

Arbitrating a Boundary

Knud E. Hermansen

P.L.S., P.E., Ph.D., Esq.

While written as a single arbitration event, the events described are actually a compendium of experiences from several arbitrations engaged in by the author.

The sun was just barely above the eastern horizon as I drove up to the two surveyors parked along the road. They were leaning against their vehicles and talking to each other. They were waiting for me. Today I am an arbitrator or arbiter. I am a judge appointed not by election or governor but by the parties themselves. My powers are derived from the agreement between the parties supplemented by statute and common sense. I embarked upon this arbitration approximately three weeks ago when I received a call from one of the attorneys. The attorneys were inexperienced with arbitration but willing to let their clients give arbitration a try. I sent the attorneys a sample arbitration agreement with an explanation on what to consider. The most important task for an attorney willing to involve their client in arbitration is to craft a solid arbitration agreement. Writing an arbitration agreement is a story by itself.

I greeted the surveyors warmly. I counted both of them as old acquaintances and friends. Both surveyors had a reputation for quality work. We were meeting at this early hour to perform the view required by the arbitration agreement. In this case, the landowners had been locked in heated litigation with all the power of a law firm to fight for them. I felt I was safe at this twilight hour. Given the poor light available at dawn, the chance of a landowner mistakenly shooting their own surveyor was too great for them to take a chance shooting at a stranger walking with their surveyor.

Prior to this day, the attorneys had decided that the early morning view should be left to the surveyors and arbiter alone. I must admit that I had eagerly anticipated watching attorneys dressed in their dresses or suits scrambling through the mud and pucker brush to look at pins, pipe, fences, walls, trees, etc. I was disappointed – there would be no wrecks at the races today. As I applied a liberal dose of bug repellent to hold off the mosquitoes and black flies that were expected to stir soon, I couldn't imagine why the attorneys would willingly forego the experience of watching the sun rise over the fields, especially if they could get paid to do so.

My combination as both a lawyer and surveyor has placed me in much demand for performing this type of service. (Though, in truth, any competent surveyor could easily fulfill the role as arbiter in boundary disputes and often do.) This case, like so many I had been involved with, had been waiting for trial for over four years. Continuances and a long court docket had caused an untold number of delays. Lengthy delays are common in civil litigation. In this case, the parties, out of patience and money, were finally willing to try some alternative to litigation. The path from death threats, to litigation, to settlement or arbitration is often simply a question of how long the clients can withstand being beaten on their heads with their own wallets. (I have never been able to determine if it is the abuse of the landowner by the process itself or the fast and steady weight loss of the wallet that is most compelling.)

On this day I believe the three of us were, for the most part, content to be doing this part of the arbitration by ourselves without landowners or attorneys present. We can speak in “surveyese” without the blank looks from laypersons or questions from counsel. We can freely use technical language that intermingles terms like “traverse,” “rods,” “scribings,” “N30°W,” etc. without causing confusion. A corner stone that resides some five feet from the spot where meticulous protraction of the record measurement would otherwise place the corner is easily put aside with the mention of the original surveyor’s name. Experience has taught us what measurement precision can be expected from the ancient surveyor who placed the stone and whose reputation is familiar to all surveyors.

I walked around the property, sometimes joking, but more often in serious contemplation as each surveyor pointed out and described the evidence they found and what weight it should be given. Finally, with the time of the hearing fast approaching, the view and casual conversations were ended and we drove our vehicles to the lawyer’s office where the hearing would be held.

Waiting for us outside the attorney’s office was one the lawyers with their client, along with a couple of witnesses. I could tell how they greeted the one surveyor and glared at the other surveyor which one of the two litigants I was seeing for the first time. Inside was the other landowner with their lawyer and witnesses. Needless to say, there wasn’t a lot of hugging and kissing between the two groups.

When there is a big crowd like the one present at this arbitration hearing, I start by getting the surveyors and lawyers off by ourselves and going through the rules that aren't in the arbitration agreement. I tell them that the first witnesses I like to hear from are the surveyors. There are several reasons for this. First, the surveyors introduce the plats and other documents that the other witnesses will often use. Second, they usually provide the most compelling evidence in the most logical format. Third, they are getting paid by the hour. I can save the landowners money by getting the surveyors out of the hearing and back to other business as soon as possible. Most lawyers and surveyors aren't familiar with arbitration so I take this opportunity to point out that the rules of civil procedure and evidence don't apply. The lawyers can make all the objections they want but I'll usually let the story go on especially, as in this case, it is rumored one litigant-landowner attempted to murder the other. I know that such testimony is totally irrelevant in locating the boundary but this testimony is what the other witnesses appreciate the most. I also tell the attorneys that they are free to consult with their client's surveyor during the questioning of the other surveyor. The attorney can even let one surveyor question the other. If one surveyor questions the other, I don't get a numb question like: "Could you please explain to the arbiter why you feel the orange post marked 'W.B. 1951,' is a corner monument set by William Bigelow in 1951?"

After the meeting with the attorneys and surveyors, we all file back to the reception area to pick up the litigant-landowners and witnesses before heading to the conference room where the hearing will take place. The look of relief on the receptionist as the people file out of the reception area tells me the two litigant-landowners weren't attempting to kiss and make up while we were gone. There is a heavy run on the coffee pot at this time.

We enter the conference room. The conference room is big. Clearly this was meant to stand as a status symbol for the law firm. People living in a mobile home don't have this much room. Naturally, each side of the litigation occupies their own side of the conference room. The conference room contains more area than the litigant-landowners are fighting over. After listening to University faculty describe their "love and peace" vision of life for 15 years, I'm half tempted to ask for a big group hug to settle the whole affair. According to faculty, people can be persuaded to put

aside their differences and to love another. I worked for a living before teaching so I know better than to believe it. Four years in the Marines has taught me that ill-will toward another can only be settled by combat. The only difference between military training and legal training is the former emphasizes that victory is measured by the amount of blood from the opponent while the later determines the victor by the amount of money squeezed from the opponent. The strategies taught by the Marines and law school were pretty much the same. (Ambush the other side. Gain fire superiority, cut off supplies, etc.) Legal and military training did not include group hugs or sessions on how to understand the other person's feelings while denying your own.

I start the arbitration hearing by introducing myself. I can tell that some of the people present expected someone in a robe or at least a suit and tie. Of course, I'm wearing a polo shirt with a tint of mud on the front resulting from climbing under a barbed wire fence. I'm still trying to stop the bleeding on my arm where a blackberry bush ripped a gash in my skin less than an hour previously. (I usually stop bleeding quickly but the insect repellent was causing this cut to burn and bleed.) My position on wearing a suit is simple. You can have a view or a coat and tie but not both within the same hour.

I've conducted hearings where the parties agreed only the surveyors and attorneys would be present at the hearing. The only difference between that small hearing and meeting with the same people in a bar is that beer is lacking in the former while plentiful in the later. Conversation is pretty informal where the landowners are not present. There is quite a crowd at this hearing, including the landowners. As a general rule, when the landowners are present, I mirror the decorum of the courtroom. I can't guarantee they'll be happy with the outcome but I can go a long way toward making them feel they've been fairly heard and had their day in court.

The first witness is one of the surveyors I've spent the last two hours talking to at the view. I've got to be careful to address him as "Mr." and not his first name. I try to look solemn as I put him under oath even though we both know he can lie with a straight face. Not more than an hour ago I suspect he doubled the size of the trout he caught on his last fishing trip when recounting the details of the trip to me. He begins his testimony. It's not long before both lawyers are thoroughly lost. They

have to start asking questions in the guise of helping me understand what they don't. In truth, I can't hold the lawyers at fault. You can hardly blame the attorney for asking a question when the surveyor identifies a corner as the one where I slipped on the dew laden grass and fell on my ass. Such testimony tends to limit the number of people comprehending the location of the corner to exactly three people in the room. Of course, there are some questions from legal counsel that give surveyors in the room the opportunity to look bewildered. *"Could you explain to the arbiter why you didn't question the possibility of the monument being moved? Let me remind you that you previously stated that you measured 3,234.45 feet between the monuments you found while the deed clearly calls for 3,233.82 feet."* Questions like that cause the surveyor to stare at the questioning attorney with a look of bewilderment. I let several of these questions and the resulting answers go before I feel compelled to explain to the attorneys that certain facts are no more cause for concern than the number of clouds that will be in the sky next week. Fortunately for me, most attorneys that are involved in arbitrations are good real estate attorneys and don't seek answers from the obvious.

We work through the testimony in a methodical manner similar to trial – direct, cross, re-direct, re-cross, and so on. At this point, the only difference between an arbitration hearing and a court hearing is that I ask questions. I enjoy retracing boundaries so I have lots of questions. Often the lawyers become lost because my questions and the answers from the surveyors are spoken in technical terms. Whispered conversations between the lawyer and surveyor on the other side of the room are common as the other surveyor explains to his client's attorney what I asked and what the other surveyor said in response. I suspect the attorneys are clearly surprised at this point by my interest in the testimony. No doubt in court hearings, the judge is starting to nod off at this time. This is one reason why parties specify a surveyor as an arbitrator in boundary disputes.

Finally both surveyors are done testifying. Rather than leave the room, I'm surprised to see that they remain. No doubt they are waiting for a fight to erupt when the litigant-landowners testify. Rather than one side presenting their entire case then the other side presenting their case like a trial, my arbitration hearing lets each side offer a witness in turn. Attorneys seem pleased with the flexibility as they make deals to allow elderly witnesses or those with pending appointments or jobs testify and

go on about their normal business. Hearsay and extraneous evidence run on without objection. My hand movements signal attorneys that I understand the marginal benefit of the testimony but to let it continue. Justice not only requires that the hearing be fair but the landowners sense they have been fairly heard. I listen to one witness explain why the boundary should be in a certain location because her grandmother told her the boundary location when she was seven years old. I figure that must be almost forty years ago. I listen to this testimony attentively and with some amazement. In truth, I tend to forget what my wife asked me to pick up at the store an hour earlier. This person's memory must be remarkable, if true. I'm mindful that a conversation about a boundary to a seven year old some forty years ago is to be taken with some trepidation on my part.

Testimony brings in every rancorous act — dogs shot, trees cut, cuss words shouted, and so on. This is better than day-time television. Fortunately, the fight expected when the litigant-landowners testify does not occur. Apparently there is some deal between the attorneys to keep a tight reign on their client's testimony. Clearly the failure of a fight to break out disappoints some witnesses and the surveyors who stayed. Looking around the attorney's conference room at all the antiques and costly paintings, it is easy to see why at least one attorney is eager to prevent fights.

We have been at the hearing for six hours. All the testimony has been wrapped up. I now provide some closing comments. I ask the surveyors for their coordinate files so I can reconcile the different basis of bearings between the respective plats. Each surveyor has typically excluded measurement information about the other surveyor's location. There is some reluctance to hand over large coordinate files but the two surveyors quickly agree on providing coordinates for three common points so I can reconcile the different basis of their bearings. The attorneys can't follow the conversations that are occurring at this point. They got lost at the mention of coordinates. The surveyors ignore the attorney's bewilderment and promise to send me the information. That done, we review the arbitration agreement to make sure we are all clear on the leeway I am allowed in my decision. In some cases I must choose between one of two monuments. In this case I can place the boundary wherever I feel a location is appropriate. The arbitration agreement in this case specifies that the parties will execute and exchange quit-claim deeds to seal the

decision. I offer to prepare the descriptions for the deeds. I have seen too many descriptions and decisions prepared by attorneys and judges that are problematic. Often the description the judge prepares or adopts is worst than the description the parties were fighting over. The attorneys accept my offer with relief. I also put them on notice that my decision will require one or both parties retain surveyors to adequately mark the boundary I describe. They have no objection with that part of the decision even though it is unusual after a court hearing. Finally, I promise to publish my decision within two weeks after receiving the coordinates from the surveyors. Their clients will be pleased with the quick decision. They have waited over two years to get into court. Once they agreed to arbitration, a hearing date was set within three weeks and the decision followed in two weeks. Everything will be over in slightly more than a month. The judicial sleigh ride on their wallets is coming to an end.

A week later the coordinates arrive by electronic mail. My decision is reached after carefully considering the evidence and rules of construction. I have never had an easy time reaching a decision because I agonize over each piece of credible evidence. My decision is documented and sent to the attorneys. One will be pleased the other disappointed. I don't believe in splitting the difference unless the facts clearly show that to be proper. The landowners came for justice not reconciliation. I prepare an affidavit with a description of the boundary. The affidavit with supporting documentation is sent to the registry with the proper recording fees. I do this myself to make sure a record of the decision will exist for future landowners. The boundary location is fixed. No doubt the feuding will continue over some other matter.