

# CLSA/NALS CONFERENCE 2004

## DUTIES OF A SURVEYOR

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### I. SOURCE OF DUTIES

The surveying profession is governed by an amalgam of legislative enactments, regulations and rules promulgated by various professional associations. The BLM *Manual of Instructions* also governs public surveys and limited aspects of private surveys as well. Some of these sources impose specific obligations on the surveyor, while others impose duties of a more general nature. These sources, and others, combine to create the standards of practice that surveyors must observe.

#### A. Statutes

Statutes are legislative enactments. The legislatures of our various states have passed laws which govern the surveying profession. These laws set forth the requirement that persons who engage in land surveying must have a license and empower an executive agency to promulgate and administer the licensing procedures and other rules governing the surveying profession.

##### 1. California

California adopted its Professional Land Surveyors' Act (the "Act") as part of the California Business and Professions Code. The specific provisions of the Act are codified at Bus. & Prof. Code Secs. 8700 - 8805. The Act requires the licensure of any person engaged in land surveying, and establishes the Board of Professional Engineers and Land Surveyors (the "Board") to carry out the provisions of the act and to adopt rules of professional conduct that are not inconsistent with state and federal law. The Board is authorized to hear complaints regarding, inter alia, fraud, negligence or incompetence, or a violation of any law pertaining to the practice of land surveying. Codes of ethics adopted by non-government agencies do not carry the force of law and presumably would not serve as the basis for disciplinary proceedings.

The Act also addresses some specific issues, such as the filing of a record of survey with the county surveyor. The surveyor "shall" file the record of survey if the surveyor identifies certain discrepancies enumerated in Cal. Bus. & Prof. Code Sec.

8762(b). The Act also addresses the requirements for preparing a record of survey and marking monuments. The record of survey must show the monuments, basis of bearings, legal identification of the property, and contain the surveyor's statement. Cal. Bus. & Prof. Code Sec. 8764.

An established or restored corner, other than a lost corner, must be commemorated by the filing of a "corner record" with the county surveyor. After a lost corner is established, the surveyor is required to file a record of survey. Cal. Bus. & Prof. Code Sec. 8773.

The Act also addresses photogrammetry, and restricts the use of that title to licensed land surveyors, civil engineers, and photogrammetric surveyors. Cal. Bus. & Prof. Code Sec. 8775.

The Act grants surveyors the right to enter upon private property without prior notice, but advises that prior notice shall be given where practical. Cal. Bus. & Prof. Code Sec. 8774. For a discussion of right of entry laws, see Knud Hermansen, Surveyor's Right of Entry Laws, The Nevada Traverse, Vol. 31, No. 1 2004.

## **2. Nevada**

The Nevada Revised Statutes ("NRS") contain a number of sections which address the surveying profession. Chapter 278 on land use addresses subdivision and plat maps. Nevada's statutes addressing the surveying profession as a whole are contained in NRS Chapter 625. Some of the relevant sections include the following:

Responsible charge. NRS 625.080.

Creation of the seven (7) member State Board of Professional Engineers and Land Surveyors. NRS 625.100.

Right of entry. NRS 625.335

The requirement to file a record of survey. NRS 625.340.

The contents of a record of survey. NRS 625.350. This includes "Any other data necessary for the interpretation of the various items and locations of the points, lines and areas shown." NRS 625.350(2)(h).

A record of survey is not required to be filed when a final subdivision map is to be recorded. NRS 625.370.

Requirements for monuments. NRS 625.380.

Grounds for disciplinary proceedings. NRS 625.410. These include, inter alia, fraud, deceit, gross negligence, incompetency, misconduct, or any violation of the Nevada Revised Statutes or Nevada Administrative Code. Private reprimands are prohibited, and an order imposing discipline is a public record. NRS 635.460.

## **B. Regulations**

Regulations are laws enacted by the appropriate board or agency within the executive branch. Boards and the regulations they adopt derive their authority from the statutes. Regulations cannot conflict with the statutes. Regulations address the operations of the boards and often contain more specific provisions on the subject matter regulated.

### **1. California**

California's regulations governing engineers and land surveyors are contained in California Code of Regulations Title 16, Division 5, Secs. 400-474.5. The provisions address discipline, testing, licensing, and some specific technical issues. Some relevant provisions include:

Responsible Charge. Sec. 404.2 (discussed below).

Area of Competence. Sec. 415.

A professional . . . land surveyor licensed under the Code shall practice perform . . . land surveying work only in the field of or fields in which he/she is by education and/or experience fully competent and proficient.

Nothing in this regulation shall be construed . . . to prohibit a land surveyor from performing land surveying work in areas which involve the application of new principles, techniques, ideas or technology . . .

Perpetuation of Corners and Corner Records. Sec. 464.

Code of Professional Conduct. Sec. 476. A violation of the the Code of Professional Conduct subjects the surveyor to discipline pursuant to Bus. & Prof. Code Sec. 8780. The Code of Professional Conduct addresses conflicts, representations made to clients and others, and maintaining confidences. The Code of Professional Conduct offers few specifics on how a surveyor is to perform a survey.

## **2. Nevada**

Nevada's regulations governing professional engineers and land surveyors are contained in Chapter 625 of the Nevada Administrative Code. Some of the relevant provisions include:

Code of Conduct. NAC 625.510-625.550. The short code of conduct addresses honesty, competency, relations with the public, relations with employers and clients, and relations with other surveyors and engineers.

Initiating a complaint. NAC 625.140. Anyone who is aggrieved by the professional misconduct or incompetency of a licensee may initiate a complaint.

Responsibility to comply with standards of practice. NAC 625.660.

Requirements for positional certainty. NAC 625.666-625.668.

Search pertinent documents, including maps, deeds, title reports, title opinions and records of the U.S. Public Land Survey System. NAC 625.680.

Contact the surveyor with a material discrepancy. NAC 625.700.

Provide a report to the client on a discrepancy. NAC 625.700.

Format for legal descriptions. NAC 635.790.

### **B. Associations**

Most professions have associations which are focused on fostering the technical, ethical, and business development of its members. Other than state bar associations, membership in these associations is generally voluntary. The associations may adopt codes and rules for their governance and for the standards of the profession. With the notable exception of mandatory state bar associations, such codes and rules are advisory only, and do not have the force of law.

#### **1. California Land Surveyor's Association**

The California Land Surveyor's Association (CLSA) has adopted a Code of Ethics that is broken down into two (2) parts - Fundamental Principles and Fundamental Canons. The Code of Ethics is drafted at a very general level, and most of the provisions address how surveyors represent themselves to the public rather than how they perform a survey.

## **2. Nevada Association of Land Surveyors**

The By Laws and Constitution of The Nevada Association of Land Surveyors (NALS) provide for a standing committee on ethics and also require periodic review of the Code of Ethics. NALS has adopted an eleven (11) point Code of Ethics. NALS has also adopted guidelines for processing violations of the Code of Ethics. According to these guidelines, the entire complaint process should be kept in strict confidence between the parties and the Association. The Code of Ethics is drafted at a very general level, and most of the provisions address how surveyors represent themselves to the public rather than how they perform a survey. The possible exception is No. 11 which provides that a surveyor “will not solicit professional services on a contingency basis.” Question whether the prohibited act is solicitation or the use of contingency agreements.

## **3. National Society of Professional Surveyors**

The National Society of Professional Surveyors (NSPS) has adopted a Surveyor’s Creed and Canons. “In humility and with need for Divine Guidance,” surveyors make certain pledges. These pledges also are written at a general level and address the surveyor’s representations to the public. Canon No. 3, in particular, is noteworthy for the reason as it provides that “A Professional Surveyor should accept assignments only in one’s area of expertise.”

## **4. American Land Title Association**

The American Land Title Association (ALTA), ALTA, American Congress on Surveying and Mapping (ACSM) and NSPS jointly adopted Minimum Standard Detail Requirements that must be observed on survey maps that are intended to be used for title insurance decisions. Although surveyors are generally not members of ALTA, the surveyor unquestionably has a duty to meet these minimum standards when performing a survey that will form the basis for title insurance decisions. Pursuant to Requirement 3, the surveyor must conform with the current “Accuracy Standards for Land Title Surveys” adopted by AMCS, NSPS and ALTA. Through this reference, the surveyor must also conform to the standards of these other associations. In this manner, and others set forth in the Minimum Standard Detail Requirements, ALTA/ACSM govern the manner in which surveys are to be performed and recorded.

## **5. BLM *Manual of Instructions***

A separate discussion would be necessary to fully address the standards contained in the Manual of Instructions for the *Survey of Public Lands of the United States, Bureau of Land Management*. The *Manual* unquestionably governs the methods

required for surveying public lands. The *Manual* also governs certain aspects of other surveys, including the standards for retracement and corner recovery. The law is unsettled on the question of the weight to be afforded to the *Manual* under the rules of evidence applicable in civil court proceedings. For example, *See State v. Evans*, 116 Id. 429, 776 P.2d 438 (Id. 1989) (rejecting standards in the *Manual* relating to lost and obliterated corners). However, even when the courts decline to follow the *Manual*, the surveyor should not discount the standards set forth in the *Manual*. The *Manual* is a widely accepted authority on the technical aspects of surveying for the issues addressed, even if the *Manual* does not apply to the survey at issue.

## **6. Standards of Practice**

The law regarding duties owed and the standard of conduct required vary from jurisdiction to jurisdiction. However, the Restatement of the Law, Second, Torts proffers the statements of the most frequently used. With the regard to the general standard of care, the Restatement provides as follows:

### **§ 283 Conduct of a Reasonable Man: the Standard**

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

With regard to professional negligence, the Restatement provides as follows:

### **§ 299A Undertaking in Profession or Trade**

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

All of the information discussed above is part of the body of knowledge normally possessed by members of the surveying profession, and thus, is incorporated into the standard of care.

## **II. SPECIFIC DUTIES (DISCUSSION)**

### **A. Responsible Charge**

#### **1. What is “Responsible Charge?”**

- a. Cal.CodeReg. Sec. 404.2
- b. NRS 625.080 (definition only)

2. What is the Responsible Charge responsible for?

**B. Chain of Title**

1. What is the duty to review the chain of title?
2. What is the duty to review unrecorded documents?
3. What is the value of unrecorded documents?

**C. Duties to Third Parties**

1. What is the duty to note encroachments and signs of adverse use?
2. What is the duty to advise a third party before recording a map that may adversely impact their interests?

**D. What needs to be included on a record of survey, and what is the surveyor's right to limit the purpose of a survey? See *Crow v. Boofter*, 203 N.W.2d 608 (Ind.App. 2003) and Note: *Surveyor's Case Show Importance of Exculpatory Language in The Nevada Traverse, Vol. 30, No. 4, 2003.***

**III. HOT TOPICS (DISCUSSION)**

Mr. Matuska is an attorney with the Brooke Shaw Zumpft law firm in Carson City, Nevada. He was born in Livermore, California, and received his A.B. and J.D. degrees from the University of California, Davis. He is a member of the State Bars of Nevada, California and Washington. He appears regularly in federal, state and appellate courts in California and Nevada. His practice focuses on real estate litigation and related areas, including title and boundary defense, construction disputes, landlord/tenant matters and creditor's representation. Mr. Matuska is also an associate NALS member. He was a panelist at the 2002 Tri State Surveying Conference in Elko (Quasi-Legal Interpretations - Lost v. Obliterated & Deed Ambiguities) and he will be a presenter at conference on Practical Real Estate Title Skills in Reno on 20 May 2004. Mr. Matuska welcomes your questions or comments. He can be reached at (775)782-7171.

Overhead Projector and/or computer

1. Corona/Lime
2. Cal.Bus.&Prof.Code
3. NRS, including NRS 278.xxx (map requirements) and NRS 625.410 (grounds for discipline)
4. Cal. Regs Sec. 476 (code of professional conduct)
5. NAC 625.010-625.550 (code of ethics); NAC 625.660 (duty to comply with standards of practice)
6. CLSA Code of Ethics
7. NALS Code Ethics
8. NSPS Creed and Cannons
9. Alta/ACSM standards
10. Restatement (2d) of Torts
11. Cal.CodeRegs Sec. 404.2 (responsible charge)
12. NRS 625.080 responsible charge
13. New Jersey statutes – responsible charge
14. Dreyer legal descriptions (duty to review chain of title.
15. Hazen's Beach survey (duties to third parties)