters that have real programmatic or economic impact on the organization.
- Board members who are lawyers – run, don't walk, away from this situation, tempting though it is.

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## People – Your Lawyer

### Regardless Whether Paid or Pro Bono, Set Expectations:

- **Budget** -- What will the litigation cost in fees and expenses?
- **Billing frequency and detail** -- Typically monthly, itemized
- **Who will work on the matter?** # of people, expertise needed
- **Responsiveness** - Both yours and theirs.

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## People – Your Attorney

### Role of Insurer in Selecting and Managing

- Most policies allow the insurer to select counsel.
- Insurers generally have relationships with established firms in specialty areas, but some insurance panel counsel may lack expertise in conservation matters.
- **You are still the client of the attorney**, but you may need to assert your interests and should stay engaged. For example:
  - › 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.

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## Privileges!

### Attorney Client Privilege

*The client's right to not disclose confidential communications between the client and an attorney regarding legal advice*

- Communications you might think or hope are privileged probably are not:
  - Not business advice
  - Not discussions of your internal decision-making
  - Not non-attorney board reports
  - Not donor information
  - Not personnel matters
  - And not the email inviting your lawyer to lunch in which you called the landowner a jerk.*

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## Privileges!

### Attorney Client Privilege (continued)

- **Who is the Client?** The Land Trust (the organization)
- **The Attorney Client Privilege Can Be Waived.**
  - The Land Trust is the only entity that can waive the privilege
  - Can waive even if an employee or officer disagrees
  - Waiver can be intentional or inadvertent, such as by sharing the communication with third parties or employees/agents of the client who do not have a business need to know the information.

**TAKE AWAY:** You must maintain the confidentiality of these communications in order to preserve the privilege.

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## More on Privileges!

### Attorney Work Product

- Protects documents and other information prepared in anticipation of (preparation for) litigation
- Not all documents prepared by attorneys are work product.
- **TIP:** 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.

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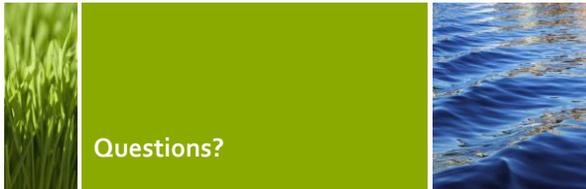
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## Discovery

- › 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

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## Discovery

Includes:

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

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## Scope of Discovery

- › 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.
- › 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.*

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## Scope of Discovery (cont.)

- › Federal - 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...**”

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**Time for audience participation!**

Pop Quiz on Scope of Discovery

Say we have an easement enforcement case we are litigating. Can the other side (landowner) get the following through discovery?

- A. All employment records (including all performance reviews) of the staff who have performed easement monitoring
- B. All monitoring reports from each and every other easement land trust holds where a violation was found and explanation of whether enforcement action was taken or not, and if not, why not.
- C. All emails and text messages sent by every staff member for the year of the violation
- D. Same as above, only limited to emails and text messages about the landowner and this particular property.

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**Duty to Preserve Documents and Information**

- Litigation requires implementing a written Legal Hold – directive from counsel to relevant staff to preserve all documents (paper and electronic) and information related to a matter.
- How and where are information and documents maintained in the organization? (so you can a) find them and b) keep them from being destroyed.)
- How does your staff communicate? – IM, Facebook, email, text, file-sharing services, Skype for business – so you know where your records are.
- Traps for the unwary: system upgrades, swapping or reformatting computers or servers, departing employees, office cleanout

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**Duty to Preserve Documents and Information**

What happens if you don't preserve -- "Spoilation"

- › A court can sanction a party in litigation for not **timely implementing a legal hold and/or doing it incorrectly.**
- › The sanction may be 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.")

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### 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 timely litigation hold

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### 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

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### 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

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## 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.

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## 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

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## When Discovery Concludes . . . Opportunity for Mediation

### How?

- Court-encouraged or increasingly court-ordered
- Party-initiated

### What?

- Involves a disinterested third party
- Parties "present" their case to mediator
- Mediator engages in "shuttle diplomacy"
- Must have settlement authority in hand

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## 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

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

Include:

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

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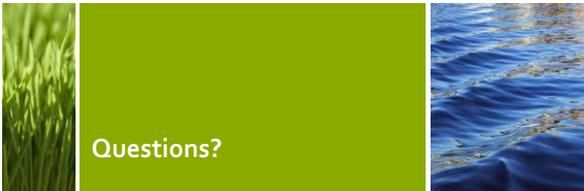
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**If attempts to resolve fail . . .  
Oh @#\$\$%, We're Going to Trial**

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

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**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

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## 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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## Postscript: Dealing with the Press and Media



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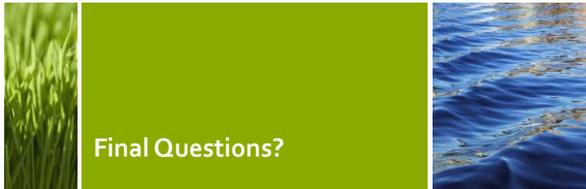
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