Measuring Your Risk: Surveyor Contracts for Everyone

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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.
Learning Objectives

Participants in this session will:

- Acquire knowledge and skills to manage project risks involving the services of surveyors
- Develop familiarity with important contract provisions, whether you're the surveyor or you're contracting with a surveyor
- Understand the standard of care and the expectation of performance for surveying services
- Gain insight into how the negligent rendering of surveying services can result in claims
Surveyor Considerations:

Risk Management
What Makes Surveyor Risk Different?

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

- Scope
- Schedule
- Cost

Project
Manage Client Expectations

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

Communicate
Common Sources of Confusion

Why do other engineers and architects get to throw their documents away?

Do I really have to keep my documents forever?

Untrue!
Documentation

- Statute of Repose
- Statute of Limitations
- Contractual Obligations
- Practice-Related Considerations
- Advice from Attorney
- Forever
Transfer of Risk:

Contract Elements
Contract’s Purpose

Establish:

- Scope of services
- Relationship
- System of communication
- Standard of care
- Rights/responsibilities of parties
Contract Types

AIA C201

EJCDC E-560

Examples of State-Specific Forms

• North Carolina Society of Surveyors
• Tennessee Association of Professional Surveyors
• “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.”

• “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

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
<table>
<thead>
<tr>
<th>Survey Types</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land Title Surveys</td>
</tr>
<tr>
<td>Boundary Surveys</td>
</tr>
<tr>
<td>Subdivision Plats</td>
</tr>
<tr>
<td>Horizontal and Vertical Control</td>
</tr>
<tr>
<td>Infrastructure Location</td>
</tr>
<tr>
<td>Topographic Surveys</td>
</tr>
<tr>
<td>Hydrographic Surveys</td>
</tr>
<tr>
<td>Mine Surveys</td>
</tr>
<tr>
<td>Architectural Surveys</td>
</tr>
<tr>
<td>Stake-out Survey</td>
</tr>
<tr>
<td>“As-Built” Surveys</td>
</tr>
</tbody>
</table>
Additional Services

- Permits
- Subdivision Plans
- Digital Terrain Modeling
- Laser Scanning
- Aerial Mapping
- Construction Layout
- Subsurface Utility Exploration

Don’t forget, you can exclude certain services too!
EJCDC Section 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

North Carolina

• “Surveyor’s services shall be conducted with the same level and degree of skill ordinarily exercised by members of its profession operating in a similar locality, at a similar time and under similar conditions and circumstances. Except as provided in this Section, no other warranties, express or implied, are offered or intended by the Surveyor.

Tennessee

• “Land Surveyor makes no warranty, either express or implied, as to its findings, recommendations, opinions, or professional advice except that its services were performed pursuant to generally accepted standards of professional practice in effect at the time of performance.
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 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
- Be within your expertise
- Do so on a limited basis
- Express a professional opinion
- Known by and in control of
- Set time and place

RLI DESIGN PROFESSIONALS
Design Professionals Learning Event
Payment Terms

- Amount of or basis for compensation
- Additional services deviations
- % of interest for late payment
- No withholding to impose a penalty 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

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

Cause

- Material breach
  - Ex: Not making periodic payments
- 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
Ownership

Section 6.03

- All documents are instruments of service and **surveyor retains ownership and property interest**
- Signed and sealed **copy** given to client
- **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**
  - Limited license **creates no rights in any other parties**
Electronic Data Transfer

North Carolina

- “However, Client shall only rely upon Documents provided in printed, non-electronic format, which are fully marked with the original seal of the Surveyor…”

- Informational 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 to defend, indemnify, and hold harmless if used without your involvement
Tennessee

• “Client agrees to limit the liability of Land Surveyor, its principals, employees, and subconsultants, to Client for any claim or action arising in tort, contract, or strict liability, to the amount of the Land Surveyor’s fee under this agreement.”

EJCDC

• Land Surveyor’s Liability Limited to Amount of Land Surveyor’s Compensation: To the fullest extent permitted by law, and notwithstanding 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.
E-560 Section 6.11

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 claim, 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
Section 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.**”
Standard of Care and Claims
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.

- Alabama Pattern Jury Instruction, Sec. 25.20
Words to Avoid

“Highest”
“Most”
“Best”
“All”
“First-Class”
“Superior”
“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, 1995 Ohio App
The Contractual Conflict

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.

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 (Architecture or Engineering) firms performing the same or services for (type of project).
Tort Law vs Contract Law

Negligence

Breach of Contract
Surveyor Torts (other than negligence)

- Slander of Title
- Trespass (civil & criminal)
- Fraud (civil & criminal)
- Nuisance (civil & criminal)
- Outrage
- Bad Faith
- Mental Anguish
- Conspiracy (civil & criminal)
- Respondeat Superior
Breach of Contract/Warranty

1. Did you make a promise in your contract?
2. Did your client have the right to rely on it?
3. Did they?
4. Did what you promised turn out to be false?
5. Did this result in harm to your client?
Surveyor makes no warranties, either express or implied, with respect to services provided under this Agreement.

- Assure
- Certify
- Attest
- Ensure
- Guarantee
- Warrant
- Insure
- Represent
- Shall
- Will Endeavor to Guard
- Free From Defects
Case Study – Economic Loss Doctrine

KHLH Inc. vs. Wisconsin Land Surveyors

• Economic loss doctrine rejected
• Be aware: Design professionals are exposed to having to defend actions brought by contractors with whom they have no privity of contract

Facts

• Land surveyor contracted with homeowners to plot land for house placement – no excavation stakes
• Contractor asked surveyor to place stakes
• Surveyor made error in placement and poured foundation violated building code
• Contractor sought to recover damages

Court ruled, even without contract, surveyor had duty to place stakes so they wouldn’t cause foreseeable harm
Surveyors are professionals.

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.

*Bixenmann v. Dickson Land Surveyors*
2A:53A-27 Affidavit of lack of care in action for professional, medical malpractice or negligence; requirements.
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 in 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.

• Universal Citation: NJ Rev Stat § 2A:53A-27 (2013)
Case Study – Slander of Title

Butler v. McCain & Associates

- 2 property owners – Annie and John
- 2 different surveyors hired by Annie
- 1 surveyor error
- 1 surveyor as an expert in anticipation of litigation
- 1 lawsuit by John against surveyor acting as expert

Lesson: Acting as an expert witness may expose a surveyor to a slander of title claim. Seek contractual protection!
• Technology is blurring the lines for some and causing engineers to offer services historically undertaken by surveyors.
Take Away

#1 Commandment: Have a written contract!
Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects Continuing Education Systems Program

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