1. DISCLAIMER

*I Am Not Your Attorney.*

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney 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.

2. JEFF’S 10 COMMANDMENTS ON TORTS

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.”


3. JEFF’S 10 COMMANDMENTS ON TORTS

- 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

4. KNERR V. MAULDIN

Court Of Appeal Of California, Second Appellate District, Division Six
*2006 Cal. App. Unpub. LEXIS 6749*
August 2, 2006

5. From the CLSA Amicus Brief

The Superior Court sought to determine the location of the boundary in question by assessing which testimony was "more credible." Although it paid lip service to the concept of "following in the footsteps" of the original surveyor--being one Mr. Davy who, in 1926, surveyed the boundary of Chatsworth Lake View Annex and created the protracted lots within--it does not appear to have understood how that is done.

6. From the CLSA Amicus Brief

The Superior Court refused to recognize the importance of actually retracing the original surveyor's 1926 work, instead accepting the boundary location of respondent's surveyor, South Bay Engineering.... If this Court adopts the Superior Court's approach to determining boundaries, property rights will rest on witness credibility assessments at trial, instead of on proper survey procedure and boundary control, and the quest for evidence of the original surveyor's work.
From the CLSA Amicus Brief

The advance of technology has allowed for the increase in precision and reliability of locating evidence with ever-increasing efficiency. It must be made clear that simply locating or collecting evidence is not boundary surveying. Evaluation and interpretation of the collected evidence is what constitutes boundary surveying. It is possible to locate a boundary in the wrong location with a high degree of precision.

Primary Authorities Cited in the CLSA Brief:
- Bullard v. Kempff (1897) 119 Cal. 9, 15 quoting Diehl, supra.

From Diehl v. Zanger

"The plaintiffs in error submitted evidence conducing to show, among other things, that lots thirty-nine and forty, as well as other contiguous lots in the subdivision, had for twenty years and upwards been identified and defined in their position and extent upon the ground by buildings, fences and harmonious occupancy, and that at the very time of the grant to defendants in error the physical evidences of recognized and long admitted bounds which plaintiffs in error contend for, were visible and apparent to everybody."


"There was no conflicting evidence in regard to these facts. They were not disputed, and there is no evidence that the practical locations and proprietary and possessory recognitions ever deviated until after the remarkable results of the late survey."


"This litigation grows out of a new survey recently made by the city surveyor. This officer after searching for the original stakes and finding none, has proceeded to take measurements according to the original plat, and to drive stakes of his own. According to this survey the practical location of the whole plat is wrong, and all the lines should be moved between four and five feet to the east."


From Diehl v. Zanger
“Nothing is better understood than that few of our early plats will stand the test of a
careful and accurate survey without disclosing errors. This is as true of the government
surveys as of any others, and if all the lines were now subject to correction on new
surveys, the confusion of lines and titles that would follow would cause consternation
in many communities.”


13 From *Diehl v. Zanger*

“Indeed the mischiefs that must follow would be simply incalculable, and the visitation
of the surveyor might well be set down as a great public calamity.”


14 From *Diehl v. Zanger*

“The surveyor has mistaken entirely the point to which his attention should have been
directed. The question is not how an entirely accurate survey would locate these lots,
but how the original stakes located them.”


15 From *Diehl v. Zanger*

“No rule in real estate law is more inflexible than that monuments control course and
distance—a rule that we have frequent occasion to apply in the case of public surveys,
where its propriety, justice and necessity are never questioned.”


16 California Law

“Where, as here, there is an established interior monument near the lots being
surveyed, it is that monument that should be used. (See, e.g., *State of California v.
Thompson* (1971) 22 Cal. App. 3d 368, 379, 99 Cal. Rptr. 594 ["Although respondent
contends that [appellant's surveyor] ought to have commenced his survey from the
east in order to literally ‘follow in the footsteps’ of [the original surveyor], this
argument is without merit. A survey from the nearest established corner is least liable
to error.”


17 California Law
"If the position of the line always remained to be ascertained by measurement alone, the result would be that it would not be a fixed boundary, but would be subject to change with every new measurement. Such uncertainty and instability in the title to land would be intolerable."

_Young v. Blakeman_, 95 P. 888 (Cal.1908).

18 □ California Law

"As we view the case, however, the sole and only question for determination, in so far as the rights of plaintiffs (who are respondents here) are concerned, is whether the description contained in this deed, corrected as above stated, embraces the parcel of land in dispute. The deed, in so far as it purports to describe the tract of land conveyed by the city to Bonilla is free from ambiguity or uncertainty."


19 □ California Law

"If in running the lines as called for upon the ground it should appear that the calls of distance and course are in fact inconsistent with natural monuments called for, then such calls as to distance and course must, under the well-recognized rule, yield to the latter, provided the location of such monuments can be found."


20 □ California Law


21 □ From the Rest of American Jurisprudence

"Texas law is well settled that unless the facts are undisputed, the location of a survey line, as it was run on the ground by the original surveyor, is a question of fact for the jury. The Texas Supreme Court has explained that as to what are boundaries, is a question of law for the determination of a court; as to where the boundaries are upon the ground, is a question of fact to be determined from the evidence."

22 From the Rest of American Jurisprudence

"In determining boundaries, when finding the lines of a survey, the cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed. The primary objective in locating a survey is to follow the footsteps of the surveyor; by which is meant to trace on the ground the lines as he actually ran them in making the survey."


23 JEFF’S 10 COMMANDMENTS ON TORTS

2. OPERATE ABOVE THE STANDARD:

24 JEFF’S 10 COMMANDMENTS ON TORTS

"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 circumstance."

Alabama Pattern Jury Instructions, Sec. 25.20, Malpractice, Non-Medical Professionals.

25 JEFF’S 10 COMMANDMENTS ON TORTS

"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_."


26 JEFF’S 10 COMMANDMENTS ON TORTS

"We have not had the occasion to state the standard of care owed by a land surveyor. Medical and legal malpractice actions are analyzed according to tort law principles instead of contract law, and in those cases liability is predicated on ‘deviation from the professional standard of care.’ We have said that ‘_standards for demonstrating the elements of professional negligence do not differ from profession to profession_.’"

_Graves v. Downey Land Surveyor_, 885 A.2d 779 (Me. 2005)

27 JEFF’S 10 COMMANDMENTS ON TORTS
“The duty of care that the Superior Court imposed in this case required the Graveses to demonstrate that S.E. Downey's work on the survey was below that of an ordinarily and reasonably competent land surveyor in like circumstances. Courts in other jurisdictions have articulated the duty of care of land surveyors in similar ways. For example, in West Virginia a surveyor is held to the standard of care that a 'reasonably prudent surveyor' would have applied with regard to the same project.”

*Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005)*

---

28. **JEFF'S 10 COMMANDMENTS ON TORTS**

“Both Maryland and North Carolina state that a surveyor must ‘exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances.’ We agree with the Superior Court that the duty of care a land surveyor is obligated to provide is that degree of care that an ordinarily competent surveyor would exercise in like circumstances.”

*Graves v. Downey Land Surveyor, 885 A.2d 779 (Me. 2005)*

---

29. **GRAVES V. DOWNEY**

Supreme Judicial Court of Maine

885 A.2d 779

November 22, 2005

---

30. **JEFF'S 10 COMMANDMENTS ON TORTS**

3. 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.

---

31. **JEFF'S 10 COMMANDMENTS ON TORTS**

- There is no immunity from prosecution.
- Privity of contract is on death's door.
- Third party beneficiary doctrine is alive and well.
- Liability under implied contract.
- Tort liability.
- Criminal actions.

---

32. **ROZNY v. MARNUL**

Supreme Court of Illinois

250 N.E.2d 656

May 26, 1969

---

33. **JEFF'S 10 COMMANDMENTS ON TORTS**
“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*...”


34 □ JEFF’S 10 COMMANDMENTS ON TORTS

“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,...”


35 □ JEFF’S 10 COMMANDMENTS ON TORTS

“...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*.”


36 □ JEFF’S 10 COMMANDMENTS ON TORTS

.onload Who are your potential plaintiffs as a professional services provider?

37 □ JEFF’S 10 COMMANDMENTS ON TORTS

“[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.”


38 □ JEFF’S 10 COMMANDMENTS ON TORTS
“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.”


39 WATTS v. SHANNON and LEGGINS
Tennessee Court Appeals
2005 Tenn.App. LEXIS 403
April 5, 2005

40 JEFF’S 10 COMMANDMENTS ON TORTS
4. HAVE A WRITTEN CONTRACT.
Having a contract will help to avoid one of the common denominators of almost all litigation: MISCOMMUNICATION.

41 JEFF’S 10 COMMANDMENTS ON TORTS
☑ How many of you work under a contract every time your provide professional services?

42 JEFF’S 10 COMMANDMENTS ON TORTS
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.

43 JEFF’S 10 COMMANDMENTS ON TORTS
Miscommunication:
☑ One common denominator in cases involving land surveyors is a breakdown in the communication between the surveyor and the client.

44 LAWLER v. HARE
Alabama Court of Civil Appeals
587 So.2d 387
August 9, 1991
Lawler v. Hare

“In this case, the trial court determined that Lawler failed to provide the appropriate direction and supervision for Mr. Baker. Mr. Baker testified that he and his crew did the survey and plat for the Hares. Lawler testified that he never visited the property and was not even in Alabama when the survey was completed.”


JEFF’S 10 COMMANDMENTS ON TORTS

5. 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.

REASOR v. PUTNAM COUNTY

Indiana Supreme Court
635 N.E.2d 153
May 27, 1994
6. READ ALL CERTIFICATIONS CAREFULLY.
Many certifications will have guarantees and warrantees imbedded in them that will nullify your errors and omissions insurance and expose you to greater liability.

52 COMMONWEALTH
V.
CJM, P.C.
SUPERIOR COURT OF CONNECTICUT
JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
2008 Conn. Super. LEXIS 2774
November 5, 2008

53 JEFF’S 10 COMMANDMENTS
ON TORTS
7. PROFESSIONAL NEGLIGENCE MEANS YOU FELL BELOW THE STANDARD OF CARE.

54 JEFF’S 10 COMMANDMENTS
ON TORTS
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.”
_Bender v. Kansas Secured Title_, 119 P.3d 670 (Kan. 2005).

55 JEFF’S 10 COMMANDMENTS
ON TORTS
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.”

56 JEFF’S 10 COMMANDMENTS
ON TORTS
Professional Negligence:
“A claim of surveyor liability is founded on the three elements common to any tort: a breach of duty, causation, and damages.”

57 JEFF’S 10 COMMANDMENTS
ON TORTS
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.”


**58**  **LAWSON V. WINEMILLER**

Court of Appeals of Ohio  
1995 Ohio App. Lexis 2043  
May 17, 1995

**59**  **JEFF’S 10 COMMANDMENTS**  
**ON TORTS**

Certificate of Merit Laws:  
“Currently, eleven states have enacted a certificate of merit statute of some form. These states are Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, and Texas. What follows is a summary of each state’s certificate of merit statutory scheme.”

Thomas, Feldman & Wilshusen, LLP, Dallas, Texas.  

**60**  **JEFF’S 10 COMMANDMENTS**  
**ON TORTS**

Certificate of Merit Laws:  
Texas  
“TEX. CIV. PRA. & REM. CODE ANN. SECTIONS 150.001-.002 (Vernon 2004) is Texas’ certificate of merit statute. Sections 150.001 and 150.002 govern any professional malpractice action against a registered architect or licensed professional engineer. Thomas, Feldman & Wilshusen, LLP, Dallas, Texas.

**61**  **JEFF’S 10 COMMANDMENTS**  
**ON TORTS**

Certificate of Merit Laws:  
Texas  
“To commence such an action, a plaintiff must file with its complaint ‘an affidavit of a third-party registered architect or licensed professional engineer competent to testify and practicing in the same area of practice as the defendant. The affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim.’ A plaintiff’s failure to file the requisite affidavit ‘may result in dismissal with prejudice of the complaint against the defendant.’”
Thomas, Feldman & Wilshusen, LLP, Dallas, Texas.

62 □ JEFF’S 10 COMMANDMENTS ON TORTS
8. FRAUD ISN’T JUST FOR FAT-CATS ON WALL STREET.
Fraud is committed by land surveyors on a daily basis.

63 □ JEFF’S 10 COMMANDMENTS ON TORTS
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 party; or if made by mistake or innocently, and acted on by the other party.”

64 □ 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.

65 □ 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.

66 □ 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.

67 □ JEFF’S 10 COMMANDMENTS
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.”


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.

74 JEFF’S 10 COMMANDMENTS ON TORTS
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.

75 JEFF’S 10 COMMANDMENTS ON TORTS
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

76 JEFF’S 10 COMMANDMENTS ON TORTS
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

77 JEFF’S 10 COMMANDMENTS ON TORTS
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

78 JEFF’S 10 COMMANDMENTS ON TORTS
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

79 □ JEFF’S 10 COMMANDMENTS ON TORTS
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

80 □ JEFF’S 10 COMMANDMENTS ON TORTS
IRS Determination of Status
“Be aware that it can take at least six months to get a determination, but a business that continually hires the same type of workers to perform particular services may want to consider filing the Form SS-8.”
Source: IRS Website

81 □ JEFF’S 10 COMMANDMENTS ON TORTS
Consequences of Treating an Employee as an Independent Contractor
“If you classify an employee as an independent contractor and you have no reasonable basis for doing so, you may be held liable for employment taxes for that worker.”
Source: IRS Website

82 □ JEFF’S 10 COMMANDMENTS ON TORTS
IRS Small Business Workshops
“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

83 □ JEFF’S 10 COMMANDMENTS ON TORTS
Other Torts (or crimes):
- Trespass (civil & criminal)
- Nuisance (civil & criminal)
- Outrage
- Bad Faith
- Mental Anguish
- Respondent Superior/Master-Servant.