



Measuring Your Risk: Surveyor Contracts for Everyone

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RLI Design Professionals
DPLE 177

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Course Description



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 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

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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



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

Advice from Attorney

Practice-related considerations

Advice from Accountant

E-Discovery considerations

Contract Elements

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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

Assumptions & Reliance

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

Schedule

EJCDC § A1.05 – Completion Schedule

Survey Task	Completion Date (delivery to Engineer)
Boundary Survey	on or by _____ [or within ____ days of the Effective Date.]
Topographic Survey	on or by _____ [or within ____ days of the Effective Date.]
Reports	on or by _____ [or within ____ days of the Effective Date.]

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.

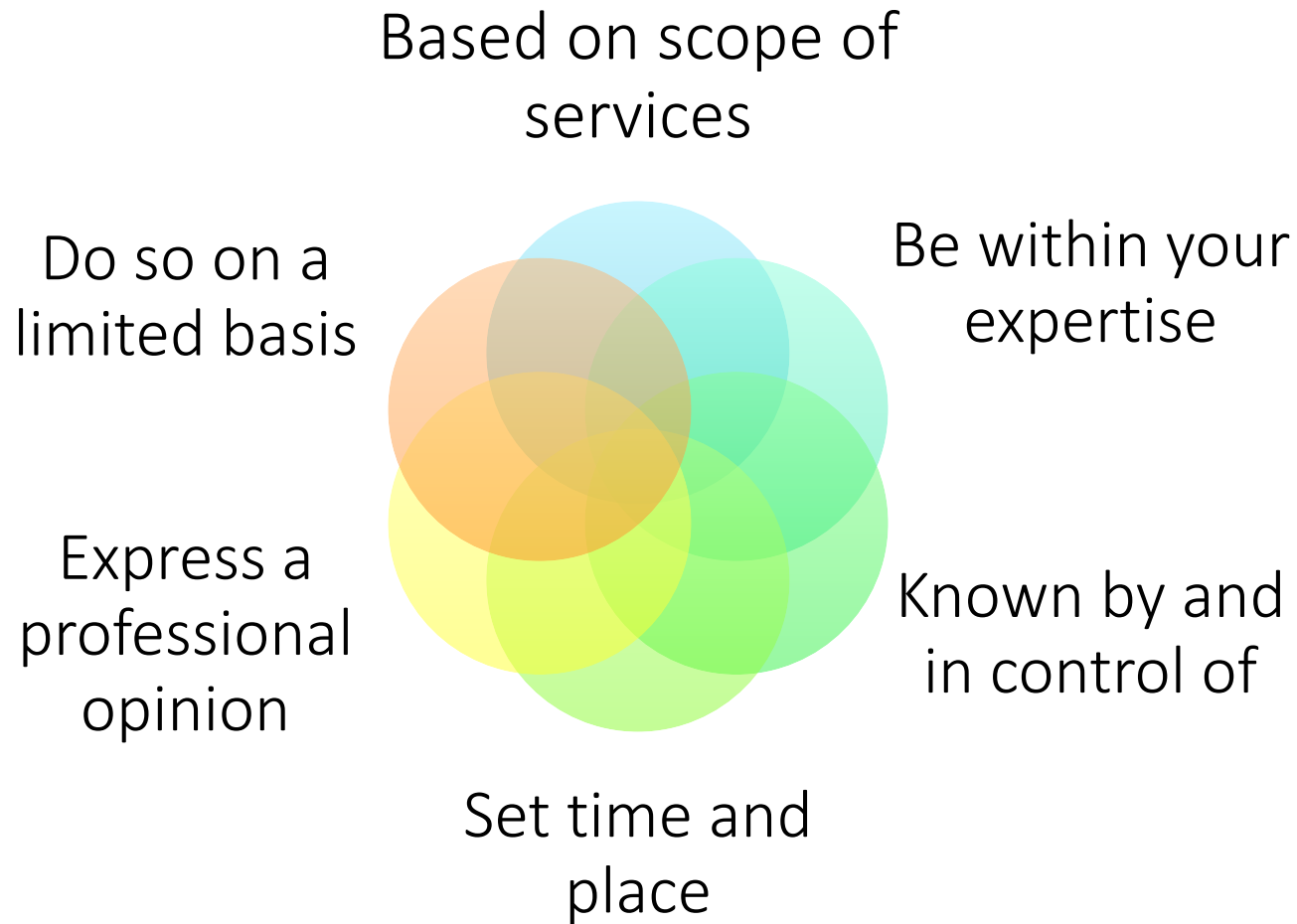
Surveyor Creed

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



Payment Terms



Amount/basis for compensation

Additional services deviations

% of interest for late payment

No withholding or liquidated damages

Reimbursable expenses

Right of Entry

EJCDC E-560 2015

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

Secure on your own right to terminate or suspend your services.

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

Ownership

EJCDC E-560 § 6.03

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

Ownership

NC Society of Surveyors

Agreement for Professional Surveying Services § 8.2

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 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.

Indemnification

EJCDC E-560 2015 § 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 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.



Standard of Care and Claims

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Standard of Care



Alabama

Pattern Jury Instruction § 25.20

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”

“Highest standards in the profession”
“Best professional standards”
“Superior standard of care”

Phrases to avoid

Standard of Care Translation

“

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:

Slander of title	Outrage
Trespass (civil and criminal)	Bad faith
Fraud (civil and criminal)	Mental Anguish
Nuisance (civil and criminal)	Conspiracy (civil and criminal)
Respondeat superior	

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.

“Assure”
“Certify”
“Attest”
“Ensure”
“Guarantee”
“Warrant”
“Insure”
“Represent”
“Shall”
“Will endeavor to guard”
“Free from defects”

Terms to avoid

Case Study – Economic Loss Doctrine

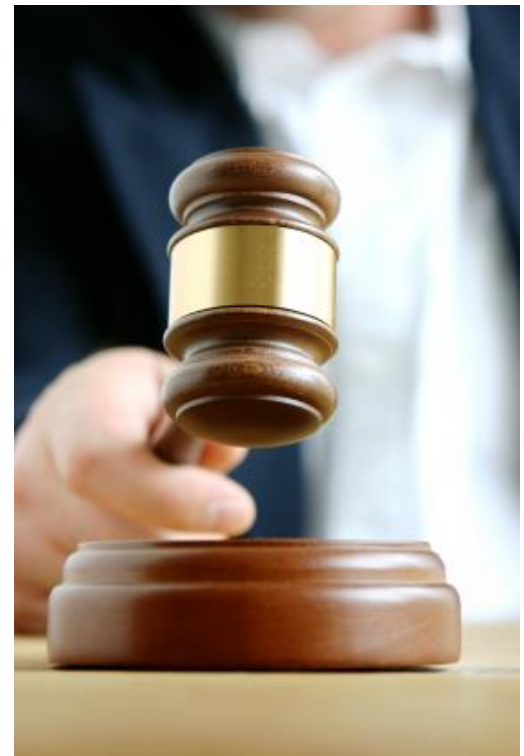
Background:

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.



Case Study – Standard of Care

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.”



Certificate of Merit

NJ Rev. Stat. § 2A:53A-27 (2013)

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 by the treatment, practice or work that is the subject of the complain, 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

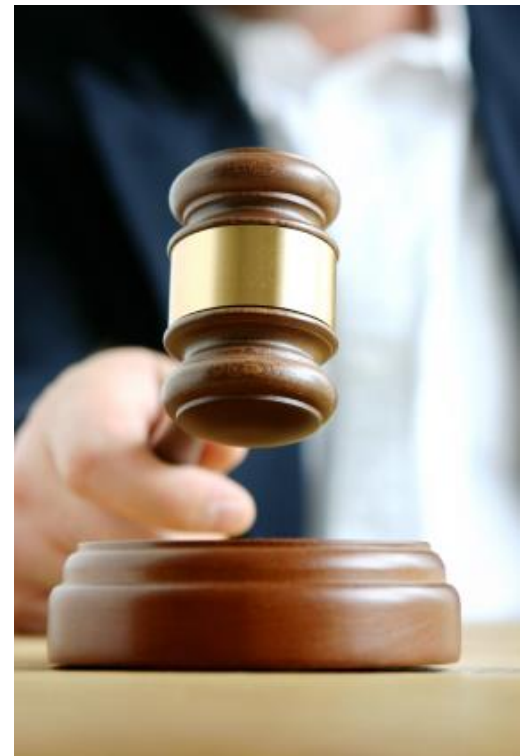
Scenario:

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.

Take Away

1 Commandment:

Have a written contract!



Thank you for your time!

QUESTIONS?

**This concludes The American Institute of Architects
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