BOUNDARY NEGOTIATION AND SETTLEMENT STRATEGIES

Boundary disputes may be resolved through negotiation either after the commencement of litigation or before the commencement of litigation. In some cases it may be preferable to attempt to resolve the boundary dispute before commencing litigation, but the careful attorney must always be aware of possible statute of limitations issues, including, but not limited to, the ten (10) year period provided under Section 501 of the Real Property Actions and Proceedings Law and CPLR 212(a).

Negotiations to resolve boundary disputes are not very different from negotiations used to resolve other kinds of disputes. For more information about negotiation strategy and tactics, go to http://www.NegotiationInstitute.com . The author has attended Marty Latz's CLE seminar on negotiation strategy and tactics, and the author strongly recommends that seminar for anyone interested in negotiations. In particular, the author recommends and follows Mr. Latz's "Five Golden Rules":

- "Information is power" -- so get as much information as possible about everything and everyone;
- "Maximize your leverage" by (i) evaluating how much each party needs a resolution, (ii) finding out each party's best alternative to a negotiated resolution, and (iii) taking practical steps to achieve your client's best alternative if a negotiated resolution does not happen;
- "Employ 'fair' objective criteria," such as surveys, expert opinions, and title reports;
- "Design an offer and concession strategy"; and
- "Control the agenda."

There also are several books devoted to the art and science of negotiation, including the following books available at http://www.amazon.com :

- Negotiation (Harvard Business Essentials) (Harvard Business School Press);
- Peter B. Stark and Jane S. Flaherty, The Only Negotiating Guide You'll Ever Need: 101 Ways to Win Every Time in Any Situation;
- Howard Raiffa, The Art and Science of Negotiation; and
- Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In.

Typically, boundary disputes are resolved through negotiations when the parties and their respective attorneys realize and understand that litigation almost invariably will consume far more time and expense than a negotiated resolution. Moreover, in most cases a negotiated resolution may be preferable to each party's likely best alternative outcome from litigation.

During negotiations, each party's attorney will seek to use the substantive law and the known factual circumstances -- especially all surveys of the disputed area -- to advance his or her own client's position. Therefore, it is vitally important that the attorney seeking to negotiate a resolution of a boundary dispute have at his or her disposal (i) the applicable law and (ii) the relevant facts and circumstances, particularly surveys and deeds.

A. Setting Objectives for Negotiations

Insofar as the resolution of a boundary dispute most likely will affect permanently the parties' respective real properties, it is vitally important that the careful attorney communicate with his or her client in order to understand the client's objectives and to educate the client about the range of likely outcomes, whether through litigation or negotiation. The attorney and the client should together make a field inspection of the disputed area -- without knowingly trespassing on anyone else's property. At the time of the field inspection, the attorney should have available a copy of the most recent survey, preferably one showing the location of trees, fences, and other prominent physical features in or about the disputed area. Photographs of the disputed area should be taken by the attorney for future reference and memorialization. (Photographs taken by the client for use at trial can be taken at the same time if it appears that litigation may be possible.)

After viewing the disputed area, the attorney and the client should discuss the matter thoroughly. (Any discussion about the client's objectives before the attorney views the disputed area will be less efficient.) Often clients can be very emotional about boundary disputes, especially if the boundary dispute involves vegetation or other elements to which the client has become attached emotionally. More likely than not, most clients will be seeking to preserve the integrity of the boundaries of their property as reflected in their deed. It may be especially important to maintain the integrity of the property's boundaries if the local municipality (i.e., the village, town, or city) has minimum lot sizes or set backs set forth in the local zoning ordinance. Relocating a boundary line may make the clients' lot non-conforming -- a situation to be avoided if at all possible.

Some clients, however, will seek to continue encroachments from their property onto an adjoining property. The client may deem the encroachments -- such as a fence or vegetation or a structure -- to be an essential feature of his or her property.

In either case, it is vitally important that the attorney gather together all photographs, surveys, deeds, and other relevant documents (e.g., invoices for work done by or for the client in or about the disputed area). Armed with the relevant documents and a working knowledge of the law likely to be applicable to the boundary dispute at hand, the attorney and the client should make an initial list of the client's objectives. (As mentioned previously, the attorney must be aware of minimum dimensional requirements set forth in the local zoning ordinance.) If possible, the objectives should be put in order of priority, so the attorney will know the client's most important objectives.

Unfortunately, boundary disputes are often perceived to be "zero sum" games in which one party's gains necessarily equate to the other party's losses. Therefore, it is important to factor into your client's formulation of his or her objectives important values that might not be apparent otherwise. Insofar as boundary disputes typically involve neighboring landowners, there is significant value in resolving the dispute amicably and for the long run.

It is important to understand the worst case result that your client can expect. By understanding the worst case scenario, you and your client can take steps to try to avoid it or minimize it.

Finally, the client's ultimate objective -- and best alternative -- must be kept in mind at all times. The best alternative to a negotiated settlement may available only by pursuing litigation. Alternatively, the best alternative to a negotiated settlement may be letting the matter alone for the time being. Each alternative to a negotiated settlement must be considered with the applicable statute of limitations firmly in mind.

B. Presenting Opening Positions

In some cases, the client's opening position will be set forth in a complaint for an action that has been commenced against the adjoining landowner and any other interested parties who may be required to be joined under Article 15 of the Real Property Actions and Proceedings Law.[1] It can be very effective to come out "with guns blazing" because the mere commencement of a lawsuit may provide the leverage necessary to reach a quick resolution. On the other hand, a more diplomatic approach -- in the form of a demand letter -- may be more effective, especially if there has not been any previous "bad blood" or other unpleasant dealings between the parties. When the boundary dispute is relatively simple, an oral communication -- perhaps directly from the client to the other party -- may be most effective in order to maintain a spirit of neighborliness.

Unlike other negotiations, boundary dispute negotiations almost invariably will involve a future long-term relationship between the parties as neighbors -- unless, of course, one of the parties moves away. Therefore, the negotiation process should tend to take the form a problem-solving endeavor -- rather than a competitive game -- even though the parties may view their boundary dispute as being a "zero sum" game. A problem-solving approach includes formulating an opening position that will appear credible based upon legitimate objective standards (such as a survey showing a proposed resolution of the dispute) and which will not cause the other side to become angry or confrontational.

In any case, the party's opening position -- whether it is set forth in a complaint or a letter or orally -- should be crafted so the client will have some room to bargain. In general, the recipient of the party's opening position will invariably decline to accept it without reservation or counteroffer. Therefore, the opening position should have built in some "wiggle room" that will protect the client's ultimate objectives.

A meeting with the other side (and his or her attorney) should be considered, especially if it can be done at the site of the boundary dispute. (The site of the boundary dispute is likely to be viewed as neutral territory, so it is a preferable location to either of the attorneys' offices.) Also consider preparing a meeting agenda, which will tend to control the parties' discussion at the meeting.

C. How and When to Make Concessions

The attorney should resist the temptation to make concessions early in the negotiation process. Instead, use the negotiation process to gather information and to understand the other side's interests and goals. (The attorney should put his ego aside and let the other side provide information.) Particularly in the area of boundary disputes, it is important to understand the other side's interests in the matter.

- Does the other party need the disputed area in order to be in compliance with local zoning ordinances?

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[1] Whenever there is a possible adverse possession claim, the careful attorney must be aware of the impact of the statute of limitations. Under Section 501 of the Real Property Action and Proceedings Law, "[a]n entry upon real property is not sufficient or valid as a claim unless an action is commenced thereupon within one year after the making thereof and within ten years after the time when the right to make it descended or accrued." See Real Prop. Actions & Proceedings Law § 501; see also CPLR 212(a) ("An action to recover real property or its possession cannot be commenced unless the plaintiff, or his predecessor in interest, was seized or possessed of the premises within ten years before the commencement of the action.").

- Does the other party want the disputed area to remain "natural" to serve as a buffer area?

- Does the other party want the disputed easement or right-of-way to gain access to some nearby facility or feature (such as a body of water)?

- Does the other party want the disputed area to preserve certain vegetation or other physical features that the other party may have planted or erected inadvertently in the disputed area?

Getting the other party's answers to these (and other similar) questions is of paramount importance when an attorney is seeking to resolve a boundary dispute. The attorney should not rely upon his or her own client's perception (or recitation) of the other party's interests and goals. Whenever possible, the attorney should get answers from either the other party's attorney or the other party directly -- keeping in mind that the attorney cannot provide legal advice to a person with interests that are adverse to the attorney's client's interests.

Parties generally expect that their respective offers and concessions will follow a pattern. As negotiations proceed to conclusion, the parties' respective concessions should become smaller and smaller until an agreement is reached. On the other hand, if one party makes a significantly large concession in the middle negotiations, it will communicate to the other side that perhaps other large concessions are possible. Concessions should be made with a view towards communicating to the other side how far you are willing to go. When making a concession, always ask for something in return.

Maintaining credibility is extremely important throughout the negotiation process. To gain credibility, the attorney should be consistent when identifying which issues are "non-negotiable." The attorney also should consider sharing independently verifiable information -- such as surveys, deeds, and case law -- to the extent that the information will bolster his client's negotiation position. On the other hand, the attorney should never lie. If other side seeks information that would diminish your client's negotiation position, their inquiries should be deflected or directed to other issues.

D. Overcoming Impasse

Sometimes the parties' emotions can get in the way of a negotiated settlement. Attorneys, however, need not be emotional, and they can assist the process by not reacting to the emotional salvos launched by one side or the other. Patience and objectivity may themselves help to overcome impasse.

Understanding the other side's point of view also can be helpful toward breaking an impasse. Objective facts -- such as information shown on a survey prepared by the independent surveyor -- can be used to break an impasse.

When litigation is pending, the scheduled dates can be used to keep the pressure on to reach a negotiated settlement. In particular, being ready to go to trial can lead to resolution of an impasse. If litigation has been commenced, the judge may be willing to become involved as a mediator to break a negotiation impasse. Alternatively, the parties themselves may agree to go to arbitration or mediation.

Finally, a brainstorming session -- potentially even with the other side's attorney -- may lead to options that had not be considered before. Sometimes a creative solution can break an impasse between the parties. Consider the use of licenses (rather than easements) to permit existing conditions in the disputed area to continue for some period of time.

E. Finalizing the Agreement

Any oral commitments to resolve the parties' boundary dispute should be confirmed in writing as soon as possible. If litigation has been commenced, consider requesting that the Judge conduct proceedings in open court to memorialize the terms of the negotiated resolution. See Stefanovich v. Boisvert, 271 A.D.2d 727, 705 N.Y.S.2d 436 (3d Dep't 2000) (holding that there was no basis to change terms of oral stipulation of settlement establishing common boundary line); see also Robinson v. Borelli, 239 A.D.2d 656, 657 N.Y.S.2d 783 (3d Dep't 1997) (party's misunderstanding regarding boundary line as set forth in stipulation of settlement did not require vacating stipulation); Griffin v. Montemarano, 205 A.D.2d 863, 613 N.Y.S.2d 453 (3d Dep't 1994) ("Stipulations of settlement are favored by the courts and not lightly set aside. Only where there is cause sufficient to invalidate a contract will a party be relieved from the consequences of a stipulation."). If any of the parties seem to be particularly untrustworthy or fickle, a great deal of time and energy may be saved if the parties' settlement "in principle" is memorialized in open court, on the record, and transcribed.

Thereafter, settlement documents in final form should be transmitted to the other side with a reasonable deadline for execution. There is a significant advantage to drafting the settlement documents, and, therefore, the conscientious attorney should want to be the draftsman of the settlement documents. While drafting the settlement documents, the draftsman has the opportunity to consider and deal with issues that might not have been negotiated by the parties. Moreover, written settlement documents will tend to add both credibility and legitimacy to the proposing party's position.

The most important documents to settle boundary disputes are the ones that will be recorded against the parties' respective properties. Typically, these documents take the form of declarations, which either (i) will create or (ii) will release interests in real property. Sometimes declarations do both simultaneously. Declarations should be prepared with all the formalities of a deed, and must be executed and acknowledged in order to be recorded in the County Clerk's Office.[2]

The commencement of litigation may facilitate the conclusion of negotiations because litigation usually entails scheduled dates of various kinds, including conferences with the Court. Although scheduled dates may be adjourned for reasonable amounts of time, it is unwise to stipulate to dismiss the pending litigation before all of the necessary settlement documents are executed and properly recorded.

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[2] When filing documents in the County Clerk's Office it often is necessary to file certain forms, such as TP-584 and the Real Property Transfer Report. Therefore, the settlement documents should include provisions requiring the parties to execute and deliver any other documents necessary to record the requisite settlement documents in the County Clerk's Office.