

Mediating Boundary Disputes

ACSM-MARLS-UCLS-WFPS CONFERENCE 2009



Written and Presented by:
John B. Stahl, PLS
P.O. Box 901617
Salt Lake City, Utah 84090-1617
www.CPLSinc.com
©2008 Cornerstone Land Consulting, Inc.

Mediating Boundary Disputes – Abstract

Mediating Boundary Disputes will define the role of the surveyor and the various formats available for mediation of boundary disputes between neighbors. This workshop will provide the surveyor with hands-on discovery of the infinite variety of solutions that are available to the landowners for resolution of their problem. The surveyor will learn to think outside of the box when dealing with landowners. This workshop is designed enable the surveyor by enhancing negotiation skills used in the mediation process.

Have you ever wished the landowners could just come to an agreement and settle their dispute or remove the ambiguity that exists in their title documents? This workshop will provide hands-on instruction on utilizing the numerous tools available to the mediator to encourage an agreement. Real-life situations will be enacted which expose the variety of solutions that can be achieved through negotiation. The surveyor will come away from this workshop with a new outlook on his ability to provide a professional service to his client and their neighbor.

Instructor Biography



John B. Stahl, PLS, is a registered professional land surveyor in the states of Utah and Montana, currently owning and operating Cornerstone Professional Land Surveys, Inc., and Cornerstone Land Consulting, Inc., in Salt Lake City. Mr. Stahl specializes in surveying land boundaries, resolving boundary conflicts, performing title research, land boundary consultation services, mediation and dispute resolution. He has been qualified as an expert witness in numerous boundary and negligence cases and has actively participated in the preparation of amicus curiae briefs to the Utah Supreme Court. He has furthered his mediation education by participating in a state qualified 40-hour training program. Mr. Stahl has been a state chair of the Utah Council of Land Surveyors and a Utah delegate to the Western Federation of Professional Surveyors. He is an adjunct professor for the Salt Lake Community College, where he has taught mathematics, ethics and liability courses for land surveying students. He has taught an extensive course in land boundary law since 1991. Mr. Stahl received his A.A.S. degree in land surveying from Flathead Valley Community College in Kalispell, Montana and has authored several articles and publications covering topics on boundary laws, research, and resolving conflicts of evidence.

Table of Contents

Mediating Boundary Disputes

| | |
|--|----|
| Introduction | 1 |
| Defining the role of the mediator | 5 |
| Mediation Defined | 5 |
| The Disinterested Third-Party | 6 |
| The Facilitator | 8 |
| The Expert Witness in Mediation | 9 |
| Mediation Agreement | 10 |
| Preparing Yourself as a Mediator | 11 |
| State Specific Regulations | 12 |
| Mediation Training | 14 |
| Certification Process | 15 |
| Unauthorized Practice of Law | 17 |
| Conduct of the Mediator | 19 |
| Rule I. Impartiality (20) | |
| Rule II. Conflicts of Interest (20) | |
| Rule III. Competence (20) | |
| Rule IV. Confidentiality (20) | |
| Rule V. Quality of the Process (21) | |
| Rule VI. Advertising and Solicitation (21) | |
| Rule VII. Fees (21) | |
| Rule VIII. Self-Determination (21) | |
| Listening and Reframing | 22 |
| Looking for the Alternative | 23 |
| Finding the Common Ground | 24 |
| Equal Dissatisfaction | 24 |
| Your Professional Opinion | 25 |
| Encouraging the Agreement | 26 |
| Documenting the Agreement | 26 |
| Conclusion | 28 |
| Sample Mediation Guidelines | |
| Sample Memorandum of Understanding | |
| Mediation Exercise #1 – Doctor, Doctor! | |

Mediating Boundary Disputes

by John B. Stahl, PLS

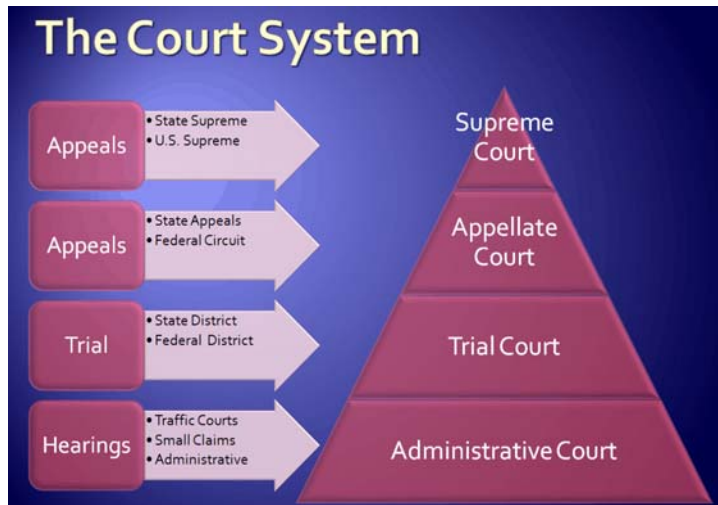
Introduction

Mediation has provided a means for parties to settle disagreements and disputes as long ago as history records. The first biblical reference to mediation is found in Exodus 2:13 (referred in Acts 7:26). ^{2:13}*When [Moses] went out the next day, behold, two Hebrews were struggling together; and he said to the man that did the wrong, "Why do you strike your fellow?"* (Revised Standard Version) Throughout history, mankind has set up judicial processes for settlement of disputes which arise among its citizens. Cultural distinctions were incorporated into the designs of settlement processes allowing multiple solutions ranging from adjudication by an all-powerful chieftain, king or ruler, or mediation by the spiritual leaders, to individual battles and duels-to-the-death between the disputants.

Although the ultimate contest might provide a quick and inexpensive solution for dispute resolution, alternative and less finite means for settlement are typically sought. The tendency toward final determinations require the rule of law to enforce any settlement. When parties work together to amicably reach a settlement agreement, the only enforcement available is based upon their mutual trust to follow their agreement. When a binding form of resolution is sought, the parties are afforded the rule of law which will enforce the judgement requiring their obedience. When the disputing parties are separated by a lack of trust, their only means for ending their dispute is by submission to a ruling party (the judicial process) backed by the strength of the police force (an administrative or executive process).

The judicial process is made of layers of judiciaries and appellate levels. When Moses grew weary of ruling the people, he said, ^{18:15}*Because the people come to me to inquire of God;* ^{18:16}*when they have a dispute, they come to me and I decide between a man and his neighbor, and I make them know the statutes of God and his decisions.* Moses' father-in-law counseled him by saying, ^{18:21}*Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens.* ^{18:22}*And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you* (Exodus 18:13-22, Revised Standard Version). Thus was born the Judeo-Christian

NOTES:



legal system from its mediators, governors and administrative law judges upward to its highest courts of appeal.

Much of the surveyor’s work focuses on penetrating the legislative and administrative laws, rules and regulations which govern the development of property. The surveyor’s expertise can supply the client with information needed to accurately locate land boundaries, prepare maps, and design improvements to the property which will meet

governmental requirements. The surveyor’s expertise can also be a valuable service in the judicial process. Much of the surveyor’s knowledge with the administrative rules and regulations can assist the parties during settlement or litigation.

The history of surveyors and mediation is quite evident as well. Prominent surveyors in our nations history were memorialized on Mount Rushmore. Three of the four busts carved into granite, Washington, Jefferson, and Lincoln, were surveyors by trade. Theodore Roosevelt, who couldn’t seem to find his way on a map as he charged San Juan Hill (actually named Kettle Hill), apparently was in need of their services. President Roosevelt, even though not a land surveyor, did act as a mediator to successfully bring peaceful conclusion to the Russo-Japanese War in 1905.

“It is quite true that for many people in the world, the Portsmouth Peace Treaty is the story of the negotiations between Russia and Japan. But if one takes a hard look at the preparation for peacemaking in terms of mediation, it is not just the story of two nations. Rather it is the story of more than three nations. When it comes to the question of who hosted the peace conference or the peace making effort, no one argues that it was the Americans led by American President Theodore Roosevelt, as he hosted the treaty negotiations in such a way as to put the U.S.’s own stamp on the final outcome. This led us to believe that President Theodore Roosevelt acted successfully as a mediator to bring the Russian-Japanese conflict to an end.” *The Road to the Portsmouth Peace Treaty: The Reluctance of European Nations to Act as Mediators*, Shoji Mitarai, Soporro University, IACM Conference 2005

George Washington was also an apparent advocate of mediation. His last will and testament contained the following Alternative Dispute Resolution (ADR) provision:

NOTES:

“But having endeavoured to be plain, and explicit in all Devises – even at the expence of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that **all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants – each having the choice of one – and the third by those two.** Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.”

Thomas Jefferson is not only the recipient of honor having the Thomas Jefferson School of Law named after him, but is also attributed the honor of the Thomas Jefferson Mediation Program attending the community. The Thomas Jefferson Mediation Program gives students the opportunity to participate directly in the resolution of community disputes. The program views mediation in the legal community as “a growth industry” and the Thomas Jefferson School of Law “has been a community leader in immersing students in the art of conflict resolution through this clinical program.”

Abraham Lincoln was a skilled trial lawyer who viewed litigation as a “last resort.” He is quoted as writing:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time.” *Abraham Lincoln’s Notes for a Law Lecture*, July 1, 1850.

As ancient as the concepts of Alternative Dispute Resolution (ADR) are, the courts have renewed their support in out-of-court resolution techniques. Supreme Court justice Sandra Day O' Connor has said,

"Courts of this country should not be the places where the resolution of disputes begins. They should be the places where disputes end - after alternative methods of resolving disputes have been considered and tried."

Admonitions have been made directly to surveyors, encouraging them to take an active role in society as mediators, assisting landowners in the establishment of their boundaries and settlement of disputes. In a presentation addressed to the second annual meeting of the Michigan Association

NOTES:

of Surveyors and Engineers held January 11-13, 1881, Thomas M. Cooley, Chief Justice of the Michigan Supreme Court, made the following observations:

“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.” *The Judicial Function of Surveyors*, The Michigan Engineers’ Annual, 1880-1881

Chief Justice Cooley’s article, entitled *The Judicial Function of Surveyors* provides surveyors with timeless guidance which rings true to this very day. The *Judicial Function* paper has been printed and re-printed in surveyor’s textbooks for more than a century. The paper appears in the appendices of such treatises as: *Theory and Practice of Surveying*, by J.B. Johnson, 1886; *A Manual of Land Surveying*, by Hogman and Bellows, 1891; *A Text-book of Plane Surveying*, by William G. Raymond, 1896; *Practical Surveying*, by Ernest McCullough, 1915; *Evidence and Procedures for Boundary Location*, 3rd, 4th and 5th Editions, by Brown, Robillard & Wilson; 1994, 2002, and 2004.

So are the words of famed authors such as Raymond Skelton who, in 1930 wrote:

“Furthermore, the [surveyor] is often the first to find the conflict between an established line and its corresponding deed line. Where boundaries are unsettled such discoveries are likely to start a dispute, for the first impulse of the party encroached upon is to defend the land laid down by his deed calls. It is much easier to prevent a fight than to stop one, and for a party to defer action than to back down from an untenable position. Therefore, if the [surveyor] can explain the principles of establishment and illustrate them by an abstract application, the militant party may be persuaded to seek legal advice rather than to depend upon rough tactics. When this is accomplished the matter may often be adjusted peacefully, and when they elect to abide by the established line, the position of the new line may be made a matter of record so that the conflict with the deed line is explained and thus overcome.” *The Legal Elements of Boundaries and Adjacent Properties*, Ray Hamilton Skelton, § 305, 1930 (1st ed).

The nations legal justice system is founded upon the constitutional rights enjoyed by its citizens. They are not to be discouraged from settling their differences amicably and should be given every opportunity to avoid litigation. The legal system is designed to assist disputing parties at every level of conflict even when confrontation is inescapable. One of the primary keys in encouraging

NOTES:

settlement is to avoid the dispute as often as possible and, when unavoidable, to resolve the conflict as soon as possible. Conflicts are always easiest to resolve before tempers flair and before animosity sets in. Surveyors are typically in an ideal position to facilitate the landowners by assisting them in resolving matters upon discovery. Surveyors are also in an ideal position to act as the catalyst as if lighting a match to tinderred grass.

Defining the role of the mediator

The justice system's view of dispute resolution has undergone a refreshing overhaul in recent decades. The variety of solutions available for resolution are being redefined in the overhaul. Where the justice system has set itself according to an ancient set of rigid rules and procedures, the recent Alternative Dispute Resolution (ADR) trend has been transformed to include a number of potential formats which result in successful resolutions without litigation. The litigious nature of society has caused an outpouring of cases, overwhelming many of the courts. Schedules were burgeoned with trivial disputes with high likelihoods of being settled out of court if given the opportunity. Many courts are beginning to require that the parties attempt a mediated settlement before allowing them to present their case before a tribunal. Judges would much rather the people decide their own fate.

Mediators, unlike arbitrators and judges, are not decision makers. Their role is to assist the parties in arriving at their own settlement. Mediation is not intended to make clients happy. Rather, the goal is a settlement agreement that the parties can live with. The role of the mediator will somewhat change with the setting agreed to by the parties, but their primary role as a facilitator will be foremost. The mediator will assist the parties to communicate and to negotiate their positions and will encourage them to consider alternative solutions to their problem. Mediation is performed by people from various walks of life including the play ground monitor, the priest, the human resources director, or your mother-in-law. Many mediations, in more formal settings or in lieu of litigation, are performed by retired judges and lawyers as well as certified mediators, arbitrators, and negotiators. Most surveyors have mediated boundary disputes without even realizing their role in solving a neighbor problem.

Mediation Defined

The Dispute Resolution Commission, which serves as the governing body for North Carolina's Superior Court mediation program, has adopted Standards of Professional Conduct which define mediation as follows:

NOTES:

“Mediation is a private and consensual process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.”

Mediation is not a particular routine designed specifically with a set of rigid rules. The mediation setting and process is dictated by the parties and their particular situation. The environment for the mediation may vary from the kitchen table, an on-site walk through, a conference room or even a formal courtroom. There is no established procedure other than general recommendations. Mediation can be categorized into basic formats which assist in understanding the variety of possible settings.

The Disinterested Third-Party

The mediator selected by the disputing parties must not have an interest in the outcome of the settlement. The mediator must be free of conflicting interests or the outcome of the negotiations may appear to be biased. The surveyor, as mediator, must advocate an agreement between the parties, not any particular location for the boundary line. Facilitating an agreement is the goal of the mediator. In order to accomplish this goal, the mediator must clearly act as a disinterested third-party to the mediation. There must be no bias in the position of the mediator. Even a perceived bias by one of the parties may be enough to taint the outcome and potential for an agreement. The parties must be aware that the mediator favors neither party and has no stake in the outcome of their agreement.

Does this mean that a surveyor, while employed by one neighbor and upon discovery of a problem needing resolution, cannot act as a mediator? Not necessarily. The surveyor is required to maintain impartiality in all of his boundary line decisions. The fact that the survey is paid for by one of the owners, can not affect the surveyor's interpretation of the evidence and determination of the boundary location. When a problem is discovered which is beyond the surveyor's authority to resolve, the surveyor should encourage their client to meet with the adjoining landowner to attempt a mutual resolution. The adjoining landowner is a necessary party to undertake any action to repair

NOTES:

significant ambiguities or uncertainties. The surveyor's involvement in the meeting only serves the purpose of providing information to the parties so they may reach an informed decision.

Many times, surveyors may be asked to assist the parties in understanding the problem discovered and identifying the potential forms of resolution which may be available to them. In this position, the surveyor is taking on the role of the mediator. If the parties are unable to decide upon a resolution, it is not uncommon for them to ask the surveyor for their opinion with regard to a possible solution. Only then should surveyors submit their opinion for consideration. If the parties agree with the submission and are willing to abide by it they have, in effect, elevated the surveyor to the level of an arbitrator in their agreement. As long as the parties agree to abide by the surveyor's decision and do so by actually conforming to the surveyor's decision, their actions will bind them to their agreement. If the parties successfully enter into an agreement regarding their boundary, and choose to abide by their agreement, the surveyor can act as the mediator facilitating them with the necessary documentation process.

Disinterest in the outcome of the boundary location is a role that should be familiar to surveyors. The ability to remove themselves from the decision process and to allow the parties to reach the decision, right or wrong, is sometimes difficult. Surveyors must remind themselves that they are disinterested in the outcome and that their opinion is irrelevant to the parties' resolution. The surveyor's opinion must be held in check and expressed only when requested or when the issue becomes a matter of litigation.

Rule 114 of the Minnesota General Rules of Practice provides a clear description of the procedures for deciding whether to use ADR. The Rule mandates the court provides parties with information on ADR. Parties are required to discuss the use of ADR and address this issue in the informational statement filed with the court. If the parties are unable to make a decision on the use of an ADR process or a neutral, the court may order the parties to any number of ADR alternatives. This does not mean parties are required to settle their differences through ADR. They are required, however, to at least discuss their differences with the neutral and attempt to resolve their differences prior to a trial. The Minnesota statutes define this disinterested mediator as a "neutral."

A "neutral" is an individual or organization who provides an ADR service, such as mediation or arbitration, as stated in Rule 114.02(b). Neutrals who are on the State Court Administrator's Rule 114 Neutral Roster are "qualified neutrals." Neutrals are professionals with a wide variety of backgrounds. Some are also attorneys, and they do not represent anyone for whom they are acting as a neutral.

NOTES:

Minnesota, as does nearly every state, defines the role of the mediator in the litigation process and establishes the statutory guidelines for the regulation their practice. The state’s regulations are a must for study by all surveyors interested in providing this vital service to their clients. The service can provide the client with alternative considerations short of calling their attorney at the first sign of a problem. They are often quite capable of resolving the issue themselves.

The Facilitator

Facilitation, much like mediation, is particularly useful to prevent conflicts from arising between parties. Facilitation is a process which is more directly applicable to the informal processes which the surveyor is more likely to be involved with when a problem is discovered. Facilitation is, however, different from mediation. Mediation is a *goal* oriented method for obtaining an agreement between parties. Facilitation is a *process* oriented method which enables or enhances the parties’ ability to arrive at an agreement. Both facilitation and mediation will result in an agreement.

Facilitation works best during the *pre-conflict* stage of a potential disagreement. The emphasis on the process engages the parties presenting their ideas for resolution or their desires for outcome. The process will provide opportunity for the parties to each express their concerns by encouraging open communication between the parties while seemingly directed to the facilitator. The facilitator is there to make the process of communication easier, often when direct communication between the parties seemed impossible.

During the presentation of ideas, the facilitator should act as the record keeper. Often a flip chart can be used to aid in documenting the ideas and recording them with visible means. The ideas recorded should be:

- visible to all members;
- maintained simultaneously with the thought process;
- accurately reflect the language of the parties; and
- condensed to a final agreement

As ideas are presented, the facilitator should encourage more ideas and discourage any comments given regarding ideas already presented. The purpose of the presentation phase is to exhaust the possibilities for solution before beginning the evaluation process. During the evaluation process, the parties can discuss the positive and negative elements of each proposed solution and can refine the acceptable language which defines the solution. Many, if not most, of the ideas will be

NOTES:

completely eliminated during the evaluation phase and the parties will be naturally directed to a common solution which is ultimately acceptable.

The Expert Witness in Mediation

There are several roles which the expert witness can play in the mediation process. The surveyor's role will be determined by the stage of dispute when brought or discovered. Are the parties already aware of the problem or are they looking for ammunition to use against the neighbor because of a separate underlying problem? Have the lawyers already been called? Has litigation begun? Or, is the surveyor the one to discover the problem with opportunity to resolve the potential dispute before one arises?

As the surveyor, when a potential dispute is discovered, there are numerous avenues available. The crucial factor the surveyor is faced with is *preparation*. Preparation takes time, and time is the most common reason for dissatisfaction between surveyors and their clients. Upon discovery, the surveyor must notify the client, activate the stop-work clause in their contract, and negotiate the additional time and expenses for the necessary research. The surveyor must properly gather the evidence to determine the nature and extent of the problem before determining the level of involvement needed for its resolution. Without the necessary information identifying the source and nature of the problem, any repair decisions will be uninformed decisions.

“Although a successful mediation primarily relies on an experienced mediator and the willingness and participation of the parties involved, expert witnesses can have an important role to play. For example, it is not unusual for each party to invite a consultant surveyor to attend the mediation to assist with technical issues in the case. But just how much do expert witnesses, such as surveyors, know about the mediation process, and what can mediators do to maximize their contribution?” *All in a Day's Work*, The Maritime Advocate, Issue 17, January 2002, David Taylor

The expert witness must have a basic understanding of the mediation process. He should understand the fundamental difference between mediation, arbitration, and litigation. The litigation process has a specific set of rules which the surveyor must follow with a primary goal of assisting the court in ascertaining the proper facts of the case and teaching the attorneys and the judge the common application of the legal principles and standards of practice involved for the determination of the matter being litigated. In an arbitration setting, the surveyor provides a similar role, albeit less formally. In the mediation setting, however, the surveyor's role is quite different. The key goal of the mediation is to obtain a settlement. This goal is not a matter of who is right or wrong, or who

NOTES:

has the better case. It's not a matter of where the boundary is located, or who is encroaching. It is a matter that is given to the disputing parties to reconcile. The focus is upon reconciliation, not upon the problem.

The surveyor must also understand the mediator's role in the process. The mediator needs to be informed of the facts of the case and he may want the expert's input as to the likelihood of success, if litigated. The mediator may want this information given in private session with the expert, or he may want the expert's evaluation done before the client or openly discussed before both parties. The level of dispute between the parties or the style of the mediator will typically set the stage.

Mediation Agreement

The primary goal of mediation is to achieve a settlement between the parties. It is immaterial if the settlement is right or wrong, good or bad from the mediator's perspective. What is material is whether the settlement is acceptable or unacceptable to the parties. An unacceptable settlement, of course, isn't a settlement, but is a failure to mediate. There are, however, degrees of unacceptability which do not result in failure. It is often said that a successful mediation is one where both parties are equally dissatisfied with the result.

The mediation process naturally moves both parties from their opposing positions toward a mutual agreement. That process will require the parties to yield their position from some perspectives in exchange for a greater benefit – the agreement. During the mediation, the parties are allowed to communicate their concerns and to vocalize their emotions. Sometimes simply venting those emotions to one another is part of the mediation process. The mediator must take opportunity to turn the negative emotions into positive statements of importance. When negativism surfaces during a mediation, it always has a positive side which, when conceded, results in healing and brings objectivity back to the discussion.

An undefined problem has an infinite number of solutions. - *Robert A. Humphrey*

For every complex problem, there is a solution that is simple, neat, and wrong. - *H. L. Mencken*

The mediation agreement can come in many forms and an infinite number of solutions. The mediator is not a judge or an arbitrator. The mediator's role is not to advise on the success of the agreement, but to simply document the agreement in a form which the parties will mutually understand their result. The agreement, as with any successful contract, must be founded upon a meeting of the minds, an assent.

NOTES:

The success or failure of every agreement must consider the long term. Three elements are essential for the preservation of a successful agreement: assent, good faith, and mutual satisfaction. Any agreement constructed upon a foundation of these elements will achieve long-term success. There are three elements which can serve to destroy the completion of any agreement, including its long-term success: mutual mistake, misrepresentation, and fraud. These three agreement destroyers can undermine the agreement causing it to crumble. The mediator should be on guard for signs of any one of these elements. If the parties are mistaken in their belief, the mutual mistake can be cause for the agreement to be revisited when new information is discovered which was unknown at the time of the agreement. If one of the parties misrepresents information or is untruthful in its disclosure, the parties will be unsuccessful in their assent. Intentional fraud or deceit by one of the parties will also potentially undermine the agreement success.

Preparing Yourself as a Mediator

Mediators are not decision makers. This concept is a difficult one for many surveyors to yield. Surveyors make decisions every day with regard to boundary locations, building placements, regulatory issues, etc. These decisions are based upon a logical evaluation which results in a predictable outcome. That process is contrary to mediation. As long as surveyors understand the distinction, they can provide a valuable service assisting their clients in the process of resolving disputes.

The surveyor makes a good mediator because they have no vested interest in the boundary location. The surveyor really doesn't care how the parties resolve their differences. The documentation can be prepared no matter what settlement outcome results. If the parties decide to move their boundary, the surveyor can assist them with the necessary descriptions, surveys, monuments, and documents to record the movement. The surveyor is familiar with the necessary approval processes and can assist the parties in a pre-evaluation and likelihood of successful approval if needed.

Making the transition between surveyor and mediator is sometimes a difficult, but necessary one. Leaving the role of decision maker to the role of decision facilitator is a conscious decision the surveyor must make. Surveyors have a natural tendency to gravitate to what they determine is the correct solution. In mediation, any solution is considered the correct solution because it is a solution. That does not mean that any alternative is acceptable. When technical matters are concerned, some alternatives are unacceptable because of regulations which affect the parties' decisions. The surveyor can play an important role assisting the parties in their evaluation of the

NOTES:

alternatives and can direct them away from outcomes contrary to the regulations and toward successful solutions.

Study, training and experience were required for the surveyor to obtain his level of professionalism. Obtaining a similar level of professionalism in the judicial arena expects no less of the surveyor. The surveyor must familiarize himself with the litigation processes in order to successfully fulfil the role of expert witness or mediator. As in the surveying profession, different levels of skill, knowledge and expertise are developed before they are undertaken, in the mediation setting, similar levels must be achieved. There are many roles that the surveyor can undertake in the process of acquiring their skills as they advance.

State Specific Regulations

Anyone acting as a mediator must be aware of the specific regulations enacted for their area of jurisdiction. The formal processes of mediation are typically defined in State statutes associated with the court rules. There are specific portions of the statutes which empower the court to require the parties to mediate their dispute prior to scheduling a hearing before the bench. Some regulations affect mediation in the lower courts; some in the trial and appellate level courts. The Minnesota legislature has enacted comprehensive statutes which serve as an excellent illustration. Other states have similar laws and regulations which a mediator should familiarize themselves. The procedures as outlined under Rule 114 of the Minnesota General Rules of Practice for the District Courts categorize the ADR process under four general areas: 1) Adjudicative; 2) Evaluative; 3) Facilitative; and 4) Hybrid. Other jurisdictions recognize these general areas in one form or another. The surveyor's role can fall under any one of these categories, however, the surveyor-mediated process will typical be either a facilitative or hybrid type of mediation. A closer look at Rule 114 gives us a view from the perspective of the courts.

Adjudicative Processes

Arbitration: A forum in which a neutral third party renders a specific award after presiding over an adversarial hearing at which each party and its counsel present its position. If the parties stipulate in writing that the arbitration will be binding, then the proceeding will be conducted pursuant to the Uniform Arbitration Act (Minn. Stat. §§ 572.08-.30). If the parties do not stipulate that arbitration will be binding, then the award is non-binding and will be conducted pursuant to Rule 114.09.

NOTES:

Consensual Special Magistrate: A forum in which the parties present their positions to a neutral in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal to the Minnesota Court of Appeals.

Summary Jury Trial: A forum in which each party and their counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

Evaluative Processes

Early Neutral Evaluation (ENE): A forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives an assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral helps narrow the dispute and suggests guidelines for managing discovery.

Non-binding Advisory Opinion: A forum in which the parties and their counsel present their position before one or more neutral(s). The neutral(s) then issue(s) a non-binding advisory opinion regarding liability, damages or both.

Neutral Fact Finding: A forum in which a neutral investigates and analyzes a factual dispute and issues findings. The findings are non-binding unless the parties agree to be bound by them.

Facilitative Processes

Mediation: A forum in which a neutral third party facilitates communication between parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties.

Hybrid Processes

Mini-Trial: A forum in which each party and their counsel present its position before a selected representative for each party, a neutral third party, or both, to develop a basis for settlement negotiations. A neutral may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

NOTES:

Mediation-Arbitration (Med-arb): A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but if they reach impasse, they arbitrate any deadlocked issues.

Other: Parties may by agreement create an ADR process. They shall explain their process in the Informational Statement.

Mediation Training

Most states offer training programs as part of their mediator certification process. The training sessions range from 30 to 50 hours depending upon the state and the type of certification sought. Many mediators are employed in the family services sector which requires a higher number of hours due to specific legislative concerns and sensitivity training. The training programs take the participants through an exploration of the ADR processes with a focus upon hands on training through role-playing assignments.

The training provides exposure to the various forms of mediation from more formal settings to the informal. The participants are enlightened by the wide variety of solutions developed by each group when provided with the same factual conditions. Comparisons of the mediated solutions allow the participants to perceive the potential problems from differing viewpoints. Learning sensitivity for the different perspectives of the parties based upon their cultures, backgrounds, and levels of education, helps the mediator understand more clearly their concerns. This understanding naturally develops the ability to listen more inventively and to communicate more effectively.

Rule 114.13 Training, Standards and Qualifications for Neutral Rosters

(a) **Civil Facilitative/Hybrid Neutral Roster.** All qualified neutrals providing facilitative or hybrid services in civil, non-family matters, must have received a minimum of 30 hours of classroom training, with an emphasis on experiential learning. The training must include the following topics:

- (1) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;
- (2) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues and power balancing;

NOTES:

(3) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;

(4) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice and mediator introduction pursuant to the Civil Mediation Act, Minnesota Statutes, section 572.31.

(5) Rules, statutes and practices governing mediation in the trial court system, including these rules, Special Rules of Court, and applicable statutes, including the Civil Mediation Act.

The training outlined in this subdivision shall include a maximum of 15 hours of lectures and a minimum of 15 hours of role-playing.

Certification Process

There are no state requirements for the informal practice of mediation. Most states, however, do have specific legislation with regard to voluntary certification for court-mandated mediation. Mediation is not considered a licensed profession in itself, however, the courts may require the provider to complete certain training and experience programs and may offer a certification to perform court-ordered mediation. The courts typically maintain a roster of mediators qualified by training and experience from which to select and appoint mediators. The mediation skills obtained through the training programs are skills which the surveyor can put to use in their every day practice regardless of their desire to obtain certification status. Mediation training is open and available to all levels of mediators.

For instance, the Utah “Alternative Dispute Resolution Providers Certification Act” (58-39a) defines:

(3)(a) “Certified dispute resolution provider” or “certified ADR provider” as “a person providing services as a mediator, negotiator, conciliator, or arbitrator who has voluntarily qualified for certification and is certified under [58-39a-2] or whose certification by another state is recognized by the division in collaboration with the [Alternative Dispute Resolution Providers Certification Board].”

NOTES:

The certification statute is administered by the Division of Occupational and Professional Licensing which is the same department which also administers the professional licensing of Land Surveyors and Engineers. The statute goes on to define:

(4) “Dispute resolution provider” as “a person other than a judge acting in his official capacity, who holds himself out to the public as a qualified neutral person trained to function in the conflict-solving process using techniques and procedures of negotiation, conciliation, mediation, arbitration, mini-trial, moderated settlement conference, neutral expert fact-finding, summary jury trial, special masters, and related processes.

The Utah statute clearly distinguishes between the “certified” provider and the “non-certified” provider of ADR services.

The Utah statutes further defines:

(1)(a) “Alternative dispute resolution” or “ADR” means the provision of an alternative system for settling conflicts between two or more parties, which operates both independent of or as an adjunct to the judicial-litigation system, through the intervention of a qualified neutral person or persons who are trained to intercede in and coordinate the interaction of the disputants in a settlement process.

(b) “Alternative dispute resolution” or “ADR” includes arbitration, mediation, conciliation, negotiation, mini-trial, moderated settlement conference, neutral expert fact-finding, summary jury trial, and use of special masters and related processes in civil disputes.

Clearly, all forms of mediation are subject to state regulation for both “certified” and “non-certified” ADR providers.

The Utah certification under the division rules (R156-39a) is separated into classifications as either, 1) an Arbitrator; 2) a Mediator; or 3) a Negotiator. Qualification for certification as a Mediator requires the completion of 30 hours of education specifically designed for mediation together with the greater of 10 hours experience or three separate cases serving as a mediator. Payment of a certification fee is required on a two-year renewal period similar to the requirements for professional licensees.

NOTES:

Unauthorized Practice of Law

Some states have specific statutes in place which define the practice of law or the unauthorized practice of law (UPL). Some of these statutes are quite specific, others are more general. The surveyor/mediator should be aware of the legislation, rules and regulations which govern not only the practice of surveying, but also the practice of mediation. There have been many studies upon the question and attempts to define the line between mediation and UPL. The mediator should keep abreast of current developments in the laws and rules which govern their practice.

The practice of law can be practically defined as taking the facts of a particular case, applying the governing law and then giving advice based on these considerations. In the mediation context, a non-attorney mediator who takes the facts of a particular case, applies these facts to the law of the matter and advises a participant to the mediation as to this analysis, is committing the unauthorized practice of law. However, the giving of legal information is generally not considered to be the unauthorized practice of law.

"A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation. A mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise." Standards of Professional Conduct, North Carolina Dispute Resolution Commission

The surveying profession has always had an interesting overlap with areas of law as practiced by the professional attorney. Surveyors, in every boundary determination made by them, gather evidence to determine the facts of the case at hand. They then apply the governing law to the set of facts. The outcome of this process is the determination of the boundary location to which the surveyor then expresses their professional opinion, certifies, and monuments the boundary. The distinct difference between the actions of the surveyor and those of the attorney is that the attorney then proceeds to *give advice* to the client regarding their rights where the surveyor will *impart knowledge* in the form of explanation of why a particular rule of law was applied as opposed to another. Imparting knowledge during mediation is for the purpose of assisting the parties to make an informed decision, not for the purpose of advising them of any particular advantage. Advising the client with regard to what they should or should not do or consider doing with regard to the matter is the grey line which is sometimes difficult to distinguish.

The Montana legislature has defined “practicing law” in 37-61-201 of the Montana Code.

NOTES:

37-61-201. Who considered to be practicing law.

Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law.

The Commission on Unauthorized Practice of the Supreme Court of the State of Montana published a document clarifying the authorized and unauthorized practice of law as recent as 2007. In the case of Commission on the Unauthorized Practice of Law v. O'Neil, 334 Mont. 311 (2006), the Supreme Court set forth the following as indicia of the practice of law:

- a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.
- b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.
- c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state.
- d. Negotiating the legal rights or responsibilities of others.
- e. Holding one's self out or advertising one's self as an attorney admitted to practice law in Montana; or, holding one's self out as a non-attorney entitled to practice law in Montana; or otherwise advertising services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana.

The Court further stated that “[T]hese indicia are precise, comprehensible to a reasonable person and sufficient to prevent a person of common intelligence from having to guess at their meaning.”

The Commission recognized that “serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator was permitted whether or not they constituted the practice of law. Consistent with most states, the Commission recognized the importance of allowing the ADR provider the latitude necessary for assisting the parties in the resolution process which includes the preparation of agreements documenting their resolution.

NOTES:

The mediator should inform the parties that no advice will be given with regard to the legality of their agreement. If the parties are in need of independent counsel, they should be encouraged to do so prior to concluding their agreement. They should also understand, however, that their ability to enter into an agreement is dependent solely upon their own desire to settle their dispute. The parties must be allowed to make informed decisions and should be provided an equal footing in the mediation process.

Much of the discussion regarding mediation and UPL has centered around the documents used and/or produced during the mediation process. The mediator may present an Agreement to Mediate which is signed by the parties prior to commencing the mediation. These forms, which are signed voluntarily by the parties, should not be made binding and the parties should understand that they can continue or halt the mediation at any point. The agreement to mediate should encourage the parties to at least make a good faith effort to settle the matter. Further litigation is always an option open to them, however, they are encouraged to see the mediation through to its conclusion, whether successful or not.

The settlement agreement produced during the mediation will outline the mediated conditions and concerns of the parties. The language chosen should be the language of the parties, not the mediator. The mediator may suggest language which may better document the parties' concerns, but the mediator should not interject language not agreed upon by the parties. The parties' agreement may take several forms, some of which are defined by the particular rules and regulations. Typically, the agreement document will take the form of a Memorandum of Understanding. The memorandum should constitute the final agreement between the parties. If the parties have partially agreed to a settlement of portions of their dispute, the partial agreement should be equally documented. Even a partial agreement will serve to remove certain elements from subsequent litigation and may reduce the associated time and cost.

Conduct of the Mediator

Mediator conduct is an important consideration as the failure to properly facilitate the process can result in an unfair and disputable agreement. Any agreement between parties can be challenged, however, the more satisfied the parties are with the agreement, the less apt they are to upset it. There are always areas of dissatisfaction with the specific terms in any agreement, but that dissatisfaction should be overcome by the desire to reach a common goal. The resolution of the dispute should provide a satisfying experience for the parties.

NOTES:

A sound code of ethics can provide a valuable guide for the mediator to judge his or her conduct during the mediation. The *Minnesota General Rules of Practice, Rule 114 – Appendix Code of Ethics* provides several guidelines which should be observed in any mediation.

Rule I. Impartiality

A neutral shall conduct the dispute resolution process in an impartial manner and shall serve only in those matters in which she or he can remain impartial and evenhanded. If at any time the neutral is unable to conduct the process in an impartial manner, the neutral shall withdraw.

Rule II. Conflicts of Interest

A neutral shall disclose all actual and potential conflicts of interest reasonably known to the neutral. After disclosure, the neutral shall decline to participate unless all parties choose to retain the neutral. The need to protect against conflicts of interest shall govern conduct that occurs during and after the dispute resolution process. Without the consent of all parties, and for a reasonable time under the particular circumstances, a neutral who also practices in another profession shall not establish a professional relationship in that other profession with one of the parties, or any person or entity, in a substantially factually related matter.

Rule III. Competence

A neutral shall serve as a neutral only when she/he has the necessary qualifications to satisfy the reasonable expectations of the parties.

Rule IV. Confidentiality

The neutral shall maintain confidentiality to the extent provided by Rule 114.08 and 114.10 and

| <u>Opening Statement Checklist</u> | |
|---|--|
| 1. Introductions & Gen. Info. | <input type="checkbox"/> Willing to Participate |
| | <input type="checkbox"/> Voluntary |
| 2. Goals | <input type="checkbox"/> Discuss Issues |
| | <input type="checkbox"/> Better Understand |
| | <input type="checkbox"/> Work toward mutual resolution |
| 3. Overview of Mediation | <input type="checkbox"/> Share Perspectives |
| | <input type="checkbox"/> Ask questions |
| | <input type="checkbox"/> Clarify issues & interests |
| | <input type="checkbox"/> Brainstorm options |
| | <input type="checkbox"/> Write agreement |
| 4. Mediator's Role | <input type="checkbox"/> Oversee process |
| | <input type="checkbox"/> Impartial & Neutral |
| | <input type="checkbox"/> Not a decision maker |
| 5. Party's Role | <input type="checkbox"/> Good Faith |
| | <input type="checkbox"/> Willing to work to solve problems |
| | <input type="checkbox"/> Respect & civility |
| 6. Confidentiality | <input type="checkbox"/> Mediator Ethic |
| | <input type="checkbox"/> Exceptions |
| | <input type="checkbox"/> Child Abuse |
| | <input type="checkbox"/> Elderly or Disabled |
| | <input type="checkbox"/> Computer Crime |
| | <input type="checkbox"/> Other |
| 7. Caucuses | <input type="checkbox"/> Anyone can ask |
| | <input type="checkbox"/> Confidential |
| 8. Guidelines of Conduct | |
| 9. Questions | |
| 10. Sign Agreement to Mediate | |

NOTES:

any additional agreements made with or between the parties.

Rule V. Quality of the Process

A neutral shall work to ensure a quality process. A quality process requires a commitment by the neutral to diligence and procedural fairness. A neutral shall not knowingly make false statements of fact or law. The neutral shall exert every reasonable effort to expedite the process including prompt issuance of written reports, awards, or agreements.

Rule VI. Advertising and Solicitation

A neutral shall be truthful in advertising and solicitation for alternative dispute resolution. A neutral shall make only accurate and truthful statements about any alternative dispute resolution process, its costs and benefits, the neutral’s role and her or his skills or qualifications. A neutral shall refrain from promising specific results.

In an advertisement or other communication to the public, a neutral who is on the Roster may use the phrase “qualified neutral under Rule 114 of the Minnesota General Rules of Practice.” It is not appropriate to identify oneself as a “certified” neutral.

Rule VII. Fees

A neutral shall fully disclose and explain the basis of compensation, fees and charges to the parties. The parties shall be provided sufficient information about fees at the outset to determine if they wish to retain the services of a neutral. A neutral shall not enter into a fee agreement which is contingent upon the outcome of the alternative dispute resolution process. A neutral shall not give or receive any commission, rebate, or similar remuneration for referring a person for alternative dispute resolution services.

Rule VIII. Self-Determination

A mediator shall recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. The primary responsibility for the resolution of a dispute and the shaping of a settlement agreement rests with the parties. A mediator shall not require a party to stay in the mediation against the party’s will.

NOTES:

Listening and Reframing

Effective techniques for improving collaboration and resolving conflicts include listening for understanding, reframing, elevating the definition of the problem, and creating clear agreements. Use of these techniques helps to manage conflict by fostering understanding and acceptance, surfacing and acknowledging underlying interests or needs, identifying common ground, and communicating clearly regarding future actions that enable each person to feel that his or her needs have been addressed. The following table summarizes these four techniques.

| Mediation Techniques | | |
|---------------------------------------|---|--|
| Technique | Description | Purpose |
| Listening for Understanding | Listening openly without interrupting, giving advice, judging, or asking immediate questions | Allows speaker to feel heard and control content of information; allows listener to hear underlying issues, show empathy, and make open assessments of the situation without jumping to conclusions or confirming assumptions |
| Reframing | A statement or response that acknowledges the emotion, removes the inflammatory language, restates the problem or issue, and seeks clarification or validation from the speaker | Through reframing, one can neutralize the language, assess underlying issues, inform the speaker that you understand what they are saying, and redirect the conversation from a confrontational mode into a problem solving mode |
| Elevate the Definition of the Problem | A statement or response that combines multiple opposing or disparate positions by reflecting back to an issue that is common to everyone involved | To acknowledge issues that are important to each person while establishing common ground; to demonstrate commonality and encourage each person to work together toward a common goal; to regain trust |
| Clear Agreements | A mutually acceptable agreement that is specific, clear, and represents an attempt to meet the needs and interests of the parties | Guide for preparation of agreement documents; provide a foundation for trust and a plan for addressing costs for final survey, document preparation, review and filing fees; third party notice |

Surveyors have a natural tendency to solve problems. Their entire career is developed upon their ability to reason quickly and to resolve complex issues. When the surveyor realizes that the solution is not their responsibility, but lies with the landowner, their natural tendencies are immediately upset. The surveyor must be trained to apply the techniques used in mediation. They require the

NOTES:

surveyor to operate outside of their accustomed comfort zone. Deeds, maps, and survey monuments don't reveal emotion to the investigating surveyor. Dealing with parties in mediation is sometimes overwhelmed with emotion. Getting past the emotional issues so the parties can resolve the issue at hand is part of the listening and reframing process.

The parties communications with one another are often emotionally charged. Their disapproval of each others' actions or treatment must be dealt with in order to expose the underlying causes of their disagreement. They may be required to settle a boundary issue, but the cause for their inability to settle the boundary may stem from the fact that one party has done something to offend the other. Once the offence is dealt with, the parties can reconcile and can enter into an agreement together. Until the root cause of the problem is exposed and dealt with, negotiations will often fail.

Looking for the Alternative

The process of seeking alternatives for consideration is a powerful tool in the mediators kit. Seeking alternatives requires that the parties actively engage in solving the problem. The process involves brainstorming ideas which, upon presentation, may appear immediately likely or unlikely, however, every suggestion is a step toward working together for a common goal. Common goals naturally bring parties together and facilitates their resolution to the problem.

During the brainstorming session, any idea is good enough to write down. If they are immediately rejected by the other party, encourage them to add an alternative idea of their own. You can come back later to evaluate and eliminate any unacceptable alternatives. Brainstorming allows the parties to become inventive of ideas while allowing them to understand their individual concerns and goals for settlement. The parties are provided opportunity to expose what concerns them most and what concerns they share in common.

The focus of the brainstorming session will naturally evolve to a discussion of the merits of the alternatives presented. Through this discussion, the likelihood of successful consideration can be determined and unsuccessful alternatives eliminated. The mediator can prompt their discussion by asking questions such as, "what would happen if this idea were chosen," or "what impact might this alternative have upon your future plans?" Keeping the common goals in mind will help the mediator to facilitate a discussion which brings both parties together. This tool can be used to change the subject from a dissenting viewpoint back to points of agreement, keeping a cooperative atmosphere.

NOTES:

Finding the Common Ground

The mediation of most boundary conflicts is quite simple. The common interest shared by both landowners is the boundary line itself. Most often the surveyor performs his survey and identifies a problem either with the occupation of the land or a discrepancy in the title. Once the error is sufficiently researched and confirmed, the most adequate solution presents itself, along with a few alternative methods that are not as well suited. The landowners either are surprised by the finding or were already expecting it before they ordered the survey. Most landowners would rather solve the problem than escalate it.

When the surveyor presents the possible remedies to the client, the next stage of the process is to meet with the neighbor. The vast majority of occurrences result in a settlement of the issues on the very first meeting with a simple hand shake and clear direction to the surveyor regarding the wishes of the landowners. They may wish to “make the record fit the fence,” or they may choose to simply “move the fence.” They may even decide to “split the difference” and move both the record line and the fence. The surveyor then proceeds to prepare the necessary documentation and produces it for the signature of the landowners.

Occasionally, the landowners’ interests differ appreciably and consideration must be given to their unique needs. They both may desire to construct a residence that will have certain characteristics and require certain placements on the available land. One may have a desire to enlarge his parcel and the other may be able and willing to accommodate their desires. One may desire to enlarge his front yard while the other may desire to enlarge the back. The possible remedies are as infinite as the imagination of the landowners. What begins as a potential conflict is often reduced to a neighborly agreement followed by a hand shake and a lasting cooperative relationship.

Equal Dissatisfaction

Many times the mediation settlement will require each of the parties to sacrifice portions of their desires in the spirit of compromise. When there simply isn’t enough land to go around or to fulfill their needs, something has to give. It may be that one party will give land, the other may give money. It may be that each will be required to give portions of their land in an exchange. The possibilities are usually plentiful, and, as long as the parties are willing to remain at the mediation table, a solution is likely. The alternatives to mediation breakdown are to: 1) do nothing and let the conflict continue; or 2) litigate the conflict at great expense to both parties at the risk of the judge’s decision. Either solution may be acceptable to the parties.

NOTES:

One matter to keep in mind when the only solution is based upon compromise is that the parties are in perfect harmony when each is equally dissatisfied. There will be no true “winner” in any compromise. Both should leave the mediation feeling like they lost something. Whether that loss is a little or a lot, the real issue is whether the feeling of loss is equal.

Your Professional Opinion

One of the most difficult transitions for the surveyor results from the need to allow the parties to determine the outcome of their boundary location. Surveyors are trained to offer their professional opinion regarding boundary locations. Occasionally, the surveyor is confronted by a problem with the title documents, confusions between found monumentation, or inconsistencies between lines of occupation and title boundaries which are beyond the surveyor’s capacity to resolve. In the haste for making a determination, the surveyor often resorts to making a determination in conflict with the expectations of the landowners. The ambiguity, discrepancy, or occupation issue is brought to immediate exposure but the landowners’ ability to resolve the problem is overlooked.

The result of the surveyors determination is insufficient for repairing a potential dispute and, instead, fosters a disagreement between the neighboring owners. The survey provides the catalyst for an often heated dispute which potentially could have been avoided. The surveyor is immediately drawn into the dispute by phone calls from the adjoiner expressing their dissatisfaction with the survey results and demand to correct the obvious mistake. An adversarial relationship is immediately formed between the landowners and the surveyor.

The land surveyor should, instead, hesitate before doing anything which will potentially upset the neighbors. Often a quick visit or phone conversation will alleviate any concerns over the surveyor’s findings. The follow-up phone call provides an opportunity for the surveyor to confirm the landowner’s expectation of where their boundary is located. If the surveyor’s determination differs from their expectation, the potential for a disagreement exists. There is no point in proceeding to force the parties to conform to the surveyor’s findings. Mediation may provide a simple solution.

Mediation of the potential dispute can bring the parties to an understanding and agreement as to the location of their boundary. The surveyor must realize at this point that their professional opinion is irrelevant. There is a disagreement that needs to be settled. The parties should be enabled to settle it. Once the settlement is reached, the surveyor can then provide the necessary documentation, monumentation and final survey which corresponds with the agreement.

NOTES:

Encouraging the Agreement

It could be said that no surveyor was ever sued for performing a survey which met the expectations of both the client and his neighbor. The surveyor must perform the survey by gathering the evidence necessary to make an independent determination of the boundary location. The surveyor, at the same time, must maintain their impartiality with regard to the outcome. The evidence, when viewed in light of the legal requirements, will normally disclose the boundary location. While this evidentiary process may seem binding upon the surveyor, it is not binding upon the parties. Their acceptance of the survey and resulting boundary location is a subjective matter which they alone control. It is up to the parties to resolve any disagreement or uncertainty which may arise as a result of or during the performance of the survey. The surveyor has no authority to resolve the problems which may arise. His only responsibility as a surveyor is to perform the survey in accordance with the applicable standards of care.

The landowners, however, do have the authority to resolve disputes and uncertainties in their boundaries. The resolution does not require intervention by attorneys and courts. The landowners must be given first opportunity to resolve the matter peacefully and amicably between themselves. The surveyor can provide the necessary services to document the resolution. The only times the attorneys need be called is when the parties are in need of legal advice or when they fail to reach a settlement. The parties may then authorize the courts to determine a binding resolution on their behalf.

When an agreement is encouraged between the parties and they are empowered with the information necessary to reach an informed consent, the surveyor becomes the assistant providing the documentation necessary for resolution. Documentation of an agreed-upon boundary results in little to no liability for the surveyor. Both parties are in agreement with their result; its up to the surveyor to simply document it. When both parties are satisfied, what then is the potential for a lawsuit against the surveyor?

Documenting the Agreement

The variety of solutions derived from the mediation, settlement, agreement or judicial processes yield an equally varied possibility of documentary solutions. The final form of the settlement is controlled not only by the settlement itself but by state and local statutory processes. These processes vary greatly by state, region, or locality and must be intimately understood by the land surveyor. The land surveyor will provide a major role by providing the necessary documentation for the review, acceptance, and approval of the landowner settlement agreement by the local

NOTES:

reviewing agency. Certain documents will be necessary for the local agency and others may be required for the public records repository.

Most agreements will result in some form of correction or amending document being filed in the public records. There will be some, however, that will require no alteration as the parties have agreed to relocate the occupational improvements to harmonize with the existing record boundary. All of the agreements should, at a minimum, include a land survey map graphically indicating the location of the boundaries relative to existing lines of occupation. Monuments should be set along the agreed-upon boundaries with the full expectation of the parties to the agreement. The survey map should also document all monuments found which were relied upon during the course of the survey and a narrative or survey report should be provided to document the deed records, owner testimony and survey history relied upon to achieve the surveyor's ultimate opinion regarding the boundary location.

Any good agreement will provide the parties with a lasting document which will: 1) identify the parties; 2) outline the nature of their problem; 3) summarize the outcome of their discussion; 4) recite the agreed-upon solution; and, 5) provide for the signatures of the parties present. Additional documentation may be required to meet the needs for appropriate resolution. The repairs could vary from the execution and exchange of deeds, a recorded boundary line agreement, a boundary line adjustment, or the recordation of affidavits formalizing any long-term solutions affecting title to the properties.

NOTES:

Conclusion

The surveyor's role in mediation is entirely up to the surveyor. They may choose to involve themselves at virtually any level of the mediation process. To do so, they must be willing to step a bit outside of the box which they normally operate. The advantages are immediately evident.

The surveyor-mediator is immediately transformed from a party completely disinterested in the outcome or impact that his survey has. They are transformed from the every-day, evidence in – solutions out, routine of the survey process. Rather than the typical attorney referral when a problem is discovered, the surveyor can be transformed from a problem finder to a problem solver. The surveyor can become part of the solution rather than fearing repercussion for the problems caused as a result of disclosure on the survey.

When the surveyor becomes part of the solution process, he provides a level of service that typically far exceeds the client's expectations. Rather than leaving with a feeling of disappointment when informed of a problem which faces them, they are given solutions to a problem they never even knew had existed. When surveyors offer services which result in solutions, the clients and their neighbors are more satisfied with the result and will generally feel they were treated in a more professional manner.

The surveyor, of course, doesn't need to inform them that the exemplary service pocketed more money and resulted in less liability than had the service not been performed.

NOTES:

Sample Mediation Guidelines

1. We understand the purpose of mediation is to resolve disputes and the Mediator will act as an impartial third party. We understand final agreements will be determined by the participants and not the Mediator. We agree to actively participate in the search for fair and workable options.
2. We agree to treat all mediation participants with respect and make a good faith effort to eliminate destructive communication patterns such as personal attacks, name calling, threats or intimidating behaviors. We agree to make a commitment to create and maintain a safe, productive working relationship free from physical contact or verbal abuse in mediation and in our on going relationship. We agree to listen to one another, without interruption, and try to understand each other's point of view.
3. We acknowledge that we do not know the Mediator, nor does the Mediator know either party outside of this process.
4. We understand the Mediator may meet privately with each party during mediation; this is called a caucus. Generally, comments in the caucus are confidential with the exception of any information that is agreed can be shared by the Mediator.
5. We agree to inform the Mediator of all issues that are in dispute and are related to our dispute. We understand full, open and honest sharing of this information is necessary for a successful mediation.
6. We understand mediation is confidential and not admissible in court, other than providing the Court the Status Report of the results of mediation and the written Memorandum of Agreement. We understand neither the Mediator nor any mediation records can be subpoenaed. We understand that no tape recording of sessions will be permitted. We agree not to use information obtained in mediation against anyone. All notes taken by parties are subject to review at the end of the session.
7. We understand exceptions to Mediator confidentiality exist if the Mediator reasonably believes: (1) a threat of violence will result in death or bodily harm, (2) unreported child abuse has occurred, or (3) criminal activity is occurring or will occur. The Mediator may report these suspicions to the appropriate persons or agencies, without specific permission.
8. We understand the only decision permitted by the Mediator is to declare an impasse. If the parties are unable to reach an agreement after examining all information and options reasonably available, the session will stop. The Mediator may declare an impasse if the process is not moving toward agreement or failure of any participant to follow the Mediation Guidelines.
9. If mediation is Court Ordered, and, if an impasse is declared, we understand the Mediator will inform the Court in writing that mediation was attempted but no agreement was reached. All notes taken by the mediator are destroyed following the session. The mediator will not testify in Court.
10. We understand any party may terminate mediation at any time and the Mediator will provide no information or opinion to the court regarding the reason for the termination.
11. Although participation in mediation is mandatory, we understand agreements reached in mediation are voluntary. A "Memorandum of Agreement " will be prepared detailing the terms of agreement, and distributed

to each party and attorneys, if represented by an attorney, to review and sign. We are advised to review the Memorandum with an attorney and understand the document is not a Court Order until signed by both parties AND approved by the Court. We understand the signed document is to be submitted to the Court.

12. We understand that as a result of discussions with attorneys and/or post-mediation negotiations, there may be changes in the Memorandum of Agreement initially drafted by the Mediator. We agree to take responsibility for contacting the Mediator with these changes within the designated review period.

13. We understand we are encouraged to discuss mediation with our attorney and/or counselor, and those communications are subject to that professional's rules of confidentiality.

14. We understand a fee may be charged to each party for the mediation, and the fee is due at the start of the session.

15. We agree to suspend court hearings and legal discovery while in mediation, unless such action is required as stated in law.

16. We understand the Mediator does not represent the legal interests of any party in mediation and we have been encouraged to consult independent legal counsel for advice on the legal implications of the decisions made in mediation.

17. We understand the Mediator will not provide legal, financial, or therapeutic advice to any party with regard to any issues raised during mediation or any unrelated matter.

I understand the guidelines of mediation, and provide my consent for the Director or Mediator to discuss the results of mediation with my attorney.

Date: _____ Mediator: _____

Sample Memorandum of Understanding

BINDING MEMORANDUM OF UNDERSTANDING:

ESSENTIAL TERMS AND CONDITIONS OF SETTLEMENT

THIS MEDIATION BEING CONCLUDED, THE PARTIES AGREE AS FOLLOWS:

If any of the provisions do not apply, strike and initial the inapplicable language:

1. This is a final, binding and enforceable agreement resolving all issues that were raised or could have been raised between the parties signing below that arise from or relate to the matters presented in this mediation described as _____. (“Dispute”), unless specifically noted herein.

2. Each party agrees to mutually release the other, their heirs, representatives, principals, successors, agents, employees, officers and directors, and attorneys of all claims, known or unknown, arising from or relating to the Dispute. Except as otherwise provided herein, each party will bear their own costs and expenses (including attorney fees) incurred up to and including the Effective Date as defined in Section 12, below.

3. All pending legal actions shall be promptly dismissed with prejudice and without attorney fees or costs to either side.

4. All terms of settlement shall be confidential except as otherwise provided under Oregon Law. The parties further agree not to initiate or cause to initiate any claim or investigation against any other party with any governmental agency or professional association.

5. (a) _____ shall pay to _____ the sum of \$ _____ on or before the _____ day of _____, time being declared to be of the essence.

(b) _____ shall pay to _____ the sum of \$ _____, on or before the _____ day of _____, time being declared to be of the essence.

(c)

(d)

(e)

(f)

(g)

6. The parties agree that: (Select only one)

A. This Memorandum shall act as the final settlement document between the parties and may be fully enforced as a complete settlement agreement in accordance with Oregon law. *Therefore, Sections 7 and 8 below do NOT apply.*

As a result, this settlement agreement contains the other standard settlement terms generally accepted in the legal community where the mediation is held for this type of dispute, including but not limited to the following: Oregon law applicability; Venue: _____; severability; survivability; binding effect; notice provisions; legal representation; actual authority to bind; no admissions; doubtful and disputed claims, each party responsible for own taxes, hold harmless, indemnification and defense, attorney fees to prevailing party, integration, merger, mutually written, number, gender caption, equitable and injunctive relief, execute necessary documents, etc.

Additional documents necessary to implement this settlement shall include:

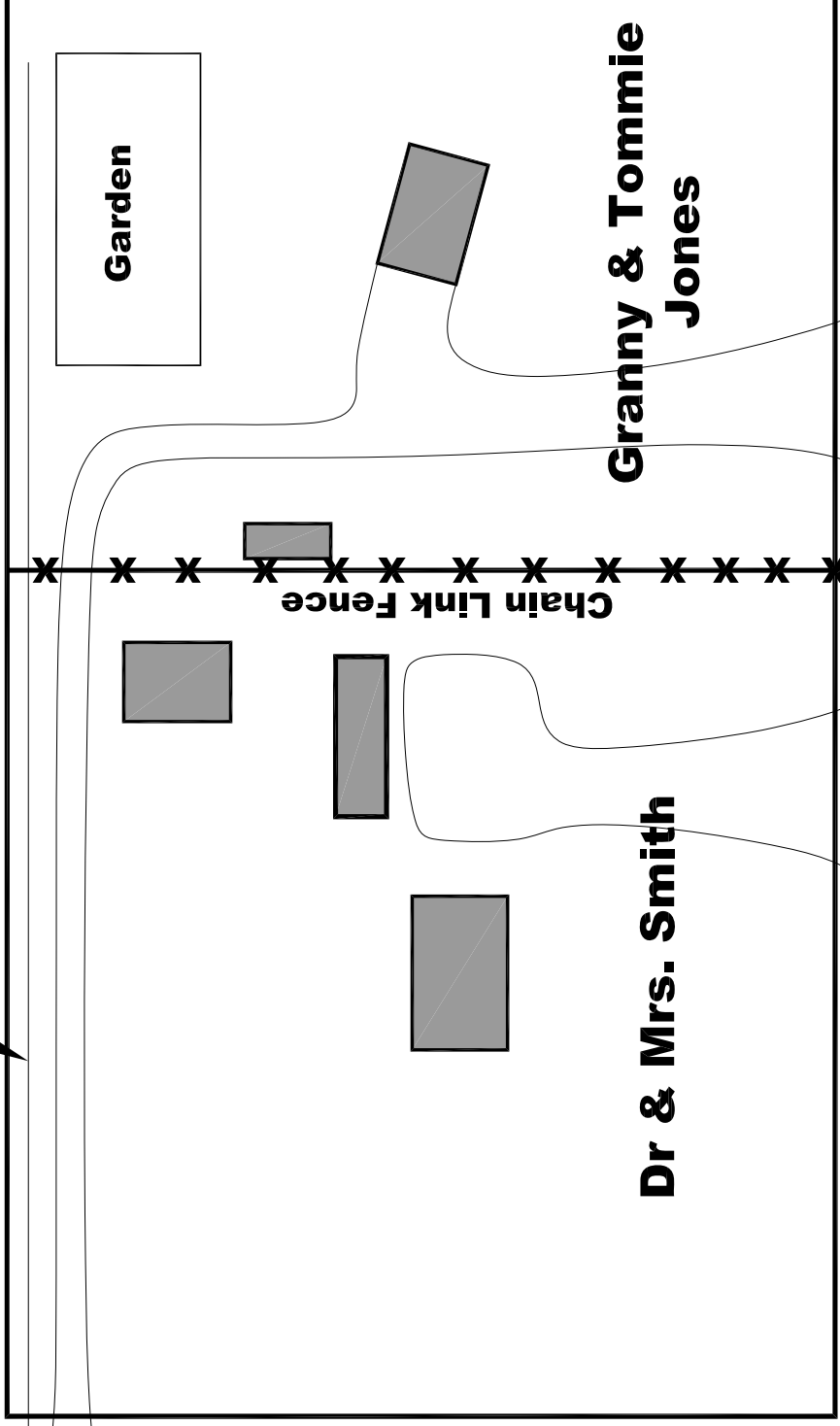
B. Final settlement documents will be draft by the parties or their respective legal counsel in accordance with the terms and conditions contained herein. *Therefore, Sections 7 and 8 below DO apply.*

7. The parties agree to complete and sign all final settlement documents on or before _____ . However, inability to reach agreement on the final form or content of the documents will not invalidate this settlement according to the terms contained in this Memorandum, which may be fully enforced according to its terms.

8. If the parties cannot agree on the final form or content of the settlement documents, the matter will be resolved by: (Select only one)

A. Final, binding and non-appealable arbitration in lieu of trial by a jury or judge. The arbitration shall be conducted in accordance with ORS 36.300 ET. Seq. by the Mediator before whom this matter was mediated (hereinafter referred to as “the Arbitrator”). The Arbitrator shall be empowered to provide any additional language and terms necessary or appropriate to effectuate the settlement outlined in this Memorandum, based upon (a) all relevant information (confidential or otherwise) provided during the mediation, and (b) all other relevant information submitted to the Arbitrator by the parties. The format of the arbitration proceeding shall be within the sole discretion of the Arbitrator and may include “Mediation-Arbitration.” The Arbitrator’s fees shall be charged at the rate currently prevailing in the legal community in which the arbitration is held, and shall be divided equally between the parties and paid in advance. The Arbitrator shall not be held liable in an action or proceeding for damages alleged to have resulted from any act or omission in the

Irrigation Ditch



Garden

Granny & Tommie Jones

Chain Link Fence

Dr & Mrs. Smith

Mediation Exercise #1 – Doctor, Doctor!

Granny Jones has lived in the same home on an eight acre farm in the South Valley for the past 35 years. Granny Jones is a widow. She lives with her 23 year-old grandchild, Tommie. Due to a medical emergency last year, Granny was forced to sell part of her property to pay her hospital bills. The purchasers were Dr. John Smith and his wife Joan, who bought five acres of Granny's property including an old abandoned adobe house. They purchased the property on a real estate contract (\$110,000 total to be paid in monthly installments over ten years at eight percent interest). They moved in a trailer and began to restore the old adobe house.

There has been repeated friction between the Tommie and the Smiths ever since the Smiths moved in. First, the Smiths tore down the old fence between the two properties and replaced it with a six-foot chain link fence. Granny complained that this was a zoning violation, and the Smiths countered that Granny's old storage shed was a hazardous eyesore and was too close to the property line. Then Tommie had a big Fourth of July party and several fireworks exploded in the Smith's chicken coop. The Smiths called animal control and reported that Tommie was abusing his dog. Meanwhile, Tommie repeatedly complained to the Smiths that their dogs were running loose, trespassing throughout the neighborhood, and terrorizing the Granny's animals.

One night, two months ago, Tommie left Granny's property and, instead of going out the driveway to the street, he took his truck the back way on an old dirt irrigation ditch road that crosses the back of the property purchased by the Smiths. As he neared the Smiths house, he was gunning the engine and had the radio up full blast. The access road was muddy from a recent storm and he lost control of the truck when the Smith's prize winning potbellied pig, Veronica, dashed out in front of the truck. Tommie hit the pig, slid off the road, and ran over \$500 worth of trees that the Smiths had planted the week before. Veronica suffered a broken leg, and the vet bills were \$600. Tommie hit the steering wheel and suffered some facial lacerations and bruises. After the accident, he ran to the house, woke his grandmother, and called the Smiths. They came right over. Dr. Smith cleaned Tommie's minor cuts while Joan tended to Veronica. Dr. Smith noticed that Tommie's eyes were bloodshot and that he smelled strongly of alcohol.

One week after the accident, the Smiths presented the Jones with a bill for \$1100 covering the cost of the trees and the vet bills. When Jones refused to pay, the Smiths withheld \$1100 from their regular monthly real estate payment. They also put up a fence cutting off the Jones' access to the old dirt road and irrigation ditch claiming that Jones' had no right to use the road on their property.

The Jones' sent a demand letter to the Smiths advising them that they are delinquent on the real estate contract, summarizing the interest and penalties that are due (\$1200 monthly payment, \$200 interest and penalty), and threatening to take legal action to have the barrier on the access road removed. The Smiths' wrote back enumerating their damages, demanding \$1500 and an apology, and threatening to sue for the full value of Veronica (\$7000) unless the Smiths are reimbursed immediately. They remind the Jones' that they have no legal right to use the access road and to stay off of their property or the sheriff will be notified.

One day, while sitting in your office and reflecting upon the perfect weekend being forecast for your long-awaited fishing/camping trip, you receive a phone call from an irate Mrs. Smith. Mrs. Smith informs you that she wants one of those "surveys" of her property that clearly shows that the Jones' have no right to use the irrigation road across their property. She's willing to pay good money to get the job done and wants to take the survey results to the sheriff by this Saturday so he can keep the Jones' from using the road across her property.