

Mediation opportunities for the surveying profession in Tennessee

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Abstract

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

Key words & phrases: surveyor, surveying, mediation, boundaries, boundary disputes, alternative dispute resolution

Introduction

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

Chief Justice Thomas M. Cooley of the Michigan Supreme Court wrote those words over 130 years ago near the conclusion of his essay entitled The Judicial Functions of Surveyors.² But what exactly is a quasi-judicial capacity? And what difference does it make whether the parties acquiesce in a survey or not? Either the job was done correctly or not, right?

This author is of the opinion that in his essay Justice Cooley was advocating that surveyors should go beyond the passive role of a fact finder and reporter to become an active participant in resolving issues and disputes that are revealed during the course of the survey. He was advocating that surveyors could and should not only reveal problems to our clients, but that we also should help them to find solutions to those problems. Unlike a judge, we can not impose our solutions on the parties against their will, but we can propose solutions that the parties may or may not agree to abide by. This is fundamentally the role of a mediator One underlying premise of this paper is that one of a surveyor's primary roles is to assist the legal system in fulfilling its role in society.³ It is not the only role that surveyors fulfill, but it is one that differentiates surveyors from their colleagues in related fields.⁴

The role of the legal system in society

Why does law exist? This is a question that has been examined repeatedly through the centuries and with varying answers.⁵ One theory is that law exists primarily to remedy the insecurity and uncertainty inherent in a state of anarchy.⁶ There may be other personal and social problems associated with a state of anarchy, but insecurity and uncertainty seem paramount. We can say that a state of anarchy exists whenever two or more people find themselves in a situation with limited resources and no system for allocating those resources between them. Law provides the means of allocating limited resources and of setting behavioral standards for people. It provides a means for resolving disputes about those allocations and behaviors. It also provides a means for enforcing decisions that resolve the disputes.

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

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

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

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

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

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

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

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

And while the judicial branch creates substantive law through the majority opinions of its published cases, this creation of substantive law (common law) is a by-product of the dispute resolution function. For no court can create common law, except in the context of an actual controversy that it has jurisdiction to decide and that is ripe for decision.⁷ Although litigated dispute resolutions administered by the judicial branch of government are the only ones that are directly enforced by the executive branch, they are only one component of the dispute resolution system employed by most American states as well as the federal government. There are other components as well.

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

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

Nevertheless, for the past few generations, litigation has been resorted to all too often as a primary resolution technique instead of being used as an alternative to the other available dispute resolution devices. But this is beginning to change.

It is changing for four reasons.

One reason is education. There are a multitude of baccalaureate and graduate programs designed to train people in conflict resolution.⁸ And perhaps more importantly, most law schools offer coursework in alternative dispute resolution, with many of them mandating completion of an alternative dispute resolution course in order to obtain a law degree. As graduates of these programs circulate throughout society, awareness of the existence of alternative dispute techniques can't help but grow.

Another reason why alternative dispute resolutions are becoming the primary resolution technique is the increasing unavailability of litigated resolutions. There are two aspects of this unavailability. One is cost, the other is time. Other than small claims court, it is hard to imagine a person getting a fully litigated dispute resolved at the trial level in less than a year or for less than \$5000. This is a best case estimate of cost and time, not a typical estimate. It is easy to imagine disputes where the cost of the litigated resolution exceeds the value of winning everything each party hoped to get. And it is easy to imagine disputes in which the time it takes to get a fully litigated resolution makes the outcome moot.

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

The fourth, and perhaps the most important reason why alternative dispute resolution devices are increasing in use, lies in new procedural rules being adopted in many jurisdictions in the United States. These new rules take many forms. Perhaps the most powerful one is found in statutes and court rules that authorize judges to divert cases to one or more alternative dispute resolution devices before proceeding with litigation. In other words, court rules are being adopted in some jurisdictions that allow judges to order the parties to try one or more alternative dispute devices before a trial will even be scheduled.⁹ These judges are being granted the power to make sure that litigation is the alternative resolution device, and not the primary one.

Tennessee was one of the first states to adopt these devices and the Tennessee judiciary continues to employ them. Two devices, Judicial Settlement Conferences and Mediation, can be ordered without the consent of the parties. Others can also be ordered, but only with the consent of the parties.¹⁰

This should be of direct interest to surveyors in Tennessee, because Tennessee's Supreme Court Rule 31 authorizes non-attorneys to be approved as mediators. To be more specific, licensed surveyors can qualify as court ordered mediators in Tennessee, so long as they possess a bachelor's degree, 6 years of practical work experience and undergo 40 hours of approved mediation training (plus a few other requirements that most surveyors will have no problem meeting).¹¹

In short, Tennessee judges can order cases involving boundary disputes (and others) to be mediated by qualified surveyors. Prior to the enactment of TSC Rule 31, a judge could appoint a surveyor as an expert witness, but no mechanism existed where a surveyor could participate in the judicial process to directly help end the dispute. While surveyors have been acting as mediators for over a century via our lot line agreements and other informal means, many Tennessee surveyors also have the opportunity to participate formally as court appointed mediators.

Tennessee surveyors have the opportunity to demonstrate that they belong alongside attorneys and other professionals as equal partners in the resolution of disputes outside of litigation.

The following details about court ordered mediation pursuant to Tennessee Supreme Court Rule 31 may be useful to surveyors in deciding whether to seize this opportunity. Details as to the nature of mediation in general can be obtained in a formal training program or in other literature.

How court ordered mediation works in Tennessee

Civil cases can be ordered into one or more alternative dispute resolution processes. These processes include case evaluation, non-binding arbitration, mini-trials, summary jury trials, mediation, and other procedures provided by court rule or stipulated to by the parties.¹²

Mediation is defined as a process in which a neutral third party helps the parties communicate, identify issues, and explore possible solutions. The goal is for the parties to come up with a mutually acceptable resolution on their own. The mediator has no authority to decide anything (except for procedural rules) or to impose any resolution on the parties against their will.¹³

At first glance, the idea of court ordered mediation seems inconsistent with the basic premise that mediation is a voluntary process in which the parties come up with their own resolution, under the guidance of a neutral third party. Upon further scrutiny, however, court ordered mediation remains a voluntary process. This is because the court can impose penalties upon the parties for failure to attend, but there is no penalty for failure to agree. In short, the parties can be ordered to attend, but they don't have to make a genuine effort to try and resolve the dispute at mediation. Indeed, the mediator is authorized to end the mediation session whenever she determines that the matter is not suitable for mediation or if one of the parties is unwilling to participate in a meaningful manner.¹⁴

Although the court has no power to impose sanctions upon parties who do not make a bona fide effort to resolve the dispute through mediation, the court rules do provide an incentive for the parties to make a genuine effort to resolve their dispute at mediation. This incentive lies in the fact that the parties can be ordered to pay the costs of the mediation as court costs.¹⁵

These costs will vary from place to place and from mediator to mediator, but since many mediators are attorneys, retired judges and other professionals, it is reasonable to expect that mediator fees to be comparable to what local experienced attorneys can command. Given that, fees alone can provide an incentive for the parties to make good use of the mediator's time. And if the parties elect to have their attorney join them in the mediation sessions, their attorney's fees provide still more incentive.

The costs of proceeding to trial can provide an additional incentive for the parties to make a genuine effort to resolve the matter at mediation. A skilled mediator can make sure the parties are aware of those costs, which are not only financial, but also can include emotional costs, lost productivity, damaged health, unwanted publicity, and permanently damaged relationships.

Not only can Tennessee surveyors serve as court-ordered mediators, but it is reasonable to expect that they will be highly sought as mediators in boundary dispute cases and probably in some other cases where land rights are in dispute. This is because surveyors will need to be involved in a successful resolution no matter what.

The mediation process ends with a report to the court. Either the parties fail to resolve their dispute (in which case the matter proceeds down the path of litigation) or they resolve it. If they do resolve it, the resolution needs to be written up.¹⁶ Resolutions of boundary disputes will almost always require a legal description and they will often require a monumented survey too.

Under this scenario, the mediator works with the parties to reach agreement, then they hire a surveyor. The surveyor meets with the parties, and presumably the mediator, to find out what was agreed to. The surveyor then does his work and submits his product to the mediator who then incorporates it into the report to the court. It should be easy to see that the process will run much quicker and more economically if the mediator is the surveyor. And it is reasonable to expect should that surveyors will be welcomed onto the approved list of mediators since they can help the system run more efficiently and economically.

Furthermore, since all Tennessee attorneys are aware that litigants can be ordered into mediation as part of the litigation process, the cost-conscious ones will seek it before resorting to litigation, or early in the process. And once they see the advantages that a surveyor-mediator can offer in boundary dispute cases over other mediators, it is reasonable to expect considerable demand for surveyors to serve as mediators before the court issues an order.

Conclusion

As Justice Cooley noted over 130 years ago, surveyors have long been an integral part of the legal system. While many surveyors limit their participation in the legal system to the preparation of legal descriptions, plats and monumenting existing legal descriptions, other opportunities exist as well. While surveyors can and often do assist in the litigation process by serving as masters and expert witnesses, the surveyors' normal role is preventative in nature.

Well written and researched legal descriptions help prevent boundary disputes. Well researched surveys with clear and complete plats and quality monumentation are equally important aspect of preventing boundary disputes from arising.

But no matter what, disputes will still arise. And there is a place for surveyors to assist the legal system to resolve those disputes without the need for litigation. Although some surveyors may prefer to limit their role to researching and reporting facts, they have long had the ability to help landowners resolve their disputes by helping them reach boundary line agreements and then working with the legal system to monument and document those agreements. This is informal mediation. And this is the quasi-judicial role that Justice Cooley wrote about as requiring the "acquiescence" of the parties.

What has changed is that Tennessee surveyors have the opportunity to participate in the legal system as formal mediators, both privately and as court-appointed mediators. This is an opportunity that is shared with their colleagues in some other states, but is denied to surveyors in many other states.¹⁷

The opportunity is there. Taking advantage of it won't be easy. It will require an investment of time, energy, and money. But that shouldn't be too surprising. After all, good things rarely come easily.

Endnotes

1. Portions of this paper were excerpted from Mediation: A new opportunity for the surveying profession in Michigan, by Jerry D. Taylor, published in The Michigan Professional Surveyor, Nov-Dec., 2000, Volume 40, Number 6, pp. 1, 4, 9, 13.; from Surveying and Mediation: New Opportunities in a Old Role, by Jerry D. Taylor, presented at the American Congress on Surveying and Mapping annual meeting on March 19, 2001; and from Mediation Training in Surveying Curricula, by Jerry D. Taylor, presented at the XIX meeting of the North American Surveying and Mapping Educators Conference on June 27, 2003 American Congress on Surveying and Mapping annual meeting on March 19, 2001.
2. The Judicial Functions of Surveyors, presented to the Michigan Association of Surveyors and Civil Engineers in 1881, by Chief Justice Thomas M. Cooley of the Michigan Supreme Court.
3. No effort is made to argue the validity of this underlying premise in this paper. The author asks that readers who dispute the validity of it accept it as a given for now. Arguments in support of or opposition to this premise could make for a paper in and of themselves.
4. These statements are made without the benefit of a state by state examination of licensing criteria. They are based on the December 1, 1997 Report of the Task Force on the NCEES Model Law for Surveying which contained a recommendation on page 3 "...that the use of the title 'Professional Land Surveyor' be preserved for those practicing legal and boundary surveys..." The report further recommended the implementation of a licensing system in which Professional Land Surveyors would need to pass state specific licensing exams, whereas those bearing the new title of Geomatics Professional would not need to pass state specific exams. While these are mere recommendations, it is presumed that the recommendation limiting the practice of Professional Land Surveying to legal and boundary surveying was and still is closely related to current licensing practices in most states.
5. A history of questions and responses to the question of why law exists can be obtained in most standard textbooks on jurisprudence.
6. This conclusion that people in a state of anarchy experience insecurity and uncertainty is derived from the definition of anarchy as "Absence of government; state of society where there is no law or supreme power; lawlessness or political disorder." Black's Law Dictionary, 1979, 5th edition, West Publishing Company. In such a state, the strongest could be expected to take what they want and dominate the others. However, given the fact that strength fades with age, and that new alliances can be formed at any time, all persons, even the strongest, would be insecure and uncertain as to their futures. This in turn hinders economic productivity, for people aren't likely to invest their labor in anything (other than armaments and camouflage) unless they believe they have a reasonable chance of reaping the fruits of their labor.

7. Article III, Section 2 of the U.S. Constitution limits jurisdiction of the federal courts to actual cases or controversies. This has been interpreted to preclude the federal courts from issuing advisory opinions on matters. Ripeness doctrines provide that the courts will not decide hypothetical questions. There must be an existing dispute that is ripe for resolution. Similarly, doctrines as to standing preclude persons who do not have legally enforceable rights that could be materially affected by the outcome of the dispute to participate as a party to litigation. See generally, Constitutional Law, 11th edition, 1985, by Gerald Gunther, published by Foundation Press, Chapter 15, Sections 1-3.
8. 316 schools are listed on the web page for the Conflict Research Consortium of the University of Colorado as having a center for conflict resolution or offering a program of one type or another, ranging from certificate programs to graduate degree programs. See <http://www.crinfo.org/action/search-portal.jsp?pid=4540>
9. See Mediation in the U.S. Legal System, by Edward P. Davis, Jr., at http://lawcommissionofindia.nic.in/adr_conf/DAVIS5.pdf for a general discussion of mediation, including court-ordered mediation. Also see the following as samples regarding court-ordered alternative dispute resolution: MCR 2.410 (C)(1) in Michigan, TSC Rule 31 in Tennessee, Wis Stat 802.12(a) in Wisconsin, Nev S.C.R. 3(A) in Nevada, Cal CCP 1141.10 in California, and Gen. Prac. Rule 114 in Minnesota.
10. See TSC Rule 31, Section 3(b) for procedures that can be ordered by the court without the consent of the parties and Section 3(d) for procedures that can be ordered by the court with the consent of the parties.
11. TSC Rule 31, Section 17, states that the qualifications to be listed as a Rule 31 mediator in general civil cases include the following: (A) to be of good moral character... (B) to have ... a baccalaureate degree plus six years of practical work experience (C) to complete 40 hours of general mediation training.... And (2), if the applicant's profession requires licensing (A) to be in good standing with the Board of Agency that issues licenses in that profession (although there is no requirement that an approved mediator take the licensing exam or pass it if they do take it), and (B) not be the subject of 3 or more open complaints to the Board about their professional conduct.
12. See TSC Rule 31, Section 3 generally.
13. See TSC Rule 31, Section 2(i), and Appendix A, Sections 1(b) 5(a) and 5(b).
14. See TSC Rule 31, Appendix A, Sections 4(b) and 10(b).
15. See TSC Rule 31, Section 8.
16. See TSC Rule 31, Appendix A, Section 10(a)(1).
17. Cursory research was done to find out eligibility requirements to be included on a court approved list of mediators in several states. Seven states were sampled, other than Tennessee. Two of the states, Illinois and South Carolina, precluded all persons who weren't retired judges, members of the state Bar, of in possession of a JD degree. Few surveyors can be expected to meet these requirements. Five states, Alabama, Florida, Michigan, North Carolina and Utah had eligibility requirements of a baccalaureate degree or less, coupled with several other requirements. While not all surveyors can meet all of these requirements, and many may find them burdensome, it is reasonable to presume that most surveyors in these states have a reasonable chance of meeting the eligibility requirements to be placed on the court-approved mediation list in these states.