

# Ask Vic!

—by Victor O'Schinnerer

**Q:** What is the problem with using oral contracts? I do not see the point in using a written contract for a small job.

**A:** Contracts are arguably the most important risk management tool available to a surveyor. Oral agreements not only lead to disputes, unmet expectations, and claims, they also make defending a claim difficult. That being said, a written contract does not need to be a lengthy, onerous document. Even something as simple as a letter agreement can effectively spell out the responsibilities of the surveyor and important details such as a schedule for payment.

Relatively small or unsophisticated clients may be reluctant to enter into a written agreement, causing the surveyor to agree to dispense with the formality of a written agreement. This can be perilous since a client's unwillingness to sign a written agreement may indicate reservations about making a formal commitment to the project, to payment, or to the surveyor. Even if the surveyor has worked for the client in the past without a written contract and without incident, there remain many compelling reasons to execute a written agreement. Beyond the financial considerations, there are important aspects of a professional relationship that should be understood and confirmed in writing in a written agreement. Some advantages of a written agreement include the following:

**Documented Evidence of an Agreement:** A written professional services contract provides objective, documented evidence of the scope and terms of the agreement. This is distinct from an oral agreement, in which the terms are left to the subjective, often biased recollections of each party. By definition, an agreement is intended to reflect the mutual assent of the parties regarding the contract and their respective obligations to one another. Putting agreements in writing allows each party to review the terms and make certain that they are comfortable with the rights and obligations they are assuming.

**Specificity in Contract Terms and Conditions:** Putting pen to paper encourages, if not compels, parties to be more conscientious about addressing and memorializing the complete terms of their agreement. Negotiating a written agreement provides an opportunity for careful selection of the language to reflect those terms. The absence of agreement or mutual assent on a material term may lead to the legal conclusion that no agreement exists at all. The absence of other contract terms may lead a court to infer terms that do not necessarily reflect the intention of the contracting parties.

**The Basis for Third-Party Analysis:** In the event that a contractual dispute between the surveyor and the client cannot be resolved directly, a written agreement provides an objective basis upon which some third party (a judge, jury, or arbitra-

tor, for example) may resolve the dispute. Without the written agreement, the third party will inevitably be required to resolve credibility issues based upon hearing conflicting testimony from the parties regarding their subjective and biased recollection of the terms of the relationship.

Providing services under oral agreements should be considered with great caution. While many firms have practiced successfully without written agreements, such oral contractual relationships, while usually valid and binding, often result in an unclear understanding of the scope of services and inconsistent levels of expectations from each party. The relationship between the surveyor and the client, their level of communication, and the quality of the provided services all factor into the determination of risk. The use of a written professional service agreement can clearly establish expectations and provide protections for both the surveyor and the client.

**Q:** In the past I've been told that client selection is an important part of managing my risk. Do I really need to worry about the clients that I take on?

**A:** Client selection might be the most important step in assessing potential risks for a project. Clients often spend great effort in evaluating potential surveyors because the selection of the right surveyor is a crucial first step in the maximizing the potential success of a project. The same is true for surveyor firms.

Frequently, it is advisable to investigate the previous track record of a potential new client. This is probably more of a factor with developers or corporate clients with continuing building programs than with some other clients, but it might be wise to do so with infrequent corporate or institutional clients. Colleagues and contractors may have worked with the potential client in the past and can provide information from personal experience. They may be able to provide insights about the quality of the professional relationship, whether or not bills were paid in a timely manner, and the client's attitude toward risk allocation, among other things.

Surveyors should also be alert to the "naive" client. Clients that have never been involved in construction projects are more prone to be involved in disputes than more experienced clients who better understand what is possible. Naive clients may have unrealistic expectations of the surveyor specifically and of the construction process in general. These types of clients tend to be relatively easily disappointed, which can lead to disputes.

Just as types of projects have certain histories of claims associated with them, so do specific clients. Some clients are

simply more litigious than others. It is possible to investigate the court records in your area or in the client's home area to determine the incidence of litigation to which the potential client was a party. Although arbitration cases are not a matter of public record, local attorneys may know or be able to informally determine the reputation of the client in this regard. Word of mouth among colleagues is also valuable.

Since two-thirds of claims against surveyors in the Schinnerer and CNA program originated from the client, surveyors need to take extra care in the selection of their clients. It is not surprising that the client is the largest source of claims against surveyors since the client is the party that most often retains the surveyor. Therefore, it is the client with whom surveyors have a direct relationship.

Surveying firms need to be thorough in their evaluation before deciding to work with a particular client, whether the client is the owner of the project or a general contractor retaining the surveyor. Surveying firms should select clients that understand, appreciate, and value the services of surveyors. Prudent selection 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.

The importance of client selection is illustrated in the claims scenarios below.

#### Case #1

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 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 lot owners 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 #2

A surveyor provided a boundary and topographic survey for a farm property awaiting development. The client had little experience with surveyors and had never before had a proper survey. 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 with the property without fixing the problems. The client later claimed \$260,000 in losses. At mediation there appeared to be minimal liability on the part of the surveyor.

The client filed a complaint against the surveyor with the state licensing board, alleging incompetence and misconduct. Based on varied documentation that showed 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 they 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.

Do you have a question regarding an insurance or practice management issue? Email it to [AskVic@Schinnerer.com](mailto:AskVic@Schinnerer.com) and look for your answer in a future issue of *ACSM's Bulletin*. Victor O. Schinnerer & Company, Inc., is the underwriting manager for the CNA professional liability program. Schinnerer and CNA have been the commended program of the American Congress on Surveying and Mapping since 1965.

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