

Using the law to protect ourselves

- Contractual law
- Rules of evidence
- Statutes
- Case law

“Liability” includes...

"almost every character of **hazard or responsibility**, absolute, contingent or likely...condition of being responsible for a **possible or actual** loss, penalty, evil, expense, or burden; condition which creates a duty to perform an act immediately or in the future...the state of being **bound or obliged in law or justice** to do, pay, or make good something; the state of one who is bound in law and justice to do something which may be enforced by action..."

(Black's Law Dictionary, 1979)

Liability of practitioners

Regulations affecting our practice

- Intrastate
- Interstate
- International

Liability of practitioners: Standards of care

- State statute descriptions of minimum criteria for plats, research, instrument calibration, coordinate base, location and types of monumentation, etc.

Liability of practitioners: Standards of care in UT

- Statute 58-1-501: Unlawful and unprofessional conduct
- Statute 58-22-102; (defines professional practice)
- Statute 17-23-17: Map of boundary survey - Contents - Marking of monuments - Record of corner changes
- Statute 17-23-17.5 : Corner perpetuation and filing
- Statutes 57-10-1 et seq: UT Coordinate System

Liability of practitioners: Unprofessional conduct in UT

R156-22-502. Unprofessional Conduct.

"Unprofessional conduct" includes:

- (4) failing to conform to the accepted and recognized **standards and ethics** of the profession including those stated in the "Model Rules of Professional Conduct" of the National Council of Examiners for Engineering and Surveying (NCEES), 1997, which is hereby incorporated by reference.

Liability of practitioners: Standards of care in MT

- Statute 37-67-101: (defines professional practice)
- Rules 24.83.2201 et seq.: Unprofessional Conduct
- Rule 24.83.1001: Form of corner records [contents]
- Rule 24.83-1104: Uniform standards for certificates of survey
- Statutes 70-22-201 et seq: MT Coordinate System and zones

Liability of practitioners: Standards of care

- Standards prescribed by ACSM/ALTA, specifications prescribed by NGS
- Professional society guidelines and codes of ethics (state and national)
- The practice of an "ordinarily prudent" surveyor

Bell v. Jones

523 A.2d 982, DC Ct. of Appeals, 1986

- Negligence?
- Contributory negligence?
- Reliance on certification?

MT 37-1-701: Liability for negligence as well as willful acts.

- Except as otherwise provided by law, everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

About NSPS

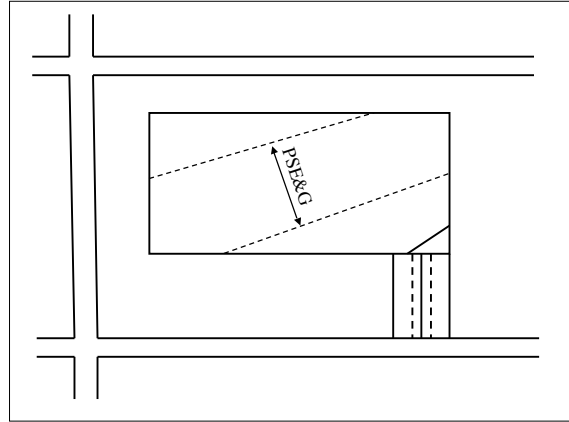
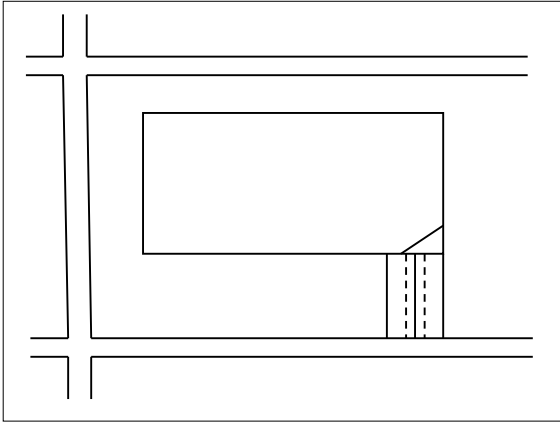
Objectives

- Advance the protection of public welfare relative to surveying and mapping issues.
- Encourage high standards of ethical and professional behavior;

Surveyor's Creed and Canons

- As a Professional Surveyor, I dedicate my professional knowledge and skills to the advancement and betterment of human welfare.

Committees



Minimizing liability: Documenting the file

- What should be in your file before the work starts
- What should be in your work file once the contract is signed
- What should be in your field notes

Legal recognition of electronic records, electronic signatures, and electronic contracts. (UT 46-4-105, MT 30-18-106)

1. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
2. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
3. If a law requires a record to be in writing, an electronic record satisfies the law.
- 4.
5. If a law requires a signature, an electronic signature satisfies the law.

Minimizing liability: Contracts

- What is a contract?
- How is a contract made?
- What are the elements perfecting a contract?
- What is the legal effect of a contract?
- What is proof of a contract?

“Contract” defined

- “(11) ... the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law. (Compare ‘Agreement’.)”
(UCC § 1-201. General Definitions.)

“Agreement” defined

- “(3) ... the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance ...

(Compare ‘Contract’.)”

(UCC § 1-201. General Definitions.)

“Agreement” or “Contract”?

- “Although often used as synonymous with ‘contract’, agreement is a broader term; e.g. [it] might lack an essential element of a contract. The bargain of the parties in fact as found in *their language* or *by implication* from other circumstances including course of dealing or usage of trade or course of performances...”

(Black’s Law Dictionary)

Limitation of Actions in UT

§ 78B-2-305. Within three years [from discovery]

§ 78B-2-307. Within four years

- (1) after the last charge is made or the last payment is received (a) upon a contract, obligation, or liability not founded upon an instrument in writing

§ 78B-2-309. Within six years ... Instrument in writing

- (2) upon any contract, obligation, or liability founded upon an instrument in writing

Limitation of Actions in MT 27-2-202. Actions based on contract or other obligation

- (1) ... for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.
- (2) ... for the commencement of an action upon a contract, account, or promise not founded on an instrument in writing is within 5 years.
- (3) ... for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

The Contract: Who, What, Why, When, Where - and How Much?

- Scope of work, purpose of work
- Location and extent of site
- Staff, equipment, and procedures
- Time frames
- Weather and other contingencies
- Fees and payment schedules
- Ownership of final plans or records
- Signatures by authorized parties

Privity of contract

- "That connection or relationship which exists between two or more contracting parties..."
- "No privity" means parties must resort to the limitations of actions.
- The lack of a duty to others is distinct from foreseeable use.

Two types of non-privy

Vertical non-privy plaintiff

(in the chain of buyers or users, but not directly from the defendant)

Horizontal non-privy plaintiff

(not in that chain of purchasers, but "consumes, uses, or is affected by the goods")

Uniform Commercial Code

- "UCC Section 2-318 provides three Alternative provisions (A-C) covering third party beneficiaries of express or implied warranties..."
- A does not address vertical non-privy plaintiffs
- B & C affect both vertical and horizontal plaintiffs.

UCC §2-318, Alternative B Third Party Beneficiaries of Warranties Express or Implied

A seller's warranty whether express or implied extends to **any natural person who may reasonably be expected to use, consume or be affected by** the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

UCC in UT – Alternative B 57A-2-318. Third party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to **any person who may reasonably be expected to use, consume, or be affected by** the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

UCC in WV – Alternative A

Section 46-2-318. [Third party beneficiaries]

A seller's warranty whether express or implied extends to **any natural person who is in the family or household of his buyer or who is a guest in his home** if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Five grounds for suit

- Personal injury
- Property damage
- Direct economic loss (loss of bargain)
- Consequential economic loss (loss of profit)
- Suits about express warranty

Rozny v. Marnul

250 NE 2d 656, Supreme Ct. of IL, 1969

- Guarantees and certifications
- Privity of contract
- Ultimate users

Limits of liability

- Statutes of limitation
- Statutes of repose
- When does the statute begin to run?

Discovery

"In a general sense, the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden' the acquisition of notice or knowledge of given acts or facts..."

(Black's Law Dictionary, 1979)

New Market Poultry Farms, Inc. v. Fellows

241 A. 2d 63, Supreme Ct. of NJ, 1967

- Statutes of limitation
- Time for discovery
- When is work complete?

Minimizing liability: Contracts

- Verifying the actual work needed
- Time frame in which the work is needed
- Who is my client?
- Who, what, why, when, where, and how much?

Jacka v. Ouchita Parish School Board

186 S. 2d 571, Supreme Ct. of LA, 1966

- What services were contracted?
- Reliance on information provided by client

Other ethical considerations

- Full disclosure
- Conflict of interest
- Professional courtesy
- Fair and dignified competition
- Maintaining professional competency

Communicating with the client

- Regular reporting
- Discovery of unexpected or unusual conditions
- Renegotiations if conditions are beyond scope of agreement

Preserving the evidence

- Surveyor's reports
- Plans
- Descriptions
- Monumentation

Rules of evidence affecting professional practice

- Judicial notice
- Presumptions
- Character evidence
- Testimony by experts
- Hearsay
- Testimony or written admissions
- Routine business practice

Federal Rule 406 Habit; Routine Practice

- Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Federal Rule 801

The following definitions apply under this article:

- (1) Statement.** A "statement" is (a) an oral or written assertion; or (b) nonverbal conduct of a person, if it is intended by him as an assertion
- (2) Declarant.** A "declarant" is a person who makes a statement.
- (3) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Federal Rule 802 Hearsay Rule

- Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
- (states modify to refer to own courts and legislature)

Federal Rule 803 Hearsay Exception: Availability of Declarant Immaterial

- (Fed. Rule 803, Paragraph 6)
Records of Regularly Conducted Activity
- (Fed. Rule 803, Paragraph 7) (not all states!)
Absence of Entry in Records Kept in Accordance with the Provisions Paragraph 6

Regular reporting to client

- Discovering unexpected or unusual conditions
- Re-negotiations if conditions are beyond scope of agreement

Rowley Engineering & Associates v. Cuomo

- The contract expressly provides that if Ms. Cuomo changed the scope of the work, she would be required to pay for any additional work involved. However, there is no evidence that she changed the scope or authorized any additional work.

Federal Rule 1001 Definitions

- (1) Writings and Recordings
- (2) Photographs
- (3) Original
- (4) Duplicate

Federal Rule 1002 Requirement of Original

- To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Federal Rule 1003 Admissibility of Duplicates

- A duplicate is admissible to the same extent as an original unless
 - (1) a genuine question is raised as to the authenticity of the original or
 - (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Federal Rule 1004: Admissibility of Other Evidence of Contents

- The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if -
 - (1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
 - (2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or...

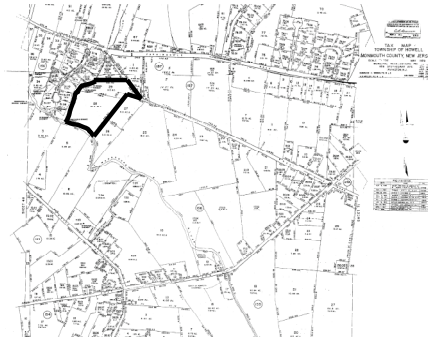
Collecting fees on schedule

- Based upon time
- Based upon completion of percentages of work
- What to do if fees are not paid on time

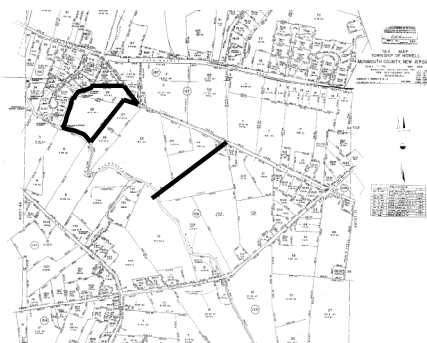
“(19) ‘**Good faith**’ means honesty in fact in the conduct or transaction concerned.”

(UCC § 1-201. General Definitions)

What the current deed describes (three tracts)



The potential claim



Small Claims in UT (78A-8-101et seq.)

- File actions in District Court small claims division
- File in the county having jurisdiction
- Limit: \$7,500 including attorney fees (but not including costs)
- “Do- it-yourself” paperwork and trial
- Filing to freeze assets
- Filing for sheriff or constable to collect

Small Claims in MT (25–35–501et seq.)

- File actions in Justice’s Court, small claims division
- File in the county having jurisdiction
- Limit: \$3,000 (limit 10 claims per year)
- “Do- it-yourself” paperwork and trial
- Filing to freeze assets
- Filing for sheriff or constable to collect

Mechanics’ lien

A claim to secure "priority of payment of the price or value of work performed and materials furnished in erecting or repairing a building or other structure, and as such **attaches to the land as well as buildings and improvements erected thereon** (citation omitted)...Such lien covers material men, tradesmen, suppliers, and the like, who furnish services, labor, or material on **construction or improvement of property.**"

(Black's Law Dictionary, 1979)

Mechanics’ liens in UT 38-1-3. Those entitled to lien - What may be attached.

Contractors, subcontractors, and all persons performing any services ... in the construction, alteration, or improvement of any building or structure or improvement to any premises ... who have furnished ... plats, plans, maps, ... surveys ...or who have rendered other like professional service... shall have a lien upon the property upon or concerning which they have rendered service ... for the value of the service rendered...

Construction liens in MT 71–3–522: Definitions

- (6) (a) "**Real estate improvement contract**" means an agreement to perform services, including labor, or to furnish materials for the purpose of producing a change in the physical condition of the real estate, including:
- (vi) preparation of **plans, surveys**, ... for any change in the physical condition of the real estate, regardless of whether they are used to produce a change in the physical condition of the real estate.

South Park Land and Livestock Co., Inc. v. Hamilton Enterprises, Ltd

538 P. 2d 444, Supreme Ct. of CO, 1975

- The surveyor has a right to a mechanic’s lien; he cannot commit “arbitrary and unreasonable” acts to induce payment on outstanding bills.

Laws protecting our clients– Tort defined

- “A private or civil wrong or injury, **other than breach of contract**, for which the court will provide a remedy in the form of an action for damages...)

(Black's Law Dictionary, 1979)

Elements of tort action

- Existence of a legal duty from defendant to plaintiff
- Breach of duty, and
- Damages as a proximate result

Specific Torts

- Trespass
- Assault
- Battery
- Negligence
- Products liability
- Intentional infliction of emotional distress

Three general categories of torts

- **Intentional torts**
(defendant knew or should have known consequences of action or inaction)
- **Negligent torts**
(defendant's actions were unreasonably unsafe)
- **Strict liability wrongs**
(a particular action causes damage, rather than the degree of carelessness)

Tort Action in UT (76-6-206) Criminal trespass

- (2) A person is guilty of criminal trespass if...
- (b) knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
- (i) personal communication ...
 - (ii) fencing or other enclosure obviously designed to exclude intruders; or
 - (iii) posting of signs ...

Tort Action in MT (45-6-203) Criminal trespass to property

- ...a person commits the offense of criminal trespass to property if...
- (a) enters or remains unlawfully in an occupied structure
 - (b) Enters or remains unlawfully in or upon the premise of another

Tort protection for some surveyors UT (63-73-9) & MT(76-5-105) – Investigatory powers and immunities of survey personnel

- (1) Authorized survey personnel, after providing reasonable notification and identification, have the right to enter all lands subject to the police power of the state for the purpose of securing geologic, topographic, and mineral and water resource information or specimens and samples required by the survey in fulfillment of its objectives.
- (2) Survey personnel are immune from trespass while engaged on official business.

Protection for surveyors vs. Tort Action in MT (76–16–111)

- **Entry to property by professional land surveyor or other qualified person -- trespass exception -- notice -- liability.**

(2) A person qualified under subsection (1) may enter public or private land to investigate and use boundary evidence and perform boundary surveys if the notice requirements of subsection (3) are met.

Damages

“A pecuniary compensation or indemnity...”

- Compensatory or actual damages
- General and special damages
- Punitive awards

Negligence defined

- “The omission to do something by which a reasonable [person], guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent [person] would not do.”

(Black’s Law Dictionary, 1979)

Forms of negligence

- Contributory negligence
- Gross negligence
- Ordinary negligence
- And for surveyors, “willful and wanton disregard of property rights of others”

Criminal negligence in UT 76–2–103: Definitions

A person engages in conduct:

- (1) Intentionally, or with intent or willfully...
- (2) Knowingly, or with knowledge ... aware that his conduct is reasonably certain to cause the result.
- (3) Recklessly ... consciously disregards a substantial and unjustifiable risk ... its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise.

Negligence and liability in MT 45–2–101: General definitions

(43) "Negligently": ... consciously disregards a risk that the result will occur or that the circumstance exists or ... disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a **gross deviation from the standard of conduct** that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care.

LaBruno v. Lawrence

*166 A.2d 822, Superior Ct. of NJ,
Appellate Div., 1960*

- Reliance on a survey
- Punitive and compensatory damages

Certifications

- The right of the public to rely on the professional
 - Certification
 - Declaration
 - Guaranty
 - Warranty