

Certification

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Many surveyors as a matter of course, requirement, or sense of responsibility certify survey documents or their survey work. The question of whether a surveyor should or should not certify documents has been hotly debated among surveyors and attorneys.

Certification can be thought of as notes, statements, or admissions² made by the practitioner for the benefit of another party. There are three reasons often cited for surveyors to certify their work. First and foremost, certification is provided to assure the client that professional services have been completed, standards achieved, and obligations met. The document prepared by the surveyor is not just a map and words, but a culmination of a professional undertaking. As a consequence, many certifications take the form of a statement or statements made to foster reliability, trust, and acceptance of the surveyor's work. Secondly and in conjunction with the first, the words in the certification and act of signing the certification introduces some solemnity which is meant to impress on the surveyor the importance of their services and the need for their apt attention to detail and accuracy. Third, historical precedence has led many to believe certification is a necessity of practice. Surveyors have used certifications in one form or another throughout America's history. Certification has become so entrenched that it is now considered a surveyor's duty and required by some statutes, rules, or standards.

These arguments while seemingly persuasive are not compelling because they in fact deal with the appearance of a certification rather than the contents of the certification. In other words, the gist of the problem is not with certification itself so

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² The term "certification" may refer to the surveyor's express certification or general statements (notes) made on the plan the surveyor has sealed. See e.g., *MacBean v. St. Paul Title Insurance Corporation*, 405 A.2d 405, 169 N.J.Super. 502, 8 A.L.R.4th 1238 (1979)

much as the manner, scope, and form of certification many surveyors execute.

Consider the manner in which some certifications are created. The most onerous certifications are not created as an expression of the surveyor's free will, thought, and deed but as a rigid check-list or fill-in-the-blank form written by non-surveyors without any surveying experience or knowledge.³ To exacerbate the problem, the certifications are frequently presented not when the services are sought but when the survey is all but completed and the surveyor's payment is due.⁴ As a result, the wording of the certification goes beyond the normal scope of the surveyor's knowledge, experience, expertise, professional duty, or contractual duty. The form of the certification does not take the form of a rendition of facts, rather the certification takes the form of an assurance of perfection; that is, unrestricted statements on the title quality, survey/inspection accuracy, and completeness of performance. The tenor of many certifications create an express assurance where the courts would infer none.⁵ A comparison of historical certifications⁶ with those of the present will show the contrasting difference in tenor.⁷ The result of present certifications is that the surveyor indemnifies the buyer for conditions the surveyor has no or little control over.

Given the present manner, scope and form of certifications, several problems result. First, certifications that assure perfection give the client a false sense of security.

³ See e.g., Survey Reports required by the U.S. Department of Housing and Urban Development, Office of Housing, Federal Housing Commissioner and the Lawyer's Title Insurance Corporation.

⁴ Conceivably, the surveyor could refuse to sign the certification because it is outside the scope of the surveyor's contractual duty. Realistically; however, the surveyor faces the dilemma of either refusing to sign and letting the client question the quality of the surveyor's work, on the one hand, or signing the certificate and risking additional liability or making false representations, on the other hand.

⁵ "We recognize that in the absence of an express contract, the courts are reluctant to construe contractual dealings and services of lawyers, physicians and architects, and probably some other professions, as implying a contract of guaranty or insurance of favorable results. And under some circumstances civil engineers will not be held to have impliedly warranted or insured favorable or certain results. It all depends on the nature of the employment and the particular services to be rendered....If a civil engineer is employed to locate a government land line between tracts or areas, we submit that he would not impliedly insure location of the correct line. In determining this location, it is commonly known that his [opinion] is dependent on obtaining a correct starting point for his survey--a point that is often obscured or is evidenced by misleading or false marks--marks that are made by someone else. An engineer under such circumstances cannot ordinarily be expected to guarantee or insure definite and positive results. *Broyles v. Brown Engineering Co., Inc.* 151 So.2d 767, 275 Ala. 35 (1963)

⁶ E.g. "I have on this day made a survey for ___, as directed by my warrant, marking the bounds with some care, using stone where practicable."

Ordinarily, an exemplary but realistic surveyor will not insure results or the accuracy of their work for their client⁸ for the reason there is no certainty of perfection nor can there be in typical land surveying practice. The reasons there are no certainty of perfection in locating boundaries and identifying problematic site conditions should be obvious. These include: the lack of care by the original surveyors; the decay of physical evidence; loss of memory; poor quality of previous surveys; evidence hidden by vegetation, snow, construction, and deceit; and lack of recorded information, to name a few. These are circumstances outside of the surveyor's control. Under these conditions, a truthful statement in the form of a certification can be nothing more than a reasonable opinion based on a defensible solution to a complicated situation. Forceful and unrestricted assurances of perfection are not generally true and will not change an uncertain and vague situation to one of certainty and clarity.

A second result of seeking certifications making unrestricted statements of perfection is to expose the surveyor to an increased risk of liability. Undeniably, the surveyor should be held liable for negligent or unprofessional conduct. Liability founded upon tortious conduct such as negligence can be minimized by conforming to normal professional or contractual standards. Monetary loss can be minimized by liability insurance. On the other hand, unrestricted certification introduces contractual liability founded upon breach of contract⁹ or breach of warranty.¹⁰ This perspective of liability is not ordinarily covered by insurance and has resulted in potential liability far beyond what many surveyors bargained for or contemplated as reasonably likely to occur.¹¹ Not so some clients and insurance companies who seek and rely on survey certifications and therefore appear to be more interested in

⁷ See e.g., Survey Reports required by the U.S. Department of Housing and Urban Development, Office of Housing, Federal Housing Commissioner and the Lawyer's Title Insurance Corporation.

⁸ In this regard, surveyors are no different from attorneys and doctors. Under the best of conditions, there can be no absolute certainty, only increased confidence in the predicted outcome or results.

⁹ An argument for breach of contract would hold that the contents within the certification statement(s) to be evidence of the terms of the contract.

¹⁰ An argument for breach of warranty would be predicated on interpreting the certification to be a statement of express warranty or guarantee. E.g. "I hereby certify this survey to be accurate and comply with Class... Survey Standards"

¹¹ See e.g. *Rozny v. Marnul*, 250 N.E.2d 656, 43 Ill.2d 54, 35 A.L.R.3d 487 (1969) and *Bell v. Jones*, 523 A.2d 982, (D.C.App: 1987)

having the surveyor certify that certain conditions exist or do not exist than receiving a survey plan from the surveyor. It is not information or an opinion they seek but an assurance of quality that they can rely upon. They have come to seek the surveyor's willingness to attest to the marketable quality of the title rather than visible attributes that impinge on title quality (i.e. marketability).¹² In effect, the certification is used to fix responsibility (i.e. liability)¹³ rather than simply provide helpful information.

A third result of certifications is to raise the cost of surveying and fees sought. To comprehend this result, you must understand the choices the surveyor faces when asked to execute a certificate. The surveyor has four choices: First, the surveyor can refuse to sign the certificate thereby risking a dispute or raising concern over the quality of the survey. Second, the surveyor can modify the certificate and again risk a dispute or raise concerns over the quality of the survey. Third, the surveyor can sign the certificate without a knowledgeable foundation and risk potential liability. Fourth and finally, the surveyor can take the time and effort to perform their survey to comply with the certifications that are sought. As a result, a conscientious surveyor that may wish to avoid a dispute will increase their fee in order to account for the additional time and effort necessary to meet the certificate's conditions. In some situations, the increased liability risk by itself cause a prudent practitioner to raise their fee for doing business.

The surveyor's concerns that are raised by certification can be removed by one of three ways: First, certifications can be omitted or used sparingly. The form or source of liability meant to hold the surveyor accountable for their performance should be based on express contractual terms or negligence. Second, unrestricted assurances or guarantees of survey perfection should not be sought or given. Site conditions, historical neglect, third party deceit, time limitations, or cost restraints make

¹² Consider the difference in tenor and risk of liability brought about between the following statements: "I certify that I have located the apparent encroachments shown on the attached plan" as opposed to "I certify that there are no encroachments unless noted on the plan."

assurances or guarantees of survey perfection unlikely to be met and untrustworthy when received. Third, if assurance is required, then it should be factually based on what was done or discovered not conclusions or conditions not discovered.¹⁴

¹³ A certificate on the plan asserts responsibility for the surveyor and therefore liability. *Klinger v. Kightly*, 791 P.2d 868 (Utah 1990)

¹⁴ Consider the different implications between the following two statements: "I certify that I have measured each angle three times" as opposed to "I certify that I have accurately measured each angle."