I Am Not Your Attorney

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney in your jurisdiction who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

JEFF’S 10 COMMANDMENTS ON LIABILITY

1. KNOW THE LAW THAT GOVERNS YOUR PRACTICE:

“It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”


JEFF’S 10 COMMANDMENTS ON LIABILITY

- Ignorance of the law is no excuse for the average person.
- Even more so the professional service provider.
- Regulated by the State and Licensed for the protection of the public.
- Expected not only to know the law but to apply it as well.
- Torts—a civil wrong.
- Crimes and Criminal Prosecution
2. HAVE A WRITTEN CONTRACT.
Having a contract will help to avoid one of the common denominators of almost all litigation: MISCOMMUNICATION.

How many of you work under a contract every time you provide professional services?

Problems with oral contracts:
- What were the terms of the contract?
- Did you make warranties or guarantees?
- How will you enforce the agreement?
- How will you defend against a breach?
- Breeding ground for misunderstanding & miscommunication.
JEFF'S 10 COMMANDMENTS ON LIABILITY

Miscommunication:
- One common denominator in cases involving land surveyors is a breakdown in the communication between the surveyor and the client.

LAWLER V. HARE
Alabama Court of Civil Appeals
587 So.2d 387
August 9, 1991

HUNTER V. WILSHIRE
SUPREME COURT OF ALABAMA
2005 Ala. LEXIS 180
October 21, 2005
3. AVOID SIGNING YOUR CLIENT’S CONTRACT.

Don’t sign your Client’s contract (if possible). Many clients have contracts that they have developed over the years that are totally inappropriate for the professional service provider. If you must sign your Client’s contract have it reviewed by legal counsel for potential pitfalls.
4. PRACTICE DEFENSIVELY.
Conduct your business and your professional practice defensively, as if you will be going to court on every project that you turn out, because you never know where the lawsuit will be coming from.

JEFF’S 10 COMMANDMENTS ON LIABILITY

- Educate yourself.
- Educate the other professionals who work for you.
- Educate your party chiefs.
- Do not practice outside your areas of expertise.
- Be careful what you sign.
- Avoid litigious clients.
5. READ ALL CERTIFICATIONS CAREFULLY.
Many certifications will have guarantees and warranties imbedded in them that will nullify your errors and omissions insurance and expose you to greater liability.

COMMONWEALTH
V.
CJM, P.C.
Superior Court Of Connecticut
Judicial District of Hartford at Hartford
2008 Conn. Super. LEXIS 2774
6. UNDERSTAND YOUR POTENTIAL LIABILITY:
As a professional service provider, you are not only liable for your own actions, you are liable for the actions of those who work for you as agents or employees.

- There is no immunity from prosecution.
- Third party beneficiary doctrine is alive and well.
- Privity of contract is dead.
- Negligence is a stand-alone tort.
The general rule in California is that a professional person may be held liable to third persons who suffer damage proximately caused by the negligence of the professional person as an independent contractor in the performance of his professional duties even though there is no privity of contract between the third person and the professional person and even though the client does not complain about the quality of the professional service... The reason for the rule is that the action is ex delicto, not ex contractu....

"Originally professional persons were exempt from liability to third persons because it was believed that they owed their duty to their clients not to third persons. In rejecting the privity of contract requirement [California] declared that whether or not liability to third persons existed involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury...."


"...the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. Foreseeability and proximate cause now supplant the former requirement of privity of contract."


Who are your potential plaintiffs as a professional services provider?
JEFF’S 10 COMMANDMENTS ON LIABILITY

“[T]he courts have eliminated the need for privity between the Land Surveyor and the party seeking relief... that is, the party complaining no longer has to be the party with whom the land surveyor enjoyed a contractual relationship.”


JEFF’S 10 COMMANDMENTS ON LIABILITY

“The day of privity of contract between the surveyor and client is over; the surveyor is obligated to disclose, for the possible benefit of third parties, all information that may lead to damages.”


KENDALL V. LOWTHER

Supreme Court of Iowa
356 N.W.2d 181
September 19, 1984
Jeff's 10 Commandments on Liability

7. Professional negligence means you fell below the standard of care.

But I thought praying helped from work would actually protect me from committing malpractice that day.
JEFF’S 10 COMMANDMENTS ON LIABILITY

Tort v. Contract Action:
“The difference between a tort and a contract action is that a breach of contract is a failure of performance of a duty arising under or imposed by agreement, whereas a tort is a violation of a duty imposed by law.”

JEFF’S 10 COMMANDMENTS ON LIABILITY

Negligence:
“Any negligence action, of which there are myriad varieties, essentially requires the following elements: (1) existence of a duty on the part of the defendant; (2) the defendant’s breach of that duty; (3) existence of a causal relationship between the defendant’s conduct and the plaintiff’s injuries; and (4) resulting injury to the plaintiff.”

JEFF’S 10 COMMANDMENTS ON LIABILITY

Professional Negligence:
“A claim of surveyor liability is founded on the three elements common to any tort: a breach of duty, causation, and damages.”
Professional Negligence:

More specifically, to recover in an action for professional negligence, the plaintiff has the burden of proving: (1) the standard of care within the profession; (2) the defendant's failure to adhere to the professional standards; and (3) that the defendant's failure to adhere to the professional standards proximately caused harm to the plaintiff.


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**BELL V. JONES**

District of Columbia Court of Appeals
523 A.2d 982; 1986 D.C. App. LEXIS 495
December 31, 1986, Decided

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**BELL v. JONES**

District of Columbia Court of Appeals - 1986

LOT 822, SQUARE 1255
VOLTA PLACE IN GEORGETOWN

CERTIFICATION: I hereby certify that I have reviewed the property as shown and indicated lines, in accordance with D.C. Charter's records, and have located all of the existing improvements shown by notes and top survey. I have marked the west, east, north, and south boundary lines, and all lines as shown, and find there are no improvements other than those shown across the property lines except as indicated.

Signed: [Signature]
November 14, 1978
8. FRAUD ISN'T JUST FOR FAT-CATS ON WALL STREET.
Fraud is committed by land surveyors on a daily basis.
JEFF’S 10 COMMANDMENTS ON LIABILITY

Fraud:
"Alabama defines three types of fraud: intentional fraud; reckless fraud; and innocent fraud. Legal fraud is a misrepresentation of a material fact made either willfully to deceive, or recklessly without knowledge, and acted on by the other part; or if made by mistake or innocently, and acted on by the other party."


2011 MINIMUM STANDARDS

Sec. 1. Purpose - For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client, the title company, the lender, and the surveyor professionally responsible for the survey.

2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Sec. 1, Para. 2. Effective Date of Feb. 23, 2011.
2011 MINIMUM STANDARDS

Sec. 1. Purpose - In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats and maps that are of a professional quality and appropriately uniform, complete and accurate.

2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Sec. 1, Para. 3. Effective Date of Feb. 23, 2011.

2011 MINIMUM STANDARDS

Sec. 3. D. Boundary Resolution - The boundary lines and corners of any property being surveyed as part of an ALTA/ACSM Land Title Survey shall be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and survey.”

2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Section 3. D.

2011 MINIMUM STANDARDS

Sec. 3. E. iii. Measurement Standards - … Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e. inaccurate) if it was established or retraced using faulty or improper application of boundary law principles.

2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Sec.3.E.iii.
Section 5. Field Work – The survey shall be performed on the ground … and the field work shall include … A. The location of any monuments or lines that control the boundaries of the surveyed property.

2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys, Sec.5.A.i.

JEFF'S 10 COMMANDMENTS ON LIABILITY

9. SLANDER OF TITLE IS ACTIONABLE AGAINST A LAND SURVEYOR WHO IDENTIFIES THE WRONG BOUNDARY LINE.

As with fraud, slander of title is committed by land surveyors on a regular basis.

Slander of Title:
“The action of slander of title only applies to property rights or interest. The aspersions may relate to any property … they may be about lack of title … the plaintiff need not be the legal title holder … publication of the aspersion is required.”

10. CONSPIRACY IS MORE COMMON THAN YOU THINK AND CAN SEND YOU TO FEDERAL PRISON.

Civil Conspiracy:
“A civil conspiracy is a combination of two or more persons to accomplish an unlawful end or to accomplish a lawful end by unlawful means. The gist of the action is not the conspiracy alleged, but the wrong committed.”

Criminal Conspiracy:
“A criminal conspiracy is merely an agreement between two or more persons to commit a crime.”

The Form W-2 is used by employers to:
- Report wages, tips and other compensation paid to an employee.
- To report the employee’s income tax and Social Security taxes withheld and any advanced earned income credit payments.
- To report wage information to the employee, and the Social Security Administration. The Social Security Administration shares the information with the Internal Revenue Service.

A Form 1099-MISC is:
- Generally, used to report payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business.
- Required among other things, when payments of $10 or more in gross royalties or $600 or more in rents or compensation are paid.
- Provided by the payer to the IRS and the person or business that received the payment.
IRS Definition of Employee

“The determination [of employment status] is complex, but is based on whether the person for whom the services are performed has the right to control how the person performs the services. It is not based merely on how the person is paid, how often the person is paid, or whether the person works part-time or full-time.” [Emphasis added.]

Source: IRS Website
**JEFF’S 10 COMMANDMENTS ON LIABILITY**

**IRS Definition of Employee**
There are three basic categories of factors that are relevant to determining worker classifications:
- Behavioral control
- Financial control and
- Relationship of the parties

Source: IRS Website

**Independent Contractor**
“The general rule is that an individual is an independent contractor if you, the person for whom the services are performed, have the right to control only the results of the work and not the means and methods of accomplishing the results.” [Emphasis provided.]

Source: IRS Website

**Common-Law Employee**
“Under common-law rules, anyone who performs services for you is your employee if you can control what will be done and how it will be done. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.” [Emphasis provided.]

Source: IRS Website
JEFF'S 10 COMMANDMENTS ON LIABILITY

IRS Determination of Status
“If you would like the IRS to determine whether services are performed as an employee or independent contractor, you may submit Form SS-8 (PDF), Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.”
Source: IRS Website

Consequences of Treating an Employee as an Independent Contractor
“If you classify an employee as an independent contractor and your have no reasonable basis for doing so, you may be held liable for employment taxes for that worker.”
Source: IRS Website
The Virtual Small Business Tax Workshop is composed of nine interactive lessons designed to help small business owners learn their tax rights and responsibilities.

www.irsvideos.gov/virtualworkshop/
Source: IRS Website

Other Torts (or crimes):
- Trespass (civil & criminal)
- Nuisance (civil & criminal)
- Outrage
- Bad Faith
- Mental Anguish
- Respondent Superior/Master-Servant.

Statutes of Limitation
- Statutes of limitations are just what the name implies; legislatively enacted limitations on certain causes action.
Statutes of Limitation

I would venture to guess that every state in the Union has statutes that limit certain actions.

I would further venture a guess that almost every state has a limitations period that applies to professional services providers.

A Colorado case that is instructive on the professional’s knowledge of his or her own State’s laws.

The case is Cornforth v. Larsen and Larsen Surveying, 49 P.3d 346 (Colo.App. 2002).
LIMITATIONS ON LIABILITY

“The statute states in relevant part that, ‘all actions against any land surveyor brought to recover damages resulting from any alleged negligent or defective land survey shall be brought within the time provided in section 13-80-101 after the person bringing the action either discovered or in the exercise of reasonable diligence and concern should have discovered the negligence or defect which gave rise to such action, and not thereafter, but in no case shall such an action be brought more than ten years after the completion of the survey upon which such action is based.’”


LIMITATIONS ON LIABILITY

“NOTICE: According to Colorado law, you must commence any legal action based upon any defect in this survey within three years after you first discover such defect. In no event may any action based upon any defect in this survey be commenced more than ten years from the date of the certification shown hereon.” [Emphasis provided].


LIMITATIONS ON LIABILITY

“When construing a statute, we must determine and give effect to the intent of the General Assembly. To determine that intent, we look first to the plain language of a statute. If we can give full effect to the ordinary meaning of the words used, we construe the statute as written, because we presume the General Assembly meant what it clearly said. We also presume the General Assembly intends a just and reasonable result. A statutory construction that leads to absurd results will not be followed….”

LIMITATIONS ON LIABILITY

“Statutes of repose set a date after which a claim may be barred whether or not an injury has been discovered previously. Such statutes begin to run on the date of the act or omission giving rise to the injury. In contrast, statutes of limitation run from the date the injury was discovered or should have been discovered. The purpose of a statute of repose is to prevent the assertion of stale claims and to reduce the so-called ‘long tail’ of liability created by the discovery rule.”


LIMITATIONS ON LIABILITY

“Under the plain language of the statute, in order for the ten-year statute of repose to apply, the survey has to contain the notice. Since it is undisputed that the survey did not contain the notice, the ten-year statute of repose has no application.”


LIMITATIONS ON LIABILITY

“Without express direction from the legislature, the Court is unwilling to read into the statute an automatic ten-year period of repose.”

Discovery Rule

- The basic concept behind the discovery rule as it would be applied to the engineer or land surveyor, is that an applicable statute of limitations will be tolled (will not begin to accrue), until the discovery of the error.

- The problem for the engineer and especially for the land surveyor is that the discovery of an error or omission may not occur for years or even decades, thereby potentially tolling the statute until that time.

“Observing how the discovery rule is applied nationally to the issue of surveyor negligence or breach of contract does not indicate any dispositive national trend. A number of jurisdictions have applied the discovery rule to surveyor negligence, while others have rejected it.”

LIMITATIONS ON LIABILITY

Discovery Rule
- Fortunately, most discovery rules state that they will toll the statute until the error is discovered or should have been discovered.

Rule of Repose
- In addition, many states have included an outside ultimate limit within which the aggrieved party must come forward or the claim will be forever barred (a statute of repose).

“The ‘discovery rule’ has been used by courts and legislatures to avoid the harsh result that often allows a statute of limitations to run when some damage is incurred, even if the plaintiff has not yet discovered that he has suffered damages. Many statutes of limitations that incorporate a discovery rule also include an outer time limit, called a statute of repose.”

LIMITATIONS ON LIABILITY

“Indeed, Minn. Stat. § 541.052 (1998) is such a statute, as it incorporates elements of a discovery rule, by requiring actions to be brought within two years of discovery of a surveying error, with a statute of repose, by limiting any action to 10 or 12 years after the date of the survey.”


Rule of Repose

- Even though the application of statutes of limitation is state specific as it applies to the boundary surveyor, there is still a common thread that runs through all of the law, across all 50 states. Legislative bodies and the courts hate antiquated claims that often have in them more injustice than justice.

Rule of Repose

- The Courts and State Legislatures that enact “rules of repose” or “statute of repose” recognize the need to balance the plaintiff’s right to have a remedy with the professional’s right to have finality.
LIMITATIONS ON LIABILITY

“The establishment of a boundary line by acquiescence for the statutory period of twenty-one years has long been recognized in Pennsylvania. Two elements are prerequisites: 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of twenty-one years. As recognized by the Superior Court and the common pleas court, the doctrine functions as a rule of repose to quiet title and discourage vexatious litigation.”


LIMITATIONS ON LIABILITY

“As President Judge Coffroth aptly observed…a prospective purchaser will see the fence or similar marking; given its obvious presence as apparent boundary, he is therefore put on notice to inquire about its origin, history, and function. After 21 years, the chips will be allowed to fall where they may, for reasons of equity and peace.”


LIMITATIONS ON LIABILITY

“As a matter of public policy and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into…It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years [to come forward with a claim…. After 20-years] the memory of transactions has faded and parties and witnesses passed away…."

McDurmont v. Crenshaw, 489 So.2d 550 (Ala. 1986)