

Surveying and Mediation: New Opportunities in an Old Role

Jerry D. Taylor, P.S., J.D.
Surveying Department
School of Technology
Michigan Technological University
1400 Townsend Drive
Houghton, MI 49931-1295
TX: 906-487-2445
e-mail: jdtaylor@mtu.edu

Abstract

Many surveyors seek to be more than technicians who locate land boundaries in accordance with a rigid and inflexible set of rules. While they have the role of applying legal rules and principles in locating boundaries and disclosing problems, many also try to go beyond that and help clients try to find solutions to the problems that are disclosed. This is the role Justice Thomas M. Cooley wrote about in his essay entitled "The Judicial Function of Surveyors" over 100 years ago. Since then surveyors have debated the apparent conflict between the desire to go beyond the role of a technician and the lack of authority to do so. Recent trends in the legal profession, notably the overcrowding of the courts and the move towards Alternative Dispute Resolution (ADR) devices, especially mediation, have opened a window of opportunity for surveyors to fulfill the role written about by Justice Cooley. This paper will examine the role envisioned by Justice Cooley, the concept of mediation as it is currently evolving, and show the existence of both an opportunity and a need for surveyors to fulfill the role of mediators in boundary disputes.

Introduction

Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of parties concerned.

Chief Justice Thomas M. Cooley of the Michigan Supreme Court wrote those words over 100 years ago near the conclusion of his essay entitled The Judicial Functions of Surveyors.¹ I first encountered these words, and others like them in the essay, as a student. They left me proud to be entering a profession of such apparent importance to society. But they also left me with unanswered questions. For what exactly is a quasi-judicial capacity? And what difference does it make whether the parties acquiesce in my survey or not? Either the job was done correctly or not, right?

When a man has had a training in one of the exact sciences, where every problem within its purview is supposed to be susceptible of accurate solution, he is likely to be not a little impatient when he is told that, under some circumstances, he must recognize inaccuracies, and govern his action by facts which lead him away from the results which theoretically he ought to reach. Observation warrants us in saying that this remark may frequently be made of surveyors.

The preceding passage is the opening paragraph of The Judicial Functions of Surveyors.² It described my attitude as a student and young surveyor. But no longer.

The underlying premise of this paper is that a primary role of the Professional Surveyor is to assist the legal system in fulfilling its role in society.³ It is not the only role that surveyors fulfill, but it is one that differentiates surveyors from their colleagues in related fields more than most other roles.⁴

The role of the legal system in society

Why does law exist? This is a question that has been examined repeatedly through the centuries and with varying answers.⁵ This paper is based on the theory that law exists primarily to remedy the insecurity and uncertainty inherent in a state of anarchy.⁶ There may be other personal and social problems associated with a state of anarchy, but insecurity and uncertainty seem paramount.

We can say that a state of anarchy exists whenever two or more people find themselves in a situation with limited resources and no system for allocating those resources between them. Law provides the means of allocating limited resources and of setting behavioral standards for people. It provides a means for resolving disputes about those allocations and behaviors. It also provides a means for enforcing decisions that resolve the disputes.

The rules that people create to allocate resources and regulate behavior will be referred to as substantive law or substantive rules. These are what people commonly think of as "the law". But a body of substantive law isn't enough to end the state of anarchy.

Rules that are "on the books" but aren't enforced have no practical value. People can be expected to take resources and otherwise behave according to their personal code (if any) if there is no power to stop them. This is the same behavior as if there were no substantive rules at all. This is the behavior found in a state of anarchy.

So society establishes rules that authorize the imposition of penalties and other incentives for people to obey the substantive law. If people do not voluntarily submit to these penalties, society establishes rules that authorize the use of force by certain members against others. Rules that set penalties and authorize force will be referred to as remedial law or remedial rules.

But a society that has established substantive rules to regulate conduct and remedial rules to enforce the substantive rules still remains in the state of anarchy. This is because people will still disagree as to whether the substantive rules have been violated, and what remedy should be used. An objective process needs to be established for resolving disputes. Otherwise, the strongest, or the most numerous, or those who are most in favor with the enforcer will have the disputes resolved in their favor all the time, regardless of the truth of the matter.

So society establishes an objective process for resolving disputes. Rules that are established to resolve disputes will be referred to as procedural law or procedural rules.

Therefore, most legal systems have three different components, substantive law rules, procedural law rules, and remedial law rules. All three types are equally necessary to avoid the adverse consequences of anarchy.

Although they do not match up exactly, these components largely correspond to the three branches of government found in the U.S. federal government and most American states. The legislative branch is largely responsible for enacting substantive law rules. The executive branch is largely responsible for administering the remedial law rules. The judicial branch is largely responsible for applying procedural law rules as it resolved disputes.⁷

If a legal system is to be accepted by a society in lieu of the state of anarchy, it not only must possess these three components. It also must structure them in a way that is both acceptable and accessible to the general population. The issue of acceptability generally relates to justice and fairness. The issue of accessibility is directly related to the practicality of the system. Both issues are beyond the scope of this paper, although the issue of accessibility will be briefly touched on.

Dispute resolution systems and the role of the judicial branch of government

While it might be argued that it serves to enforce the substantive law, the judicial branch actually exists to resolve disputes. It does so by issuing judgments that decide how the dispute shall end. These judgments eventually authorize the executive branch to use force to make sure that the remedy is imposed.

And while the judicial branch creates substantive law through the majority opinions of its published cases, this creation of substantive law (common law) is a by-product of dispute resolution function. For no court can create common law, except in the context of an actual controversy that it has jurisdiction to decide and that is ripe for decision.⁸

Although litigated dispute resolutions administered by the judicial branch of government are the only ones that are directly enforced by the executive branch, they are only one component of the dispute resolution system employed by most American states as well as the federal government. There are other components as well.

All of the other components of the dispute resolution system employed in the United States have one feature in common. They have no ability to compel enforcement except by resort to litigation in the judicial branch. The executive branch only enforces orders issued by the judicial branch of government. It does not enforce resolutions obtained from the other components of the dispute resolution system until the judiciary approves them.

The other components of the dispute resolution system are referred to as alternative dispute resolution devices. This is something of a misnomer since the dispute resolution system does not rely on them as alternatives to litigation. The system actually relies on these devices as the primary means of resolving disputes, with litigation as a subsequent step to be used only if enforcement by the executive branch is really needed. The system does allow for parties to resort to litigation as an initial dispute resolution device, but use of litigation as a dispute resolution device is designed to be the alternative technique, not the primary one.

However, for the past several generations, litigation has been resorted to as a primary resolution technique instead of being used as an alternative to the other available dispute resolution devices. But this practice is beginning to change.

It is changing for four reasons.

One reason is education. Law schools throughout the United States are making more course work available in alternative dispute resolution techniques and many of them are mandating it as a part of their degree.⁹ This is important because lawyers often are the first professional turned to by a person who is experiencing a dispute. They are in an excellent position to assess the various techniques available to resolving that dispute. In addition to the increased instruction in alternative dispute resolution that is occurring in law schools, there is an increase in baccalaureate and graduate programs designed to train people in conflict resolution.¹⁰ As graduates of these programs circulate throughout society, awareness of the existence of alternative dispute techniques can't help but grow.

Another reason is the increasing unavailability of litigated resolutions. There are two aspects of this unavailability. One is cost, the other is time. Small claims courts have made litigated resolutions available quickly and for low cost. But these are usually limited to low value disputes. And since no person can be compelled to use small claims court for a dispute resolution against their wishes, it isn't guaranteed to be available even if the jurisdictional requirements are met.¹¹ Other than small claims court, it is hard to imagine a person getting a fully litigated dispute resolved at the trial level in less than a year or for less than \$5000. This is a best case estimate of cost and time, not a typical estimate. It is easy to imagine disputes where the cost of the litigated resolution exceeds the value of winning everything each party hoped to get. And it is easy to imagine disputes in which the time it takes to get a fully litigated resolution makes the outcome moot.

A third reason why alternative dispute resolutions are growing is that they are better suited to resolving disputes between parties who have a continuing relationship than litigation is. The litigated dispute resolution process is adversarial in nature. The process of obtaining a litigated resolution often generates more ill will than the underlying dispute did in the first place. Disputes between family members, neighbors, and others who have continuing relationships are resolved with less damage to the relationship itself if an adversarial process like litigation is avoided.

The fourth, and probably the most important reason why alternative dispute resolution devices will be resorted to before litigation, lies in new procedural rules being adopted in many jurisdictions in the United States. These new rules take many forms. Perhaps the most powerful one is found in statutes and court rules that authorize judges to divert cases to one or more alternative dispute resolution devices before proceeding with litigation. In other words, court rules are being adopted in some jurisdictions that allow judges to order the parties to try one or more alternative dispute devices before a trial will even be scheduled.¹² These judges are being granted the power to make sure that litigation is the alternative resolution device, and not the primary one.

A broad overview of alternative dispute resolution devices

Dispute resolution devices can be categorized in a variety of ways. In this paper, they will be broken down into the categories of "externally imposed" resolutions, "party-selected" resolutions, and hybrids between these two.

Externally imposed resolutions occur when someone other than the parties resolves their dispute for them. The primary characteristic of such a resolution is a judgment of some sort, whether it is called a judgment or something else (typically an "award"). Litigated

resolutions are of this type. Binding arbitration is an alternative dispute resolution device that is externally imposed. Externally imposed resolutions are typically adversarial contests that result in win-lose resolutions.

Hybrid resolutions are proliferating as creative minds try to come up with new alternative dispute resolution techniques. As such, they are not readily categorized. Many of them are hybrids in that an external resolution is proposed (or awarded), but it isn't binding on the parties. They then have the option of adopting it. Some of these devices use the award as a starting point for negotiations. Others require that it be accepted on an all or nothing basis. Some provide for financial penalties if the party doesn't do better than the award in subsequent litigation. Others are totally non-coercive.

Party-selected resolutions result from negotiations between the parties. They result in agreements, not awards or judgments. They are the most common form of dispute resolution, and are so common that they are not often thought of as a dispute resolution at all. Many, probably most, agreements are entered into to prevent disputes, not to resolve them. Nevertheless, negotiations are the most commonly used alternative dispute resolution device.

Except for court-ordered alternative dispute resolution efforts, all alternative dispute resolution devices are the result of agreement between the parties. With arbitration, the agreement is to submit the dispute to arbitration and to abide by the award, regardless of the outcome. With party-selected resolutions, the resolution itself is an agreement. Since binding agreements are contractual in nature, substantive contract law principles are a big part of alternative dispute resolution techniques. But there are also other rules that make it plain that alternative dispute techniques are an intended part of both the federal and the state dispute resolutions systems in America. These rules are procedural in nature and often supercede substantive law rules. They operate to encourage citizens to settle their disputes by agreement outside of court by creating exceptions to other rules.¹³

The role of the surveyor in the legal system

Surveyors assist the legal system in two basic ways.

One way is by collecting evidence as to boundary locations (or other information of interest to the legal system; forensic data for instance). After collecting the information, the surveyor expresses an opinion as to the location of the client's boundary. This opinion may be based solely on an evaluation of written evidence, unwritten evidence, or some combination of the two.¹⁴

This role is labeled as a technician's role in this paper, because it results in the collection of data and an opinion that will be used by others to more directly fulfill the purpose the legal system exists for, that of dispute resolution.

Surveyors who perform as expert witnesses remain in the role of a passive technician, reporting the facts that were discovered and the reasoning behind their opinions. It is an important role, and one that the judge or jury relies upon, but like the role of other technicians, it remains a supporting role. This is because the purpose of the litigation is to resolve the dispute. Expert witness testimony and opinions only helps the court decide how to resolve the dispute. It does nothing to cause it to be resolved sooner, or more peacefully, or with more certainty.

There is another role for surveyors within the legal system. It is a role of active advocacy, not of passive technical reporting. This paper labels it as a professional role within the legal system. Cooley called it a quasi-judicial capacity.¹⁵ Although over one hundred years of social and technological change may alter it some from how it was envisioned in the 19th century, the role is essentially the same.

The role is labeled as a professional one, because when surveyors perform this role they work directly to resolve or prevent disputes. They are not assisting someone else who has the primary responsibility for performing that role. They accept that lead responsibility for themselves.

The role is to advocate that the parties enter into an agreement as to where their boundaries should be. There is an important distinction between advocating that the parties agree to a particular location, and between advocating that they agree, period. The goal is to advocate for finality and certainty without litigation, not necessarily to advocate that the parties adopt the result that a court would adopt if the matter were brought before it.

When surveyors try to persuade the parties to come to an agreement as to a boundary location, without specifying or suggesting any particular location, then they are acting as neutral, disinterested agents of the legal system, and not of any party. And if surveyors find that the parties have already reached an agreement as to where their boundaries are, they can provide a valuable service to the parties and the legal system by monumenting the agreement and persuading the parties to document it, even if their written legal descriptions provide differently. This is the role that Cooley wrote about long ago.

A brief return to The Judicial Functions of Surveyors

Suppose, for example, a particular village street has been located by acquiescence and used for many years, and the proprietors in a certain block have laid off their lots in reference to this practical location. Two lot owners quarrel, and one of them calls in a surveyor, that he may make sure his neighbor shall not get an inch of land from him. This surveyor undertakes to make his survey accurate, whether the original was so or not, and the first result is, he notifies the lot owners that there is error in the street line, and that all fences should be moved, say 1 foot to the east. Perhaps he goes on to drive stakes through the block according to this conclusion. Of course, if he is right in doing this, all lines in the village will be unsettled; but we will limit our attention to the single block. It is not likely that the lot owners generally will allow the new survey to unsettle their possessions, but there is always a probability of finding some one disposed to do so. We shall then have a lawsuit; and with what result?¹⁶

In the above passage, Cooley outlined a hypothetical situation in which the correct boundary location varies from the occupied boundary location by one foot. The passage presumes that a survey is made and the surveyor monuments the correct position of each

lot in the block, without doing anything more. Cooley then left us with the rhetorical question as to the impact of this surveyor's behavior on the community.

The surveyor in the above passage was performing in the role of a technician. She investigated the situation and expressed her opinion as to where the boundaries were, without doing anything more. The result was to disclose the existence of a disparity between the written boundaries of the parties, and those that they were actually using, without doing anything to resolve the discrepancy. Whether the surveyor correctly located the written boundaries is immaterial. There was peace and certainty in the community before she arrived, but now there is uncertainty, and there is a risk that the peace has been disrupted as well. This uncertainty and risk are negatives (costs) to be avoided if possible. Depending on the circumstances, they may not only detract from the value of the surveyor's work, but they could outweigh it.

Surveyors can avoid injecting these negatives into the community. One way surveyors can do this is to express their opinions and then actively help the parties to resolve discrepancies that are disclosed. Another way that surveyors can do this is by collecting evidence as to unwritten rights and incorporating that evidence into the boundary analysis.

Cooley wrote:

...there is no particular time that shall be required to conclude private owners, where it appears that they have accepted a particular line independently as their boundary, and all concerned have cultivated and claimed up to it. Public policy requires that such lines be not lightly disturbed, or disturbed at all after the lapse of any considerable time. The litigant, therefore, who in such a case pins his faith on the surveyor is likely to suffer for his reliance, and the surveyor himself to be mortified by a result that seems to impeach his judgment.

Of course, nothing in what has been said can require a surveyor to conceal his own judgment, or to report the facts one way when he believes them to be another. He has no right to mislead, and he may rightfully express his opinion that an original monument was at one place, when at the same time he is satisfied acquiescence has fixed the rights of parties as if it were at another. But he would do mischief if he were to attempt to "establish" monuments which he knew would tend to disturb settled rights; the farthest he has a right to go, as an officer of the law, is to express his opinion where the monument should be, at the same time that he imparts the information to those who employ him and who might otherwise be misled, that the same authority that makes him an officer and entrusts him to make surveys, also allows parties to settle their own boundary lines, and considers acquiescence in a particular line or monument, for any considerable period, as strong if not conclusive evidence of such settlement. The peace of the community absolutely requires this rule.¹⁷

Surveyors are well aware of the nuances involving written and unwritten boundaries. The topic is thoroughly treated in college classes, in textbooks, and in continuing education seminars. So when surveyors choose to perform only the technical role by disclosing the location of written boundaries without doing anything more, it is rarely because they don't have an opinion as to unwritten boundaries. It is more often because they consciously decide not to take on the role of expressing opinions as to unwritten boundaries or of assisting the parties in reconciling discrepancies. Two factors are largely responsible for providing surveyors with a disincentive to move beyond the technical role.

The disincentive against helping the parties to reconcile discrepancies is rooted in the law of agency. It has both an ethical component and a financial one. The ethical problem is that if a surveyor has been hired as the agent of one party and is being paid by that party, then the surveyor has duties of confidentiality and loyalty to the client. This doesn't allow the surveyor to cheat adjoining parties, or to slant her decisions in favor of her client. But it does prohibit her from giving information to adjoining parties that can adversely affect the client without first obtaining the client's permission. And that leads to the financial problem. Which is that it not only can be futile to persuade a client to pay for the surveyor's time in giving information to others, but it's also unfair to expect the client to pay for a public benefit. So who pays? Usually no one is willing to pay. So information as to the options for reconciling discrepancies rarely gets disseminated to all the affected parties.

A related problem is that surveyors who want to help clients document their agreements as to boundaries are risking liability for practicing law without a license in some jurisdictions. Such surveyors are limited to making referrals and recommendations to be taken by the parties to an attorney for implementation. This adds delay, inconvenience and cost with the end result often being that nothing gets done.

The disincentive against expressing opinions as to unwritten boundaries lies in the risks imposed on the surveyor by the legal system she is serving. In most states a surveyor has no authority other than to express opinions based on evidence they collect and evaluate. Unlike judges and prosecutors, who also evaluate evidence and issue opinions, a surveyor's opinion does not ever become law to be followed by those who follow. Survey opinions are not protected by the doctrines of *res judicata*, collateral estoppel, or harmless error.¹⁸ Not only are surveyors unprotected by governmental immunity, as judges and prosecutors are, but they are also exposed to liability for negligence. This can include an exposure for failing to discover evidence, which is a function that neither judges nor prosecutors engage in. Since the evidence involved in assessing unwritten boundaries can be both difficult and time consuming to discover, many surveyors avoid the risk of error in assessing unwritten boundaries by noting the possibility of their existence without expressing an opinion as to whether they exist or where they are located.

For the above reasons, plus others, many surveyors have stayed within the technical role of monumenting written rights and disclosing the potential existence of unwritten boundaries. However, the increased emphasis on alternate dispute resolutions within the legal system is removing some of these old obstacles. New opportunities for surveyors to become actively involved in boundary dispute resolution and prevention are starting to appear.

Opportunities for surveyors to participate in alternate dispute resolution

Earlier, this paper discussed dispute resolution techniques and broke them into the three categories of externally imposed resolutions, hybrid resolutions and party-selected resolutions.

Externally imposed resolutions are obtained in litigation and in binding arbitration. Litigation and binding arbitration are similar in that a neutral non-party announces the resolution. In litigation that will be a judge or jury. In arbitration, that will be the arbitrator.

At present, there are few opportunities for surveyors to participate as a decision maker in this type of dispute resolution. Obviously, surveyors can always be called to jury duty. They also can try to qualify for inclusion on the approved lists of arbitrators maintained by the American Arbitration Association (AAA). But arbitrations conducted by the AAA usually result from disputes about contracts containing arbitration clauses. Boundary disputes would rarely, if ever, involve pre-existing contracts between the parties. After the dispute started, the parties to a boundary dispute could agree to submit it to arbitration, and if they did so, they could select an arbitrator and arbitration process by any means they could agree to. But this requires an agreement after the dispute, which is unlikely without third-party help.

Surveyors who want to serve as arbitrators have few realistic options available. They can try to be added to the list of approved arbitrators maintained by the AAA, but it is both hard to get onto the list, and few boundary disputes are referred to the AAA. They can create their own arbitration process and try to persuade the general public to submit their boundary disputes to them for resolution under that process as they arise. This would be a most daunting task for an individual, but might be feasible if done by an organization such as a professional society.¹⁹

Hybrid dispute resolutions are hard to characterize and discuss because of the variety of forms they can take. But one hybrid dispute resolution system is worth mentioning here.

Boundary surveying practice with the surveyor acting in the technical role can be characterized as a hybrid dispute resolution system. The surveyor acts as a neutral non-party who investigates the evidence affecting boundaries and issues her opinion without seeking the parties' input (except as to the whereabouts of evidence). In this sense, it is an external resolution, much like a judgment or arbitration award. But it is not binding on the parties or the courts. The parties can choose to honor the surveyor's opinion and use the surveyor's markers for their boundary, or they could hire other surveyors for additional opinions, or they could ignore the survey markers, or they could refer the matter to litigation. It does not result in a dispute resolution, but points the way to one if the parties elect to adopt it.

In litigation, the court may inquire as to the surveyor's opinion, but the court is not bound to follow it and will issue its own opinion *de novo*.²⁰ There are times in which a surveyor will be hired pursuant to a statutory provision or court referral under circumstances in which she appears to be authorized to issue opinions that are binding on the parties. But a close review of these statutes or court processes will reveal that the surveyor's opinion carries no presumption of correctness and if appealed to the court will be reviewed *de novo*. Opinions that carry no presumption of correctness should be considered as advisory and not binding.

It is always possible, when corners are extinct, that the surveyor may usefully act as a mediator between parties and assist in preventing legal controversies by settling doubtful lines. Unless he is made for this purpose an arbitrator by legal submission, the parties, of course, even if they consent to follow his judgment, cannot, on the basis of mere consent, be compelled to do so; but if he brings about an agreement, and they carry it into effect by actually conforming their occupation to his lines, the action will conclude them. Of course, it is desirable that all such agreements be reduced to writing, but this is not absolutely indispensable if they are carried into effect without.²¹

In the above passage, Cooley discusses some of the ways that surveyors can assist with the third type of dispute resolution, which this paper refers to as party-selected resolutions.

Most experienced boundary surveyors are familiar with party-selected resolutions. However, formal mediation is a process that few surveyors have traditionally practiced. It presents some of the same obstacles to surveyors as binding arbitration does, but they seem to be of a lesser degree, and new opportunities to get involved are opening up.

Party-selected resolutions are negotiated. Except for mediation, they are informal and subject to no pre-agreed upon rules. The most common and simplest occur when two people find out they are in dispute and work out a solution on their own.

Surveyors sometimes get involved in these resolutions when they are hired by a client (often two clients who have agreed to split the surveyor's fees) and told that the parties have agreed to a line and want the surveyor to survey it. Sometimes they have already contacted an attorney who will request specific data to be used in preparing deeds to memorialize the agreement. Other times, the surveyor will recommend that the parties contact an attorney of their choice to memorialize the agreement. Sometimes, the parties cannot be persuaded to seek the help of an attorney in memorializing the agreement. In these cases, depending on the state where the surveyor is located, the surveyor can usually do things to memorialize the agreement. Examples include recording the survey certificate, preparing and recording lot line agreements, as well as preparing and recording affidavits.

A more difficult situation exists when surveyors learn of the party-selected resolution after the fact, when one or both parties are not available to verify the terms of it. If surveyors conclude that such a resolution did occur, they can take the same steps here as when the parties are available to spell out their agreement in person. (Except that the option of preparing a lot line agreement to be signed by the parties obviously will not be available.)

When surveyors base their surveys on something other than the recorded deeds in the chain of title, that exposes them to risk. And that risk is increased when either party is not available to spell out the details of their resolution. Still, there are steps that can be taken to minimize the risk. Foremost of those steps is to record a memorial of the evidence that led to the conclusion that a resolution was previously arrived at. The more detail that the evidence is described with, the better.

Sometimes when the parties cannot reach an agreement they turn to a third party to help them reach agreement. Most attorneys try to serve as agents in negotiation before resorting to litigation. And even if a lawsuit is filed, the parties and their attorneys resolve it before they get to trial in the vast majority of cases.

Surveyors also have the opportunity to help their clients resolve potential disputes by negotiation and many surveyors act in this capacity when they can. The problem that a surveyor (and an attorney) faces in this situation is that the other parties know that the client has hired the agent. They assume that the agent's duty of loyalty requires them to take maximum advantage of the situation for their client. The agent is not trusted and consequently has a difficult task ahead of her. Still, the agent often is far enough removed from the emotions of the dispute to be able to come up with a resolution that both parties can accept as their own.

Formal mediation is a process in which a neutral person tries to help the parties arrive at an agreement. The mediator has to have the same characteristics of neutrality and non-involvement that a judge or arbitrator needs. But the mediator's task is different. The mediator does not decide anything other than the rules to be followed in the negotiations. Usually, the mediator tries to refrain from even suggesting possible resolutions. The mediator does not normally assess evidence or apply that evidence to the substantive law. Instead, the mediator just tries to keep the parties focused on the issues to be resolved.

One of the ways that the mediator can help the parties arrive at a resolution is by assessing and pointing out the ramifications of any proposed resolutions as well as the ramifications of not reaching an agreement at all. Another important way that the mediator helps the parties is by memorializing the agreement if one is reached. A surveyor is ideally suited to perform both of these services with regard to boundary dispute mediations.

Often the parties do not understand the financial costs of litigation. One of the tools a mediator has available to keep the parties on track towards reaching an agreement is to point out the cost of not reaching an agreement. Most surveyors are (or can become) familiar enough with the litigation process to be able to explain it step by step, along with estimated costs for each step. The costs of collecting survey evidence in anticipation of trial and of presenting expert testimony is rarely considered by the parties, much less understood. Surveyors are qualified to point out those costs, item by item.

Often the parties propose resolutions that are impractical for one reason or another. Surveyors are well positioned to note and comment upon the practical ramifications of various proposals, including conformity or lack thereof with governmental regulations. Other times the disputes are based on misunderstandings of law and legal rights. Although few mediators would get involved in the negotiations by pointing out such misunderstandings, sometimes the parties want a sub-issue clarified by the mediator. Again, a surveyor is well situated to help with such questions.

Finally, the resolution needs to be memorialized. The minimum memorial of a boundary dispute resolution is a legal description of the agreed upon boundary. Ideally, the legal description will call for monumented lines on the ground and a survey certificate. Since a surveyor will need to be involved in the memorialization of the agreement, it is more efficient, economical and reliable if the mediator and the surveyor are the same person.

The opportunities for a surveyor to become involved in mediation are similar to those available for arbitration with two exceptions.

One is that the degree of mediation-specific training needed to be an effective mediator is usually considerably less than for arbitration. Since arbitration is an externally imposed judgment, it requires more knowledge of the substantive law involved and the procedural law dealing with arbitration, appeals, and due process. Since mediation is party-selected, the training can be limited to the practical concerns of dealing with disputants as well as the features of well-drafted agreements. There is no need to be concerned with appeals since the parties cannot appeal their own decisions. All they can do is to challenge the accuracy and completeness of the written memorial or the enforceability of it. Experienced boundary surveyors should already be familiar with the practical aspects of dealing with disputants as well as basic contract requirements. Training to apply knowledge that is already possessed to the unique practices of formal mediation should be all that is required.

The opportunity for surveyors to become involved in formal mediation differs from the opportunity to become involved in arbitration in another way, too. This is partially because of the new emphasis on alternative dispute resolution within the legal profession. It is more directly related to the fact that mediators require less legal training than arbitrators. The ability of courts to force parties to try an alternative dispute resolution before resorting to litigation may present a special opportunity to surveyors in jurisdictions that have authorized court-ordered mediation.²²

Courts that are seeking to reduce their caseloads have few options available to them. Binding arbitration is not an alternative because that would deprive the parties access to the courts. It would be a delegation of judicial power against the parties' will, and as such, would violate most, if not all, state constitutions as well as the U.S. Constitution.

Court-ordered mediation does not have that problem, because court-ordered mediation does not deprive the parties of an opportunity for a regular trial. It merely adds another step to the trial process. If the parties reach a resolution, it will be by their agreement, and no one will be deprived of anything against their will. If the parties do not reach agreement, the court will still be there to decide the dispute.

Mediators used in court-ordered mediation are either selected out of the private sector by the agreement of the parties, or are selected from an approved list maintained by the court system. Qualifications for being placed on the approved lists vary from jurisdiction to jurisdiction, but should only require an additional investment of a few dozen hours of mediation training for surveyors who are located in states where the opportunity exists.²³

There remain obstacles to be overcome by surveyors who would like to become more actively involved in preventing and resolving boundary disputes, but new opportunities are arising. The risks to the surveyor who wants to include evidence of old unwritten boundary agreements in their boundary analyses still remain. And agency law issues and financial disincentives still remain. But an overburdened legal system is beginning to open up new opportunities by allowing surveyors to participate in court-ordered mediations. And once the general citizenry, the surveying profession and the legal profession become accustomed to seeking dispute resolutions prior to litigation, the opportunity for surveyors to function as mediators can be expected to increase as well.

Conclusion

Boundary surveyors are accustomed to thinking of their role as being judicial in nature. They often think of themselves as being of service to, and a part of, the legal system. And this is true, but only in part.

For the legal system does include a place for surveyors within it. And that place sometimes is judicial in nature, such as when surveyors collect evidence, analyze it, and report their opinion as to where boundaries are located. But surveyors never become judges. Anytime surveyors think judicially, they think as a person who resolves disputes by "externally imposed" means. Only arbitrators operating under a binding arbitration agreement, judges, and juries have this power. Surveyors who think judicially, like a judge, only issue opinions as to what one of these decision makers will decide.

The legal system exists to resolve disputes and it prefers to resolve them without the need for litigation. Procedural rules that encourage parties to settle their disputes without litigation have been in place for many years. New rules are being enacted to give more encouragement to out of court settlements, and some jurisdictions are authorizing judges to order people to try alternative dispute resolutions before a trial will be held.

The legal system has a role for surveyors that is not judicial and not binding on the parties. It is more of a counselor's role than a judge's role or a technician's role. There is a place for it in formal mediation, including court-ordered mediation. There is also a need for it to be exercised informally, in counseling clients and their neighbors about the options available for resolving discrepancies and preventing future disputes.

The role is an old one. What are new are the opportunities to practice it via court-ordered mediation in those jurisdictions that authorize it. What is also new is an increased emphasis on resolving disputes without the need for litigation. When that emphasis is applied to boundary disputes, it translates into new opportunities to perform in an old role.

Footnotes

1. 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.
2. The Judicial Functions of Surveyors, *ibid*
3. No effort is made to argue the validity of this underlying premise in this paper. The author asks that readers who dispute the validity of it accept it as a given for now. Arguments in support of or opposition to this premise could make for a paper in and of themselves.
4. These statements are made without the benefit of a state by state examination of licensing criteria. They are based on the December 1, 1997 Report of the Task Force on the NCEES Model Law for Surveying which contains a recommendation on page 3 "...that the use of the title 'Professional Land Surveyor' be preserved for those practicing legal and boundary surveys..." The report further recommended the implementation of a licensing system in which Professional Land Surveyors would need to pass state specific licensing exams, whereas those bearing the new title of Geomatics Professional would not need to pass state specific exams. While these are new recommendations, it is presumed that the recommendation limiting the practice of Professional Land Surveying to legal and boundary surveying is closely related to the existing licensing practices in most states.

5. A history of questions and responses to the question of why law exists can be obtained in most standard textbooks on jurisprudence.
6. This conclusion that people in a state of anarchy experience insecurity and uncertainty is derived from the definition of anarchy as "Absence of government; state of society where there is no law or supreme power; lawlessness or political disorder." Black's Law Dictionary, 1979, 5th edition, West Publishing Company. In such a state, the strongest could be expected to take what they want and dominate the others. However, given the fact that strength fades with age, and that new alliances can be formed at any time, all persons, even the strongest would be insecure and uncertain as to their futures. This in turn hinders economic productivity, for people aren't likely to invest their labor in anything (other than armaments and camouflage) unless they believe they have a reasonable chance of reaping the fruits of their labor.
7. While the various branches of government are roughly aligned with the three components of a legal system, they are not perfectly aligned. For instance, the judicial branch sometimes creates substantive law via its concept of common law. The executive branch also creates substantive law by way of administrative rules and administrative law hearings are a part of the dispute resolution system. The legislative branch not only creates substantive law, but also creates procedural law from time to time as well.
8. Article III, Section 2 of the U.S. Constitution limits jurisdiction of the federal courts to actual cases or controversies. This has been interpreted to preclude the federal courts from issuing advisory opinions on matters. Ripeness doctrines provide that the courts will not decide hypothetical questions. There must be an existing dispute that is ripe for resolution. Similarly, doctrines as to standing preclude persons who do not have legally enforceable rights that could be materially affected by the outcome of the dispute to participate as a party to litigation. See, generally Constitutional Law, 11th edition, 1985, by Gerald Gunther, published by Foundation Press, Chapter 15, Sections 1-3.
9. As of 1997 there were 177 law schools offering courses in alternative dispute resolution. Directory of Law School ADR Programs and Courses, 1997, Section on Dispute Resolution, American Bar Association
10. 50 schools in the United States are listed as offering a program of one type or another, ranging from certificate programs to graduate degree programs on the web page for the Conflict Research Consortium of the University of Colorado. See <http://www.colorado.edu/conflict/program.htm>
11. The small claims court process varies from jurisdiction to jurisdiction. While each jurisdiction has a unique process, Michigan's small claims court process is offered as an example of one such process. Parties who agree to go through the small claims court process in Michigan give up the right to recover more than \$3000 in damages, the right to trial by jury, the right to have an attorney present, and the right to appeal. Standard rules of evidence do not apply in small claims court either. The process begins with the plaintiff opting to go into small claims court. The defendant then has the option of removing the case to the general division of the district court. If neither party removes the case from the small claims court before the matter is heard there, then the above rights are waived. See, generally, MSA 27A.8401 *et seq.*; MCL 600.8401 *et seq.*; MCR 4.300 *et seq.*
12. See Mediation in the U.S. Legal System, by Edward P. Davis, Jr., published on the Institute for the Study and Development of Legal Systems web page, at <http://www.isdls.org/adr.htm> for a general discussion of mediation including court-ordered mediation. Also see the following regarding court-ordered alternative dispute resolution in the following states: MCR 2.410 (C)(1) in Michigan, TSC Rule 31 in Tennessee, Wis Stat 802.12(a) in Wisconsin, Nev S.C.R. 3(A) in Nevada, Cal CCP 1141.10 in California, and Gen. Prac. Rule 114 in Minnesota.

13. One such rule deals with the admissibility of hearsay evidence. Generally, hearsay is not admissible in trial proceedings. But there are many exceptional circumstances in which hearsay is admissible. One such exception is commonly referred to as a party admission. FRE 801(d)(2)(A) Another related exception are statements against interest. FRE 804(b)(3) The use of confessions and other forms of hearsay that are party admissions is widespread. Indeed, this type of evidence may be the most highly prized form of evidence sought by prosecutors and other litigators. But there are problems created by allowing this evidence to be admitted at trial.

It tends to cause parties to clam up and not talk. In the criminal context, that is not such a big issue (although it is a big issue to the law enforcement community). But in the context of civil disputes, it is a big issue. This is because the justice system wants to encourage the settlement of those disputes without resort to litigation. And rules that encourage parties to clam up and not talk are antithetical to negotiated settlements. The parties have to communicate in order to reach an out of court agreement. If they fear that statements made during their settlement negotiations will wind up being used as evidence against them at trial, they are not likely to be as forthright in those discussions as they might otherwise be. So, nearly all judicial systems have a rule that provides that statements made in the context of settlement negotiations are not admissible, period. See FRE 408 for evidence that the federal judiciary provides for this.

Other examples of rules that encourage party agreements by superceding the substantive law are more familiar to surveyors. These are found in the doctrines of oral agreement, acquiescence, repose and some forms of estoppel. These all operate to supercede the part of the statute of frauds that requires transfers of real property interests to be in writing. They only differ in the circumstances under which unwritten evidence of an intent to transfer an interest in real property is allowed to supercede the statute of frauds.

14. The opinion is generally expressed on the ground with the placement or marking of monuments. It is also expressed graphically with a map of the survey results. The opinion may also be expressed in writing with a new legal description, or a survey report, or an affidavit.
15. The Judicial Functions of Surveyors, *ibid.*
16. The Judicial Functions of Surveyors, *ibid.*
17. The Judicial Functions of Surveyors, *ibid.*
18. The doctrines of *res judicata*, and collateral estoppel operate to bring finality to a dispute once a decision has been reached. Generally, they provide that once the matter has been decided and the time for appeal has expired, that matter cannot be revisited again, even if new evidence is discovered. The doctrines are designed to give closure to a dispute and rest on the premise that it is better to have disputes ended once and for all, even if they were erroneously decided.

The doctrine of harmless error is applied to appeals from lower court decisions. It generally provides that lower court decisions won't be reversed even if there is error, if that error is harmless and has no practical impact on the final outcome.

The doctrine of repose that was announced in the Michigan case of *Adams v Hoover* appears to be trying to create a surveyor's version of something akin to *res judicata* or collateral estoppel. See *Adams v Hoover*, 196 Mich. App. 646; 493 N.W.2d 280; 1992

19. The prospect of surveying associations functioning much as the AAA does, only limited to boundary disputes and other areas related to surveying, has potential. The economies of scale are there, the effort would further the public welfare, and the effort would improve the esteem and the income of the members who chose to participate. The author is unaware of any surveying associations that provide this type of service as yet, but it seems that nothing prevents them from doing so either.

Mediation and arbitration services can be provided by the private sector without running afoul of state licensing laws. Similarly it is not necessary to be a member of a state bar association to provide these services privately either. (Those jurisdictions that have court-ordered alternative dispute resolution do have criteria that must be met to get on the court-approved list for referrals).

20. When a court reviews a matter "*de novo*", it is reviewing it from the beginning with no presumptions as to the correctness of the prior decision that is being appealed from. The review is made as if there had been no prior decision at all. The prior decision is considered to be a mere opinion, entitled to no more weight than any other opinion. When a surveyor issues an opinion via the placement of monuments and the preparation of a survey certificate, that opinion is given no weight until such time as the surveyor testifies to it at trial (or via deposition). And even then, it gets no more weight than the opinions of other expert witnesses.

21. The Judicial Functions of Surveyors, *ibid*.

22. Some courts that are implementing court-ordered alternative dispute resolution programs require that a person be a member of the state bar to get on the approved roster of providers. Illinois appears to be an example of such a state. See Illinois Supreme Court Article I, Rules 86 *et seq*. Others seem to require arbitrators to be members of the state bar, but not other dispute resolution providers. Still others do not require membership in the state bar at all.

Michigan and Tennessee are two states that seem open to having surveyors participate in their court-ordered alternative dispute resolution programs. Both states allow non-attorneys to participate upon completion of a 40 hour approved training program, and both require participation in a minimum of one supervised mediation session. Tennessee also requires 6 years of related work experience for persons who have a baccalaureate degree, or 4 years for a person with a graduate degree. See Michigan Court Rule 2.411(F)(2). and Tennessee Supreme Court Rule 31, Sections 13 and 17.

23. Michigan and Tennessee's programs are 40 hours in length. Michigan Court Rule 2.411(F)(2). and Tennessee Supreme Court Rule 31, Section 17. North Dakota is proposing one that will be 30 hours long. Proposed N.D.R. Civ. P. Rules 8.8 and 8.9. Eight hours of continuing education in mediation training is also required every two years to remain on the approved list in Michigan. Michigan Court Rule 2.411(F)(4)