



Staking Out Your Future

Schinnerer's Guide to Managing Professional
Liability Exposure

Staking Out Your Future: Schinnerer's Guide to Managing Professional Liability Exposure is one of the many risk management tools available to surveyors from Victor O. Schinnerer & Company, Inc. and the National Society of Professional Surveyors.

Schinnerer, the commended professional liability program of the National Society of Professional Surveyors, has developed a unique range of professional liability coverages and risk management services to assist surveying firms of all sizes respond to the needs of their clients and provide services in a manner that meet their particular practice management goals.

For more information about Schinnerer programs, contact the firm's independent insurance broker, or call Victor O. Schinnerer & Company, Inc. at 301/961-9800, fax at 301/951-5444, email at vos.info@Schinnerer.com, or visit Schinnerer's website at www.Schinnerer.com.

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TABLE OF CONTENTS

BENCHMARKING & CLAIMS TRENDS

INTRODUCTION.....4

WHY BENCHMARKING AND CLAIMS STUDIES ARE IMPORTANT.....4

How to Use Benchmarking and Claims Studies.....4

Why this Publication is Valuable to Surveyors.....5

INDUSTRY TRENDS.....5

Need to Recreate the Built Environment.....5

CHANGES CAUSED BY ECONOMIC AND DEMOGRAPHIC PRESSURES.....6

Demographic Changes Result in Shifting Markets.....6

Financial Pressures Result in Project Delivery Changes.....6

CLAIMS TRENDS.....7

Looking at the Percentage of Claims Closed with an Indemnity Payment.....8

EVALUATING RISK:

THE CLIENT.....9

THE PROJECT.....11

SURVEYING FIRM.....14

OTHER PARTIES.....15

FEE.....16

CONTRACTS.....17

RISK MANAGEMENT RESOURCES.....18

CONTRACTS & RISK MANAGEMENT

INTRODUCTION.....22

HOW TO USE THE CONTRACT GUIDE.....23

THE VALUE OF GOOD COMMUNICATION.....23

GENERAL RULES FOR CREATING EFFECTIVE CONTRACT LANGUAGE.....23

PROFESSIONAL SERVICES AGREEMENTS.....24

TYPES OF SURVEYS AND STANDARDS.....24



General Review of Standards.....	25
Why Have Standards?.....	25
ALTA/NSPS Standards.....	26
RELYING ON ADVICE OF LEGAL COUNSEL.....	27
PRACTICE MANAGEMENT.....	27
REVIEWING A CONTRACT.....	27
Contracts as a Productivity Tool.....	28
Basic Questions to Ask When Reviewing Custom Contracts.....	29
The Establishment of Business Terms—Scope, Time, and Compensation.....	29
Onerous Transactional and Liability Terms.....	30
Missing Provisions.....	30
FOCUS ON SERVING THE CLIENT BY MANAGING RISK.....	31
NEGOTIATING A CONTRACT TO PERFORM AN ALTA/NSPS SURVEY.....	32
Scoping the Survey.....	32
Defining the Survey.....	32
The Certification.....	33
Updating the Survey and Certification.....	33
RESPONDING TO RISK MANAGEMENT ISSUES.....	33
Listing of Issues.....	33
CERTIFICATIONS.....	34
DISPUTE AVOIDANCE/DISPUTE RESOLUTION.....	36
ELECTRONIC INFORMATION TRANSFER.....	37
ENVIRONMENTAL HAZARDS.....	39
INDEMNITY.....	40
INSURANCE REQUIREMENTS.....	42
RISK ALLOCATION.....	43
STANDARD OF CARE.....	45
SAMPLE CONTRACTS.....	48

BENCHMARKING & CLAIMS TRENDS



INTRODUCTION

In today's complex design and construction environment, it is becoming increasingly difficult for surveying firms to remain profitable.

To prosper, firms need to identify, understand, and manage their risks. For more than 50 years, Schinnerer and CNA, the insurance carrier, have collected information on claims against our policyholders and analyzed the data to create risk management resources. *Staking Out Your Future: Schinnerer's Guide to Managing Professional Liability Exposure*, looks at multiple factors Schinnerer believes, based on claims studies, are crucial in assessing and developing appropriate responses to various sources of risk.

WHY BENCHMARKING AND CLAIMS STUDIES ARE IMPORTANT

The surveyor's challenge in today's competitive environment is to find ways to become more efficient and to reduce costs while improving and expanding services. The first step in meeting this challenge is to create benchmarks of the firm's

financial and competitive position and preferred status in both the near and distant future. The information the firm needs includes an analysis of the firm's practice, a vision of how the firm should be organized and grow over the next few years, and the ability to benchmark the firm through comparison to similar firms.

Staking Out Your Future will allow firms to:

- examine industry trends and emerging issues;
- compare their firm against peer firms;
- examine their experience with clients, project types, other parties, fees, and contracts;
- develop appropriate risk management procedures to effectively manage risks; and
- analyze performance in meeting business goals.

HOW TO USE BENCHMARKING AND CLAIMS STUDIES

The benchmarking and claims section of this publication is divided into three major components. The first, "Industry Trends," will help firms identify:

- what project types are expected to see an increase in construction and which are not;
- what project types may present greater risks; and
- certain factors related to claims trends and issues that may influence the design and construction industry in the coming years.

Starting on page 9, “Evaluating Risk,” looks at claims from six different factors—the client, the project, surveying firm, other parties, fee, and contracts—and presents, where appropriate, a statistical picture, case scenarios, and risk management guidance. It is this section where firms will be able to benchmark themselves and establish future goals.

We’ve included a listing of our risk management resources that we feel can benefit surveying firms. Used in conjunction with the benchmarking data in this publication, our resources can help firms manage current project risks and measure performance over time.

The second section of this publication offers an in-depth explanation of various contract and risk management issues. That section starts on page 22. After that are sample contracts surveyors can consider adapting for surveying services.

WHY THIS PUBLICATION IS VALUABLE TO SURVEYORS

The information in this publication has direct value in a firm’s management activities. It will help firms identify progress as well as problems within the design and construction industry, enabling firms to assess the potential for taking their practice into a successful future.

Finally, in addition to the information in this publication, there are more benchmarking, claims, and case studies located on our website, www.Schinnerer.com/AEriskmanagement, which can be used by firms attempting to mark where

they are today and where they want and need to be to remain profitable and successful.

INDUSTRY TRENDS

One of the attributes of a professional education is the ability to apply lessons learned to new situations. Certainly, surveying firms face new situations that will have a major impact on their professional status and business operations. While the past provides limited value in assessing the long-range future risks of providing surveying services in a dramatically changing market, applying the benchmarks of claims and losses can assist a firm in positioning itself for near-term changes and opportunities.

NEED TO RECREATE THE BUILT ENVIRONMENT

There are many expert predictions for a strong and growing economy with an increasing demand for professional services. The predictions, however, are not consistent as to what areas will be long-term growth centers. All predictions, however, indicate that the need for capital spending for new infrastructure and buildings and other productive resources in general is enormous.

One long-range analysis published in 2004 by The Brookings Institution stated that while there





is not a general sense of how demographic, household, market, and industry trends will require newly designed and constructed facilities to accommodate future growth, the need is apparent. The study, *Toward a New Metropolis: The Opportunity to Rebuild America* (Arthur C. Nelson, The Brookings Institution Metropolitan Policy Program, www.Brookings.edu), predicts the overall estimated demand for new housing, commercial, and industrial space over a 25-year period. Among the report's findings are the following:

- In 2030, about half of the buildings in which Americans live, work, and shop will have been built after 2000.
- Most of the space built between 2000 and 2030 will be residential, with the largest component being homes.
- On a percentage basis, the commercial and industrial sectors will have the most new space, with over 60% of the space in 2030 being less than 30 years old.
- Overall, most new growth will be in the South and West, with much of the West experiencing a doubling of space by 2030.
- States with a strong industrial presence will see the largest amount of growth in new industrial space. For instance, by 2030, 70% of the industrial space in the Midwest will be less than 30 years old.

CHANGES CAUSED BY ECONOMIC AND DEMOGRAPHIC PRESSURES

The need for new facilities in the U.S. is well documented. It is clear, however, that this massive expansion of the built environment will not take place along the same lines as in the past. The two major forces that will have the most significant impact on surveying firms are demographic changes and the rapid change in how projects are financed, designed, and constructed.

DEMOGRAPHIC CHANGES RESULT IN SHIFTING MARKETS

Demographic changes—the aging of the baby boomer generation born between 1946 and 1964, for example—will require a shift in project types and create different patterns of facility use in the U.S. Each sector of the construction industry reacts to different demographic and accompanying economic changes. Surveys are published annually that look ahead to the relative strengths of building sectors based on demographic changes. In brief, while the decrease in both the percentage and the total number of adults in the 35 to 50 age category may result in some weakness in new construction markets, the huge growth in the 50 to 65 age category over the next five to ten years indicates that facilities for health care, assisted living, and even hospitality and hotel space will be needed.

Expectations of shifting population mean that demand for facilities in the South and West, especially housing, will outpace the rest of the nation. While the percentage increases between 2000 and 2030 in states such as Nevada and Arizona will be significant because of rapid growth on a relatively small base, California, Texas, and Florida will see the greatest demand in absolute numbers. According to U.S. Census projections for 2030, Nevada is expected to grow by 114% and Arizona by 109%, but together, California, Texas, and Florida will house over 30% of all U.S. citizens.

FINANCIAL PRESSURES RESULT IN PROJECT DELIVERY CHANGES

Change will not only be rapid, it is also expected to radically alter the way projects are financed, designed, and constructed. The transformation in the design and construction industry will require a shifting of roles. The financial pressure for timely and efficient project delivery—with significant negative consequences to those firms that cannot react productively to the pressure—will recast the industry. The stability of surveying firms will be increasingly challenged by the demand for new and

remodeled facilities in the U.S. and the immense need for development around the world.

Many firms may see a negative impact on their traditional operations resulting from new global business outsourcing initiatives and direct international competition. Some firms may see outsourcing as a viable method to cut costs and respond to client demands in a timelier manner. However, such firms may also see a level of vicarious liability that challenges their professionalism and profitability. Firms may find that in becoming a conduit of services, rather than a provider of expertise, they create an uncontrollable competitor.

Changes in technology and cost pressures from global competition may result in the dissolution of undercapitalized firms and more consolidation of the industry may result. The increasing integration of design and construction, aided by information technologies, may be submerging the traditional firm into an integrated project financing, delivery, and operation methodology run by financial and managerial consultants.

CLAIMS TRENDS

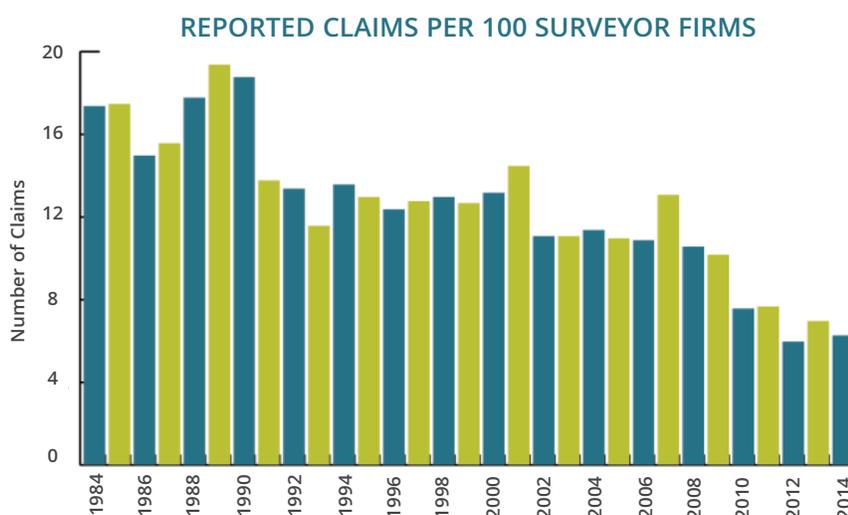
Looking back at claims experience can be helpful to firms as they expand their traditional markets and enhance the range of professional services they

offer. Information on the frequency and severity of claims of developing services and delivery methods, however, may be informative because it can be a good indicator of losses for more traditional services on common project types.

For many project types, the frequency of claims might be considered a “coincident indicator” of the professional liability exposure for that project type or specific client base. The raw claims count (frequency)—not just those claims that are ultimately resolved—can herald future losses. The frequency of claims indicates that, in some way, the surveying firm has not met expectations or has been identified as a cause of an injury. Even if claims do not result in payment by the insurer, they represent costs to the firm, distractions from the firm’s practice, and damage to the firm’s reputation.

Often, claims for a specific service that is newly developed may take years to develop as a trend. Patterns are not usually readily apparent. Changes in procedures or roles or even consensus contract language may not be construed by the legal system for many years.

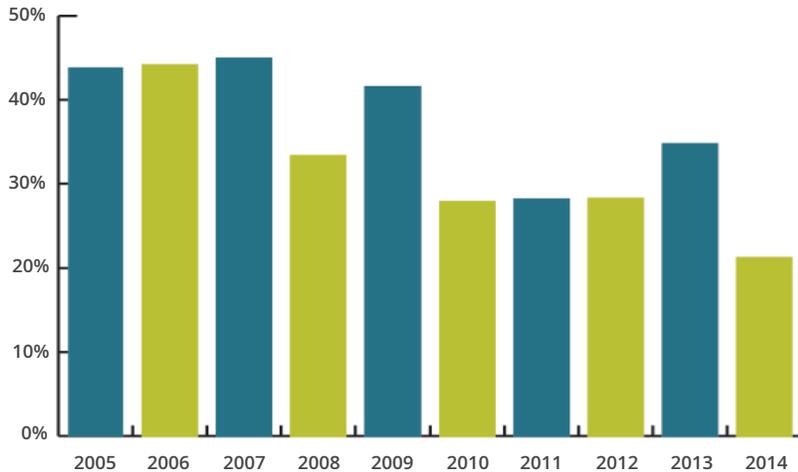
Still, a historical look at claims, how many occur and end up with payments, and how many result in defense payments only can be helpful in benchmarking professional liability exposure.



HOW FREQUENCY VARIES

This graph shows that the average number of claims per 100 surveyor firms peaked from 1988 through 1990. The interaction of many factors may have influenced this increase, such as the construction economy and client demands. Reported claims should be expected to track with construction volume. Equally, other factors such as prudent risk management techniques may have been a factor in the overall decline in frequency since 1990.

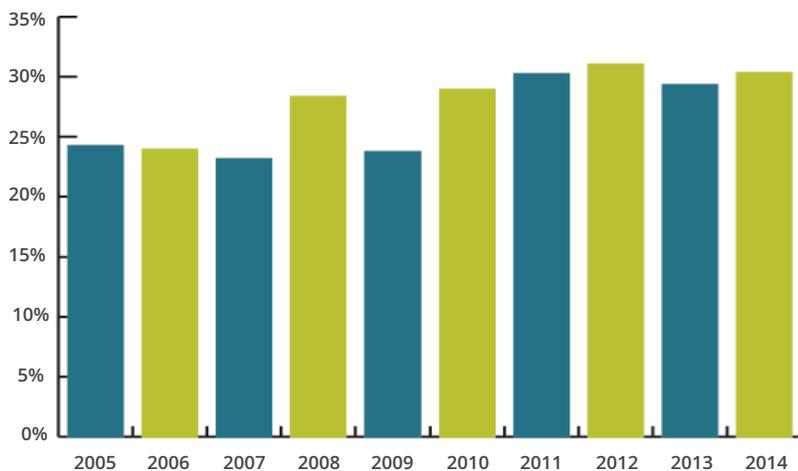
PERCENTAGE OF CLAIMS CLOSED WITH INDEMNITY PAYMENT



HOW MANY CLAIMS ARE PAID

Many claims are closed without payment by CNA above the firm's deductible obligation. But for surveyor policyholders, claims requiring an indemnity payment by CNA fluctuated between 21.2% and 44.9% from 2005 through 2014. Since the indemnity payment is money paid by CNA on behalf of the policyholder, surveying firms carrying higher deductibles may be a factor in the overall decline of indemnity payments made by CNA starting in 2009.

PERCENTAGE OF CLAIMS CLOSED WITH DEFENSE PAYMENT ONLY



HOW MANY CLAIMS REQUIRE DEFENSE ONLY

Even if CNA makes no payment to correct harm, defense costs can be significant. Defense costs have fluctuated for surveyor firms over the last five years. But this graph only represents the percentage of claims where insurance funds were used beyond the deductible obligation of the policyholder. Because the CNA program allows for incident reporting where CNA funds are used—without the commitment of the deductible—to prevent incidents from becoming claims, those insurance costs are not documented as claims-related expenses.

LOOKING AT THE PERCENTAGE OF CLAIMS CLOSED WITH AN INDEMNITY PAYMENT

Looking at 2014 data, surveying firms could argue that payment by CNA on behalf of policyholders for their responsibility in causing property damage or personal injury through negligent surveying services happened in only 30% of the claims. The other 70% must not have had a level of merit that signified culpability. Thus, 70% of all claims against surveying firms insured in the Schinnerer program could have been considered "meritless" using a

tort liability measurement. Roughly 30% of these "meritless" claims, however, required defense expenditures above the firm's deductible obligation, and all could have been assumed to require expenditures of time and money by the firm. This unproductive use of time and the commitment of defense funds by a firm increased costs. Clearly, claims that result in no payment to correct damage or harm drain the design and construction professions and the economy of productive time and force an increase in the cost of providing services to the public.

EVALUATING RISK: THE CLIENT

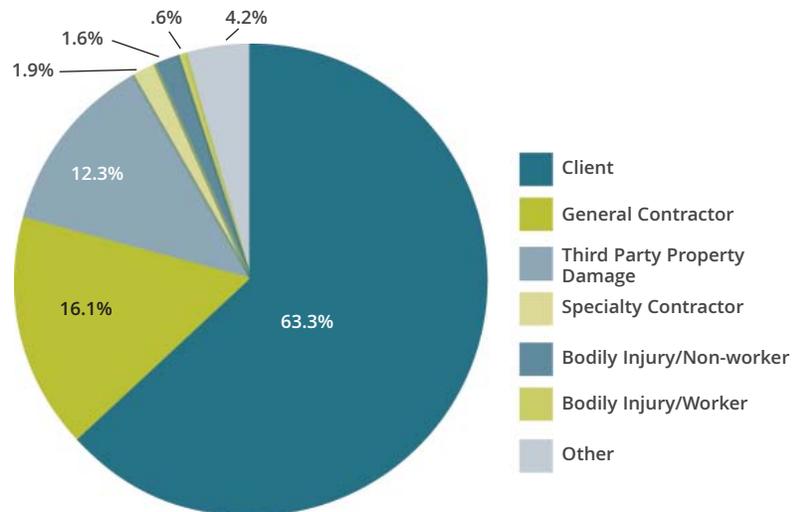
Perhaps the most important step in assessing potential risks for any project is to evaluate the client.

Clients often spend great effort in evaluating potential surveyors. They do this because the selection of the right surveyor is a crucial first step in maximizing the potential success of any project. The same is true for surveyor firms.

Since almost two-thirds of claims against surveyors in the Schinnerer program originated from the client, surveyors should take the same level of care in the selection of their clients. It is not surprising that the client is the largest source of claims against surveyors since it is the client that most often retains the surveyor. Therefore, it is with the client that surveyors have a direct obligation.

Surveying firms need to be thorough in their evaluation before deciding to work with a particular client, whether the client owns the project or is a general contractor that has retained the surveyor. Surveying firms should select clients that

FREQUENCY OF CLAIMS BY CLAIMANT IDENTIFICATION (2005 - 2014)



understand, appreciate, and value the services of surveyors. This can help avoid claims alleging professional negligence, disputes involving fees, and other potential disputes that may arise during the design or construction of a project.

CASE SCENARIO

A surveyor provided a three-lot survey plat for a residential developer who later sold the project. The surveyor was called back to the site for some re-plat work related to setback requirements, which were unrelated to the earlier work. When on site, the surveyor discovered that a neighboring lot encroached on the lot he surveyed. During the sale of the neighboring lot, a dispute arose between the two owners of the lots as to whether or not one lot encroached on the other. The surveyor hired to survey the neighboring lot claimed that his survey was correct, which was later proven to be false.

Rather than settling out of court, the original developer forced the case to trial, hoping to win damages from the surveyor. The developer's first suit was for negligence, which the surveyor won. A second suit was filed regarding the setback issues, where the developer claimed that the surveyor was responsible for delays in the project that caused significant damages. The surveyor won the second trial as well, with awarded damages of less than \$3,000, but the defense costs for both claims totaled nearly \$300,000.



CASE SCENARIOS

A surveyor provided a boundary and topographic survey for a farm property awaiting development. The client had little experience with surveyors and never had a proper survey done before. The surveyor discovered that the property had various discrepancies and notified the client verbally that the problems needed to be fixed. Several years passed before the client began working on the property without the problems getting fixed. The client later claimed \$260,000 in losses. At mediation there appeared to be minimal liability for the surveyor.

The client filed a complaint against the surveyor with the state licensing board, alleging incompetence and misconduct. Based on various documentation that showed that the client knew of the boundary issues, the board ruled in favor of the surveyor. At mediation, the client noted 25 errors with the survey. While the errors were irrelevant to the claim, defense counsel felt that this could affect a jury if the case went to

trial. The case settled with \$95,000 as an indemnity payment and defense costs of more than \$68,000.

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Hoping to build his “dream house,” a client bought a piece of land based on a surveyor’s advice that the county would issue certificates to divide the lot into two parcels. However, the surveyor missed a notation in the county records that a previous splitting of the lot had been changed back into one lot, with the county stating that the lot had to remain intact.

The client claimed \$350,000 in damages as it wanted to build a house in one portion and sell several acres for profit. The surveyor was liable for not meeting the standard of care. The claim eventually settled for almost \$175,000. The insurer paid almost \$95,000 in indemnity and the surveyor paid almost \$81,000 out of his own pocket since his insurance was depleted.

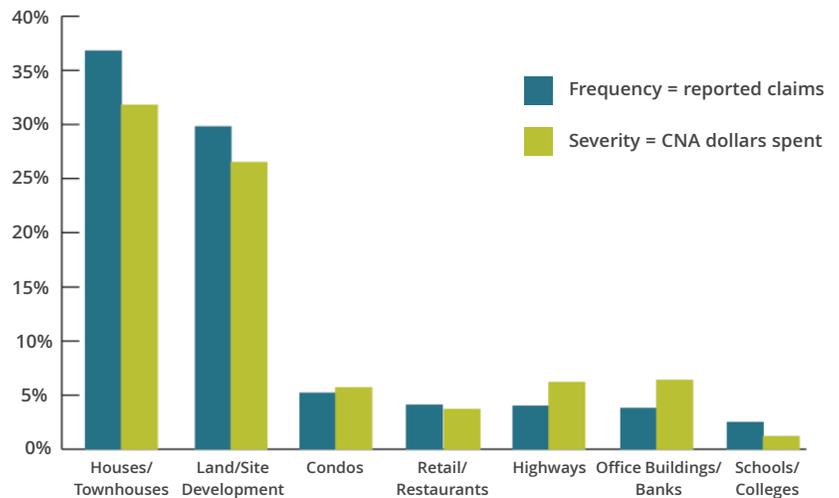
THE PROJECT

No two projects are alike. Even if a surveyor's practice concentrates on one project type, such as residential subdivisions, no two sites are identical, so the projects will be different.

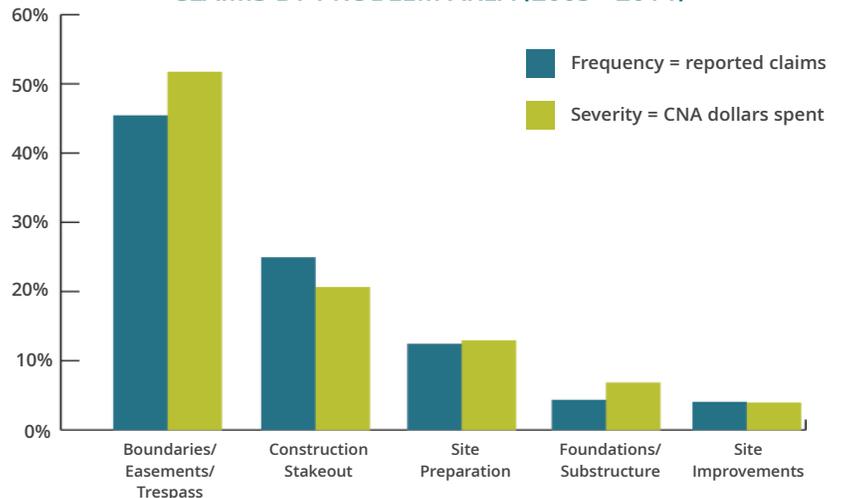
After evaluating a client, it is important to evaluate the project. Some projects are riskier than others in terms of the frequency (reported claims) and severity (costs paid by CNA) of claims. For example, as illustrated by the first chart, houses/townhouses and land/site development projects were high-risk for surveyors both in terms of the frequency and severity of claims. When looking at the severity of claims in relation to the frequency, condos, highways, and office buildings/banks projects presented a relatively high risk for surveyors as well.

Common problem areas for residential projects included boundaries/easements/trespass, construction stakeout, and site preparation.

**CLAIMS BY PROJECT TYPE
(2005 - 2014)**



**RESIDENTIAL PROJECTS:
CLAIMS BY PROBLEM AREA (2005 - 2014)**



CASE SCENARIO

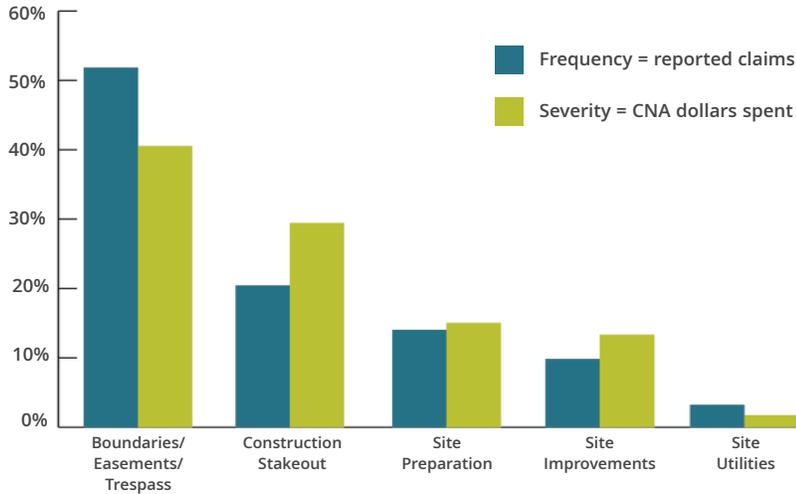
A developer hired a surveyor to survey property and obtain a letter of map revision from FEMA to show that home sites were not within the 100-year flood plain. The surveyor also prepared flood plain development forms and other documents needed by the developer.

Seven homes on the site experienced alleged flood damage. Their claims totaled more than \$709,000, the majority of which was for alleged diminished

value to the homes. The homeowners filed suit against the surveyor and other project parties. Defense counsel argued that the homes were not within the 100-year flood plain based on FEMA's mapping system. The case eventually settled through mediation, with the insurer paying \$438,500 on behalf of the surveyor (defense costs totaled more than \$145,000). The real estate agent contributed \$20,000 and the developer contributed \$70,000.

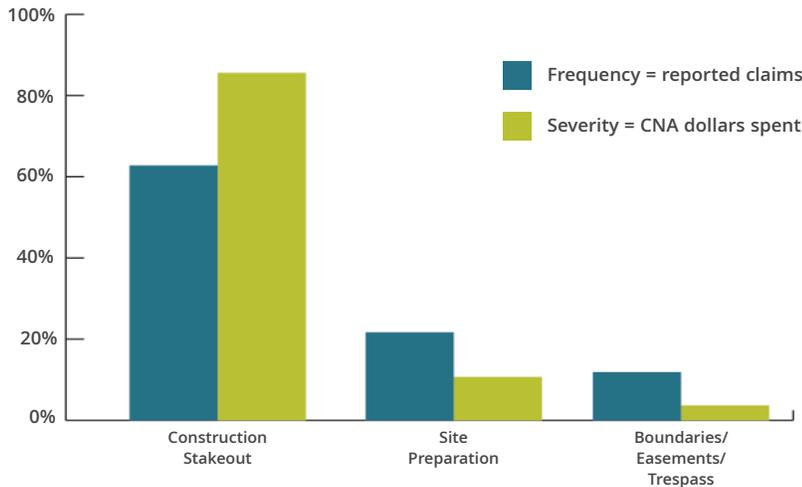


LAND/SITE DEVELOPMENT PROJECTS: CLAIMS BY PROBLEM AREA (2005 - 2014)



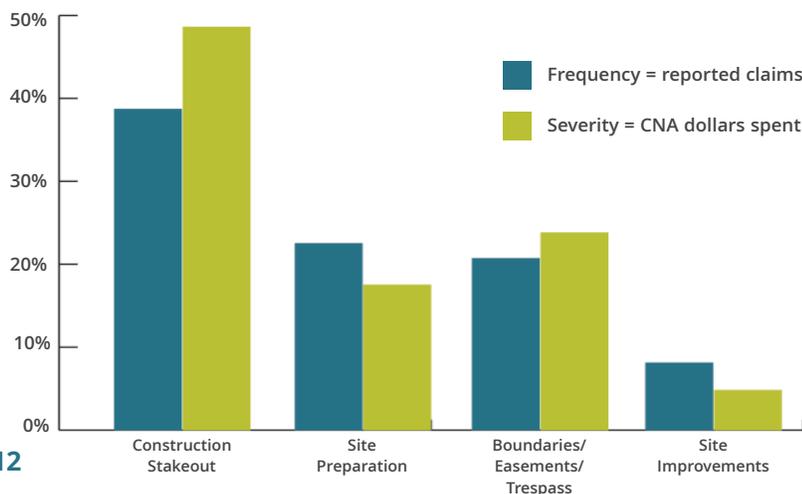
Like residential projects, boundaries/easements/trespass issues represented significant risk for surveyors in terms of frequency and severity on land/site development projects. But when looking at the relationship between frequency and severity, construction stakeout, site preparation, and site improvement issues represented high risks as well.

HIGHWAY PROJECTS: CLAIMS BY PROBLEM AREA (2005 - 2014)



When providing services on highway projects, claims involving construction stakeout represented a significant risk in terms of frequency (63%) and severity (86%).

COMMERCIAL PROJECTS: CLAIMS BY PROBLEM AREA (2005 - 2014)



For commercial projects, construction stakeout claims represented the highest risk both in terms of frequency and severity, with nearly half of all claims dollars spent on surveying claims for this project type (49%). Boundaries/easements/trespass also presented a high risk for surveyors, with 24% of all claims dollars spent on this project type.

CASE SCENARIOS

A surveyor provided professional services for a new subdivision. The surveyor used FEMA guidelines for measuring. During Hurricane Floyd, a number of houses in the development suffered flood damage, and many of them did not have flood insurance because, they alleged, they did not know they lived in a flood plain. The homeowners filed suit against the developer, town, surveyor, attorneys, and title companies involved in the project.

Most homeowners just wanted the damages repaired and to have the defendants fund their flood insurance. They retained a surveyor who was willing to say that the original surveyor should have measured from the equipment on every house, even though that was not standard practice at the time and the town approved the original measurements. With all the cases consolidated, a sympathetic jury could have found all defendants equally responsible.

All 12 homeowners settled, with the surveyor contributing \$80,000 to the overall settlement. Defense costs totaled more than \$32,000.

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A homeowner purchased water-front property in an exclusive area. A surveyor provided an incorrect survey to the homeowner, claiming that the land was buildable. The survey was then used to get a building permit. Construction started and the abutting neighbors immediately opposed any construction on the land near their home, which they claimed ruined their panoramic view of the local harbor. Many suits were filed to stop construction. It was later discovered that the land was unbuildable. After the land was sold to a developer, the case settled for more than \$71,000 as an indemnity payment and legal expenses of more than \$18,000.



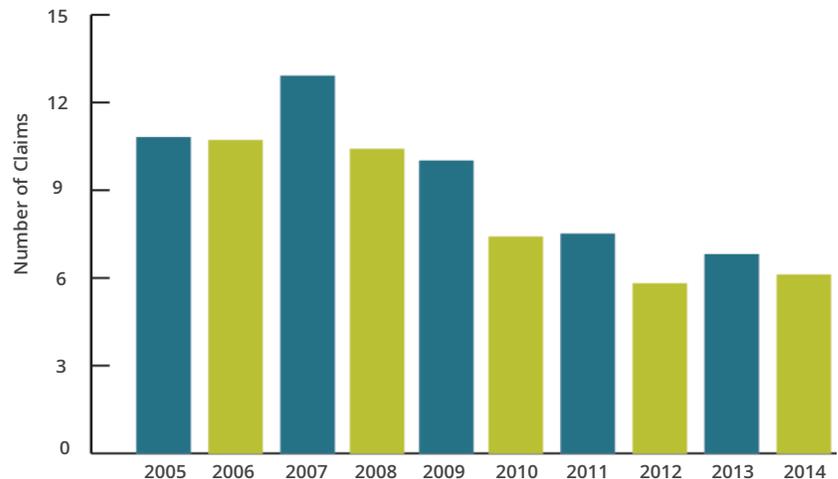
SURVEYING FIRM

Of all the factors surveyors should consider when evaluating potential risks for a project, the one surveyors have the most control over is their own firm. Evaluation as to whether a project is one that the firm can manage is a crucial question in evaluating potential risks.

This chart indicates that from 2005 through 2014, the frequency of claims against surveyors ranged between 5.8 and 12.9 per 100 firms. One factor that may have contributed to this was the rapid pace of construction during this period, causing firms to take on projects that they did not have the capacity to manage properly.

One possible result of firms taking on projects without the capacity to do so or inexperience with a particular project type could be the production

CLAIMS FREQUENCY PER 100 FIRMS



of documents that did not meet the firm's quality standards, which led to claims.

Aside from a spike in 2007, from 2005 through 2014 the frequency dropped and hit 6.1 claims per 100 firms in 2014. This drop may have been due to firms implementing and maintaining risk management procedures and more effectively managing their quality standards.

CASE SCENARIO

A surveyor provided a survey for a large lot that a client planned to purchase for a retail project. The surveyor completed the survey and forwarded a report to the client. On the survey, the surveyor noted an abandoned road that showed the existence of a gas line. The survey also indicated that the site had been inspected by an underground utility contractor. A few months after the client purchased the property, it was discovered that there was an underground fiber optic cable that went through the middle of the property. The telecommunications company and the client agreed to relocate the line for \$225,000.

The surveyor was liable in this case for several reasons, including failure to note the fiber optic cable; incorrectly labeling the fiber optic cable as a two-inch gas line; and misrepresenting that an underground utility contractor had inspected the property when the inspection never happened. The surveyor explained that this was a standard statement on its plat and that a utility contractor had never been contacted. The case settled with the insurer contributing more than \$131,000 on behalf of the surveyor.

OTHER PARTIES

On any given project, there are other parties that will influence or have a stake in the outcome. As part of the evaluation of the potential risks of any project, surveyors must factor in these other parties.

As the chart on page 9 indicates, 12.3% of claims against surveyors from 2005 through 2014 came from third parties alleging property damage. These types of claims can vary widely and may include claims that the surveyor's boundary survey was incorrect. Incorrect boundary surveys for a residential developer may result in third-party claims from individual purchasers of the lots. With multiple homeowners per development, such a claim can quickly escalate in possible costs.

Client-retained consultants should also be considered. Although retained by the client,

...12.3% of claims against surveyors... came from third parties for property damage.

surveyors will rely upon and often coordinate professional services with client-retained consultants.

Evaluation of third parties, which will include purchasers of property, occupants and users of the project, adjoining and neighboring properties, as well as consultants retained by the client, is an important step in evaluating the potential risks of any project.

CASE SCENARIO

A surveyor was retained to complete the site plan for the renovation of a gas station. A subcontractor was retained to install the gas station sign, a typical "goal post" sign, on the corner. The subcontractor was supposed to be experienced at this type of sign erection, but the client's representative on site noticed that the subcontractor's boom truck was getting close to power lines and advised the subcontractor to be careful or to shut down the power. The subcontractor did neither, and while the boom was being maneuvered, it contacted the high tension lines. The subcontractor's worker was touching the boom at the time and was electrocuted.

The subcontractor ran to help and was electrocuted as well. The families of both workers filed wrongful death suits, alleging that the surveyor's placement of the sign near the power lines made him responsible for the accident.

While it was felt by defense counsel that the surveyor had no liability in this case, cases involving serious injuries and death often result in sympathetic juries, despite who's to blame. The claim was eventually settled with a contribution of \$92,000 on behalf of the surveyor; defense costs totaled \$60,000.



FEE

The establishment and receipt of proper fees for surveying services is another important consideration in evaluating potential risks for a project. When surveyors do not receive appropriate fees necessary to provide the surveying services agreed to with the client, the temptation may be to minimize the time spent on certain aspects of the services in an attempt to control costs. Inadequate fees for services ultimately go against the client's interest for a successful project.

For this reason, it is important that the surveyor agree to fees that are adequate to cover the surveying services to be provided. Because projects may change during the course of providing services, it is important that the surveyor have language in the professional services agreement that allows for the charging of additional fees for a change in or addition to services.

Inadequate fees for services ultimately go against the client's interest for a successful project.

Finally, in addition to evaluating if fees are adequate for the professional services to be provided, it is equally important that fees are invoiced and collected in a timely fashion. Checking the financial capability of the client and the client's history in paying other surveyors can indicate how long a client takes to pay its bills and the likelihood that fees might not be collected when due. Because some fee disputes between the surveyor and client can result in a client's "retaliatory" claim against the surveyor, establishing appropriate fees for the services to be provided and evaluating a client's ability and willingness to pay in a timely manner may help avoid some professional liability claims.

CASE SCENARIO

A surveyor was retained by a client to provide surveying services for a residential project. Despite numerous payment invoices for the first project, the surveyor was not paid. While awaiting payment, the surveyor contracted with the same client to provide services for a site plan and site layout for a housing project for senior citizens. The surveyor prepared a topographic map of the project site and noted grades and rocks in one area of the site. The surveyor subsequently filed a claim against the client for non-payment of services provided in association with the residential project. The client later claimed to have

misunderstood the surveyor's location of the rocks and filed suit, alleging that the surveyor's layout of the units resulted in rock being found. The surveyor felt that this suit was in retaliation for a fee claim filed by the surveyor against the client on another project.

The case eventually closed with no indemnity payment on behalf of the surveyor, but defense costs consumed nearly all of the surveyor's \$35,000 deductible. The suit for non-payment from the residential project was still pending while the client's suit for negligence was closed.

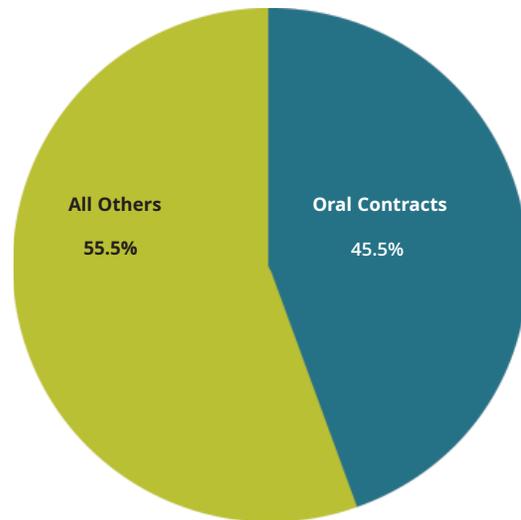
CONTRACTS

Contracts are arguably the most important risk management tool at a surveyor's disposal. Contracts should be memorialized in a written document. Close to half of the claims brought against surveyors in the Schinnerer program involved oral agreements. Oral agreements not only lead to disputes, unmet expectations, and claims, they also make defending a claim difficult.

A well-drafted contract allocates risks to the party that is in the best position to manage those risks, assigns responsibility to only one party, and addresses the authority to execute that responsibility, when appropriate. These are a few of the many factors that must be considered when evaluating a professional services agreement.

Conversely, a contract that shifts risks and responsibilities to the party that is not in the best position to manage those risks and responsibilities can be a source of claims. Contractual provisions that raise the standard of care beyond the common law standard; lack a clear scope of services; require the surveyor to warrant or guarantee services; or have insurance requirements that are beyond the

CLAIMS BY SELECT CONTRACT TYPE
(2005 - 2014)



scope of professional liability coverage are a few examples that could increase a firm's risk.

Schinnerer offers surveyor policyholders a range of tools to help evaluate their contracts. These tools can be found at www.Schinnerer.com/AE/Landing-Pages/Surveyors.aspx.

CASE SCENARIO

Using an oral contract, a surveyor was hired to perform surveying for the foundation on a church project. The surveyor did not have any overall dimensions for the project and was not given a current set of plans. As a result, there was an inaccurate pile plot for one of the buildings and possible problems with another building.

While the surveyor was not given adequate information from the start of this project, the general

contractor and subcontractor brought suit against the surveyor to recover delays and extras associated with the pile problems. The lack of a written agreement specifying the scope of services and what information was required to be provided by others hampered the surveyor's defense. Ultimately, the case settled, with the surveyor contributing almost \$113,000, with \$100,000 in the form of an indemnity payment.



RISK MANAGEMENT RESOURCES

Schinnerer provides a wide range of resources that can be used to help firms identify and manage risks. All of these resources can supplement the claims data and contract review information found in this publication.

CONTRACT REVIEW TOOLS

This publication noted that the review of a professional services agreement is an important factor in identifying potential risks. Schinnerer has published a variety of resources to help surveyor policyholders identify potential areas of risk in their professional services agreements. All of these resources can be found through www.Schinnerer.com/AERiskmanagement.

- **Surveyor's Terms and Conditions Review Guide**—This publication helps our surveyor policyholders review and negotiate common risk allocation issues in their professional services contracts. It contains specific issues and suggested contract language unique to the practice of surveying. It can be found at www.Schinnerer.com/AE/Landing-Pages/Surveyors.aspx.
- **Tips for Reviewing a Contract**—This contract review guide is primarily designed for our small firm policyholders. It includes a five-step process for general review of a contract, a contract review checklist, and our *Terms and Conditions Review Guide*. It is available at www.Schinnerer.com/AE/Pages/Contract-Review-Tools.aspx.
- **Schinnerer and CNA's Risk Mitigation Credit for Surveyors**—This publication is an in-depth explanation of the risk mitigation credit for surveyors, a feature of the CNA professional liability policy. This guide explains the "baseline" criterion that must be met to qualify for the credit, as well as all five "best practices" criteria. Firms can also learn if they qualify for the credit. It can be found at www.Schinnerer.com/AE/Landing-Pages/Surveyors.aspx.



BENCHMARKING INFORMATION AND CLAIM/CASE STUDIES

Throughout this publication, we have discussed six different factors to consider when evaluating potential risks. For each of these factors, we have included case scenarios to illustrate the importance of evaluating that factor in terms of identifying potential risks. Where appropriate, we have also included graphs to help firms better understand when potential risks may occur and to provide a benchmark against peer firms.

Schinnerer's library of claim/case studies currently includes information broken down by project type, services provided, and studies used for various legislative efforts. The data sets are updated regularly.

Visit www.Schinnerer.com/AE/Pages/Benchmarking-Claims-Studies.aspx for our online benchmarking and claim/case studies.

VOLUNTARY EDUCATION PROGRAM (VEP)

Schinnerer's Voluntary Education Program (VEP) is an online continuing education resource that covers a wide range of topics. These modules can be used for future reference, and the tests can help individuals or firms gauge their understanding of risk management concepts. Below is a list of modules available. Schinnerer policyholders can access this material at no charge at www.Schinnerer.com/AE/Pages/Voluntary-Education-Program.aspx.

LEVEL 1: INTRODUCTION TO RISK MANAGEMENT

- Module 1-1: Concepts in Risk Management
- Module 1-2: Legal Liability of Design Professionals
- Module 1-3: Developing the Capacity to Manage Risk
- Module 1-4: Evaluation of Projects and Clients
- Module 1-5: Planning Phase and Design Phase Risk Management
- Module 1-6: Bidding or Negotiation Phase Risk Management
- Module 1-7: Construction Phase Risk Management

LEVEL 2: SELECTED TOPICS IN RISK MANAGEMENT

- Module 2-1: Contracts for Professional Services
- Module 2-2: Alternative Methods for Project Delivery
- Module 2-3: Insurance for Design Professionals
- Module 2-4: Dispute Prevention and Non-Adjudicative Resolution
- Module 2-5: Adjudicative Dispute Resolution—Litigation or Arbitration
- Module 2-6: Planning for Success in the International Project Arena
- Module 2-7: Strategic Planning for Design Professionals
- Module 2-8: Specialized Risks: Designing for Sustainability and Condo Projects
- Module 2-9: Emerging Practice: Building Information Modeling and Integrated Project Delivery

INTERACTIVE RISK MANAGEMENT MATRIX

We developed this matrix to provide firms with a systematic approach to analyze and assess risks. This matrix is designed to help firms identify and quantify risks and then describe the techniques available to manage those risks. When properly implemented, a matrix can help individual members of the same firm address risk management from a common perspective. Policyholders can download a copy at www.Schinnerer.com/AE/Pages/Practice-Management.aspx.



VICTOR O.
SCHINNERER
& COMPANY, INC.

CONTRACTS AND RISK MANAGEMENT



INTRODUCTION

Throughout the years, many surveyors have taken assignments based on a telephone call, a chance meeting on the street, or a request to contact an individual who needs some level of professional service, regardless of the location or type of service to be provided.

Subsequently, the surveyor made a few notes about the job and how much it would cost. Fortunately, the surveyor was paid in most cases. When the surveyor was not paid, collecting payment was difficult, and additional expenses resulted in the elimination of profit from the job.

In today's business environment, initiating services in this traditional "handshake" manner can be hazardous to the health of a firm for many reasons. The value of land and the costs of development have skyrocketed. Field and office equipment are no longer expense items; they are capital investments. A client who is seriously delinquent or reneges on an obligation to pay can create financial difficulties for the surveyor. There are

some clients who use some technicality as reason to either withhold payment completely or reduce the surveyor's fee to the point where the surveyor has provided services at cost or even less.

Professional services agreements are one of the most important tools surveyors have for managing risk. Written agreements create expectations of performance and assigns rights and responsibilities to surveyors and their clients. By gaining an increased understanding of contractual language and negotiation skills, surveyors can respond to the challenges presented by clients and their projects.

The U.S. civil justice system holds surveyors in a special place—it respects their exercise of judgment, acknowledges the uniqueness of their services, and protects those who practice in a reasonable and prudent manner. U.S. law, however, also recognizes the freedom of parties to determine their own responsibilities and rights by contract. Although surveyors can choose to contractually expand their professional responsibilities, such commitments are often undertaken without a proper understanding of the ramifications.

Careful study of *Staking Out Your Future* will help surveyors and their clients to 1) achieve a common understanding and appreciation of each other's contractual responsibilities and 2) make informed risk management decisions when negotiating or responding to specific contract language.

HOW TO USE THE CONTRACT GUIDE

Surveyors need to be generally familiar with the topics that are likely to be at issue when negotiating with clients. This guide has introductory material about client relationships, reviewing contracts, and surveying standards that apply to professional services. Each major contract topic is identified and relevant commentary is devoted to each topic. Each topic identifies the **issue** surveyors might face with clients. We provide a brief explanation of the **concern** that surveyors might have with the issue and suggest a **response** to their clients. Where applicable, **resources** from the *Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys* and Schinnerer are listed. Surveyors can share this information with clients. Each topic also includes **commentary** that provides additional background information and some suggestions surveyors might want to discuss with their legal advisors and clients.

In addition, policyholders in the Schinnerer program can access more information on our risk management website, www.Schinnerer.com/AERiskmanagement. The site has supplemental information about many of the issues addressed in this publication, as well as special reports and studies of risk management exposures.

THE VALUE OF GOOD COMMUNICATION

Clients, like most of us, appreciate good service. Surveyors should understand the importance of developing a service orientation in their practice and communicating that orientation to their clients. To provide good service consistently, staff at all levels of the surveyor's firm must understand that providing good service to clients is an integral part

of their jobs, whether or not they interact directly with clients.

Personal relationships are also important. Clients want to feel that they are important to the surveyor and that the firm has a positive, professional attitude toward their project. This starts with the person who answers the telephone and applies to everyone, up to and including the firm's principals. The firm's commitment to service is also evident when telephone calls and emails are returned promptly, appointments are kept, and meetings begin and end at the scheduled times.

There is an adage that "clients don't care how much you know until they know how much you care." Frequently, a surveyor is chosen based on a referral or the recognized success of past projects. Most clients, however, cannot truly evaluate the technical competence of the surveyor. Nevertheless, clients do know how they are treated by the surveyor. Some surveyors are technically proficient, but do not have particularly good communication skills. Chances are that those surveyors will have greater incidences of disputes and claims in their practice than other surveyors who may not be as advanced technically, but who communicate well with their clients. Clients are often unaware of all the effort that the surveyor expends on the client's behalf. Whether bringing good or bad news to the client, always convey the message that the surveyor is there to assist the client.

Finally, clients should be involved in decision making. The surveyor should provide the client with information and advice so that the client can make informed, timely business decisions or give informed, timely consent to the surveyor.

GENERAL RULES FOR CREATING EFFECTIVE CONTRACT LANGUAGE

Although contracts for specific projects may vary considerably, the following principles for structuring reasonable agreements should guide surveyors:



- Determine who is in the best position to carry out responsibilities and assign them accordingly.

Shifting risk to a party incapable of managing that risk is both unreasonable and unproductive.

- Assign responsibilities to those with the authority to fulfill them.

Even if a party is in the best position to carry out a responsibility, that party is incapable of acting unless it is empowered to do so. Having the authority to do what is necessary to meet a contractual obligation is a basic principle of contract formation.

- Assign each responsibility to only one party.

Clients sometimes assume that if multiple parties are given responsibility for a specific duty, the likelihood of that obligation being properly fulfilled increases. Experience, however, indicates that the opposite is true. Co-responsibility creates a situation in which neither party is fully responsible. Such a situation can only lead to uncertainty and confusion.

- Use provisions that create only reasonable and realistic expectations.

Confusion or disappointment significantly increases the risk of a dispute. Contracts can establish reasonable and realistic expectations by clearly communicating responsibilities and obligations.

PROFESSIONAL SERVICES AGREEMENTS

A surveyor is required by law to exercise a reasonable degree of care, skill, and diligence when providing professional services, even in the absence of contractual language. This is the standard of care intrinsic in providing professional services. One of the most important factors in determining the liability of a surveyor is the scope of services undertaken by contract and the terms

and conditions of performance of that scope. These factors can change the standard of care and the extent of the risk assumed by the surveyor.

There is often a temptation to redefine the traditional professional relationship by creating documents with wording favorable to one party or another. It is important for each of the parties involved in a design and construction project to understand their respective responsibilities and degrees of authority, and to be able to rely on the agreed-upon division of powers and obligations.

The value of a carefully crafted professional services agreement between the client and surveyor, and a coordinated agreement between the client and other parties, is that the contractual roles and responsibilities are clearly communicated. Contract negotiations between the surveyor and client, therefore, represent the prime opportunity to communicate with the client. The resultant agreement should guide the relationship of the parties throughout their collaboration.

TYPES OF SURVEYS AND STANDARDS

There are many different types of surveying projects that can be encountered by a surveying firm. To indicate the wide range of services for which it is appropriate to use a professional services agreement, some of the more common project types are listed below.

Property:

- Land title surveys
- Boundary surveys
- Subdivision plats

Mapping:

- Horizontal and vertical control
- Infrastructure location for GIS

- Topographic surveys
- Hydrographic surveys
- Mine surveys (underground and surface)
- Architectural surveys
- Location for oil and gas wells

Construction:

- Stakeout
- Location and orientation of communication towers
- “As-built” surveys

GENERAL REVIEW OF STANDARDS

There are at least four general types of standards: precision, accuracy, content, and performance, which are defined as follows:

- **Precision:** the degree of refinement in the performance of an operation, or the degree of perfection in the instruments and methods used when making measurements. It is a measure of the uniformity or reproducibility of a result.
- **Accuracy:** the degree of conformity with a standard of accepted value. Accuracy relates to the quality of the result and is distinguished from precision, which relates to the quality of the operation by which a result was obtained.
- **Content:** refers to the features, both natural and man-made, that are to be measured and reported on the final survey plat.
- **Performance:** defines the steps to be followed in an operation, and may go well beyond the purely technical operations of a survey.

Standards have also been described as being either *technical* or *conceptual*. Precision and accuracy standards fall within the technical class

of standards, while content and performance standards are conceptual in nature. Clients are generally more interested in conceptual standards, finding the technical class of standards to be complex; technical standards included in a document like the *ALTA/NSPS Land Title Survey* have more meaning for the practitioner, while conceptual standards establish the scope of work for both the practitioner and client.

WHY HAVE STANDARDS?

A question frequently asked by surveyors is:

Why should a professional, who knows better than anyone else what kind of survey is required for a specific project, be confronted with standards of any kind, especially those presented by a client?

One answer to this question is that there is obvious disagreement among surveyors about the quality and content of specific surveys. Clients report widely varying levels of quality of surveys with inconsistent data displays. There is even the suspicion that certain surveys are performed by the “windshield survey” method, without the surveyor even going on the site to make the minimum measurements. However inaccurate or unfair this impression may be, clients, for title insurance purposes, insist on the need for a set of standards that will assure them of the value of the services both as to accuracy and content.

Standards have a leveling effect on the profession. Practitioners are apt to deliver services of unequal quality when they perform to self-determined standards based on their own impressions of what is required. Surveyors presented with a request for proposal (RFP) are assured that their competitors are playing by the same rules when there is a set of concise, comprehensive standards included with the RFP.



Remember that most clients have little or no understanding of surveying procedures and practices. One of the most frequent causes of disputes over fees between surveyors and their clients is a poorly defined scope. A carefully crafted scope of work defined by well-prepared standards minimizes confusion at the contracting stage of a project as well as at the bill-collecting stage.

Some members of the industry have argued that printed standards increase a surveyor's liability. That is true—when the surveyor is not conversant with the standards that apply to a specific project. The surveyor who fails to perform up to a standard, either through ignorance or incompetence, will eventually be brought to task. Otherwise, well-developed standards will limit a surveyor's liability by clearly defining scope and accuracy requirements. A client reluctant to pay a bill, for instance, is unable to claim surveyor misfeasance or nonfeasance when the surveyor's work was demonstrably performed to a printed standard agreed upon by both the client and surveyor.

Printed standards also assist in establishing the normal standard of care in an occupation. In professional liability cases, one of the first questions to be dealt with involves the standard of care that should have applied to the subject case. The normal standard of care is usually established through testimony, an examination of similar cases, and a review of common law edicts. Printed standards necessarily establish a certain minimum below which a surveyor's performance may not fall, but ideally do not set forth the normal standard of care performed by the surveyor. In any case, having printed standards assists in defining a minimum performance level; the normal standard of care must be at least that level, and preferably higher.

ALTA/NSPS STANDARDS

The 1962 ATA/ACSM (ATA was the American Title Association, which later became the American Land Title Association) standards made reference

to exactness in surveys. Exactness, perfection, and "error-free results" are words and phrases inappropriate to describe a surveyor's work. There is no exact, perfect, or error-free measurement. Furthermore, this document required the surveyor to report "maximum positional tolerance of corners." The document did not define the term nor is it found in standard surveying texts or dictionaries. ("Allowable positional tolerance of corners" was required to be not more than 0.02 feet in urban areas and not more than 0.04 feet in suburban areas.) In the final statement of the preamble, it was stated that the title insurance industry was entitled to rely on the "highest professional quality both as to completeness and accuracy"—a standard well beyond the normal legal standard of care required of surveyors.

In 1979, the American Congress on Surveying and Mapping (ACSM) revised the document, but the 1979 version was acted upon only by ACSM and never became a jointly published standard. In 1986, a new version of *Minimum Standard Detail Requirements for Land Title Surveys* was published jointly by ALTA and ACSM, rejecting the more objectionable items of the earlier versions. At the request of the ALTA Lenders Council, the standards were revisited and revised in 1988. Again in 1992 and 1997, the ACSM committee examined the standards due to surveyor concerns. There were apparent problems with interpretation and application; the accuracy and precision standards of Table 2 were said to be too rigid and inflexible and were an impediment to the use of new technologies. There were criticisms of inconsistency and redundancy throughout the body of the standards, especially regarding the additional survey requirements of Table 3 (now Table A in the latest version). As a result, the standards were revised and approved by the boards of ACSM and ALTA in 1999.

The standards were revised again in 2005, with an effective date of January 1, 2006. The

measurement (“accuracy”) portion of the standards was significantly revamped in the 2005 revision. The measurement standard adopted in 2005 came with minor modifications from the standards for boundary surveys adopted by the National Society of Professional Surveyors (NSPS) in 2003 (i.e., using “relative positional accuracy”). It also eliminated, once and for all, the remnants of the old table of minimum angle, distance, and closure requirements.

The standards were revised again in 2010 with an effective date of February 23, 2011. In 2012, the American Congress on Surveying and Mapping (ACSM) merged with the National Society of Professional Surveyors (NSPS).

In 2015, the standards were revised again by ALTA and NSPS and renamed the *Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys* to reflect that NSPS is now the drafting entity representing surveyors. The new standards are jointly promulgated by ALTA and NSPS. As of the effective date of February 23, 2016, all prior versions of the ALTA/ACSM standards will be superseded and surveyors should not conduct surveys under any of those previous versions.

RELYING ON ADVICE OF LEGAL COUNSEL

Lawyers and insurance professionals are not qualified to provide surveying services. Equally, surveyors should not assume that they can provide legal or insurance advice either for their own use or for that of their clients. Each specialty service should be provided by those qualified to provide that service. Therefore, we recommend that appropriate legal advice be obtained when negotiating any binding document, including professional services agreements.

Surveyors often think of lawyers, or insurance companies, as the instruments of their defense in times of trouble. Conversely, most clients have a different view of lawyers and insurance

professionals, recognizing the design process as only the first step toward a major capital investment. Except for the smallest of projects, clients consult lawyers, risk managers, and insurers from the start of the negotiation process for the design of a project. Regrettably, few surveyors have the same understanding of the need for legal and insurance counsel during the negotiation process.

A client, however, may not be represented by legal counsel experienced in the design and construction process. The client’s attorney may suggest or reject contract terms without an understanding of the peculiarities of the construction industry or an appreciation of the professional nature of surveying services. The resultant contract, therefore, may not serve as a reliable guide to the rights and duties of the parties. Sharing the information contained in this publication with a client and the client’s attorney may help educate them and create realistic expectations that can be documented in the professional services agreement.

PRACTICE MANAGEMENT

The information in this publication addresses certain practice management and professional liability issues that claims experience has shown to be troublesome to surveyors. The comments in this publication are general in nature and should not be considered as a substitute for professional advice in specific situations. The matters discussed and suggestions offered are not intended, nor should they be construed, to be expressions of legal opinions or recommendations for standards of practice. They are simply suggestions and insight for surveyors to consider and use in efforts to negotiate fair and reasonable professional services agreements with clients.

REVIEWING A CONTRACT

Surveyors typically encounter five generic types of professional services contracts: oral agreements, letter agreements, purchase orders, standard form



agreements (often with extensive modifications), and custom agreements. Custom agreements that are drafted by the client and negotiated with the surveyor present the greatest danger. While such agreements are often developed because of the unique nature of a project, the use of custom contracts is usually driven by the client's intent to establish an unbalanced contractual relationship. It is important that the surveyor keeps sight of the need to include certain project-specific and general conditions, and strives to limit onerous, unrealistic, or ambiguous contract terms.

Surveyors should be aware that there are standard form agreements published by the Engineers Joint Contract Documents Committee (EJCDC) and The American Institute of Architects (AIA) that deal specifically with surveyors.

The EJCDC published E-560, 2015 edition, *Agreement Between Engineer and Land Surveyor for Professional Services*, which is designed to be used when the engineer on a project is engaging the services of a land surveyor. The agreement is designed so that the parties can select from a scope of services that includes a boundary survey using the latest ALTA/NSPS standards, topographic surveys, and construction stakeout services. More information about the E-560 agreement can be obtained at www.ejcdc.org.

The contract documents program of the AIA published a scope of services document for use by project owners contracting for surveying services. The document, C201-2015, *Standard Form of Consultant's Services: Land Survey*, is meant to be attached to C103-2015, *Standard Form of Agreement Between Owner and Consultant without a Predefined Scope of Consultant's Services*, to form the contract. It also can be used in conjunction with other owner-surveyor agreement forms.

The C201 includes scope of services information for both boundary surveys conducted in accordance with the ALTA/NSPS standards and topographic

surveys. More information about the C201 and C103 can be obtained from www.aia.org/contractdocs.

In our opinion, the unmodified versions of these standard form agreements are fair and equitable agreements that can be used by surveyors seeking to use a standard contract published by a third party.

CONTRACTS AS A PRODUCTIVITY TOOL

A contract establishes the scope of services, overall professional relationship, system of communication, standard of care, and the rights and responsibilities of both parties. The likelihood of misunderstandings, disputes, and litigation decreases significantly if the contract is in writing and clearly represents the agreement of the parties.

The contract negotiation process provides an opportunity to set the client-surveyor relationship on a firm and productive course. Both parties must have a full appreciation of the issues involved in the negotiation, along with their inter-relationships and relative importance. From a risk management perspective, the outcome of the contract negotiation process can be considered successful if it results in a contract that satisfies the following criteria:

- The expectations of the parties are clearly articulated and reasonably integrated.
- The rights and obligations of the parties are clearly expressed.
- Risks and rewards are addressed and fairly allocated.
- Each source of risk is allocated to the party in the best position to control or otherwise manage that risk.

- Insurance is available to support common law or contractual indemnity obligations.
- Mechanisms exist to reasonably accommodate changes during the course of the project.
- The mutual understanding of the parties is confirmed in writing.

BASIC QUESTIONS TO ASK WHEN REVIEWING CUSTOM CONTRACTS

Whenever a custom contract is reviewed, some basic questions should be asked. They include:

- What does the language say?
- What does it mean?
- What problem is this language intended to solve?
- How does the language affect the surveyor's responsibilities?
- Will the language have an adverse impact on the working relationship between the client and surveyor?

THE ESTABLISHMENT OF BUSINESS TERMS—SCOPE, TIME, AND COMPENSATION

Surveyors in practice operate as commercial entities. Commercial concerns, therefore, are important in professional practices. A surveyor must enter into contract negotiations with certain commercial and professional expectations. Good business judgment often reflects sound risk management judgment; sound risk management judgment can result in profitable business transactions.

Business terms in a professional services agreement include the scope and nature of the services, the schedule for providing those services, and the compensation and payment conditions for services and reimbursable expenses. The negotiation of such terms is of primary importance

to the success of the project and the financial viability of the surveyor.

Perhaps the three most important aspects of an agreement are:

- the description of the scope of services;
- the method for determining the surveyor's compensation for performing services; and
- the schedule for the delivery of services.

The surveyor's scope of services should be defined with reasonable precision within the contract. A clear, precise definition of the scope of services is essential for business and payment purposes. An ambiguous or unspecified definition of scope may lead to an obligation to perform more services than contemplated or to a dispute with the client. Problems could include the shifting of services that might be considered as additional services into the category of basic services, and the continuing enlargement of the scope because of unclear expectations or intentional accretion.

Most claims against surveyors are brought by clients (nearly 66% as the chart on page 9 indicates). Misunderstandings and poor managerial decisions generate many of the problems leading to disputes and disagreements over compensation. Practice procedures, such as failure to respond to questions in a timely manner, can also exacerbate problems, resulting in claims. Professional services agreements should provide for the prompt payment of services, prevent the unreasonable withholding of fees, and require the equitable adjustment or renegotiation of fees for delayed or terminated projects. Similarly, an agreement should specify the time expectations for the rendering of services and the submission of deliverables. Time parameters, however, cannot be stated as absolute; milestones or deadlines must be adjusted when delays are caused by factors beyond the surveyor's control. The timely delivery of services may be a



material element of an agreement, but it should not establish a warranty.

ONEROUS TRANSACTIONAL AND LIABILITY TERMS

The business terms, general conditions, and project-specific terms that define the services, delivery, and compensation method of any agreement are usually accompanied by transactional and liability terms that structure the professional relationship. Although few contractual provisions are “deal breakers” in that they alone should cause a prudent surveyor to reject a contractual relationship, there are provisions that clearly go beyond the ability of the surveyor to manage risk. Since part of prudent risk management is the ability to transfer a portion of risk through insurance coverage, such provisions often exceed the scope of professional liability insurance and other insurance coverages.

In reviewing a contract, a surveyor should be alert to the following provisions that either significantly increase risk or create a situation where the surveyor may not be able to appropriately manage or insure against a particular risk.

Indemnity or Hold Harmless Clauses: These shift risks from one party to another, and usually the shift is from a client, such as a developer, to the surveyor. Frequently, these clauses demand more of the surveyor than the law would otherwise require—if they do not, there is no reason for these provisions to be in a contract.

Defense Obligations: These are rarely stated separately, but are usually included within an indemnity agreement. While it is reasonable for a client to ask for indemnification of defense costs that result from the negligence of the surveyor, the assumption of defense responsibilities not resulting from the surveyor’s negligence is an entirely different matter. Responsibility for the high costs of a legal defense of the client may lie with the

surveyor, even when there is no allegation of the surveyor’s negligence.

Express Warranties or Guarantees: These impose liability in a manner that is neither realistic nor effective. They can also appear throughout a contract, cleverly disguised through the addition of only a word or term to an otherwise innocuous statement of service. While a surveyor may feel comfortable providing a warranty of facts or situations within its control, such as the existence of proper professional and business licenses, providing a warranty of services is irrational. Even more important, guaranteeing the work of others—for instance, the work of the contractor—is irresponsible and inadvisable because the surveyor has no control over the contractor’s work.

Standard of Care: An improper or enlarged definition of the standard of care can create expectations that simply cannot be met. The law speaks for itself; without any statement of a standard of care, the surveyor must perform services within the usual and customary professional standard of care and in accordance with generally accepted practices in effect at the time services are rendered. While that standard can be restated, or even expanded, to be based on the competence and qualifications of the firm, such a change must be carefully crafted. What might at first glance appear to be a simple word change could create unexpected and unclear obligations for the surveyor.

MISSING PROVISIONS

There are also statements that could be missing from client-generated contracts that can cause misunderstandings; a missing provision can also make a dispute difficult to resolve. Some of these provisions are vital in drawing a “bright-line” separation between the services of the surveyor and the work of the contractor. Some of these missing provisions are:

Responsibility for the Work: A positive statement that the contractor is solely responsible for the means, methods, techniques, sequences, and procedures of the construction work and for the final project should be included in any contract leading to construction.

Worker Safety: Because the contractor has control of the site, the contractor alone should be responsible for the safety of the construction workers, the client, others on the site, and adjacent property owners. Liability may be created if a duty is assumed by the surveyor; the risk that liability may be implied because of imprecise language may be even more perilous.

Agency Status During Construction: Unless the surveyor is retained by the contractor, adding an explicit statement that the surveyor is acting as the agent of the client can prevent the involvement of the surveyor in claims brought by the contractor.

Dispute Resolution: Surveyors and their clients should anticipate the possibility of disputes or claims and include some provision for dispute resolution in their agreements. For example, in the event that direct negotiations fail to resolve a dispute, the agreement may provide for mediation, arbitration, litigation, or some combination of these methods of dispute resolution. Claims specialists have found that mediation of disputes is less expensive, less time consuming, and less adversarial than any other form of dispute resolution. While some firms may prefer arbitration because it places the power to resolve a dispute with a third party, a “mediation-first” provision does not preclude another form of dispute resolution should mediation fail.

Document Control and Ownership: Agreements should clearly state ownership and proper use of any documents. As a general rule, documents produced by the surveyor should be acknowledged as instruments of the surveyor’s service and not regarded as products. As instruments of service,

those documents should remain the property of the surveyor. Now, many clients are requiring that some or all of the surveyor’s instruments of service be immediately and unequivocally transferred for use by the client. There are significant differences between copyright and ownership of documents.

FOCUS ON SERVING THE CLIENT BY MANAGING RISK

If a source of risk can be identified and its impact assessed, a strategy for addressing that risk in a contract and during the life of the project can be developed. Risk left unmanaged or inappropriately managed may cause problems for all those involved in the project. This publication should not be seen as the only source of useful risk management information in creating a rational balance between risk and reward. Additional information and perspectives on risk management can be found in other Schinnerer publications, including *Guidelines for Improving Practice* and *Managing Risk Through Contract Language*, and the Schinnerer risk management website, www.Schinnerer.com/AEriskmanagement.





NEGOTIATING A CONTRACT TO PERFORM AN ALTA/NSPS SURVEY

A surveyor may be informed of the need for an *ALTA/NSPS Land Title Survey* for title insurance purposes in one of several ways:

- By the client at the beginning of the job;
- By the client who has no idea what an *ALTA/NSPS Land Title Survey* is;
- By the client's attorney after the survey is well underway or finished; or
- By some other third party (e.g., a realtor, purchaser, or lender).

Item #1 of the ALTA/NSPS standards makes it clear how and when the surveyor should be notified of the need for an *ALTA/NSPS Land Title Survey*, but it often does not always happen that way. Difficulties arise when a client is told what a survey of this type will cost, especially if the survey is already underway and the surveyor must start over to meet all of the requirements of the standards. When the surveyor is told that the ALTA/NSPS standards will apply, the surveyor should immediately contact the client—the party who is ultimately responsible for payment—and explain the process and requirements. It is not usually enough that a third party is representing the client; the client must be informed of the cost of the undertaking and the reasons for what may be seen as an unexpected expense.

SCOPING THE SURVEY

Contracting for an *ALTA/NSPS Land Title Survey* can be like ordering a new car; all the extras look good until their costs become apparent. Classification of surveys by the ALTA/NSPS standards used to be in order of A, B, C, and D. Most people, however, wanted a “Class A” survey regardless of the location and value of the site. In any case, the class system was eliminated in the 1999 standards.

In requesting a survey, clients may add unnecessary items from Table A of the current *ALTA/NSPS Land Title Survey*. A professional surveyor should take some responsibility for explaining the significance of all of these items and for advising the client of their need. It may be that a prospective purchaser of property has informed the surveyor's client, often a title insurance company, that contours ought to be included in the survey, even though there is no need for contours from the title insurer's point of view. This is an opportunity for the surveyor to inform the client of a way to limit the cost of the survey by specifying only those items needed by the title insurer. On the other hand, use of an *ALTA/NSPS Land Title Survey* gives the surveyor an opportunity to market additional services when a significant parcel of land is the subject of the survey and the sale of that parcel is for development purposes.

Whoever is buying the land may have a need for all of the items in Table A. The addition of Table A items will increase the cost of the survey and the value of the survey to the purchaser; the surveyor has an opportunity to enlarge the scope of services while advising the client and the purchaser of the division of the added expenses. In any case, an *ALTA/NSPS Land Title Survey* is comprehensive—it exceeds the detail of most generic retracement surveys—and should be valued accordingly by both the purchaser of services and the surveyor.

DEFINING THE SURVEY

It is a fact that most title insurance policies are lender's policies rather than client's policies. Therefore, it is the lender who is requiring the survey; if there is a conveyance of land involved, the lender's relationship is with the purchaser, not the seller. If the seller is the surveyor's client, as is often the case, it may be that the surveyor ends up negotiating with a party who has no interest in the actual survey. This arrangement makes it doubly difficult to convince the client to buy an expensive

survey—especially if a basic retracement survey has already been completed. In such situations, the surveyor’s best talents of negotiation and diplomacy are brought to the forefront.

THE CERTIFICATION

Having defined the survey and scope, it may seem to the surveyor that the rest of the project will be straightforward. Many surveyors, however, have been surprised at the eleventh hour by receiving a certification statement that goes well beyond the content of the statement in the ALTA/NSPS standards. A professional surveyor has the right and responsibility to write an acceptable certification statement regarding professional practice and risk and should not be reluctant to revise the language of the certification presented by a lawyer.

Unfortunate delays may be avoided by confronting the issue of the certification at the beginning of the job rather than at the eleventh hour. This, too, is a matter of negotiation between the surveyor and client. In the scope of work detailed in the contract between the surveyor and client, there should be an acknowledgment of the certification to be executed by the surveyor, and that certification should be described as the certification appears in the standards. The surveyor is then in a solid position to deny executing the eleventh hour version presented by an attorney for the bank, the title insurer, or the purchaser of the property.

UPDATING THE SURVEY AND CERTIFICATION

Property sales and loan closures are often delayed well beyond the date of the survey and certification. Surveyors have experienced repeated returns to their work as new dates were set and missed by the parties involved (sellers, buyers, lawyers for the seller and buyer, lenders, title insurers, and lawyers for lenders and title insurers). Each time a new date for conveyance approaches, the surveyor is asked to update the survey and certification. It

goes without saying that with every update the surveyor’s liability exposure is renewed.

Similar care must be applied in reviewing the conditions on the ground at the time of the update as at the time of the original survey. It is also true that the record can change during long delays. Eminent domain proceedings can change the configuration of the property; negotiated easements may appear in the record, even when not evidenced on the ground. Clients have even been known to convey away a portion of a site without thinking to alert the surveyor. Upon a request to update, the surveyor must make a careful examination of the record and the site.

It is important for surveyors to insist upon use of, and to review, a written agreement before commencing professional services. *Staking Out Your Future*, along with use of *ALTA/NSPS Land Title Survey* standards, can assist surveyors in identifying potential areas of liability and in managing risks.

RESPONDING TO RISK MANAGEMENT ISSUES

NSPS and Schinnerer have identified the risk management issues contained in the following pages as being common to the everyday practice of surveyors. These issues require careful consideration and planning before signing any professional services agreement.

Successful practice is possible when surveyors and clients achieve a common understanding and appreciation of each other’s contractual responsibilities. Clients need to appreciate the practical and legal limitations of professional surveying services. Surveyors need to make informed risk management decisions when negotiating or responding to specific contract language.

As stated previously, multiple pages are devoted to each risk management topic. We identify the **issue** surveyors might face with clients. We also provide



a brief explanation of the **concern** that surveyors might have with the issue and suggest a **response** to clients. Where applicable, **resources** from NSPS and Schinnerer are listed. We've also included **commentary** that provides additional background information and some suggestions for discussion with legal advisors and clients.

LISTING OF ISSUES

Certifications: The client has presented the surveyor with a certification form that seems to make the surveyor responsible for anything that has to do with the project. (page 34)

Dispute Avoidance/Dispute Resolution: The client presents a contract that neither addresses dispute avoidance nor establishes a dispute resolution mechanism. (page 36)

Electronic Information Transfer: The client wants the surveyor to provide construction contractors with CADD files and provide a final set of all project information in a reusable electronic format. (page 37)

Environmental Hazards: The client wants the surveyor to provide services on a site that contains, or could reasonably be expected to contain, an environmental hazard that could generate claims. (page 39)

Indemnity: The client wants the surveyor to agree to defend it from any claims resulting from the surveyor's services and to indemnify the client for any and all costs, losses, or damages arising out of the surveyor's services on the project. (page 40)

Insurance Requirements: The client wants to be a named insured on the surveyor's professional liability policy and requires the policy to be endorsed to cover an indemnity provision and provide notice of any change in coverage. (page 42)

Risk Allocation: The surveyor wants to assist the client on a project that involves risks identified

as being beyond the surveyor's control or far in excess of any benefit the surveyor would receive by performing services for the client. (page 43)

Standard of Care: The surveyor marketed services based on expertise and qualifications, but now the prospective client wants the surveyor to agree to perform to the highest professional standards. (page 45)

CERTIFICATIONS

Issue: The client has presented the surveyor with a certification form that seems to make the surveyor responsible for anything that has to do with the project.

Concern: Any request for a certification should be carefully examined since a certification is an assurance by the surveyor of the situation in question. Such a statement by the surveyor can impose immeasurable and unrealistic expectations, give rights to parties that otherwise would not have a legal relationship with the surveyor, and create major insurability issues.

Many certification forms result in additional liability exposure for the surveyor and may involve uninsurable express warranties and guarantees of conditions beyond the surveyor's knowledge or control. The scope and language of required certifications should be coordinated with the project's contract documents to provide appropriate safeguards for the surveyor while enabling the surveyor to fulfill contractual obligations to the client.

Response: Surveyors need to help clients gain an appreciation of the contractual, legal, insurance, and ethical constraints on their ability to issue certifications. If a certification is required by the surveyor's contract, the certification should clearly differentiate between known facts and professional opinions. Certifications should be:

- Based on contractual services;
- Identified as to their purpose;
- Indicated as being at a specific time and for a specific entity; and
- Limited to a statement of facts directly known by the surveyor or clearly identified as an expression of professional opinion, such as by including a statement that the certification is based on the surveyor's knowledge, information, and belief.

Resources: A more detailed discussion of many of the risk management issues related to certifications can be found in the *Management Advisory* titled "Certifications," located at www.Schinnerer.com/AE/Documents/Management-Advisories/Certifications.pdf.

See also, Article 7, "Minimum Standard Detail Requirements," from the *ALTA/NSPS Land Title Survey*.

Commentary: Careful attention to the language of certifications, and an ability to state the realistic limitations of a surveyor's certification to a client, constitute a prudent, assertive program of risk management that allows a surveyor to better predict the costs and consequences of practice.

Certifications can present one or more of four general problems:

- The terms of the certification may impose duties and responsibilities that extend or expand those assumed in the surveyor's contract with the client.
- The certification may involve the questionable delegation of a governmental responsibility to a private entity.
- There may not be a provision for compensating the surveyor for additional services required to

enable the surveyor to sign the certification in a professionally responsible manner.

- Provisions in the certification may create unrealistic exposures to professional liability by making the surveyor responsible as a guarantor of the contractor's or another party's performance.

If a certification is issued for the benefit of another party, such as a certification to a lending institution, the surveyor should be sure that the terms of the certification:

- Are consistent with its contractual obligations;
- Do not require an assumption of responsibility for another party;
- Do not create guarantees or express warranties; and
- Do not create inequitable or uninsurable liability exposures.

Improper certification language can result in potentially serious and often uninsured exposures to claims. If the certification does not solely state a fact known to be true by the certifying surveyor, qualifying language must be used. Stating that the certification is "to the best of my knowledge, information and belief," or simply identifying the certification as a "professional opinion," clarifies the certification.

Identifying the certification as being made at a specific point in time based on specific information available to the surveyor under the scope of services provided by the surveyor provides a reasonable expectation of the true value of the certification. This is all that should be expected from a surveyor and is consistent with the coverage afforded under a firm's professional liability insurance policy.



DISPUTE AVOIDANCE/DISPUTE RESOLUTION

Issue: The client presents a contract that neither addresses dispute avoidance nor establishes a dispute resolution mechanism.

Concern: The desire to reduce the transaction costs of disputes has led to a variety of methods to resolve disagreements quickly and with a minimum of expense. Some methods follow the path of dispute review boards in setting up a system that provides an early, neutral “expert” analysis that persuades one party to abandon its position and thus avoid the need to actually resolve the dispute. Others attempt to limit access to the court system or pare down the legal process to reduce the time frame and cost of solving a problem by adjudication.

Arbitration—a form of adjudication—replaces the judicial system with a party or panel empowered to determine fault and make an award to the deserving party. The option preferred by many firms, and one always examined by claims specialists for recommendation to insured firms, is mediation. Although mediation—a facilitated settlement negotiation—often resolves disputes quickly and with little animosity, many surveyors and clients reject mediation because it creates an arbitrary accord without proper regard to culpability. Mediation, however, has been proven to be effective in limiting the risk of surveyors by keeping a recognized problem from becoming a conflict that can only be resolved by adjudication.

Response: When a surveyor and client acknowledge that disputes will occur, they are taking a major step in communication that will help make disputes less disruptive to the professional relationship and to the design and construction process. The surveyor can then explore options for avoiding disputes and resolving those that do occur. Just as there is no one perfect design solution, there is no perfect form of preventing

disagreements or solving problems. If the contract remains silent on the method of resolution, the surveyor does not have to resort to litigation; dispute resolution options can be explored once a dispute arises.

Resources: Many state bar associations have information regarding arbitration and mediation procedures for their state. For additional information about dispute avoidance, visit the American Bar Association website at www.abanet.org or the American Arbitration Association website at www.adr.org.

Commentary: It is clear that if adversarial attitudes and disputes can be reduced, all parties to a design and construction project benefit. The process of dispute resolution begins with the structuring of a dispute avoidance mentality and course of conduct. Realistically allocating the risks on a project by contract; promoting teamwork rather than adversarial relationships; establishing the techniques for resolving issues before they become disagreements; and developing a rational method of managing disagreements before they become disputes all reduce the threat of litigation.

Any disagreement or dispute has an impact on the financial operations, morale, and reputation of a surveying firm. However, there are many options that can be explored to mitigate the damages that disputes and claims can cause.

- **Partnering:** In partnering, the parties anticipate problems and structure an approach to resolving issues before a dispute arises. The focus is on creative cooperation and the avoidance of confrontation by enabling problem solving by the parties at the lowest staff level possible.
- **Dispute Review Boards/Standing Neutrals:** At the inception of the construction phase of a project, one or more independent construction industry experts can be approved to evaluate

problems that may occur and suggest a resolution for agreement by the parties.

- **Certificate of Merit by Law or Contract:** Similar to screening panels that evaluate the likelihood of fault being determined, a certificate of merit requirement controls access to the court system by mandating the early determination by an expert witness that harm could have been the fault of the defendant.
- **Mediation:** Good faith negotiation can take many forms. When negotiations are assisted by a facilitator, the parties are engaged in the voluntary mediation process. Mediators in design and construction disputes are usually attorneys, but others can facilitate mediations.
- **Arbitration:** Adjudication of a dispute by a selected neutral rather than through litigation is the basis of arbitration. Increasingly, arbitration proceedings allow consolidation and joinder so that one arbitration involves all parties to a dispute. This can be detrimental to the interests of surveyors because surveyors can be brought into a dispute that has little or no relationship to the professional services provided.
- **Right to Attorney Fees:** Some firms contractually agree to give the “prevailing party” in a dispute the right to collect legal fees as well as any judgment or award in an effort to decrease litigation. While such provisions may have a “chilling effect” on meritless claims from disputes between parties, there can be problems with such a provision. Often, a prevailing party is not identified. In many cases, such provisions place the party with greater financial strength in control and often force a settlement regardless of merit. In addition, such an arrangement may be viewed by a professional liability insurer as a contractual commitment outside of the scope of professional liability insurance coverage.

ELECTRONIC INFORMATION TRANSFER

Issue: The client wants the surveyor to provide construction contractors with CADD files and provide a final set of all project information in a reusable electronic format.

Concern: While surveyors see CADD as a tool to enhance the design process, better coordinate interprofessional services, and minimize design conflicts, clients often see CADD simply as a means of producing documents that are faster, cheaper, more accurate, and reusable. Unrealistic client expectations have always been a problem; the use of CADD seems to exacerbate this issue. While the incorporation of CADD into the daily operations of a firm presents organizational challenges, the electronic transfer of information complicates the practice management considerations of a firm interested in both protecting its intellectual property and managing its professional liability risks.

Response: The issue of the electronic transfer of information increases the concern for contractual protection that should exist whenever a surveyor shares its intellectual property created for a project. One method to reduce the risk of meritless claims during the electronic transfer of information is by stating that a hard copy retains control over any variances or changes that might be introduced to the electronic version. Stating that the controlling version of the instruments of service is the hard copy is worthwhile because no one can be sure how the CADD information might be read under a different system. In addition, unintended or intentional changes beyond the control of the surveyor might be introduced, or the electronic information might degenerate over time.

Technological safeguards for file security provide little real protection. For the most part, once the information has been sent electronically, control over the information is impossible.



Some firms, however, look beyond technological safeguards to legal remedies. Firms often demand separate agreements requiring indemnification for the time and costs to a firm involved in a controversy over electronically transferred information. This is in addition to affirmatively stating, in the contract or on the transferred documents, that any reuse is at the sole risk of the client or user.

Commentary: In general, if five major issues are addressed, claims involving the transfer of electronic information may not become a factor in the management of a professional practice. These issues are the following:

- The information contained in the signed and sealed documents should be deemed to be correct and superior to electronic information.
- Electronic information is a component of the instruments of service and is only for the client's benefit on the specific project and for a specific use.
- There is no representation of the suitability of the electronic information for other purposes, of the durability of the information, or the medium through which the information is furnished.
- Any use for a purpose other than that for which the information is intended shall be at the receiver's risk, and the receiver shall protect and indemnify the sender from any claims, costs, losses, or damages.
- Transfer of the information does not transfer any license to use the underlying software nor does it extinguish the rights of the sender to reuse the information in the course of a professional practice.

There are other issues involved in allowing a client to reuse documents, such as establishing that the documents, as instruments of the surveyor's

service, are not products. Therefore, it may also be necessary to include disclaimer language to prevent the possibility of the application of product warranties or guarantees. In addition, if documents are used by other surveyors as the basis for other projects, the subsequent surveyor may be in a position where both professional ethics and registration law constraints are breached.

The electronic transfer of information to contractors or subcontractors raises many additional questions. For instance:

- For whose benefit are the files being shared or transferred?
- Does the surveyor have the legal right to transfer such information since the information may be owned by the client through contract or operation of law?
- How are changes to the electronic files to be communicated to all appropriate recipients?
- Does the contractor have direct rights generated by a transfer agreement or the argument of detrimental reliance should the information in the electronic file be incorrect or inadequate for the purposes of the contractor?

Usually, the electronic delivery of a drawing is for the benefit of the client, for whom the services have been performed. Therefore, it should be clearly stated that nothing in the transfer should be construed to provide any right of the contractor to rely on the information provided, or that the use of the electronic information implies the review and approval by the surveyor of any subsequent drawing based on the information. It is also reasonable to express a professional opinion that the electronic information provides information current as of the date of its release, but that the user is responsible for updating the information to reflect any changes in the design following the preparation date of the transferred information.

ENVIRONMENTAL HAZARDS

Issue: The client wants the surveyor to provide services on a site that contains, or could reasonably be expected to contain, an environmental hazard that could generate claims.

Concern: Environmental hazards can pose unique liability insurance risks to surveyors in that claims against surveyors may be generated by their presence on a project, and coverage under their professional liability policy for claims tied to these exposures may be limited. In some cases, the surveyor is involved with the project to provide services to the client to assist in correcting the environmental hazard. In other cases, the very existence of such environmental hazards is unknown to the surveyor. In either situation, surveyors are generally not in a position to manage the risks generated by the release, discharge, or dispersal of hazardous materials during the construction or reconstruction process, or by the actual removal, transportation, or disposal of such materials. The existence of such materials and any necessary abatement is the responsibility of the client. If a contractor is engaged for abatement services, it is the duty of the contractor to handle and dispose of the materials in an appropriate manner to protect its workers, the site, and those who may be harmed by the contractor's efforts.

Response: A client should recognize that a surveyor's services on a project whenever environmental hazards exist should be afforded special protections so that the surveyor can assist in solving the client's problem. If there is an environmental hazard that may generate claims against the surveyor by third parties, the client should be willing to consider one or more of the following:

- Providing protection and defense for the surveyor against any claims arising out of the



release of any asbestos, existing pollutant, or other environmental hazard.

- Providing adequate compensation for the increased level of service and risk encountered on such a project.
- Allocating by contract much of the risk to the contractor who is responsible for removal of the hazard, who can manage the risk, and who can usually be insured against such exposures.

Resources: For more information on the nature of providing environmental services, and the risks faced by professionals providing such services, check out the Schinnerer publication, *Managing Risk in the Delivery of Environmental Services*, at www.Schinnerer.com/AE/Landing-Pages/Env-Consultants.aspx.

Commentary: Surveyors need not avoid projects where exposures to environmental hazards may be present. They should, however, exercise care in identifying the potential for these risks and in assessing the probability and potential magnitude of claims. Surveyors can then make informed decisions as to whether or not to accept projects with such risks and how to manage those risks.

For the surveyor providing environmental hazard abatement services, although the likelihood of culpability is low, the threat of third-party suits is



real. The firm's costs in defending itself against environmental claims could be significant in terms of expenditures of time and money. A firm's best preparation, therefore, would be to equitably allocate the risks and costs of any such claims to the parties that control the abatement process.

There are two major variations in protecting a firm from claims and costs resulting from the actions of the contractor. The preferred one is a release and indemnity agreement from the client for any claims against the surveyor resulting from the work of the contractor. This is usually the most practical solution since it is highly likely that the client will still be around if a claim is generated. The other protection—and this may be more appropriate in the case where the contractor is well-financed and stable or when indemnification by the client is unrealistic—is to have the contractor retain full responsibility for its activities and agree to indemnify the surveying firm for the costs and value of the time expended in the defense of claims.

An example of an indemnity provision from the client that would cover pollution risks is as follows:

To the fullest extent permitted by law, Client shall indemnify and hold harmless Surveyor, its employees, and agents from and against all claims, losses, damages, and costs (including but not limited to court or other dispute resolution costs, and the time of Surveyor expended in defense of such claims) caused by, arising out of, or relating to the presence, discharge, dispersal, release, or escape of [the environmental hazard] at, on, under, or from the Project site.

Language that a firm might suggest to the client for use in its agreement with the contractor might be as follows:

Contractor agrees to hold harmless and indemnify Client and Surveyor from and against any claim or liability arising out of Contractor's

performance of the removal of [environmental hazard] including any time spent or expenses incurred by Surveyor or Client in defense of any such claim.

INDEMNITY

Issue: The client wants the surveyor to agree to defend it from any claims resulting from the surveyor's services and to indemnify the client for any and all costs, losses, or damages arising out of the surveyor's services on the project.

Concern: Contractual indemnity provisions, like other provisions of an agreement between a client and surveyor, establish rights and obligations for the parties and may shift risk from one party to another. An indemnity provision that obligates a surveyor to defend the client, or indemnify or rectify damage to a client or third party not resulting from the surveyor's failure to meet the standard of care, represents a risk to the surveyor beyond normal liability and outside the scope of professional liability insurance. There is no need to include an indemnity provision that is based on negligence since indemnity is a basic remedy under common law. Agreeing to defend or indemnify a client is a business decision. Agreeing to an indemnity provision that is not based on damage caused by the surveyor's failure to perform or furnish professional services as required by the applicable standard of care (negligence) is a business risk that is beyond common law indemnity requirements and insurance coverage.

Contracting to defend a client against an allegation of the surveyor's negligence may present a significant financial burden for a firm and may not be covered under professional liability insurance. While the Schinnerer program provides a much broader defense than most insurers, it will not simply accept a tender of the client's defense unless the claim against the client is limited to a violation of the standard of care by the surveyor.

Response: Advise the client that the surveyor's legal duty does not exceed the indemnification of losses directly caused by the surveyor's negligence, and it is this obligation that is covered by professional liability insurance. To establish an equitable allocation of risk, contract language should reflect insurable risks and should not extend to those parties to whom the surveyor would not normally be liable. While the surveyor may make a business decision to accept a defense or indemnity obligation beyond the firm's normal legal liability, such an assumed risk should be accompanied by greater compensation.

A statement that the surveyor will indemnify the client for damages and costs to the extent that they were caused by the surveyor's negligent acts, errors, or omissions reflects normal legal liability in most states.

Commentary: Indemnity provisions must be individually evaluated to determine if the assumed obligations exceed normal legal liability. Because indemnity provisions are, to a great extent, drafted in response to specific state statutory or case law, the advice of local legal counsel is appropriate in evaluating the responsibilities established in indemnity provisions.

Professional liability insurance exists to provide protection from claims of harm caused by the negligence of the insured in the performance of professional services. The Schinnerer program specifically excludes coverage for contractual obligations unless the breach of the obligation is caused by an error, omission, or other act that does not meet the standard of care of the insured professional service firm. The breached contractual obligation would then be defended, and, if substantiated, the harm caused by it would be indemnified by the policy subject to its normal terms and conditions, such as the limits of the policy. There must be a direct causal link between the negligence and the indemnity obligation for the

contract provision to be within the coverage of the professional liability insurance policy. One provision that expresses this causal link is the following:

To the fullest extent permitted by law, Surveyor shall indemnify Client, its officers, directors, partners, employees, and representatives from and against losses, damages, and judgments arising from claims by third parties, including reasonable attorneys' fees and expenses recoverable under applicable law, but only to the extent they are found to be caused by a negligent act, error, or omission of Surveyor or Surveyor's officers, directors, members, partners, agents, employees, or subconsultants in the performance of services under this Agreement.

It would be prudent to check with local counsel to provide specific advice with regard to indemnity provisions in light of recent state court decisions that have held that a party with a contractual indemnity obligation also has an obligation to provide a defense upon the request of the indemnified party unless a "contrary intention" has been expressed. Some attorneys have therefore suggested that adding the words "but not defend" between the words "indemnify" and "client" expresses that contrary intention. It is essential that these contractual commitments be reviewed with knowledgeable local counsel. The *Management Advisory*, "Defending and Indemnifying a Client," provides a more in-depth discussion of the issue: www.Schinnerer.com/AE/Documents/Management-Advisories/Defending-indemnifying-clients.pdf.

There is also a significant risk assumed by the surveyor that provides a broad form indemnity to the client. If a client's employees or contractors are aware of a broad form of indemnity that would take effect even in the case of the negligence of the client or others named as indemnitees, those parties may not meet the standard of care normally applicable to their activities.



Indemnity obligations that exceed professional liability insurance coverage represent a business risk assumed by the surveyor. Provisions that include the obligation to defend the client or others can also be problematic. While a surveyor can agree to indemnify the client for the client's reasonable costs of defense of a third-party claim once the responsibility of the surveyor is proved, assuming the defense of an allegation brought against the client can be onerous.

The Schinnerer program will honor a defense and indemnity obligation that arises out of a covered error, omission, or other act of the surveyor. The surveyor, however, risks its deductible on every defense tendered under the agreement. In addition, when parties other than those signing the contract are included in the indemnity obligation, the surveyor may be extending rights to parties that otherwise may not be able to bring a cause of action against the firm.

Note that any client that asks for an indemnity provision should also be willing to provide a complementary provision in which it protects the surveyor from the harm caused by the client and the client's agents, contractors, and consultants.

INSURANCE REQUIREMENTS

Issue: The client wants to be a named insured on the surveyor's professional liability policy and requires the policy to be endorsed to cover an indemnity provision and provide notice of any change in coverage.

Concern: The insurance requirements of some contracts reflect a lack of understanding of the nature and scope of professional liability insurance. In many cases, the requirements either make no sense, are contrary to the interests of the client, or are impossible to accommodate within available professional liability coverage options.

Requests such as specifically insuring an indemnity provision through contractual liability coverage; naming the client as an additional insured on the policy; or providing notice to the client beyond the professional liability insurer's administrative abilities create difficulties for the surveyor and the insurer. Problems involving a misunderstanding of the claims-made nature of the policy and with the ability to provide future coverage also occur.

Response: Surveyors have an opportunity to work with their insurance brokers to educate the risk managers or attorneys providing advice to clients. Some clients may not understand professional liability insurance and may make the mistake of assuming that such insurance is equivalent to that of a construction contractor or vendor of goods. Professional liability insurance pays on the surveyor's behalf only to correct damage or to indemnify for injuries, costs, and losses to the extent that payment is necessitated by the surveyor's substandard performance of professional services or provision of the services of consultants.

Surveyors should make clients aware that because of the third-party nature of the coverage, it would not be in the client's best interests to be a named insured even if this were possible. Clients should also understand that there is no need to "insure an indemnity provision" if it is based on a surveyor's normal legal duty; nor is it reasonable to attempt to cover, by specific endorsement, a contractual obligation, such as an indemnity provision, that extends beyond the policy coverage.

Resources: In addressing the insurance specifications of a prospective client, the best resource of information or advice about professional liability insurance are the independent brokers surveyors choose to represent their interests. Additionally, surveyors and their brokers can refer to the information on professional liability

insurance requirements found on the Schinnerer website at www.Schinnerer.com.

Commentary: Professional liability insurance exists to defend the insured firm against allegations of negligent performance of its professional duties and to pay on behalf of the insured firm the amount to correct damage or compensate for personal injury caused by the insured firm's negligence (above the firm's deductible, but within the firm's limit of liability under the policy). The surveyor's liability policy refers to coverage for "a wrongful act" that is defined as "an error, omission or other act that causes liability in the performance of professional services."

Naming a Client as an Additional Insured: Clients often confuse the indemnity provision of the professional liability policy with first-party coverage, such as personal automobile coverage, and sometimes ask to be an additional named insured. The theory is that being an additional named insured provides defense coverage and would be advantageous in a personal injury lawsuit. Naming the client as an insured cannot be accomplished on a professional liability policy since the client is not providing professional services. In addition, because of the wording of the policy, if the client were a named insured, it could never collect if damaged because the policy pays *on behalf of* the named insured and *not to* the named insured.

Claims-Made versus Occurrence Coverage: Often, "per occurrence" coverage is demanded even though all professional liability insurance is written on a "claims-made" basis, and therefore covers claims and not occurrences. While referring to coverage as being "per occurrence" does not modify the fundamental coverage of a professional liability insurance policy, usage of the term can cause confusion. Such a misunderstanding can lead to a lack of confidence in the business skills of the surveyor.

Certificate and Notice Requirements: To try and ensure that insurance continues in force, clients sometimes attempt to impose notice requirements as holders of a certificate of insurance. Notice to a client cannot be given of "changes" or "reductions" in the policy or the coverage since changes and reductions are not defined adequately to administratively allow such a notice. In fact, it could be argued that a reduction occurs whenever a claim reserve is established, a claim expense is incurred, or a claim payment is made since both defense and indemnity payments are within the agreeable limit. Any payment effectively reduces the coverage. Notice of cancellation or non-renewal of a policy can be given because such an action can activate an automatic notice. Such a notice requirement is usually limited to 30 days because of practical considerations.

Surveyors can consult their independent insurance broker for details of their coverage and explanations of their policy language.

RISK ALLOCATION

Issue: The surveyor wants to assist the client on a project that involves risks identified as being beyond the surveyor's control or far in excess of any benefit the surveyor would receive by performing services for the client.

Concern: Every contract allocates risks. Not all contracts allocate risks equitably or in such a way that the authority to manage particular risks is allocated along with the risks. Surveyors should have a realistic understanding of the risks that might have an impact on the firm's delivery of services and long-term financial health. In assessing the levels of risks it faces, the firm, both objectively and subjectively, must feel that its resources, abilities, and authority can be used to manage risks.

Some risks cannot be easily quantified; others are beyond a firm's ability to manage. When a surveyor



evaluates a project and client, these risks should be identified and a fair allocation negotiated. Concern should continue, however, for contractual solutions, such as indemnity provisions or limitation of liability agreements, where the protection sought may be little more than illusory.

Response: If the surveyor and client reach an understanding that a particular risk on a project is one over which the surveyor has no direct control, should continue to be the client's risk, or would have such an adverse impact that the fee for professional services is disproportionate to the risk, the surveyor and client can agree to limit the surveyor's risk. The surveyor can negotiate a release from any liability or limit risk to a specific dollar amount, fee, corporate liability, or available insurance proceeds. In addition, the professional services agreement could involve the client protecting the surveyor against third-party claims by defending and indemnifying the surveyor for any costs, losses, or damages from such claims. The allocation of the risk could also be accomplished through a contractual adoption of comparative negligence, through an exclusion of or indemnification for incidental or consequential damages, or through the creation of a "safe harbor" for anticipated change order costs.

Commentary: Risk allocation can work in a number of ways. While clients often demand that risks be shifted away from them to the surveyor or contractor, the risks should stay with the client in many situations. The logical principle is that each risk should generally be borne by the party best able to control and insure against that risk. Parties to a contract should acknowledge their respective duties and agree to the authority and compensation necessary to permit discharge of their respective responsibilities.

On many projects, there is a disparity between the potential risks the client wants the surveyor to assume and the amount of control the surveyor

has over those risks. In addition, the compensation may not be adequate to allow the surveyor to use the appropriate practice management techniques to minimize the risks or to compensate for the business decision of assuming the risks.

There are a variety of ways to achieve a fair contractual allocation of risks between the client and surveyor. These contractual devices fall into two broad and sometimes interrelated categories, described below.

Indemnity Obligations: The client would defend the surveyor against any claims and indemnify the surveyor for any costs, including expenses, losses, or damages, caused by risks beyond the surveyor's control. Thus, if a meritless claim is brought against the firm, the indemnity provision could protect the firm and pay for the significant costs and non-billable time caused by such a claim.

Limitation of Liability Provisions: If risks are disproportionately high in comparison to the fee or ability of the firm to control the risk factors, or if unique risks or those for which no insurance is available are to be encountered, the liability to the client could be waived or limited.

Provisions used specifically to shift risk or limit liability where a party is being protected against its own negligence are discouraged by courts. Broad form indemnity or limitation of liability provisions that are not specifically negotiated are often easily attacked. Before negotiating any such provision, it is strongly recommended that the surveyor consult with legal and insurance counsel to determine what risks are transferred or limited and whether the suggested language is legally enforceable. As a general rule, the courts will strictly construe the language of a limitation of liability clause or indemnity provision against the party seeking the benefit of the contractual obligation so such provisions must be specific and unambiguous.

STANDARD OF CARE

Issue: The surveyor marketed services based on expertise and qualifications, but now the prospective client wants the surveyor to agree to perform to the highest professional standards.

Concern: There is a significant difference between promotional information and a contractual commitment to meet a standard of care beyond that normally expected of a surveyor. In some cases, such as in meeting the “highest” professional standards, the suggested language is evidence of either an unsophisticated client or a client who is ingeniously manipulative. If seen as inspirational in marketing materials, such language as a contractual obligation can distort the client’s expectations. In other situations, use of an immeasurable or absolute standard of care means that regardless of the quality and competence of the services provided, the surveyor will be in breach of the contractual obligation.

The law recognizes that professional services are based on reasoned judgment and that there is no one correct course of action. While a client may want a precise definition of services and the ability to judge performance based on objective criteria, such exactness is not possible because of the unique characteristics of each project and the latitude allowed under law for the application of professional skill and experience to the challenge each project presents.

Response: While it is not unreasonable for a client who selects a surveyor on the basis of a special expertise or demonstrated competence to ask that a higher standard of care be met, the raised standard must be something that can be attained. The surveyor can increase professional duty to the client and still avoid the problem of unfulfilled expectations or the legal coercion of an unrealistic standard of care. The surveyor can do this by carefully crafting contract language to reflect a

standard of care applicable to the type of project, the specific practice characteristics of a specially qualified group of firms, or the project locale.

Commentary: The common law standard of care applied to the performance of professional surveying services has been described as a “duty to exercise the degree of learning and skill ordinarily possessed by a reputable surveyor practicing in the same or similar locality and under similar circumstances.” It is this common law standard of care that is imposed on a surveyor if a contract is silent as to the standard of care.

Clients often seek to change the standard of care by requesting that the surveyor perform to certain standards. At times, clients who are unaware of the professional duty to provide services in a non-negligent manner attempt to include vague or absolute language such as a reference to meeting “highest” professional standards. Other clients, knowing full well that a vague standard such as the “highest” or “best” can never be met, include the language so that the surveyor is held to an unachievable standard.

When clients seek to change the standard of care, a discussion with the client is essential to examine the practicality of a modified performance measure. If the client selects and compensates a surveyor for special skills, experience, or talent, the uncertain meaning of “highest” should be replaced with a measurable standard of care. If the client is attempting to force the surveyor into a situation in which the surveyor must perform its services perfectly to avoid being in breach of a contractual duty, the surveyor should recognize that it would be foregoing many protections otherwise provided by common law. The surveyor is assuming a level of responsibility that may be unattainable.

The legal system recognizes that a surveyor cannot guarantee a perfect result, and professional liability insurance only provides coverage for damage caused by the surveyor’s breach of a reasonable



standard of care. A standard of care that demands perfection essentially places the surveyor outside of its normal legal liability and insurance coverage.

The standard of care for professional and related services performed or furnished by the surveyor should be modified with caution. If a client demands a standard of care beyond that consistent with due professional skill and care, the standard should be measurable and the surveyor should receive compensation related to the necessary increase in services and risks assumed under such an agreement.

Surveyors and their clients can view some sample contracts on the following pages to get a better idea of how to negotiate an equitable contract for professional surveying services.

SAMPLE CONTRACTS



SAMPLE CONTRACTS

The value of a written professional services agreement cannot be overstated. It is a critical tool for surveyors in managing their risks.

The information presented in these sample contracts is for professional liability risk management guidance. It is designed to inform surveyors about some of the terms, conditions,

and issues to be considered when preparing professional services agreements. It is not intended as legal or insurance advice applicable to specific circumstances. Consultation with local legal and insurance counsel is recommended before applying or acting on anything contained or suggested in these contracts. These sample contracts are used and have been provided by a firm that operates a national surveying practice.

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("Agreement") is made by and between _____ ("Surveyor"), and _____ ("Owner") as of this _____ day of _____ in the year _____.

Surveyor: (Name, address, and other information)

Owner: (Name, address, and other information)

AGREEMENT

For and in consideration of the mutual promises contained in this Agreement, Surveyor and Owner agree as follows:

ARTICLE 1 SCOPE OF SERVICES

Surveyor shall provide Owner with services in connection with the Project as described in Scope of Services (Attachment A). Surveyor shall use the standard of care typically exercised in conducting professional practices outlined in the Scope of Services.

ARTICLE 2 SCHEDULE OF SERVICES

Surveyor shall start and complete work as set forth in the Scope of Services. Surveyor shall conduct the work in an expeditious manner subject to limitations such as weather, information acquisition, communications, and other factors outside of Surveyor's control. Both parties recognize that the schedule of services is subject to factors that may be unknown at the time of this Agreement. If modifications, changes, or adjustments of these terms and conditions become necessary, such modifications shall be made in accordance with Article 8.

ARTICLE 3 AUTHORIZATIONS TO PROCEED

Unless specifically provided otherwise in the Scope of Services, Owner shall give Surveyor authorizations to proceed for each phase of the Basic Services and for each Additional Service prior to Surveyor commencing work. Authorizations may be in writing, or may be verbal, with subsequent confirmation in writing.

ARTICLE 4 OWNER'S RESPONSIBILITIES

Owner shall do the following in a timely manner so as not to delay the services of Surveyor:

4.1 Designate in writing a person to act as Owner's representative with respect to the services to be rendered under this Agreement. Such person shall have complete authority to transmit instructions and receive information with respect to Surveyor's services for the Project. Surveyor may rely fully on information and instructions provided by Owner's representative. Herein after, all references in this Agreement to "Owner" mean Owner or Owner's Representative.

4.2 Provide all criteria and full information as to Owner's requirements for the Project, including design objectives and constraints, space, capacity and performance requirements, flexibility and expandability, and any budgetary limitations, and furnish copies of all design and construction standards which Owner will require to be included in the Drawings and Specifications.

4.3 Assist Surveyor by placing at Surveyor's disposal all available information pertinent to the Project, including previous reports and any other data relative to design or construction of the Project, all of which the Surveyor may use and rely upon in performing the services under this Agreement.

4.4 Give prompt written notice to Surveyor whenever Owner observes or otherwise becomes aware of any development that affects the scope or timing of Surveyor's services, or any defect or nonconformance in the work of any contractor.



ARTICLE 5 PAYMENT FOR SERVICES

Owner shall compensate Surveyor for services rendered according to the Fee Schedule (Attachment B). These rates are agreed to in anticipation of the orderly and continuous progress of the Project through completion, and are subject to escalation in accordance with the Fee Schedule.

ARTICLE 6 PAYMENT TERMS

Owner agrees to pay all fees within ____ days of the date of the invoice. Balances due over ____ days will be assessed an interest rate of ____% per month (____per year). Owner agrees to pay for any costs of collection including, but not limited to, lien costs, court costs, or attorneys' fees involved in or arising out of collecting any unpaid or past due balances.

ARTICLE 7 INVOICING

Detailed billings will be provided on a monthly basis.

7.1 FIXED FEE

The invoices will be based on Surveyor's estimate of the proportion of time spent on each phase of the project at the time of billing relative to the total fee for those phases, plus actual reimbursable expenses.

7.2 TIME AND MATERIALS

The invoices will be based on the applicable billing rate for actual hours expended during the billing period, plus reimbursable expenses as outlined in the Fee Schedule.

ARTICLE 8 MODIFICATIONS AND ADJUSTMENTS

If specific periods of time for rendering services set forth in the Scope of Services are exceeded through no fault of Surveyor, or if Owner has requested significant modifications or changes in the general scope, extent, or character of the Project, all rates, measures, and amounts of compensation, as well as the time of performance, shall be equitably adjusted. The Scope of Services related to the Project may be revised or modified to include supplementary service for any reason upon agreement of Surveyor and Owner.

Owner may modify the scope, extent, or character of the Project, necessitating modifications to the Scope of Services or Fee Schedule. In each case, the Scope of Services will be modified in a manner mutually acceptable to the Surveyor and Owner, and the Fee Schedule will be equitably adjusted to accommodate the changes. Any change to the Scope of Services or the Fee Schedule will be documented in a Contract Change Order, in the form attached hereto that will become a part of this Agreement. Should the Surveyor and Owner be unable to agree on modifications to the Scope of Services and/or Fee Schedule, Surveyor shall have the right to terminate this Agreement as outlined in Article 9.

ARTICLE 9 TERM AND TERMINATION

Surveyor's obligation to render services under this Agreement will extend for a period which may reasonably be required for the services to be provided, including extra work and required extensions. If Owner fails to give prompt authorization to proceed with any phase of services after completion of the immediately preceding phase, or if Surveyor's services are delayed or suspended by Owner for more than

three months for reasons beyond Surveyor's control, Surveyor may, after giving seven days' written notice to Owner, suspend or terminate services under this Agreement.

If payment is not received within ____ days of the date of invoice, Surveyor reserves the right, after giving seven days' written notice to Owner, to suspend services to the Owner or to terminate this Agreement. Surveyor shall not be liable to Owner or any third parties for any damages caused by the suspension or termination of work for non-payment. Should the Surveyor and Owner be unable to agree on modifications to the Scope of Services and/or Fee Schedule as outlined in Article 8, Surveyor shall have the right to terminate this Agreement upon seven days' written notice to Owner. Owner may terminate this Agreement for any reason or without cause upon 30 days' written notice to Surveyor. If any work covered by this Agreement is suspended, terminated, or abandoned, the Owner shall compensate the Surveyor for services rendered to the date of written notification of such suspension, termination, or abandonment.

ARTICLE 10 LIMITATION OF LIABILITY AND RESPONSIBILITIES

The Owner shall hold harmless and indemnify Surveyor from all losses, damages, costs, and expenses which Surveyor may suffer or sustain which result from acts or omissions of any contractor, subcontractor, supplier, or any of their agents, employees, or any other persons (except Surveyor's own employees and agents) at the site or otherwise furnishing or performing any of the contractor's work. Nothing contained in this paragraph, however, shall be construed to release Surveyor from liability for failure to properly perform duties and responsibilities assumed by Surveyor under this Agreement.

ARTICLE 11 ASSIGNMENT

Neither Surveyor nor Owner shall assign, sublet, or transfer any rights under or interest in this Agreement without prior written consent of the other party. Any assignments shall be of all rights, obligations, interests, and responsibilities hereunder. Nothing in this paragraph shall prevent Surveyor from employing independent professional associates and consultants to assist in the performance of the services hereunder.

ARTICLE 12 RIGHTS AND BENEFITS

Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than Owner and Surveyor, and all duties and responsibilities pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Surveyor and not for the benefit of any other party. All reports, field notes, drawings, and any other documents, data, or information prepared by Surveyor in conjunction with the services provided under this Agreement shall remain the sole property of Surveyor.

ARTICLE 13 SUCCESSORS

This Agreement is binding on the partners, successors, executors, administrators, and assigns of both parties.

ARTICLE 14 APPLICABLE LAW

The terms and conditions of this Agreement shall be governed by the law of the principal place of business of the Surveyor.



This Agreement, consisting of ___ pages together with the Attachments identified above, constitute the entire Agreement between Owner and Surveyor and supersede all prior written or oral understandings related thereto. IN WITNESS WHEREOF, the parties hereto have executed this Agreement, or caused this Agreement to be executed by their duly authorized official or agent.

OWNER

(Insert name of company)

By: _____

Print: _____

Title: _____

Date: _____

SURVEYOR

(Insert name of company)

By: _____

Print: _____

Title: _____

Date: _____

ATTACHMENT A

SCOPE OF SERVICES

(Insert Name of Project)

Surveyor shall provide Owner with services in connection with the Project as described below:

(Insert description of Surveyor's services)

Owner shall provide to Surveyor the following:

(Insert description of Owner's obligations)

ATTACHMENT B

FEE SCHEDULE

(Insert Name of Project)

Owner shall compensate Surveyor for services rendered in accordance with the following:

HOURLY FEE SCHEDULE:

(Insert appropriate hourly rates)

FIXED FEE:

(Insert fixed fee information)

REIMBURSABLE EXPENSES:

The following expenses will be charged on an as-used basis:

Blueline or Bond prints \$____/sheet

Mylar prints \$____/sheet

Certified mailings or shipping \$____

Delivery fees \$____

Other out-of-pocket expenses cost plus ____%

After a period of ____ months from the date of this Agreement, all fees remaining under this contract are subject to an increase of up to ____ at the discretion of the Surveyor, and may further be increased by ____ annually thereafter.



DESIGNATION OF OWNER'S REPRESENTATIVE

(Insert Name of Project)

In accordance with Article 4.1 of the Professional Services Agreement between _____ ("OWNER") and _____ ("Surveyor"), dated _____ respectively, Owner hereby designates _____ to act as Owner's Representative with respect to the services to be rendered under this Agreement. This designee shall have complete authority to transmit instructions and receive information with respect to Surveyor's services for the Project unless or except as outlined below:

- No Exceptions
- Exceptions (list below)

OWNER

(Insert name of company)

By: _____

Print: _____

Title: _____

Date: _____

AUTHORIZATION TO PROCEED

(Insert Name of Project)

In accordance with Article 3 of the Professional Services Agreement between _____ (“OWNER”) and _____ (“Surveyor”), dated _____ respectively, Surveyor is hereby authorized to proceed with the following phases of the project:

OWNER

(Insert name of company)

By: _____

Print: _____

Title: _____

Date: _____



TASK ORDERS

Some clients use a "Task Order," commonly referred to as a "work order" or "purchase order," to procure services. In such cases, the client may enter into a base agreement with the surveyor that generally defines the standard terms of the agreement and then issue work orders to the surveyor for project-specific assignments. If the client uses the same work order form for all procurement (for example, hiring a construction contractor, retaining a surveyor or design professional, or purchasing goods or equipment), the form will probably contain many provisions that are not appropriate for use in the procurement of surveying services.

In those circumstances in which a client uses work orders in conjunction with a base agreement to procure project-specific services, care must be taken to make certain that the work order contains accurate and complete project-specific information, including scope of services and terms, and the method, amount, and timing of payment.

TASK ORDER

Date Ordered:	Taken By:	Job #:
Client:		Tel. #:
Representative:		Tel. #:
Title:		
Billing Address:		Fax #:
City:	State:	Zip Code:
Job Location (Sec-Twp-Rng):		County:
Subdivision:		Lot #s:
Project Name:		Common Location:

SERVICES TO BE PERFORMED:

Number of Copies to be Provided: _____ Date to be Completed: _____

Mail Additional Copy to: _____

Cost of Professional Services: _____ Client Order/P.O. #: _____

_____ hereby agrees to pay _____ for the above-stated professional services within _____ days of the date of the invoice, in addition to _____% per month (_____% per year) on any balance unpaid after _____ days and any costs of collection including, but not limited to, lien costs, court costs, or attorneys' fees involved in or arising out of the collection of any unpaid or past due balances.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

ABBREVIATED HISTORY OF THE SCHINNERER PROGRAM

- 1955** Washington insurance broker Vic Schinnerer approached by Leon Chatelain, FAIA, president-elect of The American Institute of Architects, with request to develop first professional liability insurance program specifically for design professionals.
- 1956** In cooperation with the AIA and NSPE, Schinnerer develops insurance policy and comprehensive program of risk management. First official professional liability insurance policy issued to Leon Chatelain on June 4th, 1956.
- 1962** Schinnerer conducts first Annual Meeting of Invited Attorneys in conjunction with the annual national convention of the AIA as specialized continuing legal education course for defense counsel. Specialized program for Land Surveyors developed. It becomes the commended program of the American Congress on Surveying and Mapping (ACSM).
- 1971** Schinnerer organizes Office for Professional Liability Research (OPLR) to analyze claims data. Schinnerer's OPLR develops *Guidelines for Improving Practice* as a major loss prevention reference guide.
- 1986** Working with the professional societies, Schinnerer develops Invited Brokers Meeting series to increase the knowledge and skills of independent insurance brokers.
- 1994** First edition of *Managing Risk Through Contract Language* published to support use of consensus AIA and EJCDC documents and address owner-generated risk issues. By 2001, over 70,000 copies of four editions distributed to practitioners, project clients, government officials, and educators.
- 1998** The new *Understanding and Managing Risk: A Guide and Voluntary Education Program for Design Professionals* (later changed to Voluntary Education Program (VEP)) is introduced as a policyholder reference and comprehensive continuing education program on risk management.
- 2002** Schinnerer, in conjunction with ACSM, publishes *The Surveyor's Contracts and Risk Management Manual*. The guide is designed to help surveyors and clients achieve a common understanding and appreciation of each other's contractual responsibilities, and make informed risk management decisions when negotiating or responding to contract language. Schinnerer also publishes the *Surveyor's Terms and Conditions Review Guide*, a comparison of acceptable language to assist surveyors in reviewing language provided by a prospective client.
- 2007** Schinnerer publishes *From Risk to Profit: Benchmarking and Claims Studies for Surveyors*. The benchmarking guide looks at six factors Schinnerer believes, based on claims studies, are crucial in assessing and developing appropriate responses to various sources of surveying risks.
- 2010 - 2015** Schinnerer conducts three professional practice webinars specific to the risks of providing surveying services. The webinars cover topics like ALTA/NSPS standards and surveyor liability on projects.
- 2016** Schinnerer publishes *Staking Out Your Future: Schinnerer's Guide to Managing Professional Liability Exposure*, a new resource that combines the information from *The Surveyor's Contracts and Risk Management Manual* and *From Risk to Profit: Benchmarking and Claims Studies for Surveyors* into one convenient risk management resource for surveyors.



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