

# A Boundary Arbitration

By

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Over the years I have had the pleasure to serve as a mediator, commissioner, master, referee, and arbitrator to determine the location of disputed boundaries. The following is a story of a boundary arbitration.<sup>2</sup>

The call comes in from an attorney. The attorney was informed by his client's surveyor that I offer services as an arbitrator. The attorney asks if I would be interested in arbitrating a disputed boundary involving his client. He explains that the boundary has been in litigation for five years and the parties would like to have the dispute resolved in an expedient manner (i.e., they can't afford any more justice the usual way). After checking for a conflicting interest, I volunteered that I would be interested in serving as an arbitrator.

Further communications involve the attorneys for both parties – usually by e-mail. Fees are discussed. I like to use a lump sum fee. I explained this fee would be split between the parties, payable in advance. (I did not need experience to tell me that obtaining the fee after a decision is published might be problematic, especially from the losing party.) Calendars are compared and a date chosen for the arbitration.

The attorneys admit that this is the first time they have been involved in arbitration and ask what I would need and what they should do. I explain that the most important legal services they can provide their clients at this time is to agree upon the rules of arbitration. Arbitration is governed by rules established or agreed to by the parties. I provide the attorneys with a sample arbitration agreement to work from. I emphasize that the agreement is very important. It sets forth my powers and the framework for any decision.

Contrary to a trial where the attorneys often have to argue the law to educate the court, the arbitrator selected for his or her knowledge in the subject area needs little coaching about the law or how to apply the law to the facts.

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<sup>2</sup> The rendition is actually parts from various arbitrations. Names and certain facts have been changed to protect privacy.

One of the advantages of arbitration is that the arbitrator is generally chosen because they are an expert in the subject area. As a consequence, the attorneys need not worry that the arbitrator will become confused, bored, or lost. Arbitrators, such as myself, often ask questions of the witnesses during the hearing. Contrary to a trial where the attorneys often have to argue the law to educate the court, the arbitrator selected for his or her knowledge in the subject area needs little coaching about the law or how to apply the law to the facts.

I ask the attorneys for a copy of the pleadings or a summary of their position (position paper). Receiving this information from the attorneys will allow me to be prepared for the hearing. A good position paper from the attorney succinctly summarizes their client's position, factual information, and the claims they feel are compelling.

As the fee, agreement, and other documents are received, I make sure to acknowledge receipt of each item by e-mail. I also send out a notice stating the time, location, and procedure for the hearing. For clients that have endured five years of uncertainty, the flurry of paperwork and acknowledgements provide some comfort that the dispute will soon be resolved. The steady, five-year drain on their wallets will end.

When the arbitration agreement arrives, I see that I have been retained to locate the deed boundary. I'm not sure if the parties realize the import of the phrase "deed boundary" but the phrase creates an important distinction. This means that I cannot determine a boundary location based on possession or equity. If I had been tasked to determine the ownership boundary, I could have considered and decided upon a claim of adverse possession.

This agreement is not as restrictive as a previous arbitration agreement where the agreement limited my decision to fixing the boundary a court had already determined. The court's decision was so poorly written that the parties didn't know who was successful. Following seven years of litigation and after waiting a year for the court's decision, the parties agreed to let me decipher the court's decision rather than chance waiting another year for the court to clarify its decision. Within three weeks I gave my decision and the case was finally put to rest.

I always like to view the site of the disputed boundary before the hearing so I was pleased to read in the agreement that the arbitration agreement provided me with the option to schedule a view. I was further pleased to read that the view was to be limited to the surveyors involved and myself. Don't misunderstand my pleasure upon reading this portion of the agreement. I don't mind tramping around the property with attorneys, clients, etc. (like a herd of cattle) but a view with attorneys and their clients is not the same as a view with just the surveyors. The view with attorneys and clients is much more stilted. Attorneys are often physically unprepared for the mud, brush, bugs, etc. that populate the disputed boundary location. With clients and attorneys on the view, the surveyors are much too cautious in communicating information to me.

In this case, as most cases, I know the surveyors so communications are frank, open, and extensive. Technical language is used and they quickly point out items they will speak about later during the hearing. I'm sure my meeting relieves much of the stress the surveyors may feel about testifying at the hearing later that day.

Not only will the parties feel they've had a fair and impartial hearing but they can go on to claim they have had "their day in court."

The hearing is scheduled at the courthouse. I must admit to some reluctance about sitting on the judge's seat (bench). Usually, I am facing the bench either testifying or representing a client so I feel out of place sitting "on the bench." (Sort of like a grade school student must feel who sits at the teacher's desk.) Most arbitration hearings occur in a conference room where my position as arbitrator is not so physically elevated. However, I can appreciate the advantages of using the courtroom. Most importantly, not only will the parties feel they've had a fair and impartial hearing but they can go on to claim they have had "their day in court."

My first ruling from the bench is to direct the parties to address me by my name rather than some lofty title (e.g., "judge," "your honor") that would be unquestionably ill deserved on my part. My second edict is to remind everyone that they are involved in arbitration and not civil litigation, so the rules of evidence and civil procedure are not strictly followed. I don't mind objections to testimony or evidence, but I remind the attorneys that most testimony will be allowed unless clearly irrelevant and redundant (a.k.a. boring and far fetched). I doubt anyone who has seen me as an arbiter can honestly say that I am not attentive and thrilled to hear all the particulars of a boundary dispute. I listen with rapt attention to all testimony regardless of the apparent credibility of the witness.

Most judges and experienced attorneys understand that attentive listening should not be misconstrued as believing.

In a previous arbitration, I overruled an objection and allowed an 81-year old witness, Zelma, to testify as to the exact location of a stone she saw once while visiting her Uncle for a week when she was seven years old. Most judges and experienced attorneys understand that attentive listening should not be misconstrued as believing. Surely, even the attorney that objected to Zelma's testimony must admit on reflection that it was far more effective to roll his eyes rather than continuously object to her testimony. (Zelma who was almost blind couldn't see him and take offense.) Also, the fact that on cross-examination Zelma could not remember her birthday present at age 7 (or any birthday for that matter) or the name of her first husband who died 20 years ago ("I don't remember his real

name, I just called him ‘dear’”) was a poignant jab at her memory and credibility — if one was needed.

Despite my reluctance to exclude testimony, however remote, even I had to stop testimony once because I could see no relevancy as to the location of a boundary because Hiram, a lobsterman, could only stack 100 rather than 150 lobster traps on his property fifty years ago.

Now I don’t intend to make light of lay testimony that may seem strange. Some lay testimony can be very entertaining. For example, consider the case where I sat as a master<sup>3</sup> and the boundary description called for “thence to the shore in a line with Conrad Beal’s lobster boat mooring ...” Obviously there was considerable testimony where Beal’s boat was moored in 1946, the origination of the description. If the position wasn’t muddied enough, there appeared to be unanimous agreement from old lobstermen that the position of the mooring with a southwesterly on an incoming tide was 30 feet different (swing) from the mooring with a northeasterly on an outgoing tide. So this led to considerable evidence (which I’ll call speculation to avoid slandering the term “evidence”) as to the exact date, time, and wind direction that was likely occurring when the description was prepared in 1946. (I should bring to the reader’s attention that the parties were fighting between two locations separated by just 10 feet.)

Witnesses come and go in this arbitration I am recounting. I like to give the attorneys the option of putting on their experts first. This courtesy keeps the cost down since their clients won’t have to pay to have the experts wait for their turn to testify. That courtesy backfired in this case since the surveyors wanted to hear the testimony of Gloria, one of the witnesses, who was called to testify after the surveyors had completed their testimony. Gloria had spent most of her life living and working out of a mobile home she rented that had a common corner that was disputed. Gloria had seen the inside of a courtroom a time or two. She was clearly a “hostile witness.” I suppose the landlord made her an offer she couldn’t refuse to testify on his behalf.

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Gloria’s testimony is a wonderful illustration that there is a difference between “opinion” and “opinionated.” Gloria’s testimony provides a good reason why the courts have rules of civil procedure and rules of evidence (and bailiffs in the room). Gloria could best be described as a “stout” woman in her mid-40s. If I had been allergic to perfume, I’d have gotten sick when she entered the courthouse and would

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<sup>3</sup> Contrary to an arbiter that is appointed by the parties to hear a case, a master (sometimes referred to as a referee) is appointed by the court to hear a case and must follow the rules of civil procedure and rules of evidence.

surely have died when Gloria got within 10 feet of the witness chair. She dressed in a manner that made some wonder what her occupation must have been as a younger and considerably slimmer woman. Her body had obviously out-paced her dress size. I was happy that the attorney questioning her was satisfied when she stated that her occupation was “self-employed and really none of his damned business.”

While decorum may have prevented others from voicing their opinion on Gloria’s chosen trade, Gloria was not so constrained. Surveyors are “college kids with toys in the woods” and members of the Bar are “pimps with suits.” This description omits many of her adjectives that went with the nouns. The adjectives would make a Marine blush.

She had a remarkably selective memory. She could remember all the details surrounding the position of a corner pin that disappeared 15 years ago (said among tears and sniffles) but could not remember a single detail that occurred seven years ago when she held off a survey crew with a shotgun (denied by Gloria with a cold, spiteful stare). Even the sheriff’s report could not jog her memory about that event. The surveyors left after Gloria was done with her testimony so I can only assume she provided enough entertainment on the witness stand to compensate for the extra time they spent remaining in the courtroom after completing their testimony.

It is worth reflecting that more than 20 years of legal practice has taught me that sometimes the eternal fire of truth will be attended by one or two damn liars who feel it is necessary to put wood on the eternal flame.

With the brief recount I have given about Gloria, it probably would not surprise readers to learn that one witness later testified that it was Gloria that removed the pin 15 years ago. Apparently, according to this testimony, Gloria had been thrown out of her home by one of her “fifteen minute boyfriends.” The pin was not solidly in the ground and provided a ready club that was within reach when she fell next to it in her unsteady state she was experiencing at the time. Of course, this testimony was based on what this witness heard in a bar, from another person, who knew the “boyfriend.” It would be classified as hearsay in court (remote at that) and not allowed. However, I noticed no one was objecting – which seemed to be the case any time some titillating piece of information was offered that included Gloria.

Before leaving this brief discussion of Gloria, I should emphatically state that Gloria did not prejudice the case by the manner of her testimony. It is worth reflecting that more than 20 years of legal practice has taught me that sometimes the eternal fire of truth will be attended by one or two damn liars who feel it is necessary to put wood on the eternal flame.

Immediately after Gloria left the building, windows are opened and everyone leaves the building under the pretense of a late lunch. After lunch we return to wrap up the testimony. Other than Gloria, all the remaining lay witnesses are nervous and

demure – very typical for lay witnesses. I’ve come to appreciate the nervousness of a witness. It has been my experience that if the witness is not nervous, they are probably belligerent and argumentative (read Gloria). Given the choice, nervous is much preferred. For the record, I am nervous for the first ten minutes or so when I testify as an expert so all witnesses have my sympathy.

On the topic of stress and nervousness while testifying, I’ve come to understand that nervousness is not always solely related to speaking in public while in a formal setting. I remember an arbitration where the attorney for a client was obviously not familiar with hunting laws and his client’s taste for venison or else this attorney didn’t believe his client deserved the protection afforded by the 5<sup>th</sup> Amendment to the Constitution and his client’s right not to incriminate himself.

From what I can remember, the attorney’s client was claiming title by adverse possession and had a reasonable case based on the septic field the client placed on the neighbor’s property 22 years ago. For some reason, the client’s attorney felt it would be helpful to his client’s case to get his client to admit that he also maintained an apple pile for several years on the neighbor’s land. When questioned by his attorney, the witness did reluctantly admit to maintaining an apple pile. Much to his client’s obvious discomfort, the attorney pressed on eliciting more details about the apple pile. He asked his client if he could see the apple pile from his bedroom window (mumbled “yes”). Next, the attorney asked his client if the client had also installed an infra-red light on the neighbor’s land that would shine on the apple pile. This question drew a copious amount of perspiration, shifting eyes, and a very hesitant affirmative nod of the client’s head in reply to his attorney’s question. At this point the attorney for the other side (who was a hunter), decided it was important to remind the witness that he was under oath and the record required the witness clearly speak a “yes” or “no.”

Despite the pleading eyes of his client, his attorney instructed his client to answer with a “yes” or “no.” A weak “yes” croaked from the attorney’s client. At this point, I could only hope the attorney was trying to impress me with how intelligent his client was rather than provide his client with a claim against him for legal malpractice.

I suppose that since the bee hive had been kicked, you can either run away or stay and count the bees. The attorney chose the later, so to speak, so the attorney asked his client if the infra-red light was rigged to a motion sensor that not only turned on the infra-red light at night but also made a beeping noise in his client’s bedroom. At this point the witness was quivering from the stress of answering the questions proffered by his own attorney. In desperation, he set his pleading eyes on the attorney representing the other party. Obviously, his look of anguish had no effect on his own attorney so why not try the other attorney? No doubt the witness was hoping the other attorney would respond, as he had so often done earlier during his testimony, with an objection as to the relevancy of the question.

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interrupt the digging.

I knew that Hell would freeze before any objection would come from this attorney – the huge smile said it all. He followed an ancient maxim of litigation – if the other side is digging a hole, don't interrupt the digging. His huge smile was his undoing though. While the attorney for the witness was ignorant of his client's body language, he clearly picked up on the other attorney's body language and realized he must have made a mistake. Before his client could (or would) answer, he withdrew the question.

I suppose I cannot let this reminisce end without mentioning the cross examination of this particular witness. On cross-examination, the other attorney asked if the apple pile was for hunting. "Yes" croaked the witness. "Was it to bait deer?" asked the attorney. Three people out of the four in the room knew that it is illegal to bait deer and very illegal to shoot deer at night. Unfortunately for the witness, the one person in the room totally ignorant of this legality was his attorney so he was not going to get any help from him. The witness knew he had to come up with his own defense. He decided the oath to tell the truth didn't apply to his personal life (now known as the "Bill Clinton rule"). He opted to respond (after considerable shifting, blinking, sweating, and coughing) by replying "no, you can't bait deer and shoot them at night. The apples were for coyotes that I shoot at night." (Baiting and shooting coyotes at night is legal.) "Coyotes eat apples?" contemptuously queried the attorney doing the cross examination. A defiant response was: "yes, in this county they learnt to eat apples!"

Returning to the arbitration in the courthouse, after the testimony wrapped up, I met with the attorneys to discuss what they want by way of paperwork to accompany my decision. For example, if the attorneys want to record my decision, they'll need a notarized affidavit from me. In this case, the attorneys felt that since the case was under a stay in civil court, they would ask the judge to adopt my decision. They can record the court's (my) decision to provide notice in the records. The arbitration agreement had provided for this option so no party could really object.

The final part of this recollection is the week I take to write the decision and the reasons for my decision. (I trust you would not be surprised if I didn't find Gloria's testimony very compelling.) Sometimes the parties to arbitration agree that I don't have to prepare findings of fact and law to accompany my decision. This agreement did require that I document my finding of facts and conclusions of law. Even so, I can usually prepare my decision in a couple of hours but I like to review it over a week. It's not unknown for my decisions to be appealed and I don't want the Supreme Court to find fault with the logic, law, and findings.

On the subject of appeal, it is much more difficult to overturn an arbitration decision as compared to a court's decision. There are only three reasons sufficient to overturn an arbitrator's decision: fraud, bias, and failure to follow the arbitration agreement. So far all my decisions have survived any appeal against them.

As a surveyor, I always try to make sure the boundaries will be marked and a plan prepared to complete the process. I order that the prevailing party mark the boundary I have fixed in my decision and to make a clear and permanent record of the boundary. I am aware of a court decision where the judge chose a hedgerow as the boundary rather than one of two possible boundaries determined by surveyors. Of course, one party had bulldozed the hedgerow and removed it five years previously. The parties are still fighting over where the hedgerow stood.

At the end of the week, I send the attorneys my decision by e-mail. It is easy for them to forward copies of my decisions to their clients and the surveyors using e-mail. I follow the electronic submission by mailing the attorneys a notarized decision. Obviously, one side is disappointed. The disappointment of the party is usually shared by their surveyor. I often go to great lengths to make it clear in my decision that the surveyor acted in a competent and exemplary manner. The decision on the location of boundaries often hinge on a careful weighing of the evidence rather than a blunder by one of the surveyors. I don't want the surveyor to be subject to unfair criticism resulting from their client's disappointment.

This concludes a boundary arbitration. The whole process was completed within a month for less than 5% of the entire legal cost that had already occurred. Please encourage your clients to consider arbitration – unless they are like Gloria.