

Real Property Disputes

Applicable Principles and Doctrines

IRWA Chapter 13

On-line presentation

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Schneider

Today – Real Property Disputes

1. Background
 - ✓ Types of surveys
 - ✓ The complex process of retracement
2. How disputes and conflicts originate
3. The overriding importance of intent
4. The special status of the original survey
 - ✓ Acceptable evidence (or not)
5. Ambiguities – what they are and how to solve them
6. Preventing conflicts in the first place
7. The Surveyor's role



Retracement Boundary Survey

[A] survey of real property that has been previously described in documents conveying an interest in the real property.

865 IAC 1-12-2



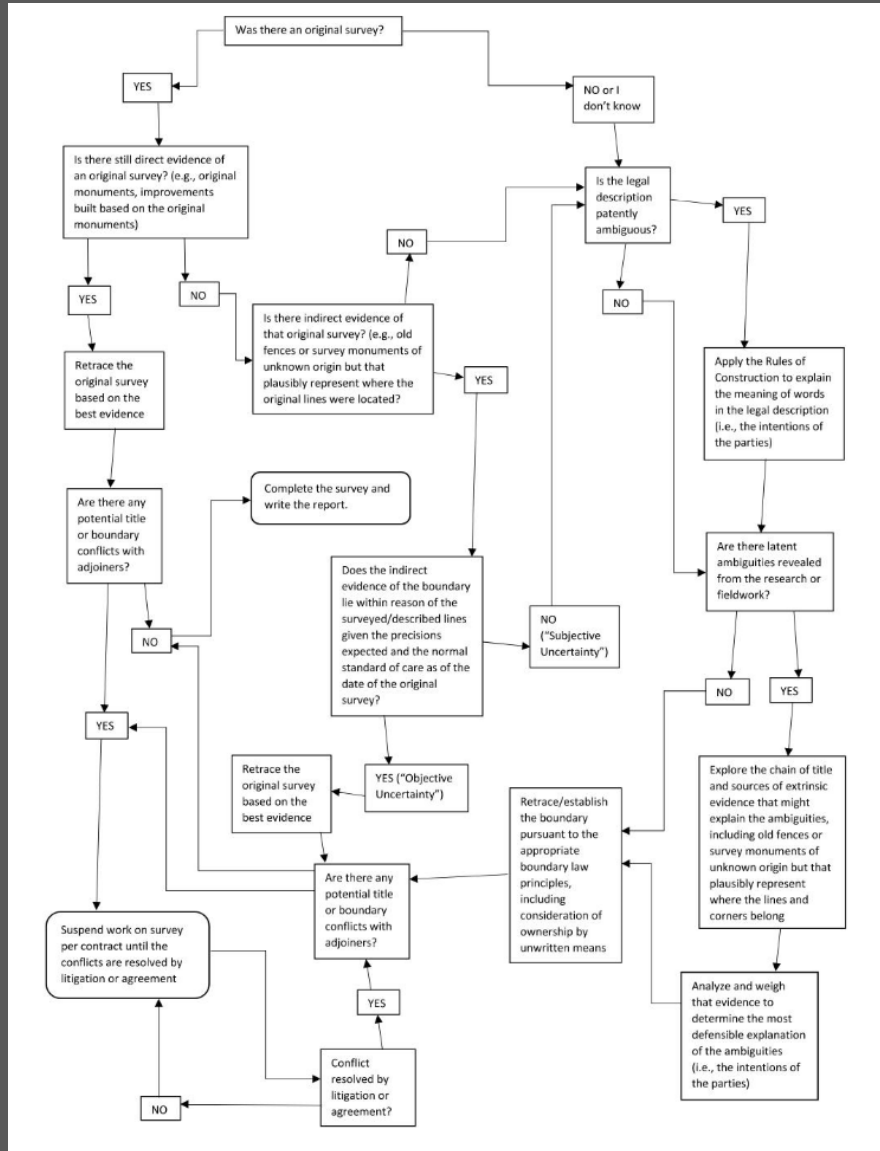
Original Boundary Survey

[A] survey that is executed for the purpose of locating and describing real property that has not been previously described in documents conveying an interest in the real property.

865 IAC 1-12-2



Flowchart



How do conflicts originate?

[T]he court noted that land surveying is not always an exact science and that qualified and experienced surveyors can and sometimes do arrive at different conclusions in interpreting legal descriptions in deeds and reconciling those descriptions with monuments observed on the property.

Turner v. Albert, 2015 Ohio 809 - Ohio: Court of Appeals, 11th Appellate Dist. 2015



How do disputes/conflicts originate?

- Poorly written legal descriptions or drawn subdivision plats (patent ambiguities)
- Conflicts between the legal description or plat and evidence on the ground (latent ambiguities)
- Lack of remaining evidence of the original survey
- Anything that calls for surveyors to make judgments relating to underlying intent
- Not taking steps to mitigate or prevent them



Intent – The Holy Grail

The grantor's intention controls, and the question for the court is not what the parties meant to say, but what they meant by what they did say.

Pointer v. Lucas 131 Ind.App. 10, 169 N.E.2nd 196 (1960)



Intent

The unambiguous intentions of the parties as expressed in the deed - *and considering the surrounding circumstances* - will override any unexpressed intentions



Intent

According to the courts, even when the legal description is unambiguous, what most clearly represents the intentions?

The original survey or acceptable evidence thereof.



Intent

Where there was an original survey
and

When the legal description is ambiguous
(patent ambiguity)

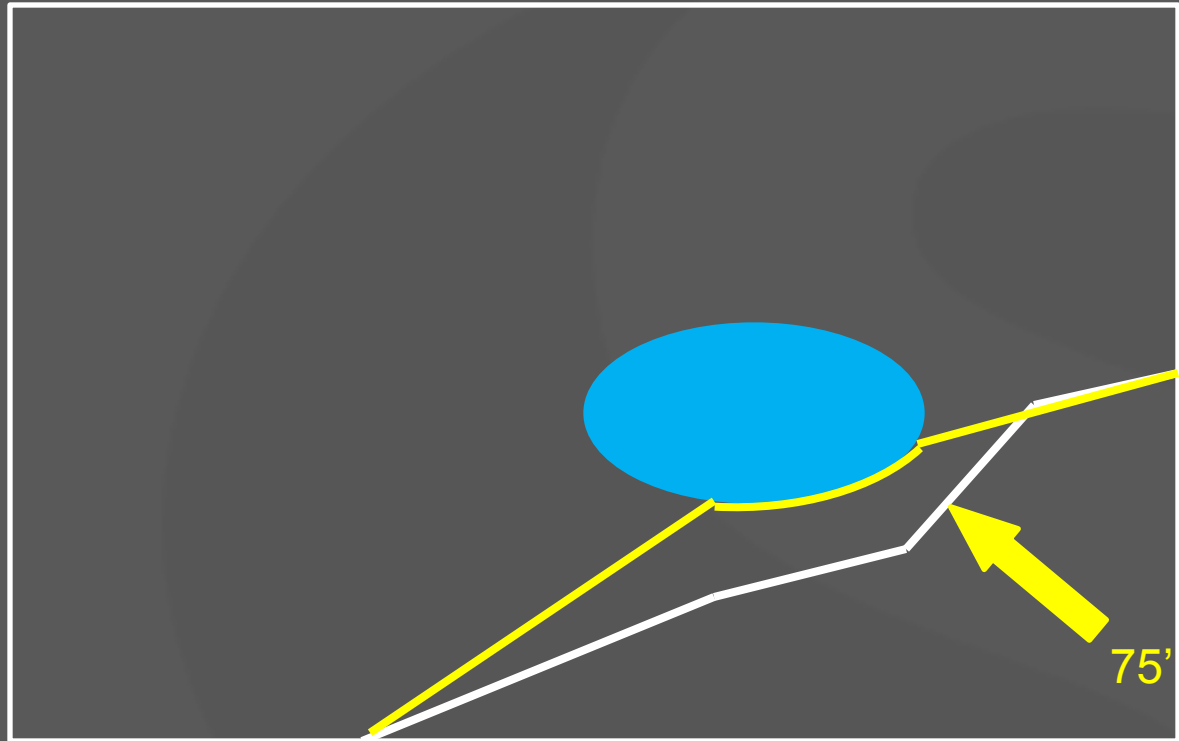
or

Where evidence on the ground raises
other questions (latent ambiguities)

Surveyors cannot simply rely on the
exacting dimensions in the legal
description. Conflicts will result.



Example



The special status of the original survey

First, the surveyor can, in the first instance, lay out or establish boundary lines within an original division of a tract of land which has theretofore existed as one unit or parcel.

...



The special status of the original survey

In performing this function, he is known as the 'original surveyor' and *when his survey results in a property description used by the owner to transfer title to property* that survey has a certain special authority in that the monuments set by the original surveyor on the ground control over discrepancies within the total parcel description and ...



The special status of the original survey

... and, more importantly, control over all subsequent surveys attempting to locate the same line.

Rivers v. Lozeau, 539 So.2d 1147, 1150-51
(Fla. Dist. Ct. App. 1989) cited in *Sullivan v. Kanable*,
41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015
(Emphasis in original.)



The special status of the original survey

Under California law, the location of a disputed boundary line is proven by retracing, as nearly as possible based upon existing evidence, the footsteps of the original surveyor whose survey fixed the boundaries. "The survey as made in the field and the lines actually run on the surface of the earth . . . must control."

BERTOLLI PROPERTIES, LLC v. HEADWATERS RANCH, INC., Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2018 (Not for Publication; internal citations intentionally omitted)



The special status of the original survey

'[T]he question presented to the court in a boundary dispute is not that of making a resurvey but one of determining as a question of fact from the preponderance of expert and nonexpert evidence (as in all other civil cases) the actual location of the monuments, corners or lines as actually laid out on the ground by the official surveyor.'

Bloxham v. Saldinger (2014) 228 Cal.App.4th 729,
736-737



The special status of the original survey

"[t]he highest and best proof of [the intention of the grantor as expressed in the instrument of conveyance], ordinarily, lies not in the words of expression of the deed, but rather, in the work upon the ground itself, where the survey was made prior to the conveyance."

Robert J. Griffin, Comment, *Retracement and Apportionment as Surveying Methods for Re-establishing Property Corners*



The special status of the original survey

[W]hat the original surveyor actually did by way of monumenting his survey on the ground takes precedence over what he intended to do as shown by his written plat of survey.

Tyson v. Edwards, 433 So.2d 549, 552-53 (Fla. 5th Dist.App.1983)



The special status of the original survey

Each party received a deed which refers to a recorded plat or survey and there is no question but that the measurements, courses, and monuments shown on the recorded plat are incorporated in each deed by reference.

...



The special status of the original survey

The descriptions therefore embody, just as would a metes and bounds description, the monuments, courses and distances set forth in the plat to describe the actual land owned by each party.



The special status of the original survey

However, this description and this plat is a symbolic representation of something which has been physically marked out on the surface of the earth.



The special status of the original survey

The actual physical markings and location by monument or otherwise is the primary thing. It locates the land.

The map or plat is secondary to this purporting to symbolically represent that which has been physically located.

Sellman v. Schaaf, 26 Ohio App. 2d 35 - Ohio: Court of Appeals 1971



The special status of the original survey

In determining the location of a boundary line, it is not where the surveyor intended to run a boundary or should have run it, but where the boundary was actually run that controls.

Wilson, Donald A., *Boundary Retracement, Processes and Procedures*, CRC Press, 2017. p. 64



The special status of the original survey

It is a fundamental principle of law that boundaries are to be located on a resurvey where the original surveyor ran the lines and called for them to be located in his fieldnotes.

Wilson, Donald A., *Boundary Retracement, Processes and Procedures*, CRC Press, 2017. p. 64



Random thoughts on original surveys

- Was there one?
- By whom?
- When?
- Finding direct evidence may be problematic
- May need to rely on indirect evidence of an original survey
- Searching for evidence is expensive and time-consuming
- It is easier, quicker and cheaper to use the geometry of the deed
- But that often **conflicts** with evidence on the ground.



The surveyor's challenges

The best evidence of the original survey

- Direct evidence
- Indirect evidence
 - What is an acceptable precision?



The surveyor's challenges

The best evidence of the original survey

Direct evidence

[T]hat means of proof which tends to show the existence of a fact in question without the intervention of the proof of any other fact.

Wilson, Donald A., *Forensic Procedures for Boundary and Title Investigation*, Wiley, 2008



Direct evidence of an original survey?

- Subdivision plat
 - ✓ “Surveyed”
 - ✓ “Laid out”
- Smaller parcels
 - ✓ “Surveyed by...” on a map
- Mandatory recordation of surveys
- Mention the survey in the description



The surveyor's challenges

The best evidence of the original survey

Direct evidence

- Lines run and marked on the original survey
- Monuments found corresponding to original plat
- Monuments found corresponding to original field notes
- Improvements built based on and soon after the original survey*



The surveyor's challenges

The best evidence of the original survey

Potential conflicts occur when:

Legal description is patently ambiguous
or

There are latent ambiguities relating to the
boundary

(e.g., When the dimensions in the legal
description do not match direct or reliable
indirect evidence of the original survey
found on the ground)



Subjective Uncertainty

The evidence of the boundaries found (possibly survey markers, but usually fences) is too remote from the expected locations to represent what would have been a faithful attempt to establish those boundaries on an earlier survey.

The evidence should not be relied upon, but may represent unwritten rights...



Objective Uncertainty

The evidence of the boundaries found (usually survey markers, but possibly even fences) is within the realm of where one might expect the boundaries to be found based on the geometry in the description, but giving due regard to the date of the old survey, and considering the instrument, conditions, and normal standard of care at that time.



The surveyor's challenges

Indirect evidence

Unidentified monuments found

- that could date to the original survey
- that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time
- that are consistent with improvements that relate to the boundary



The surveyor's challenges

Indirect evidence

Improvements found relating in some manner to the boundary

- that could plausibly date to the original survey
- that have been relied upon by the owners (and, perhaps, surveyors) for a long period of time



The surveyor's challenges

Indirect evidence

Disregarding direct – or even indirect – evidence of an original survey simply because it does not match the geometry of the legal description can have serious consequences.

But...



The surveyor's challenges

Indirect evidence

The challenge for the surveyor is to sift through the disparate evidence that was not called for in the conveyance and determine which, if any, is acceptable.



The surveyor's challenges

Indirect evidence

A primary consideration in weighing the applicability of indirect evidence ...
or assessing the plausibility of ostensibly direct evidence...

Does the evidence accurately emulate the boundary location based on the courses and corners of the original legal description *given the date of the original survey?*



The surveyor's challenges

Indirect evidence

The position of old fences may be considered in ascertaining disputed boundaries.

As between the old boundary fences and any survey made for the monuments after dispute, the fences are far better evidence of what the lines of the lot actually were.

Mulford, A.C., *Boundaries and Landmarks*



The surveyor's challenges

Indirect evidence

If a record map shows no bearings, and insufficient distances to determine direction or position of lot lines, the occupation of long standing will have control preference in spite of possible apparent differences from record.

Wattles, William, *Land Survey Descriptions*



The surveyor's challenges

Indirect evidence

As noted, the original survey of a given parcel "control[s] over all subsequent surveys attempting to locate the same line."

We acknowledge that an occupation line might be of value in setting the boundary between the properties on either side of that line.



The surveyor's challenges

Indirect evidence

Occupation lines might also correspond to improvements on property.

"The evidentiary value of improvements depends upon the probability that their builders had, at the time of construction[,] a better means of knowing where the original lines were located than is now available."

Sullivan v. Kanable, 41 NE 3d 264 - Ill: Appellate Court, 2nd Dist. 2015



The surveyor's challenges

Indirect evidence

A more accurate statement of law would be:
(1) where original stakes which mark boundaries of old plats have disappeared, surveys should try and determine where the original stakes were placed.



The surveyor's challenges

Indirect evidence

(2) In determining where the original stakes were located, various types of evidence are admissible including new stakes or monuments which replace old stakes, reference points correlated to other established points, and occupational lines established by long usage.



The surveyor's challenges

Indirect evidence

All of these may be considered by the fact finder, but no one factor, such as occupational lines, dominates the others as a matter of law.

FN 6 , *Kahn-Reiss, Inc. v. Detroit & Northern Savings & Loan Ass'n*, 228 NW 2d 816 - Mich: Court of Appeals 1975



The surveyor's challenges

Indirect evidence

Parol evidence is admissible to prove the former existence, identity and location of ancient monuments since removed, such as marked trees and stones, indicative of the location of lines and corners;

...



The surveyor's challenges

Indirect evidence

... and we see no reason why the acts of the interested parties, contemporaneous with the alleged existence of the monuments, as tending to prove their existence, should not be also admissible in evidence.

Garrett v. Spear, 998 NE 2d 297 - Ind: Court of Appeals 2013



The surveyor's challenges

Indirect evidence

The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them.

No rule in real estate law is more inflexible than that monuments control course and distance,—a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned.



The surveyor's challenges

Indirect evidence

The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks . . . and if those were discovered they must govern.



The surveyor's challenges

Indirect evidence

If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known. . . .



The surveyor's challenges

Indirect evidence

As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case, if left to their own judgment, had not so regarded them.

[Diehl v Zanger, 39 Mich 601, 605-606 (1878) (COOLEY, J., concurring) (internal citation omitted), quoted with approval in Jonkers, 278 Mich App at 267-268.]. DEAVEN v. Paulson, Mich: Court of Appeals 2011.



The surveyor's challenges

Intent, direct & indirect evidence summarized

[T]he rules of construction with regard to boundaries "[are] not ... imperative or exclusive" but are aids in construction "to ascertain, or to aid in determining, the intention of the parties" that must yield to a contrary showing. Thus, these rules do not apply "where the monument claimed is so manifestly wrong as to lead to an absurd result."

...



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The surveyor's challenges

Intent, direct & indirect evidence summarized

Monuments not mentioned in a deed may be utilized if "said monuments are afterward erected by the parties with intent to conform to the deed."

Nevertheless, if "the monuments are doubtful, a resort will be had to the courses, distances, and quantity."



The surveyor's challenges

Intent, direct & indirect evidence summarized

"Before a physical monument is accepted as a boundary line, there must be evidence other than its mere existence that the monument was intended for that purpose" which may be shown if it is mentioned in deeds related to the chain of title or there is "evidence that any past parties erected it as a monument to mark the boundary."

Long Run Timber Company v. Dept. of Conservation & Natural Resources, 145 A.3d 1217 (Pennsylvania) (2016)



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Ambiguities

Ambiguity in written contracts can fairly be said to consist of two types: patent and latent.

City of Grosse Pointe Park v. MUNICIPAL LIABILITY AN PROPERTY POOL, 702 NW 2d 106 - Mich: Supreme Court 2005



Patent Ambiguities

[A] patent ambiguity is an] ambiguity in a legal document (as a contract or will) that is apparent on the face of the document and arises from inconsistent or uncertain language.

<https://www.merriam-webster.com/legal/patent%20ambiguity>



Patent Ambiguities

Patent ambiguity refers to uncertainty on the face of a legal document.

This gives the agreement or contract an indefinite meaning.

When a document includes a patent ambiguity, no external evidence can show the testator's intention, which remains unclear.

A patent ambiguity may invalidate an agreement or contract.

<https://www.upcounsel.com/patent-ambiguity>



Patent Ambiguities

A document is found to be ambiguous only when reasonable persons find the contract subject to more than one interpretation.

Drees Co., Inc. v. Thompson, 868 NE 2d 32 - Ind: Court of Appeals 2007



Solving Patent Ambiguities

Generally, in determining boundaries, natural and permanent monuments are the most satisfactory evidence and control all other means of description, in the absence of which the following calls are resorted to, and generally in the order stated:



Solving Patent Ambiguities

First, natural boundaries; second, artificial marks; third, adjacent boundaries; fourth, course and distance, course controlling distance, or distance course, according to circumstances (sic). Area is the weakest of all means of description.

Perry v. Davis, 2013 Ohio 4078 - Ohio: Court of Appeals, 2nd Appellate Dist. 2013



Solving Patent Ambiguities

It is well established law that parol evidence of prior conversations, offered to vary or contradict the terms of a written agreement which are plain and unambiguous on the face of the instrument, is incompetent.

State ex rel. Goldsberry v. Weir, 60 Ohio App. 2d 149
- Ohio: Court of Appeals 1978



Latent Ambiguities

[A] [I]latent ambiguity is an ambiguity that does not readily appear on the face of a document.

The ambiguity becomes apparent only in the light of knowledge gained from a collateral matter.

Extrinsic evidence can be used to clarify latent ambiguities, but not patent ambiguities.

<https://definitions.uslegal.com/latent-ambiguity/>



Latent Ambiguities

A latent ambiguity is a defect which does not appear on the face of language used or an instrument being considered.

It arises when language is clear and intelligible and suggests but a single meaning, but some intrinsic fact or some extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings.

VIOLANTE v. VILLAGE OF BRADY LAKE, 2012 Ohio 6220 - Ohio: Court of Appeals, 11th Appellate Dist. 2012



Solving Latent Ambiguities

When a latent ambiguity is revealed by the survey, extrinsic evidence must be sought to explain the parties' intentions.

Extrinsic evidence could include, but is not limited to, prior surveys, statements from knowledgeable parties or landowners, evidence found on the ground (e.g., fences, monuments of unknown origin), and even calculations made by the surveyor.



Solving Latent Ambiguities

Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist."



Solving Latent Ambiguities

In other words, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract."

*City of Grosse Pointe Park v. MUNICIPAL LIABILITY
AN PROPERTY POOL, 702 NW 2d 106 - Mich:
Supreme Court 2005*

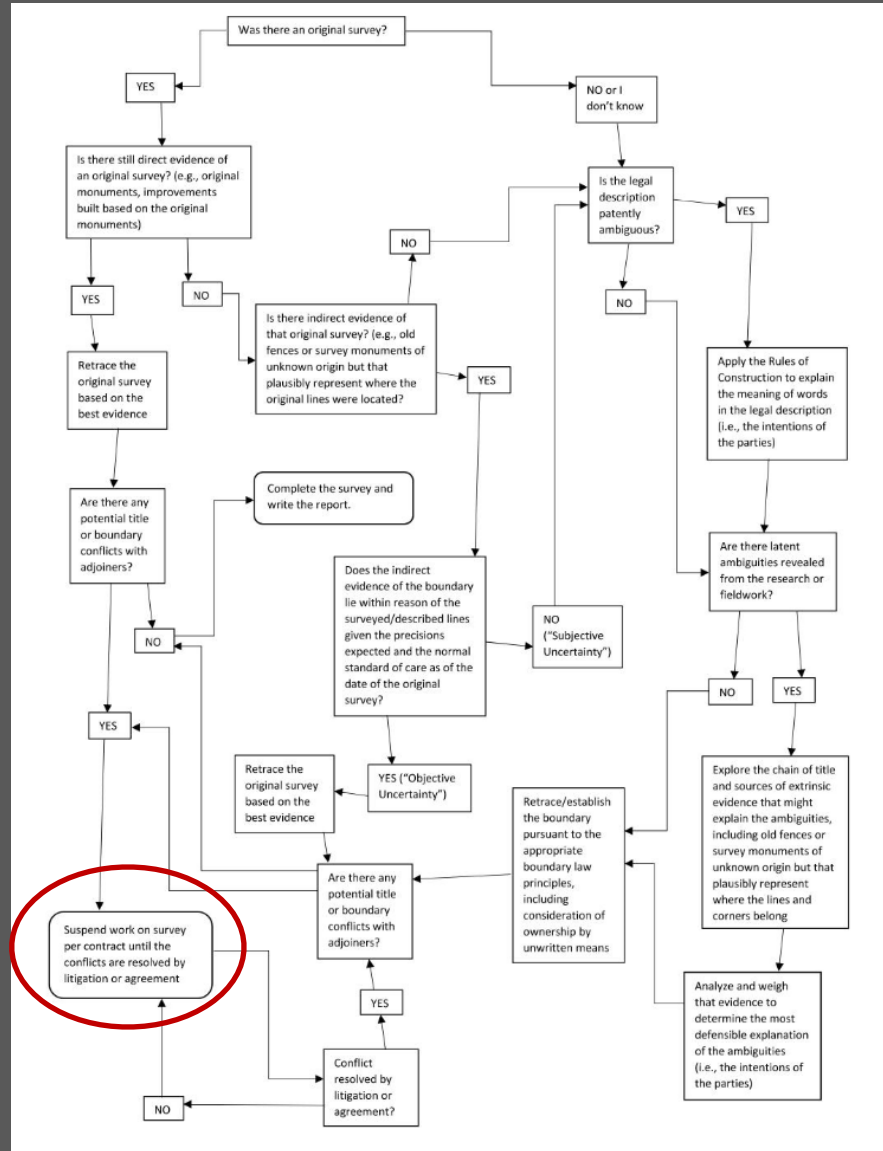


Boundary or title conflicts independent of the resolved boundary

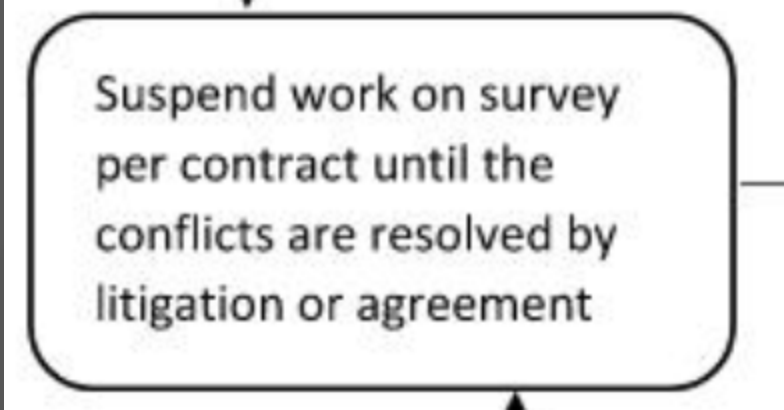
If a potential title conflict is discovered, or, once the surveyor has formed an opinion as to the location of the boundary lines and corners, he or she finds possession or occupation evidence substantively to the contrary, it is strongly advised that the surveyor proceed carefully **lest he or she create a dispute where none existed before.**



Flowchart



Flowchart



Suspend work on survey
per contract until the
conflicts are resolved by
litigation or agreement



Boundary Survey Scope of Services

Prepare a boundary survey pursuant to Indiana Administrative Code requirements in 865 IAC 1-12.

This includes monuments set or found at (or a witness to) each boundary corner, a signed, certified plat of survey and accompanying Surveyors Report.



Boundary Survey Scope of Services

It should be noted, however, that boundary determinations often disclose unseen or unknown conflicts between record documents and/or between record documents and the location of physical improvements.



Boundary Survey Scope of Services

Thus, if in the process of conducting the research, fieldwork or analysis, the surveyor identifies a possible boundary or title conflict, a sketch showing the revealed conditions will be prepared and a meeting with the client – and the affected neighbor(s), if desired – will be scheduled.



Boundary Survey Scope of Services

During that meeting, the problem will be explained, alternatives for possible resolution will be presented and any additional survey work that would be required to achieve resolution will be outlined.



Boundary Survey Scope of Services

Following that meeting, if the client wishes to engage the surveyor to assist in pursuing resolution of the problem as a consultant, expert and/or formal or informal mediator, the contract will be modified accordingly.



Boundary Survey Scope of Services

Otherwise the client will be invoiced only for the time expended to that point, and work on the survey will be suspended until or unless the client is able to resolve the issue by agreement or litigation, at which time a subsequent contract may be executed to complete the survey pursuant to that agreement or litigation.



Lake George experience

- Resolved 5 years ago after spending \$250,000
- Last week client said...



Completing the survey

Plat and report ... regardless

Why?

Provide footsteps for others to follow!

Place plat and report into the public record



John G. McEntyre and Darrell Dean (Purdue University)

“...there is support for the land surveyor to take an affirmative and responsible position with respect to identifying and making recommendations concerning boundary lines established by unwritten means.”



Curtis Brown - 1979

In my early writings, I generally advocated that surveyors should locate land boundaries in accordance with a written deed; all conveyances based upon unwritten rights should be referred to attorneys for resolution.



Curtis Brown - 1979

Within recent years there have been cases, and one in particular, wherein surveyors have been liable for failure to react to a change in ownership created by prolonged possession.



Curtis Brown - 1979

From my experience with clients, very few know that there is a difference between [ownership and the written deed]; most clients want to know what they own.



Curtis Brown - 1979

As a summary of the discussion presented, the following is offered:

1. The surveyor in finding an encroachment on his client's land, must fully inform the client of its significance; further the information must be presented in such a manner that third parties also understand the significance of any encroachment.



Curtis Brown - 1979

2. Nothing in the law prevents the surveyor from deciding who has ownership to encroachments, and he may monument ownership lines rather than written title lines;



Curtis Brown - 1979

3. In some circumstances the surveyor may be justified in monumenting the line that he believes to represent [the] true ownership line.



Curtis Brown - 1979

4. Since, to avoid liability, the surveyor must fully disclose the significance of encroachments; surveyors must have knowledge of how and when unwritten conveyances occur.

It is my recommendation that all surveyors should be required to understand the subject.



Questions?

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