Dispute Resolution Basics for Land Surveyors

2 Hours

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Final Exam

1. One way to get the parties in a boundary dispute to get past the win-lose nature of the dispute is to:

    a. Remind them that surveyors are highly trained and licensed professionals

    b. Remind them that surveyors are neutral persons who aren't biased for or against any party

    c. Introduce concepts of risk, cost, delay, and value of future relationships into the negotiations

    d. Tell the parties that the law will support the boundary as determined by the surveyor and its futile to challenge it

2. Which one of the following most accurately describes a technique for resolving conflict?

    a. Physical force by one party

    b. Litigation

    c. Arbitration

    d. All of the above

3. When working as a neutral facilitator to help the parties negotiate an agreed-upon dispute resolution, the facilitator should encourage the parties to:

    a. Listen to the other party and ignore what the facilitator has to say

    b. Discuss their goals, hopes, plans, interests, etc… before discussing their preferred resolution

    c. Agree with everything the other party has to say as often as possible.

    d. Be sure to announce their preferred resolution as soon as possible

4. BATNA is an acronym that means:

    a. Begin Agreeing To Never Accept

    b. Best Alternative To a Negotiated Agreement

    c. Basic Attempt To Negotiate Agreements

    b. Boundary Agreement To Now Accept

5. If your state allows surveyors to jointly contract to assist two or more clients in resolving a boundary issue, your contract for services should specify that fees will be:

   a. Shared equally with each party being billed separately for half regardless of the outcome

   b. Shared and billed based on the proportion of the disputed land that goes to each client

   c. Billed fully to each client with a refund given after the last client pays

   d. Billed to whomever the surveyor desires, leaving it to the parties to work out the details between themselves

6. When working as a neutral facilitator to help the parties negotiate an agreed-upon dispute resolution, the facilitator should encourage the parties to:

   a. Be sure to announce their preferred resolution as soon as possible

   b. Listen to the facilitator and ignore what the other party has to say

   c. Speak directly to the facilitator and ignore the other party

   d. Speak directly to one another

7. If a surveyor is approached by a prospective client who says they are in a boundary dispute and are preparing for litigation, which one of the following fee structures is best suited to ensure that the surveyor is paid for all time spent assisting the client in that litigation:

   a. A simple fixed fee bid to do the survey

   b. A simple hourly rate fee for the survey field crew, office technicians, and Professional Surveyor review.

   c. Whatever the surveyor wants to charge for the surveying work plus a fee for testifying at depositions and at trial.

   d. Whatever the surveyor wants to charge for the surveying work plus a fee for consulting with attorneys, responding to subpoenas, preparing to testify and standing by to testify, in addition to fees for time spent actually testifying

8. Which one of the following kinds of conflict is rarely resolved by agreement?

   a. Conflicts between parties who have similar and shared interests.

   b. Conflicts where neither party is positional

   c. Value-based conflicts.

   d. Interest-based conflicts

9. One of the important prerequisites to have productive negotiations is for the parties to:

   a. Believe that it is possible to reach an agreement with the other party

   b. Be experienced in commercial negotiations.

   c. Believe that you have the best attorney ready to step in on your behalf

   d. Have little or nothing in common with the other party

10. If a surveyor has assisted the parties to reach an agreement to resolve a boundary dispute, that agreement should be memorialized in some fashion. Ideally, the decision as to exactly how the agreement should be memorialized should come from:

   a. The parties themselves as part of the agreement.

   b. The party who is least benefitted by the agreement

   c. The attorney for the party who is least benefitted by the agreement

   d. An attorney who represents all parties or who has obtained the consent of all parties.

Dispute Resolution Basics for Surveyors

Preface

The topic of dispute resolution is a broad one, which requires an understanding of psychology, jurisprudence theory, and civil procedure to truly master. In addition, when engaging in dispute resolution for a particular kind of dispute, it helps to have a fundamental understanding of the subject of the dispute.

These course materials are targeted to licensed surveyors who are seeking to continue their professional education. More specifically, they are written to provide continuing education on the narrow topic of boundary dispute resolution. The materials will provide little or no information on the broad background topics of psychology, jurisprudence, and civil procedure. Instead, the bulk of these materials will deal with the basics of conflict in general, as well as some specific types of situations that are likely to be encountered in a boundary dispute and some practical strategies for helping to resolve the boundary dispute. After completing this course, those readers who would like to gain further mastery in dispute resolution may want to consider additional study in the psychology of conflicts, in civil procedure, and in general facilitative mediation principles.

Learning Objectives

1. Understanding the basic attributes of conflict in general.
2. Understanding the differences between agreed-upon conflict resolution and resolutions that are imposed on the parties by third parties.
3. Understanding the roles that a surveyor can assume in boundary surveying.
4. Recognizing different situations that can arise in a boundary dispute and different ways of assisting the parties in those situations.

Course Outline

I. Introduction
II. General Dispute Resolution Concepts
    a. Conflict in General – Two Types of Conflicts
    b. Conflict in General – The Conflict Life Cycle
III. Dispute Resolution Techniques
IV. Role of the Surveyor in Dispute Resolution
V. Basic Negotiation Concepts
VI. Basic Negotiation Techniques
VII. Getting Involved in a Boundary Dispute as a Surveyor
    a. Three Situations with Initial Contract Considerations
        i. Situation 1 - The surveyor is hired by a client who is not aware that a potential boundary problem exists
        ii. Situation 2 – The surveyor is hired by a client (or more than one client) who is aware of a boundary problem and has agreed to a potential resolution
        iii. Situation 3 – The surveyor is hired by a client who is aware of a boundary problem but has not agreed to a potential resolution
    b. Facilitating to Help the Parties Resolve the Dispute
VIII. Endnotes

Introduction

Conflict is inevitable. Every person has goals, dreams, aspirations, etc.…and these require resources to bring to fruition. Some of these goals will conflict with the goals of others and there may not be enough resources available for each person to accomplish their goals.

This is not necessarily a bad thing. Yes, it would be nice if we could all get what we want, but the conflict itself is not the problem. Sooner or later, the conflict will be resolved. The outcome of the conflict is not the problem so much as the damage that can result from a delayed resolution or an incomplete resolution. Delayed and incomplete resolutions result in uncertainty, and people generally seek certainty so they can move forward with their plans. When conflicts remain unresolved or are only partially resolved, the outcome of planned activities cannot be predicted and therefore tend to stop. In some cases, the person taking action (say by proceeding with their plans to build a fence) rolls the dice by continuing their work without knowing the limits of their property boundaries. The economic resources used to build the fence could be wasted and the work might need to be redone.

So, the overarching goal in conflict resolution is to get the conflict resolved as soon as possible, in a manner that completely resolves the conflict, and that does not create new conflicts or plants the seeds for future conflicts.

General Dispute Resolution Concepts

Conflict in General – Two Types of Conflicts

When analyzing a conflict and trying to find a resolution, it helps to determine the fundamental nature of the conflict.

One category of conflicts are interest-based conflicts. These typically arise when the parties have common values and interests, but they believe there are not enough resources for them to each meet their goals. Boundary disputes typically fall into this category if the disputed boundary is the real source of the conflict.

The other broad category are value-based conflicts. These occur when the parties have differing sets of values. An indicator of a possible value-based conflict is when the parties can't agree as to definitions of "good" or "fair". Conflicts based on faith or religion are an example of this sort of conflict. Although boundary disputes are not value-based conflicts, it

could well be that the disputed or questioned boundary is not the real source of the conflict. It could be that there is an underlying value-based conflict of one sort or another and the boundary dispute is only a symptom of the underlying value-based conflict.

Generally, value-based conflicts are rarely resolved voluntarily. This requires one party to abandon their values, and that rarely happens absent compulsion. And that requires some form of order enforced by a personal violence, a police agency, or an army.

On the other hand, interest-based conflicts can and often are successfully resolved voluntarily. The parties might need some assistance in reaching a voluntary resolution, but it can be done.

So, a non-party (like a surveyor) who is engaging in dispute resolution is advised to step back and try to determine what is the real nature of this conflict. Is it really a conflict as to the location of a boundary line? Or is the boundary dispute just a cover for a deeper value-based conflict (such as whether one neighbor should be starting a hog farm on their property at all, regardless of the location of the boundary).

If it is an interest-based dispute, it can be worthwhile to assist the parties to seek an agreed-upon resolution. If it is a value-based dispute, there is little hope of persuading the parties to resolve the dispute without force, and that requires a judge or other person with the power to impose a resolution against the will of one of the parties. If this appears to be the case, then the surveyor is advised to spend their energy on preparations to be a part of the judicial process.

Conflict in General – The Conflict Life Cycle

Unless something happens to shorten it, a conflict typically follows a predictable life cycle. The stages of that life cycle include:

1. A general awareness that a conflict is brewing. Resolutions are comparatively easy to reach if the parties consciously seek one at this stage
2. One party begins to go positional. That means that one party has begun to focus on one preferred resolution to the exclusion of all others. An indicator of this is often language such as, “my position is….”. Resolutions are still possible at this stage, but generally require a bit more work to get the positional party to consider other solutions beyond the one they are focusing on.
3. Both parties go positional. Disputes can still be voluntarily resolved at this stage, however, the work required is doubled – or more. If both parties remain positional for

long enough, eventually one of them will seek force to get their preferred resolution to prevail. This could be in the form of unilateral action or in the form of litigation.

4. The final stage of a conflict is the post-resolution stage. The conflict will eventually be resolved; one way or another. The issue to look for at this stage is whether it was completely resolved and whether both parties internalized the resolution. If the conflict is not completely resolved, or if it is not internalized by one or both of the parties, it will likely morph into a different dispute in the future.

As a non-party who may be working to assist the parties in dispute resolution, it is worthwhile to assess the dispute to see what stage it is in. This will allow for an estimate of the work that will be needed to get the parties to work something out and the chances of success.

Basic Dispute Resolution Techniques

Although there are many ways of resolving a dispute, they can generally be boiled down to two fundamental techniques. One way of resolving disputes is to bring in an outside force to compel a resolution. Another way of resolving disputes is for the affected parties to agree to end the dispute on their own.

Compulsory resolutions include techniques such as litigation and arbitration. The parties may or may not have the option of initiating this sort of resolution, and they may agree to opt out of the process at some point. If the process continues to the point of judgment, that judgment is out of their control and it will be forced upon them whether they like it or not. Judgments can be appealed, but they cannot be ignored by seeking a different resolution, and successful appeals are quite rare. Absent a successful appeal, an arbitrator's ruling or a court judgment is final and will be enforced by the executive branch of government (which ultimately is authorized to use violence to enforce judgments).

Party agreements to resolve a dispute are an alternative to compulsory resolutions. They are highly favored by the courts and will be enforced by the courts if done as part of the litigation process.[1] These agreements result from negotiations between the parties and can occur within litigation, or before litigation. They are an alternative to a litigated resolution and can pre-empt the need for litigation. The negotiations can be conducted by the parties themselves, with or without the assistance of paid advocates. The negotiations can also be conducted with the assistance of neutral persons who do not represent either party, but whose

role is to assist the parties in coming up with their own agreed-upon resolution.

If the negotiations successfully end with an agreed-upon resolution before litigation ensues, then additional matters may need to be done to implement the resolution. For instance, a boundary dispute may require one or more deeds to be prepared and executed to implement the resolution.

If the negotiations successfully end with an agreed-upon resolution after litigation has started, then the resolution is often incorporated into a court judgment which the parties stipulate to.[2]

Role of the Surveyor in Dispute Resolution

Over 130 years ago, Justice Thomas Cooley wrote of the quasi-judicial role that a surveyor fulfills for society.[3] That role remains and possibly is more important now than ever.

The role is judicial because the surveyor is licensed by all 50 states to determine boundary locations, and this determination is basically a judgmental process. The fact that boundaries affect the places where landowners can exercise their land use rights adds to its judicial nature.

However, it is quasi-judicial because the determination of boundary locations by surveyors is limited to the issuance of opinions as to where boundaries are located. Only a court can issue an authoritative order as to where land use rights are located.

The surveyor's quasi-judicial role in boundary matters is comparable to a police officer's role in criminal matters. A police officer expresses her opinion as to whether a person has violated the law by arresting them, or by issuing a citation. However, a person is not guilty of that violation just because a police officer arrests them. They become guilty when a court issues a judgment convicting them. Police officers are well trained in their role and when they place a person under arrest or issue a citation, they are usually correct. But until a judge says they are correct; it is not authoritative.

Similarly, a surveyor can set monuments, and write land descriptions and prepare maps and certificates. But these are only expressions of the surveyor's opinion where a boundary is located. The boundary does not become authoritatively located until a court issues an order saying where it is located.

Surveyors, like police officers, also serve another role for society. They can assist the parties to resolve disputes on their own without the need for court intervention. Police officers

do that by counseling violators - or those who are close to breaking a law. They can issue warnings instead of citations or making an arrest.

In addition to issuing opinions, surveyors can also serve as neutral facilitators to help the parties resolve boundary disputes on their own, and then advise or otherwise help the parties get that resolution documented.

Basic Negotiation Concepts

There are a variety of ways to resolve disputes, ranging from the application of force, to capitulation. But these extremes are comparatively rare and some sort of agreement between the parties is involved in most resolutions. These agreements generally result from some level of negotiation. Since negotiation is common in most dispute resolutions, it is worthwhile to examine some basic negotiation concepts. Generally, successfully negotiated resolutions usually require:

1. *Accurate knowledge about the underlying interests of all parties.* When parties to a dispute begin to go positional, they often focus solely on their own interests. And if they stay positional for long, they may become so focused on their preferred resolution that they forget their own interests. Being aware of the underlying interests of all the parties helps to frame the limits for a successful negotiation, as it is unlikely that a person will agree to a resolution until they are persuaded that it meets at least some, if not all, of their interests.

2. *A positive attitude about reaching an agreement to resolve the dispute.* There are two aspects to this positive attitude. One is that the parties must believe that it is possible to reach an agreement with the other party. The other is that they must want to resolve the dispute by agreement, rather than by force or some other method.

   If the parties think that efforts to reach an agreement will be futile - and that is often the case if the dispute has been going on for a long time - then the parties are unlikely to put in the effort needed to reach an agreement. It often helps at the beginning of a negotiation to remind the parties about prior agreements they may have reached, or to discuss simple procedural matters to demonstrate to the parties that they can agree. Something as simple as an agreement to meet at a given day and time,

or to set a time limit on the negotiations, or to agree to take turns talking can be useful in demonstrating to the parties that agreements are possible.

Discussing risk can help persuade the parties to work to resolve the dispute by agreement instead of by force. When a party is persuaded that they are "right" and that they can accurately predict the resolution that will result if they resort to force, they are not likely to agree to anything that does not give them the result they think they will get by resorting to force. Therefore, one of the things that is often necessary to get a positional person to negotiate is to point out the risks that may be involved in using force as a dispute resolution technique.

A specific technique of introducing risk to the parties is to ask them what is their BATNA (Best Alternative to a Negotiated Agreement).[4] The parties are not asked to disclose their BATNA to anyone. They are just asked to think about it and calculate it.

The BATNA is their best-case scenario. But there is also a risk that the parties will not be able to get it. They are asked to think about all the things that might prevent them from reaching their BATNA. When a resolution is sought by force, it is outside of their control. If the dispute is not resolved by agreement of the parties, then it is being resolved by a decision-maker or other forces outside of the parties' control. The other party is resisting them, and they cannot control to what extent the resistance will succeed, how long it will last, or at what cost. But if the parties agree to something, the risks of success, duration and cost contained in the agreement are now known and therefore eliminated.

3. *Clear and successful communication.* Lasting agreements are more likely when the agreement is clearly and accurately understood. When one or more of the parties misunderstand the terms of the agreement, or the statements leading to the agreement, they tend to disavow it and seek to escape its terms. A party may be less than wholly satisfied with the terms of an agreement, but they are more likely to abide by it if they accurately understand it and the negotiations that lead to it.

   An accurate understanding is more likely when messages are direct, simple, and clear. Inconsistent messages or overly complicated messages do not foster a clear understanding. There is a basic human tendency for a person to hear what they want to hear, so if a message is inconsistent, the listener is likely to hear the part they like best

and to disregard the part they dislike. If a clear understanding is the goal, then the message needs to be capable of only one interpretation.

In addition to clear and simple messages being sent, the listener needs to hear and absorb the message. Techniques for improving listening skills can be a topic for continuing professional education on their own, so they are beyond the scope of these course materials. But one of them is so important to dispute resolution that it needs to be mentioned here. The listener must want to hear the message. So, one of the skills a person needed to be an effective dispute resolver is the ability to persuade the parties to want to listen to messages sent by others.

In summary, while skill in persuading the parties to listen is a part of successful communications, the main communication goal needed for a lasting agreement is to send clear, simple messages that are heard and accurately understood. It is not possible to truly volunteer to do something you cannot understand and if the parties volunteer to reach an agreement, they are more likely to abide by it than if it is imposed upon them.

Basic Negotiation Techniques

It may seem simplistic, but we can use the analogy of a disputed pie to substitute for a boundary dispute to help understand the mechanics of a boundary negotiation.

There are two general goals in negotiations. One is to seek to increase the size of the pie for everyone. This is often referred to as win-win or integrative negotiations, and if it can be accomplished, it is almost always effective. The other goal is to increase the size of one party's slice at the expense of the other party.[5] This is referred to as win-lose or distributive negotiations. One problem with distributive negotiations is that you can expect the losing party to resist an agreement in which they feel they have lost.

At first glance, boundary negotiations will seem to fall squarely within the win-lose type of negotiation. If the parcels have already been created and are all owned by different parties, then the pie is fixed in size and cannot be enlarged to benefit everyone. If anyone gains, someone else must lose.

However, if the parties can come to see the disputed pie as having elements other than just a boundary location, then these elements can be increased for everyone's benefit and the

parties may be able to conclude that they will get more pie even if the location of the slice benefits the other party more.

These dispute elements include cost, risk, delay, and the value of a positive future relationship.

Sooner or later, the dispute will be resolved. The question that the parties need to answer for themselves is whether the dispute will be resolved by them via agreement or whether it will be resolved by someone else and forced upon them. Agreed-upon resolutions have different costs, time, risk, and effect on future relationships than compulsory resolutions have.

Not only do these factors differ depending on how the dispute is resolved, but they usually affect the parties similarly. In short, these factors can enlarge or shrink the size of the pie for all parties, and possibly to an extent where it really does not matter all that much how the pie is sliced.

For example, boundaries can be resolved with a court judgment of trespass or quiet title. But how much will this cost the parties? Maybe that can be calculated with precision, but even if it cannot, it should be apparent to everyone that it will cost more than an agreed-upon resolution.

And not only are court judgments expensive, but they also take time to obtain. The other party may employ delaying tactics and then may appeal after the initial judgment. It can take time for the parties to reach an agreement, but they have more control over the time needed to reach a settlement than they do over the time needed to obtain a final compulsory resolution.

Furthermore, there is more risk of getting a surprising and unsatisfactory result when the resolution is imposed on the parties as part of a judgment. A party can think they know the law, and they can think they know the facts, but even if they are right, no person can ever know what another person will believe is the truth. So, not only is there a risk that a party is wrong about the law or the facts, but there is always a risk that a decision-maker will believe the truth to be different than what the parties think it is. If certainty is important to the parties, then there is no question that the best way for the parties to avoid an unpleasant surprise from a judgment is to agree to a resolution. Agreements eliminate surprises.

And while it will not always be an important element in boundary dispute resolutions, the value of a future relationship with the other party is important in many boundary disputes. This is especially true in residential areas. In some disputes when it is over the parties will have no

contact again. However, when neighbors have a dispute, they will have repeated contacts in the future unless one of them sell their property. Those contacts can be pleasant, neutral, or hostile. While agreed-upon boundary resolutions may not lead to pleasant future relationships, there should be little doubt than if a dispute resolution is imposed upon a party to their detriment, the relationship between the parties is not likely to be improved. Indeed, the hostility often increases after the judgment and the aggrieved party seeks an opportunity for payback. This can result in such a hostile environment that it defeats the benefits of owning the property in question, thus leading one party or the other to sell their property just to avoid the hostile environment.

So, what are some techniques that can be used to help the parties reach a negotiated resolution by agreement? Here are a few.

1. Get the parties to talk to each other –and listen to each other - not to a third party. Persons who seek to persuade a decision maker to decide as they would like are well advised to address that decision maker directly. When a surveyor is performing the role of a boundary locator, they are in a judicial mode and are preparing to decide. Parties can and should share information with the surveyor when the surveyor is in that role. However, if the surveyor has completed their decision, or has set it aside and is helping facilitate an agreement between the parties, then the parties should talk directly to one another. By encouraging the parties to talk directly to each other and not to third parties, it helps ensure that messages get to the right place. And it helps instill the idea that the parties are in control of this resolution and that third parties are not all that important.
2. Change the subject of the discussion to interests – do not even discuss positions or possible resolutions until the very end. Ask the parties why the dispute matters to them. Try and get them to talk about <u>their</u> underlying goals and hopes.
3. Discuss the relationship between the parties. But try to get them to focus on what they would like it to be instead of complaining about the other party's behavior or position.
4. Discuss what a good agreement should look like – what topics it should address – not the specific resolutions for those topics. The goal with this technique is to get the parties to agree on something. At this stage, an agreement to agree is valuable as a way of showing good faith, and as a means of demonstrating that it is possible to come up with an agreement with the other party.

5. Analyze and discuss each party's BATNA and then introduce cost, doubt, risk, and the value of future relationships into the discussion.
6. If the initial discussions seem overwhelming or do not otherwise seem promising, consider the following techniques:
    a. *Agreement in Principle*. The idea here is to work on the large global issues, focusing on broad interests and goals – then come back and work out the details later
    b. *Building Blocks.* The goal in this technique is to break the dispute into several separate components and try to resolve them individually – one at a time.[6]

Getting Involved in a Boundary Dispute as a Surveyor

Three Situations with Initial Contract Considerations

One of the signature elements of most boundary disputes is that the parties typically have a historical relationship as neighbors and they expect to have a future relationship as neighbors, too. Depending on the details of the dispute and each party's expectations for the future, the value of this shared interest can be greater than the value of the land that is in dispute.

Imagine having to live or work next door to someone who just sued you or defeated you after two years of litigation. The fact of litigation will not be easily forgotten or forgiven by either party. While litigation may resolve the boundary location, the winner can usually count on retaliation of some sort eventually. Even if actual retaliation is not in the cards, it is unlikely that the sort of cooperative relationship that most people hope to have with their neighbors will ever come to pass.

So, while every dispute is unique, it is reasonable to expect that the parties to a boundary dispute will have a future relationship and therefore will have a shared interest in maintaining or improving that relationship. The fact that the parties are likely to have a future relationship as neighbors can be a valuable tool in reaching an agreement to resolve the boundary dispute.

In addition to the probability that a boundary dispute will involve parties who expect to have a future relationship, a surveyor who learns of the dispute will likely do so because of one of three situations.

One situation occurs when the surveyor has discovered a potential boundary issue which the parties are not yet aware of. Another situation occurs when the parties are aware that a problem may exist and have worked out a potential solution for it. The third situation occurs when the parties are aware of a problem and have not yet reached an agreement for a resolution.

Situation 1 - The surveyor is hired by a client who is not aware that a potential boundary problem exists.

This situation typically arises when a surveyor is hired to do a job and the client is either not focused on boundaries or they are ordering the work as a formality because someone else is requiring it. Situations such as this include surveys made as part of a transaction, such as an ALTA survey or standard boundary survey, to locate boundaries for a buyer or mortgagee in a proposed transaction. This situation also arises when the surveying work is ordered to obtain information for construction or design purposes. Surveys made so that fences and other construction can be properly located in relation to the client's boundaries can lead to this situation. Surveys made to generate information for a site plan or a permit or to otherwise be used in designing new real estate improvements also can lead to this situation.

So, in this situation the surveyor's work in locating boundaries is being done as a formality or is incidental to a larger purpose. And while doing that work the surveyor discovers an inconsistency in the records or an inconsistency between the record boundaries and the occupied boundaries (encroachment) of one sort or another that the client was not aware of.

The surveyor is then under a duty to inform the client of the potential problem. Depending on the surveyor's sense of ethical duties and professional responsibilities, as well as their business practices and contractual obligations, the surveyor may stop at that point. The surveyor may offer potential solutions to resolve the potential problem and may help in implementing those solutions.

These materials assume that the surveyor seeks to do something more than just disclose the existence of a potential problem and then walk away. They assume that the surveyor will either propose potential solutions or will help in implementing solutions or both.

The situation where the surveyor becomes aware of a potential problem before the client (and other affected parties) is an ideal situation for resolution, mainly because the client and the other affected parties may have a good relationship and have not yet had a chance to get positional.

However, there are some problems presented by this situation. Those problems derive from the fact that the surveyor has already established a contractual relationship with the client.

One problem is that because of the existing contractual relationship with one party, it can be difficult to be perceived as an unbiased neutral. This perception can be an obstacle to getting proposed solutions accepted by the parties. It is common - and reasonable - for someone to believe that if a surveyor is on the payroll of one party, then the surveyor will be biased in favor of the party who is paying them. As you know, a surveyor is not an advocate for the person who is paying them and really is an unbiased neutral. However, sometimes truth is less important than perception, and this can be one of those situations. If one party or another perceives the surveyor to be biased, then that perception alone can result in the surveyor's proposals to be rejected regardless of the accuracy of the perception.

Another problem is that just because the surveyor is an unbiased neutral when it comes to reporting facts, making analyses, and arriving at conclusions, the surveyor does owe the client some duties. One of those duties is a duty of loyalty and another duty is that of confidentiality. In short, just because a surveyor is under a duty to arrive at unbiased conclusions, that does not mean that they have a duty to publicize those conclusions to the world. There is a duty to inform the client of those conclusions, but it can be argued that the client paid for that information and not only has the right to keep it confidential but owns the information.

In addition, a surveyor is under a duty to avoid conflicts of interest, unless the client is informed of the potential conflict and consents to it in advance. So, if the surveyor wants to resolve the perception of bias resulting from getting paid by one party by accepting compensation from other potential parties, that would be a breach of the duty to avoid conflicts of interest, unless approved by the existing client.

In short, while a surveyor needs to always remain an unbiased neutral, they are also an unbiased neutral who is under a duty to get their client's permission before sharing information with other potential parties.

So, what are some things that a surveyor can do to assist their client in resolving a potential boundary problem that they were not previously aware of? Here are a few suggestions.

The first thing to consider is how the information will be disclosed to the client.

Ideally, the disclosure will be made orally, and in person, supplemented by whatever documents or other evidence exists to support the conclusions. Be sure to emphasize that a surveyor's conclusions are only opinions that are based on evidence uncovered during the survey. However, it is also important to let the client know that your opinions are not negotiable and, unless your client asks you to continue searching, your search is over, and your opinion is final – sort of. The reason the opinion is only "sort of" final is that no one can ever know what evidence was not found; one can only know what was found and the opinion is based on what was found.

In short, introduce the concept of risk to the client by telling them that your opinion is based on what was found and can change if new facts are uncovered, even though you are no longer looking for more evidence.

The client should be advised to seek legal counsel to help them decide the best way to resolve the potential dispute. But that does not mean that the surveyor needs to walk away entirely.

When advising a client to seek legal counsel, do not mention the possibility of litigation as the reason to see a lawyer. Instead, recommend that they seek legal counsel to explore ways to resolve the potential dispute. Inform your client of some possible solutions that should be explored with the attorney but remind your client that the decision as to whether any potential solutions you mention should be reviewed with legal counsel before deciding on how to proceed.

As part of that initial disclosure tell the client that, unless they want to obtain a court judgment, the only way to get something that is more certain than an opinion is to seek an agreement with other affected landowners to ratify your opinion or to create new facts that cause you to change your opinion.

If there are occupied boundaries that are inconsistent with your opinion as to a boundary you also may want to ask the client if they and the other neighbor are satisfied with those occupied boundaries. If that is truly the case, then the parties already have an agreement that resolves the matter. It just needs to be monumented, memorialized and preferably recorded.

Inform the client whether you are available to continue to work under the terms of the existing contract or if you are willing to help, but under a new contract.

Regardless of whether additional services can be provided under the existing contract or whether a new contract will be required, if additional services will be made available, be sure to describe them to the client.

For instance, you may be willing to meet with legal counsel – or with neighbors – to explain the conclusions you reached in the survey. However, you may also want to let your client know that you will not do this without their permission, unless subpoenaed.

Inform your client that if an agreement is reached to resolve the potential dispute that differs from what your survey concludes, you can prepare a new survey certificate and monument the agreement and/or prepare legal descriptions as needed for a boundary line agreement to be executed and recorded, or for deeds to be exchanged.

If you are willing to serve as a neutral facilitator to mediate an agreement (first check to be sure that your state allows this without formal licensing or other state regulation), let your client know that and ask if they would like you to approach other affected parties to see if they are interested in working together to find a mutually agreeable resolution.

Situation 2 – The surveyor is hired by a client (or more than one client) who is aware of a boundary problem and has agreed to a potential resolution.

This situation is like the previous one but with two significant differences.
It is similar because there is a boundary problem, and you are in the role of a surveyor. It is also similar because the parties are not yet positional.

One difference is that the parties are already aware that a problem exists and are already working together to solve it. When you have information that the potential parties are not yet aware of, the manner and timing of your communications is important. That is not an issue in this situation. You can focus your energy more on the problem itself and potential solutions to it.

Another difference is that (presumably) you do not yet have a client relationship with either party. So, this allows you an opportunity to describe the nature of your services to the parties jointly in your first meeting with them. It also allows you the opportunity to offer your services to the parties as co-clients, with fees to be shared equally by the parties and billed separately to each client. Sharing the fees equally gives the surveyor an opportunity to defeat a perception of bias before that perception can begin to form in the mind of either party.

In this situation, the offer to provide services is especially important. In addition to other standard items, the offer should:

1. Outline what was discussed in the intake interview and indicate whether you are offering to work for only one party as your proposed client or both parties as co-clients. Specify that you are offering to work as a neutral and that your opinions and reports will not be affected regardless if you are working for one party or if you are taking on co-parties. The only difference in the two situations should be how you communicate information. If you have co-parties, you should communicate jointly. If you have only one party, your communications should go to your client, and they decide whether or how to pass on information to the other party.
2. Specify if you are going to perform a complete survey and then offer solutions to what is discovered or whether you are only being hired to implement a solution that the parties have agreed to. It should go without saying that the offer should ideally include a complete survey. The parties may think that they are aware of a problem, and they are probably right, but without a complete survey, there may be other problems that they are not aware of, or the nature of the problem and potential solutions may be quite different than what they think. Only a complete survey will yield a complete understanding of the situation. Still, for one reason or another, the parties may want to limit your services to implementing the solution they have agreed to. So, you may want to offer to do less than a complete survey, but if you do, you should be sure to advise them that something less than a complete survey may result in only a partial solution with other unknown problems remaining unresolved.
3. Most boundary resolutions require the services of an attorney. Ideally, the attorney will not be needed to litigate a solution, but rather will be needed to prepare documents, such as deeds and formal agreements. These will likely require legal descriptions and maps to be prepared by a surveyor. In addition, any boundary resolution should be monumented on the ground (and this alone may require a full survey; hence the advisability of contracting to perform a full survey in the initial offer). So, the offer should not only specify these sorts of services, but it also should specify consultations with clients and attorneys as needed.

When the contract is finalized, and the work begins the surveyor should keep the following in mind:

1. If you have co-clients, be sure to avoid ex-parte communications as much as possible. Each client should be copied in on all written communications, whether by letter, email, or text message. Meetings should be held jointly whenever possible and phone calls and video calls should be held jointly if possible. If that is not possible because one party is unavailable or because a party initiated the contact without the other party being involved, then it is wise to follow up with a brief message outlining what was discussed and sending a copy to the other party. If the communication was incidental and nothing of consequence was discussed, then these formalities may be omitted. Still, it is important to remember that your goal should be to not only maintain neutrality, but also to foster the perception of neutrality. And while ex-parte communications may be innocent, they can appear suspicious and that alone can damage the perception of neutrality. Naturally, if you have not contracted with one or more parties as a co-client, you should not send any communications to them without the prior consent of your clients.
2. Beginning with your initial interview, and continuing throughout your relationship, be sure to let your clients know that boundary resolutions affect legal rights that affect others. Others who can be affected by a boundary resolution include those who will be obtaining land use rights to the property in the future, as well as spouses and other co-owners. If any of the properties involved are subject to a mortgage or other lien, those lien holders may also be affected. For these and other reasons, the parties should be reminded that their resolution should be memorialized in writing and preferably recorded. It should also be monumented on the ground as well and accompanied by a complete map and certificate of survey. Legal descriptions to be incorporated in other documents should be written by the surveyor and given to the parties or their attorneys.
3. Be sure to remind that parties that 100% of all the affected owners should be part of the final agreement to resolve the issue. If anyone owner objects or is not part of the agreement because they were not made aware of it, then the agreement does not completely resolve the issue and could all be for naught.
4. Be sure to recommend that the parties consult with an attorney. While attorneys are not neutral as a rule, there are jurisdictions where attorneys can jointly represent two or more parties to a transaction. So, it may be possible for the parties to work with a single

attorney – or they may have to get separate legal representation. Either way the cost of legal representation to make sure a problem is fully resolved without the need for litigation will be much less than if litigation is involved. And if the matter is fully resolved by an agreement which is properly executed and memorialized, there should be no litigation needed.

Because boundary resolutions invariably involve legal rights and affect title matters that surveyors rarely get involved with, the entire agreement should be handled by an attorney to ensure that it is property executed and that if fully includes all affected parties. As a surveyor it is entirely appropriate to help the parties reach an agreement, and to collect information needed to memorialize that agreement. But the final decision as to the best way to fully resolve the issue and the documents needed to memorialize it should be determined by an attorney before a final survey plat or legal descry are prepared.

Situation 3 – The surveyor is hired by a client who is aware of a boundary problem but has not reached a potential resolution.

This situation, like the prior one, assumes that the potential client has not yet entered into a contract with the surveyor. The difference between this situation and the prior one is that the potential client and other parties have not yet agreed on a solution to their problem. The parties may already be disputing the boundary location, or it may be that the potential client is merely questioning a location that is being asserted by others. It may be that the parties have been discussing the boundary location and are not in agreement. It may be that an abutting neighbor or someone else in the neighborhood has already obtained a survey and the prospective client disputes the survey or has questions about it.

Like the prior situation, the surveyor has an opportunity to discuss their services at length and explain the nature of them before submitting an offer. Unlike the prior situation, this intake interview will only be held with the prospective client and with no other parties present.

One of the first things the surveyor should inquire about is to find out if a dispute is active or if the prospective client is just questioning the assertions of others. If the prospective client is just questioning the asserted boundary, the surveyor can use the intake interview to discuss the procedures that will be used in the survey, how they tend to arrive at an opinion, and what might be expected after an opinion is rendered and the survey is complete. If a dispute is actively underway, it is worthwhile to find out if either party has gone positional, and

especially if the prospective client has gone positional. One important thing to learn about in this intake interview is whether either party has yet hired an attorney or filed a lawsuit to resolve the matter.

If the prospective client is merely questioning an asserted boundary and if no party has yet filed a lawsuit, then it can be worthwhile to educate the prospective client about the differences between litigated resolutions and agreed-upon resolutions. The offer to the prospective client should include standard boundary surveying clauses. But it may also be good to include an offer to revise the survey if the parties agree to a location other than what the initial survey reveals. If the prospective client is not so positional that an offer to facilitate an agreement would be futile, then those services can be offered as well. However, any offer to facilitate an agreement should specify that the client gives permission to the surveyor to disclose information candidly to other persons as part of the effort to facilitate an agreement.

If an offer to facilitate an agreement would be futile because the prospective client has become so positional that all they want is to “win”, or because they feel the other party is so positional that they will not cooperate in seeking an agreement, then the surveyor may want to include some clauses to encourage a quick settlement or at least to ensure the surveyor is properly compensated if she is asked to be part of the litigation process. Such an offer should contain the standard clauses to perform the initial survey, but it also can include clauses for services after the survey is complete.

One potential item to include is a statement that the initial surveying services do not include consultations with attorneys or testimony of any sort other than responding to subpoenas as a lay witness.

The offer may include an offer for an initial consultation with the client’s attorney at a fixed rate, but anything beyond an initial explanation of the survey with an attorney should be billed at an hourly rate, and ideally that hourly rate will increase every time the surveyor is asked to consult. Few attorneys will get involved in litigation for a fixed fee and neither should a surveyor. Hourly fees are one of the most effective tools used in the legal profession to encourage settlement outside of litigation and a surveyor can employ that tool just as effectively as an attorney can.

The offer should also specify a rate for anything the surveyor is asked to do after the initial survey and initial consultation. For example, if the attorney wants information that requires the surveyor to review their files, the surveyor should charge for the time needed to

review the files. If the attorney wants the surveyor to go back to the field to check anything, that work should be billed and the rate it will be billed at should be specified in the initial offer.

The offer should also specify that no work will be done, or testimony given beyond that of a lay witness unless it is paid for at a specified fee (preferably an hourly rate). This work can include time spent reviewing files, time spent waiting on stand-by or in a hallway, and time spent giving testimony or observing the testimony of others.

It is worth noting that all people, including professionals, can be subpoenaed as lay witnesses and they must comply or be subject to penalties for contempt of court. Furthermore, the professional may not be entitled to compensation other than the standard rate given to any citizen who is subpoenaed as a lay witness.

However, if a surveyor has contracted to serve as an expert witness, then they are entitled to be paid according to the terms of the contract, even if they are subpoenaed by the client's opposing counsel. The difference is that a lay witness can be compelled to testify as to what they observed with their five senses, but they are under no duty to give testimony as to their reasoning or their opinions. So, a surveyor who is serving as a lay witness must give truthful testimony as to where they placed a survey marker and as to what objects they made measurements to. But they cannot be compelled to say why they gave more weight to some evidence than to others, nor can they be compelled to say why they placed the marker where they placed it. In other words, a surveyor can be compelled to testify as to what they did, where they did it, what tools and techniques were used. But they cannot be compelled to say why one tool is better than another or why one piece of evidence was given more weight than another unless they are qualified (and paid) as an expert witness.[7]

If a surveyor is subpoenaed to testify at trial or a deposition, the terms of the contract with the client should be discussed with the attorney who issued the subpoena to make sure payment will be made according to that contract. If the surveyor is not confident that they will be paid according to the terms of the contract, then they can petition the court for an order (typically via a motion to quash the subpoena) to mandate payment as contracted or to limit testimony to that of a lay witness.[8]

Since one of the goals of these post-survey fees is to encourage settlement by making litigation expensive, it is appropriate to increase the fees as the parties get closer to litigation. For example, if the fee for post-survey consultation with attorneys is x, then the fee for preparing and testifying at a deposition could be set at 1.5x and the fee for preparing and testifying at trial can be set at 2x.

Another item that should be addressed in the client contract is post-settlement steps to document and memorialize the final resolution. Regardless of whether the resolution is reached by agreement between the parties or by judgment from the court, it is likely that a new legal description will need to be prepared, monuments set, and a map prepared to show the resolution graphically. The surveyor and all parties will be best served if the fees for that work are set forth in advance.

Facilitating to Help the Parties Resolve the Dispute

There are two primary ways that a surveyor can help their client to resolve a boundary dispute. One is to serve as a facilitator to help the parties reach an agreed resolution. The other is to help the parties' document and memorialize a resolution after it has been reached.

The following are a few tips that may be useful in helping the parties reach an agreement, should the surveyor be willing to offer this sort of service and if both parties are willing to cooperate. While surveyors are eligible and well suited to serve as formal mediators in many jurisdictions,[9] that level of service is not being discussed in these materials. The following tips are informal suggestions and are more akin to client counseling than formal mediation.

If a surveyor is to be effective in helping the parties reach an agreement, one consideration is trust. If any party feels the facilitator is biased in any way, for or against any party, what the facilitator has to say will not be listened to with an open mind, if at all. Gaining the trust of everyone involved is an important perquisite to being able to help the parties reach an agreement.

It is not necessary to tell the parties what they want to hear to gain their trust. In fact, open and forthright communication, even as to unpleasant aspects of the issues, is one element of gaining trust. If the facilitator has something to say, it should be said directly, clearly and in language the parties can easily understand.

Once a surveyor begins to take on the role of a facilitator, it is important that all communications be made jointly to the parties. Ex-parte communications made to one party in the absence of others tends to breed suspicion and distrust. If the surveyor has a client relationship with only one party, then the surveyor should get permission from their client to speak openly and fully about anything relevant to the dispute. The client should clearly release

the surveyor from any duty of confidentiality she may have regarding disclosure of information to other parties in the settlement discussions.

On the other hand, the parties should also be told that they are engaging in settlement discussions and that all statements made in settlement discussions are private, privileged and cannot be discussed or used against any party in court proceedings.[10] This is an important part of getting the parties to speak openly and freely with one another. If a party fears that their admissions or offers will be used against them if called to testify in open court, they will be less likely to engage in significant negotiations. Similarly, be sure to inform the parties that you cannot be compelled to testify as to your observations while serving as a facilitator.

In addition to establishing trust, another important goal is to get the parties talking to one another. While a surveyor may have expert knowledge in a field that is a licensed profession, when serving as a facilitator, it is important to set that knowledge aside. The facilitator is not a judge and the discussions should not be an effort to persuade the facilitator to side with one party against the other. The parties are their own judges, and the goal of each party should be to persuade the other party to agree to a deal that is mutually beneficial. This requires the parties to talk to one another and to listen to one another. The facilitator's opinion is irrelevant.

So, it is important for each party to speak freely and for each party to listen to what the other one has to say. Ideally, this will happen naturally, but if the relationship is strained, it may be necessary to ask the parties to take turns. First one party has their say – hopefully in a respectful manner – about whatever is on their mind relative to the dispute. The other party should be asked to do nothing but listen. Then they switch places. Only after each party has had a chance to speak, without interruption, should the give and take of dialog begin.

After each party feels they have spoken, hopefully they will explore options that might resolve the dispute. This is an area where the facilitator can help. It may be that the parties are positional and have fixed their minds on only one acceptable solution to the exclusion of all others. If this is the case, the facilitator can remind the parties that they do not have to settle the dispute by agreement. Other avenues, like litigation, exist. But the parties may also need to be reminded that the only risk-free way to resolve a dispute is for the parties to do it themselves by agreement. Any other resolution will require an outsider to pass judgment, and that carries risks. And those other resolutions will likely be more expensive, too. The facilitator may want to ask each party to (silently) assess their BATNA and then assess the likelihood of getting their BATNA as well as the cost and delay in getting it.

The facilitator should not try to steer the parties to a particular solution. The parties should come up with their own solution. The parties may need to be told about various options that they are not aware of, such as boundary line agreements, exchanges of deeds, life estate leases, etc.… If the parties reach an agreement, the facilitator should offer to write a brief summary of it and recommend ways to implement the agreement. If a particular solution is going to run afoul of zoning ordinances or has other issues which the parties may not be aware of, the facilitator should inform the parties of that and may have to refuse to help them implement a solution that violates a law or administrative regulation.

If the discussions result in a tentative agreement, the parties should be congratulated on their success. But they should also be told that it is not enough for them to reach an agreement. If there are co-owners who were not part of the discussions, they should be consulted and they should be asked to participate in the final resolution. This is also true if there is a lien holder whose rights might be affected by the agreement

Since legal rights are always involved in boundary matters, the services of an attorney are usually going to be needed to prepare documents needed to finalize the agreement. In addition, the rights that are affected by the resolution are usually going to be long term, if not permanent. Consequently, documents that implement the resolution should be filed in the public records. The location of the boundary resolution should be monumented on the ground and accompanied by a survey certificate.

The parties should be advised of this and they should decide if they are going to consult with an attorney separately or jointly. They should be counseled that it is always wise to consult separately with their own attorney and that it may be impossible to find an attorney who will assist them jointly. The facilitator can suggest steps to finalize the agreement, but once a tentative agreement has been reached, the facilitator should inform the parties that their services as a facilitator are finished and that directions as to what steps are to be taken to finalize the agreement should come directly from the attorney(s) who will oversee finalizing the agreement.

Endnotes

1. For example, See Federal Rule of Civil Procedure 68a, which mandates that a court clerk enter judgment if a party offers it and the other parties accept the offer 14 days or more before trial. Most, if not all, state courts have a similar rule.

2. See Federal Rule of Civil Procedure rule 68a, which mandates that a court clerk enter judgment if a party offers it and the other parties accept the offer 14 days or more before trial. Most, if not all, state courts have a similar rule.

3. The Judicial Functions of Surveyors, presented to the Michigan Association of Surveyors and Civil Engineers in 1881, by Chief Justice Thomas M. Cooley of the Michigan Supreme Court.

4. Getting to Yes, Fisher & Ury, published by Houghton Mifflin, 1981

5. The Dynamics of Conflict Resolution, pgs. 148-160, Mayer, published by Jossey-Bass, 2000

6. The Dynamics of Conflict Resolution, pgs. 161-162, Mayer, published by Jossey-Bass, 2000

7. See generally, Federal Rules of Evidence, Rules 701 and 702. Most, if not all, state courts have a similar rule.

8. See Federal Rules of Civil Procedure, Rule 45 generally and especially parts (d)(3)(A)(iv) and (d)(3)(C)(ii)

9. Mediation opportunities for the surveying profession in Tennessee, Taylor, published in the International Journal of Humanities and Social Science, Vo1. 1, No. 20, 2011

10. See generally, Federal Rules of Evidence, Rule 408. Most, if not all, state courts have a similar rule.