Measuring Your Risk: Surveyor Contracts for Everyone
RLI Design Professionals is a Registered Provider with The American Institute of Architects Continuing Education Systems. Credit earned on completion of this program will be reported to CES Records for AIA members. Certificates of Completion for non-AIA members are available on request.

This program is registered with the AIA/CES for continuing professional education. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the AIA of any material of construction or any method or manner of handling, using, distributing, or dealing in any material or product. Questions related to specific materials, methods, and services will be addressed at the conclusion of this presentation.
Copyright Materials

This presentation is protected by US and International Copyright laws. Reproduction, distribution, display and use of the presentation without written permission of the speakers is prohibited.

© RLI Design Professionals
Disclaimer

Nothing presented herein is a substitute for actual legal advice that can only be provided in the event that an attorney client relationship is formed and agreed to by both the attorney and the client. Furthermore, the presentation may involve hypothetical facts and is no substitute for legal advice based on the actual facts and circumstances of a particular situation.
Firms that provide surveying services have unique professional exposures, whether you’re the one providing services or you’re the one contracting with a surveying firm. In today’s design environment, understanding and managing perils in many forms is important. The use of risk management practices and a sound contract can help you recognize and mitigate the risks that you face.
Participants will:

1. Acquire knowledge and skills to manage project risks involving the services of surveyors;

2. Develop familiarity with important contract provisions, whether you’re the surveyor or you’re contracting with a surveyor;

3. Understand the standard of care and the expectation of performance for surveying services; and

4. Gain insight into how the negligent rendering of surveying services can result in claims.
Risk Management
What Makes Surveyor Risk Different?

- Time spent on the road
- Consistent field exposures
- Equipment theft
- Hazardous materials
Client Expectations

Which is the client’s priority?

1. Scope
2. Schedule
3. Cost
Manage Client Expectations

- Draft a reasonable scope
- Set common goals
- Agree on expectations
- Define roles and responsibilities
- Establish measurements of success
- Flag anything that may prohibit success

Communicate
Common Questions

Why do other design professionals get to throw their documents away?*

Do I really have to keep my documents forever?

*This is untrue!!! All design professionals should have a document retention policy addressing what should be retained and for how long.
Guides for Record Retention

Consider the following and act consistently...

- Applicable Statutes of Repose and/or Statutes of Limitations
- Contractual obligations
- Practice-related considerations
- Advice from Attorney
- Advice from Accountant
- E-Discovery considerations
Contract Elements
Purpose of a Contract

Establish:

- Scope of services
- Relationship
- System of communication
- Standard of care
- Rights/responsibilities of the parties
Standard Industry Documents

Standard industry contract forms *exclusively* for surveyors.

AIA C201
American Institute of Architects

EJCDC E-560
Engineer’s Joint Contract Documents Committee

State-specific forms
- North Carolina Society of Surveyors
- Tennessee Association of Professional Surveyors
AIA C201-2015 § 1.2.4

The Owner shall provide the Surveyor with documents in the Owner’s possession, such as geotechnical reports and surveys, that contain relevant information about the existing condition of the Property, including information regarding boundary lines, topography, means of access to the site, utilities, encumbrances, and locations of structures that may be affected by the Project.

EJCDC E-560 2015

Land Surveyor may use and rely upon such requirements, instructions, programs, reports, data, and information in performing or furnishing services under this Agreement.
Scope of Services

Things to include...

- What you’ll do
- What your research may include
- Type of survey
- Establish a benchmark and reference of elevation
- Dimensions, characteristics, notes, medium, format
- Survey type requirements
Survey Types

What kind of survey will you provide?

- Horizontal and vertical control
- Land title survey
- Topographic survey
- Architectural survey
- Boundary survey
- Hydrographic survey
- Stake-out survey
- Subdivision plat
- Mine survey
- “As-built” survey
- Infrastructure location
Additional Services

Don’t forget: You can exclude certain services, too!

- Permits
- Subdivision plans
- Digital terrain modeling
- Laser scanning
- Aerial mapping
- Construction layout
- Subsurface utility exploration
### EJCDC § A1.05 – Completion Schedule

<table>
<thead>
<tr>
<th>Survey Task</th>
<th>Completion Date (delivery to Engineer)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Boundary Survey</td>
<td>on or by _____ [or within ___ days of the Effective Date.]</td>
</tr>
<tr>
<td>Topographic Survey</td>
<td>on or by _____ [or within ___ days of the Effective Date.]</td>
</tr>
<tr>
<td>Reports</td>
<td>on or by _____ [or within ___ days of the Effective Date.]</td>
</tr>
</tbody>
</table>
Standard of Care

Colorado Code of Regulations (CCR)
4 CCR 730-1 § 1.3(A)(8)

Compliance with Applicable Laws, Regulations, and Codes. Licensees shall exercise appropriate skill, care, and judgment in the application of federal, state, and local laws, regulations, and codes in the rendering of professional services and in the performance of their professional duties. It will be deemed a violation of these Rules if a licensee violates local, state or federal laws or statutes that relate to the practice of architecture, engineering, or land surveying.
Surveyor Creed

Tennessee Surveyor Creed

As a Professional Surveyor, I dedicate my professional knowledge and skill to the advancement and betterment of human welfare. I pledge:

• To give the utmost of performance;
• To participate in none but honest enterprise;
• To live and work according to the laws of man and the highest standards of professional conduct;
• To place service before profit, the honor and standing of the profession before personal advantage, and the public welfare above all other considerations.
Certifications

Based on scope of services

Do so on a limited basis
Express a professional opinion
Set time and place
Be within your expertise
Known by and in control of

Express a professional opinion on a limited basis.
Payment Terms

- Amount/basis for compensation
- Additional services deviations
- % of interest for late payment
- No withholding or liquidated damages
- Reimbursable expenses
Engineer shall...in coordination with Owner, arrange for access to the Site and make all provisions for Land Surveyor to enter upon adjacent public and private property as required for Land Surveyor to perform services under this Agreement.
Termination

Things to consider...

Termination for convenience

- Either party with ___ days notice
- Surveyor to be paid in full for services performed prior to termination and reimbursable expenses
- Surveyor to deliver any completed documents to Client

Termination for cause

- Material breach (ex: failure to make prompt payment)
- Either party with ___ days notice
- Time to cure breach
- Surveyor to be paid in full for services performed prior to termination and reimbursable expenses
- Surveyor to deliver any completed documents to Client

Secure on your own right to terminate or suspend your services.
1. All documents are instruments of service and Surveyor retains ownership and property interest.
2. Signed and sealed copy given to Client.
3. Limited license to use granted:
   • For use on specific project;
   • Any (re)use or modification without Surveyor is at Client’s sole risk;
   • Client shall indemnify and hold Surveyor harmless; and
   • Limited license creates no rights in any other parties.
Electronic Data Transfer

Things to address...

- Information purposes only, not to be relied upon
- No representations or warranties as to accuracy since may be revised/modified at any time
- Stamped, signed documents take precedence in event of conflict
- No reuse without written authorization (ownership)
- Release, agree to defend, indemnify, and hold harmless if used without your involvement
Surveyor may provide draft documents to Client from time to time for its information. However, **Client shall only rely upon Documents provided in printed, non-electronic format, which are duly marked with the original seal of the Surveyor.** In the event that a discrepancy exists between Documents provided in electronic format and Documents provided in printed, nonelectronic format, the latter shall govern and control. Documents provided to Client in electronic format are only for the convenience of the parties hereto, and any conclusion or information obtained or derived from such electronic Documents will be at Client’s or other user’s sole risk.
Limitation of Liability

EJCDC E-560 2015

Land Surveyor’s Liability Limited to Amount of Land Surveyor’s Compensation

To the fullest extent permitted by law, and not withstanding any other provision of this Agreement, the total liability, in the aggregate, of Land Surveyor and Land Surveyor’s officers, directors, members, partners, agents, employees, and Subconsultants, to Engineer and anyone claiming by, through, or under Engineer for any and all claims, losses, costs, or damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to the negligence, professional errors or omissions, strict liability, breach of contract, indemnity obligations, or warranty express or implied, of Land Surveyor or Land Surveyor’s officers, members, directors, partners, agents, employees or Subconsultants, shall not exceed the total compensation received by Land Surveyor under this Agreement.
To the fullest extent permitted by Laws and Regulations, Land Surveyor shall indemnify and hold harmless Engineer, Owner, and their officers, directors, members, partners, agents, consultants, and employees from losses, damages, and judgments (including reasonable consultants’ and attorneys’ fees and expenses) arising from third-party claims or actions relating to the Project, provided that any such claims, action, loss, damages, or judgment is either (a) attributable to bodily injury, sickness, disease, or death, or to damage to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom, or (b) made or sought directly by Owner against Engineer, regardless of the type or category of claim, action, loss, damages, or judgment; but only to the extent caused by any negligent act or omission of Land Surveyor, its Subconsultants, or their officers, directors, members, partners, agents, or employees.
Hazardous Materials

AIA C103-2015 § 9.5

Unless otherwise required in this Agreement, the Consultant shall have no responsibility for the discovery, presence, handling, removal or disposal of, or exposure of persons to, hazardous materials or toxic substances in any form at the Project site.
It is the duty of a land surveyor in his (her) profession to use that degree of knowledge, skill, and care ordinarily possessed and used by members of that profession, and to perform any service undertaken as a land surveyor, in a manner that a reasonably prudent land surveyor would use under the same or similar circumstances.
Words to Avoid

Terms to avoid

“Highest”
“Most”
“Best”
“All”
“Superior”
“First-Class”

Phrases to avoid

“Highest standards in the profession”
“Best professional standards”
“Superior standard of care”
We note that a mere difference of professional opinion does not establish professional negligence. Moreover, professional negligence is not established by proving that a professional opinion turned out to be erroneous. Rather, to recover for professional negligence based on an incorrect professional opinion, one must establish that the professional fell below the standard of skill and knowledge commonly possessed and utilized by members within the profession when rendering his opinion.

Lawson v. Winemiller
Contractual Conflict

What you want:

The Surveyor shall perform its services under this agreement consistent with the skill and care ordinarily exercised by other members of the profession practicing at the same time under the same or similar circumstances in the same locale.

What your client wants:

Surveyor represents (may also include “and warrants”) that its services under this Agreement will be performed in accordance with the highest standards in the profession exercised by nationally recognized design firms performing the same or similar services for (type of project).
Tort Law v. Contract Law

Breach of contract
Violation of a duty arising under or assumed by agreement.

Negligence
Violation of a duty imposed by law.
## Surveyor Torts

In addition to negligence, you can be held liable for the following:

<table>
<thead>
<tr>
<th>Slander of title</th>
<th>Outrage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trespass (civil and criminal)</td>
<td>Bad faith</td>
</tr>
<tr>
<td>Fraud (civil and criminal)</td>
<td>Mental Anguish</td>
</tr>
<tr>
<td>Nuisance (civil and criminal)</td>
<td>Conspiracy (civil and criminal)</td>
</tr>
<tr>
<td>Respondeat superior</td>
<td></td>
</tr>
</tbody>
</table>
Breach of Contract/Warranty

Breach of contract analysis:

Did you make a promise in your contract?
Did your client have the right to rely on it?
Did the client rely on it?
Did what you promised turn out to be false?
Did this result in harm to your client?
Words That Promise

Sample Disclaimer

Surveyor makes no warranties, either express or implied, with respect to services provided under this Agreement.

Terms to avoid

“Assure”
“Certify”
“Attest”
“Ensure”
“Guarantee”
“Warrant”
“Insure”
“Represent”
“Shall”
“Will endeavor to guard”
“Free from defects”
Case Study – Economic Loss Doctrine

Background:
Surveyor is hired by homeowners to plot land for the placement of a house. The contract did not require the Surveyor to place excavation stakes but the Surveyor does so at the request of the Contractor. The Surveyor makes an error in the placement and the foundation is improperly located in violation of the applicable building code.

Contractor settles with homeowners and files.

Ruling:
Economic loss doctrine does not apply. Though Surveyor had no direct contract with the Contractor, Surveyor had a duty to place the stakes so as not to cause foreseeable harm.
Scenario:
Home purchaser retained Surveyor to identify the boundaries of the property being purchased. Surveyor drove rebar flush into the ground and marked the four corners with wooden stakes, tied with ribbon. Owner was present at the time of the survey. Shortly thereafter the Owner trips on one of the wooden stakes, falls and suffers serious injuries. Owner files suit alleging negligence against Surveyor.

Ruling:
Expert testimony needed.
“In order to prevail on a negligence claim against a licensed professional, expert testimony is usually needed to prove the existence of a breach of the standard of care.”
2. In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited by the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.
Case Study – Slander of Title

Scenario:
In 2006, a homeowner hires Surveyor 1 to assess purchased property. Surveyor 1 discovers an error in the legal description that decreases homeowner’s property by .3 acres. In 2009 homeowner hires Surveyor 2. Surveyor 2 determines Surveyor 1 was wrong.

Adjacent property owner files suit against Surveyor 2 alleging professional negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and slander of title.

Ruling:
Surveyor not liable due to the “litigation privilege” found in Civil Code § 47(b).
Surveying v. Civil Engineering

When should a surveyor be engaged?
When should a civil engineer be engaged?

Technology is blurring the lines for some and causing engineers to offer services historically undertaken by surveyors.
# 1 Commandment: Have a written contract!
Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects Continuing Education Systems Program

Barbara Sable, AVP, RLI Design Professionals
Barbara.Sable@RLICorp.com