



What Surveyors Need to Know to Manage Risk

**A Schinnerer Webinar
November 11, 2015**

Presented by:

**Curt Sumner
Executive Director, National Society of
Professional Surveyors
Frederick, MD**



**Gary Kent
Integrated Services Director,
The Schneider Corporation
Indianapolis, IN**



With

**Nahom A. Gebre, Esq., P.E.
Risk Management Attorney
Victor O. Schinnerer & Company, Inc.**

Curt Sumner

Curt Sumner is the Executive Director of the National Society of Professional Surveyors (NSPS), and a past president of the organization. He is the primary point of contact and liaison for the surveying profession to other state, national, and international organizations in the geospatial community, among federal agencies, and to the U.S. Congress. He is a licensed surveyor in Virginia and Maryland, and is a long-time member representing NSPS on the joint ALTA/ACSM Land Title Survey Standards Committee. He is responsible for content management for the NSPS weekly email newsletter NSPS News and Views.

Gary Kent

Gary Kent is in his 32nd year as a professional surveyor with The Schneider Corporation, a surveying, engineering, and GIS firm based in Indianapolis and with offices in North Carolina, Florida, and Iowa. He is chair of the committee on the ALTA/ACSM Standards for NSPS and is the liaison to NSPS for the American Land Title Association. Gary is a past-president of both ACSM and the Indiana Society of Professional Land Surveyors, and for seven years taught boundary law, legal descriptions, property surveying, and land survey systems for Purdue University. He is on the faculty of GeoLearn (www.geo-learn.com), an online provider of continuing education and training for surveyors and other geospatial professionals. He is frequently called as an expert witness in cases involving boundaries, easements, and land surveying practice. Gary writes columns for The American Surveyor magazine and NSPS News and Views.

Nahom Gebre


Nahom Gebre is a risk management attorney with Victor O. Schinnerer & Company. A registered professional engineer, Nahom practiced civil engineering prior to his involvement with risk management issues. His background includes service as in-house counsel and project manager for a large engineering firm. Nahom provides risk management advice to Schinnerer and CNA policyholders. Nahom received his Bachelor of Science in Civil Engineering from Washington University and his Juris Doctor from Tulane University Law School. Nahom's email address is Nahom.A.Gebre@Schinnerer.com.

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Learning Objectives

- Understand the legal expectations placed upon them by state registration laws and the US legal system.
- Recognize how negligently performed services can result in professional liability claims while contractual obligations can distort normal legal liability and jeopardize insurance coverage.
- Conform their performance of professional services to reduce claims and protect public health and safety.

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Professional Liability Exposures

- The Legal Status of Surveyors
- Risk Management Procedures
- Contractual Obligations
- Practice Management Issues

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Surveyors and the Law

The Two Things About the Law:

1. The law protects the reasonable expectations of the parties.
2. You are responsible for foreseeable costs of your wrongful conduct.

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Tort and Contract Law

- Basic protection of negligence standard
 - Legal framework of protection
 - Based on standard of care
- Freedom to assume contractual obligations
 - Changing or creating rights
 - Exceeding normal legal liability

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Negligence and Liability

- Was there a breach of a duty?
 - What duty existed?
 - Was the standard of care met?
- If there was a breach of a duty, did it cause damage?
 - Can the damage be traced to the breach?
 - Could such damage have been expected?

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Breach of Contract

- Did a valid contract exist?
 - Was there an agreement?
 - Was there consideration?
- If a contract existed, was it breached?
 - Was there a failure to fully perform as promised?
 - If not performed, what is an adequate remedy?

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Breach of Warranty

- Was a promise made?
 - About time, cost, result?
 - Related to the services?
- Was there a right to rely on it?
- Did the party actually rely on it?
- Did the promise prove to be false?
- What harm did reliance cause?
- What remedy is adequate?

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**Risk Management
Procedures**

**We have
procedures?**

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The Necessity of Managing Risk

Risk management is more than mitigating risk – it is preventing situations that lead to disputes.

- Protecting a firm’s reputation
- Meeting registration law requirements
- Enabling the firm to innovate
- Satisfying client and public expectations
- Remaining profitable and rewarding

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The Necessity of Managing Risk

Managing client expectations is essential to a profitable, risk-controlled culture.

- Under-promise and over-deliver
- Set common goals and expectations
- Define roles and responsibilities clearly
- Identify potential barriers to success
- Jointly establish measures of success

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Risks Exist in All Projects

- Identify Risks
- Assess and Manage Those Risks
 - Balance Compensation with Risk
 - Modify Practice Management Techniques
 - Focus on Communication and Documentation
 - Increase Capability if Unique Risk
- Prepare for Unanticipated Risks

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Risk Management Basics
<ul style="list-style-type: none">• Retention• Avoidance• Allocation• Transfer• Mitigation
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Transfer of Risk
<ul style="list-style-type: none">• Insurance• Contract<ul style="list-style-type: none">• Indemnity• Limitation of Liability
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Risk Mitigation
<ol style="list-style-type: none">1. Written, Executed Contracts with Clients that includes Payment Terms2. Contract has Professional Services Scope and Accuracy Standards outlined
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Risk Mitigation

- 3. Pre-Project Planning with client that, at the very least identifies project objectives and constraints
- 4. Quality Assurance / Quality Control Procedures

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Risk Mitigation- Documentation

Creating the Record

- Establish and enforce communication and documentation rules.
- Be objective: state facts only

Preserving the Record

- Written or Other Preserved Formats
 - Notes/tapes/transcripts/emails/calls/texts/photos
 - Project correspondence
- Preservation and Destruction Policy
 - Costs and Benefits
 - Statutes of Repose, Regulations, and Contract Obligations

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Contractual Obligations

What do you mean this project isn't like all the others?

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Oral Agreements
<ul style="list-style-type: none">• Unclear Scope of Services• Time Constraints not Documented• No Evidence of Terms and Conditions• No Contract Change or Dispute Resolution Systems• Difficulty in Relying on Memories
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Purchase Orders
<ul style="list-style-type: none">• Product liability not the professional standard of care• Express warranties and guarantees<ul style="list-style-type: none">• Absolute timely delivery• Fitness and merchantability• Broad-form defense/indemnity terms
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Limitation of Liability Provisions
<ul style="list-style-type: none">• Reperformance of services• Amount of compensation• Specific dollar amount• Insurance proceeds• Exclusion of consequential damages
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Accepting Exposures
<ul style="list-style-type: none">• Indemnification provisions beyond negligence or other normal legal standard• Certifications beyond the scope of services or available knowledge• Guarantee and warranty language• Product liability language
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Indemnification of a Client
You are assuming a business risk if your contractual indemnification obligation for your professional services exceeds your responsibility for damage caused by your <u>negligence</u> .
<i>Surveyor shall indemnify and hold owner harmless from all damages to the extent they are caused by Surveyor's negligence in performing professional services.</i>
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Ownership and Use of Documents
<ul style="list-style-type: none">• Copyright protection• License to use documents• Risk and liability• Compensation and leverage• Provisions for transfer<ul style="list-style-type: none">• Compensation• Disclaimer• Indemnification
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Certifications

- Be based on scope of services
- Be within the expertise of surveyor
- Relate a fact known by and within the control of the surveyor
- Be set as to place and time

OR

- Clearly express a professional opinion
- Be qualified as limited in use

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Standard Contracts

- EJCDC E-560 Agreement Between Engineers & Land Surveyor for Professional Services

- C201–2015 , Standard Form of Consultant's Services: Land Survey
AIA Document C201™–2015 establishes the duties and responsibilities of a surveyor when hired as a consultant to a property owner.

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Survey Types and Standards

• Land Title Surveys	• Topographic Surveys
• Boundary Surveys	• Hydrographic Surveys
• Subdivision Plats	• Mine Surveys
• Horizontal and Vertical Control	• Architectural Surveys
• Infrastructure Location	• Stake-out Survey
	• "As-Built" Surveys

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ALTA/NSPS Standards

New ALTA/NSPS Standards published.

Effective date is February 23, 2016.

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**Practice Management
Issues**

**There is even more to
worry about?**

Proposals and Advertising

- Advertising
 - Promotional material
 - Website information
- "Pre-contracts"
 - Proposals
 - Letters of intent
 - Studies and reports

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Confidentiality
<ul style="list-style-type: none">• Ethical duty of client information confidentiality<ul style="list-style-type: none">• Informed consent to disclosure• Implied authorization• Areas of risk include:<ul style="list-style-type: none">• Inadvertent production of client confidences• E-mails/texting/camera phones• Award programs• Media coverage
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Resources
<p>http://www.schinnerer.com/risk-mgmt/pages/surveyors-risk-mgmt.aspx You can view or download claim studies, risk management information, contract language and commentaries.</p> <p><u>From Risk to Profit: Benchmarking and Claim Studies for Surveyors</u> and <u>The Surveyor's Contracts and Risk Management Manual</u> publications have been updated and will be released early 2016</p>
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Questions
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