By Joel Leininger, LS

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Compromising Positions

Twice recently the idea of surveyors "splitting the difference" on a dispute between them has come across my desk. And twice I have cringed.

Those who know me know that I am not usually one to walk away from an argument (to which I plead guilty), but my reticence on this particular point has nothing to do with being hard-headed; instead it concerns our obligations and duties as surveyors.

What's Not to Like?

Compromise in a dispute can be (and usually is) a good thing. After all, the centerpiece of ADR (Alternative Dispute Resolution) is the notion that, given good faith on both sides, some middle ground can be found upon which both sides can agree. Middle ground settles controversies.

So why does the notion of compromise in a boundary dispute bother me? In short, because it usually involves abandoning our "prime directive:" *retrace*. Let's unpack the specifics.

With the advent of electronic measuring devices, most of the quantitative (*i.e.*, measurement) differences from surveyor to surveyor have decreased to trivialities. Is there any disagreement on that score? We simply do not encounter vast observational differences between modern surveys these days. This is not to say that disputes wholly surrounding measurements will never be seen again–after all, small magnitudes can still generate big controversies, especially in densely populated areas–but I believe it unlikely, for instance, that we will see the classes of errors common up through the 1960s. We have electronics to thank for this, and that's a good thing.

But disagreements between surveyors remain common. The mechanics of surveying have been supplanted as the culprit by something infinitely more challenging: boundary evidence.

Surveyors, as fact finders, are left to themselves to determine the appropriate evidence, both physical and written, for establishing property lines. No one else is under any obligation to supply us with any help (contrary language in the ALTA/ACSM standards notwithstanding), and, in my experience, they rarely try. This is not to say that surveyors have free rein to do as they wish, but that the discovery and evaluation of that evidence falls solely on us.

There is no doctrinal basis for adopting evidence inconsistent with our retracement.

Put another way, we are in search of a certain set of *facts*, the collection of which constituted the survey (or surveys) we are retracing. The true location of a particular corner is a fact. Its relationship to adjacent corners or other tracts is one or more facts. Each of these facts left behind residue, perhaps a monument, perhaps a measurement, perhaps notations in field notes, etc. The facts are sometimes dependent on one another, and sometimes not. For instance, some property corners may never have had monuments placed at them, and the retracement thereof must necessarily be dependent on measurements from elsewhere. Other corners have original, undisturbed, identifiable monuments and thus are not dependent on anything else for establishment. Some deeds are senior to some and junior to others. Our retracement is the *sum of our opinions* regarding those facts. Ideally, assembling the correct set of facts, and interpreting the evidence about them, results in a correct property outline.

Easier said, of course, than done. Hampering our task are the vagaries of unclear documents, lost monuments and the millions of other pitfalls common to investigative tasks. Nevertheless, at the conclusion of our retracement, we have (hopefully) evaluated the evidence available, in light of correct doctrine. This is the essence of defensible retracement.

And it Begins

Now comes another surveyor who, after reviewing our results, claims that one or more of our positions are incorrect. After consultation with him and reviewing the evidence on which his assertions are based, we have three choices: 1. Adopt his retracement on those positions because we are convinced that his evidence and analysis is more defensible than ours (I don't characterize this as a compromise. It is

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a reevaluation of our opinions based on evidence previously unknown to us, and is one of the marks of a true professional.) 2. Reject his evidence and analysis as inferior to ours. Oddly, this is also one of the marks of a true professional. Doing so, after articulating why, may convince him of the validity of our position. (If not, well, too bad.) And finally, 3. Take some of ours and some of his and feather the two together, splitting the difference, as it were, in an effort to make everyone happy and avoid controversy. Ouch. Here is where the train runs off the track.

There is no doctrinal basis for adopting evidence we have rejected as inconsistent with the balance of our retracement. I realize that practicalities inject themselves into the thought processes here, but we must remember what our charge is: *fidelity to the original survey*. Deviating from that fidelity, even with the best of intentions, breeches our authority as surveyors.

We Can't, but They Can

Nothing prevents owners from entering into an agreement with one another that trumps the title and survey history of the line in question. In other words, owners are free to agree that, notwithstanding the location (or locations!) of the line resulting from a comprehensive analysis of the evidence, hereafter the line will be located as follows… Obviously, the signatories to that agreement, if it is to have the desired effect, would have to include all parties-in-interest. And the compromise, to bind all successors in the property, must be properly executed, delivered and probably recorded, depending on the jurisdiction. Informal agreements do not get the job done. But assuming all this takes place, the agreement would establish a new (compromised) position for the boundary.

The bright line that should appear from the discussion above is that *our* authority to compromise does not exist, although property owners labor under no such limitation. As fact finders, we have no agency powers. We cannot bind property owners to agreements to which they were not parties. We are not operating on behalf of our clients, but as independent advisers to them. Leave compromise to those actually empowered to enter into one. That is *not* us, and we should not forget it.