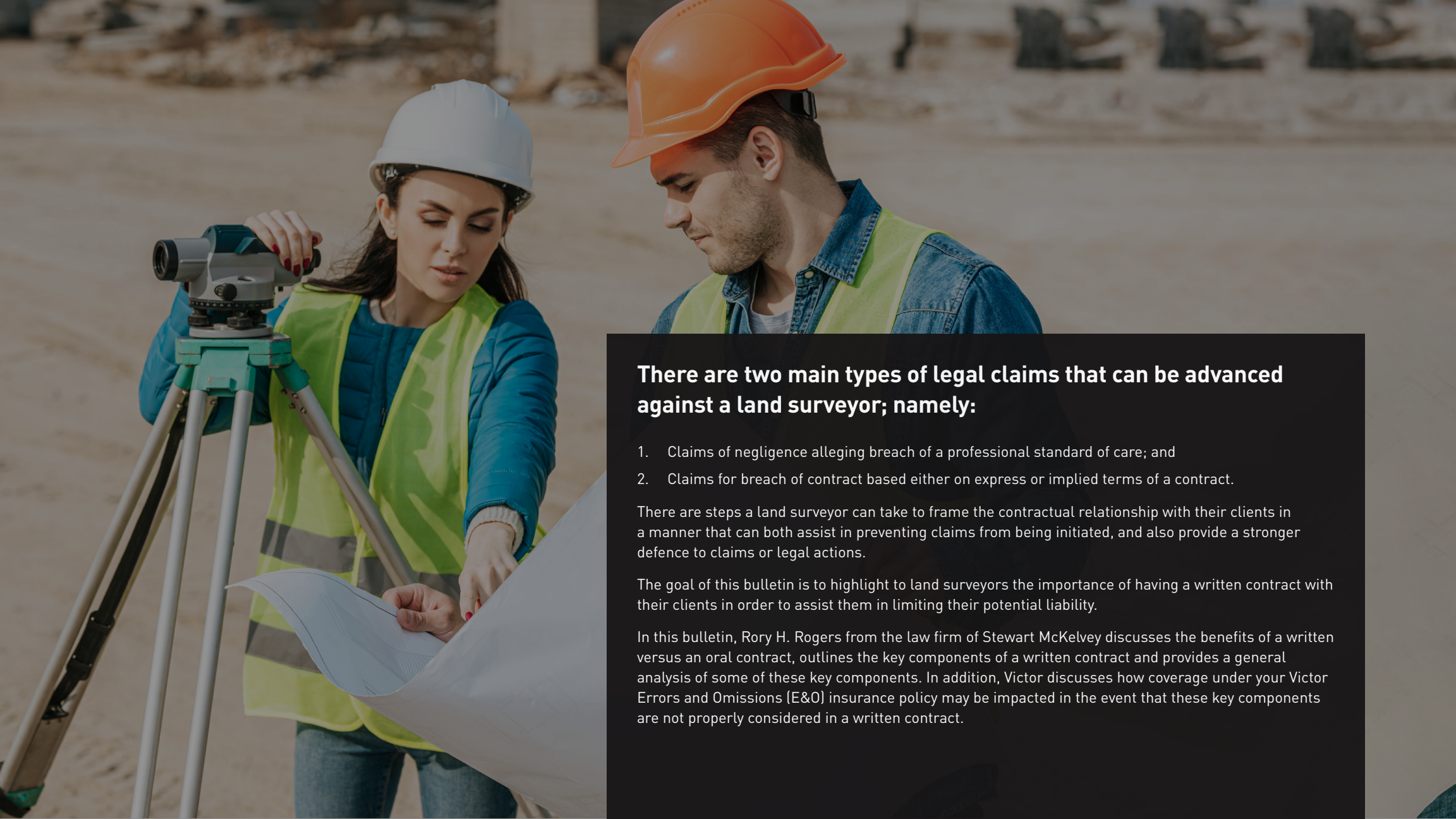




LOSS CONTROL BULLETIN – LAND SURVEYORS

The importance of written contracts



There are two main types of legal claims that can be advanced against a land surveyor; namely:

1. Claims of negligence alleging breach of a professional standard of care; and
2. Claims for breach of contract based either on express or implied terms of a contract.

There are steps a land surveyor can take to frame the contractual relationship with their clients in a manner that can both assist in preventing claims from being initiated, and also provide a stronger defence to claims or legal actions.

The goal of this bulletin is to highlight to land surveyors the importance of having a written contract with their clients in order to assist them in limiting their potential liability.

In this bulletin, Rory H. Rogers from the law firm of Stewart McKelvey discusses the benefits of a written versus an oral contract, outlines the key components of a written contract and provides a general analysis of some of these key components. In addition, Victor discusses how coverage under your Victor Errors and Omissions (E&O) insurance policy may be impacted in the event that these key components are not properly considered in a written contract.



Benefits of a 'written' versus an 'oral' contract

A contract can be either **written** or **oral**. Where a land surveyor or their client is relying upon an oral contract, there can often be disputes and uncertainties as to the scope and terms of the oral agreement. Far greater certainty arises where the nature of the retainer is based on a written contract that is signed and agreed to by both parties. A carefully crafted written contract can provide certainty to the parties that can prevent litigation and help limit risk.

A written contract also provides far greater certainty with respect to billing arrangements, which can help avoid disputes over accounts and provide greater certainty of recovery for the provision of surveying services. It is far more difficult for a client to challenge an account where there is a signed agreement stipulating the precise services to be provided and the fee the client has agreed to pay. It may also assist in avoiding or limiting a claim of negligence from being advanced against a land surveyor.

Key components of a ‘written’ contract

Ideally, land surveyors should have a written contract that is signed by both parties prior to commencement of work. Exchanges of correspondence can achieve the same purpose. But, it is important to ensure that a written or documentary record is secured, which provides clear evidence of the agreement and all the applicable terms—so as to reduce uncertainty about the terms of engagement and assist in relation to resolution of any disputes that might arise in relation to the surveying services.

A land surveyor should have their own contract template to present to their clients. In some circumstances, a client may be looking for a land surveyor to agree to a form of contract put forward by the client. Whether the written contract originates with the land surveyor or with the client, there are certain key components that should form part of the contract.

Care should be taken not to sign a client’s standard form contract without review and consideration of the appropriateness of the various provisions within the contract. For example, the contract should deal directly with professional services obligations. Clients may put forth contracts that reflect the provision of goods, which will generally not be appropriate or provide sufficient certainty as to the respective obligations of the parties.

Also important within a contract is the language used as certain words or terms may go beyond coverage provided by your Victor E&O insurance policy. For example, agreeing to defend your client from any claims resulting from your professional services goes beyond the scope of coverage under your Victor E&O insurance policy and would, therefore, be considered a business decision for which you would be entirely responsible. As well, as set out in greater detail below, land surveyors should not agree to any attempt by a client to include in a contract a waiver of subrogation.

Key components of a written contract should include the following:

- ✓ **Purpose**
- ✓ **Defining the scope of work and responsibilities of each party**
- ✓ **Term/timing**
- ✓ **Compensation: provide certainty as to compensation, including a payment schedule**
- ✓ **Defining a change order process**
- ✓ **Establishing or limiting warranties or guarantees**
- ✓ **Indemnification: defining who you are liable to and for what in the event of a claim**
- ✓ **Confidentiality: establishing confidentiality requirements**
- ✓ **Insurance: defining insurance coverage requirements**
- ✓ **Limitation of liability**
- ✓ **Dispute resolution process**
- ✓ **Choice of law clause**

Set out below are comments on clauses or provisions that should be included in a written contract:

Scope of services

It is important that a contract be as specific as possible about the scope of services to be provided. Land surveyors can use an engagement letter or contract to clearly delineate the services that will be provided and, equally as important, those services that will not be provided.

Limitation of liability

Limitation of liability clauses can be an important mechanism to manage risk and limit potential damages. Limitation of liability clauses need to be specific and clearly worded.

Limitation of liability clauses could include:

- 1. Limitation of liability to the amount of professional fees, or some multiple of professional fees charged for the services;**
- 2. Limitation of liability to a specified amount that provides some reflection of the scope of possible damages given the nature of the retainer; or**
- 3. Limitation of liability based on expressly stated limits of insurance required under the contract.**

It is possible that a land surveyor's insurance limits for a particular policy period may be eroded as a result of another claim. This can have the effect of limiting the insurance coverage available for a particular claim to an amount less than the stipulated policy limits. A carefully crafted limitation of liability clause should limit the land surveyor's liability to the amount of coverage available under a responding insurance policy. It is also important to remember that your Victor E&O insurance policy is a claims-made and reported policy, which provides coverage for claims-made and reported during the term of a policy. Therefore, it is your responsibility to ensure that you maintain your insurance coverage in order to meet your contractual requirements.

Limitation of liability clauses will apply only to the contracting parties. Therefore, if a third party (not party to the contract) advances a claim in tort or negligence against the land surveyor, then the land surveyor needs to be aware that in such circumstances they may not be protected by any potential application of limitation of liability clauses set out in the contract.

As well, courts do not always enforce limitation of liability clauses, especially where there may seem to be some "unequal bargaining power," or if the limitation of liability is viewed by a court as disproportionately below a reasonable quantification of damages. Accordingly, even where a land surveyor is successful in securing a signed contract limiting the damages to professional fees paid or some other stipulated amount, there is some uncertainty as to whether such clauses will be enforced by a court.



Based on current case law, Canadian courts have far more frequently enforced limitation of liability clauses based on contractual stipulated minimum insurance policy limits held by professionals.

In addition, it is also important for land surveyors to exercise care to identify any limits in the prime contract that might override limits in the contract entered into between themselves and their client.

Limitation of liability clauses can also exclude certain kinds of damages that might otherwise be recoverable through the litigation process depending on the circumstances. An exclusion clause or a limitation of liability clause can, for example, exclude claims against land surveyors for loss of profits or from indirect or consequential damages.

Furthermore, it is important to understand that your Victor E&O insurance policy only provides coverage for compensatory damages and, where insurable by law, punitive or exemplary damages which does not include interest, fines or penalties (whether contractual or other). Therefore, land surveyors can protect themselves by including a provision in their contract with their client to limit their liability to damages that are covered under their insurance policy.



Indemnification and hold harmless

Certain indemnification and hold harmless clauses will not expand the scope of potential obligation on the part of a land surveyor, while others can significantly increase a land surveyor's exposure to damages. Appropriate and fair indemnity clauses should be negotiated to protect both parties. Land surveyors should only assume reasonable responsibility in relation to any potential loss arising from their provision of professional services. Principles of negligence would generally require a professional to meet an appropriate and reasonable standard of care in the profession. Therefore, an indemnification clause that is restricted to the indemnification by the land surveyor to the client arising from a negligent act or omission is unlikely to expand the scope of potential liability on the part of the land surveyor.

On the other hand, land surveyors should strongly resist any attempt by a client to build into the contract a broad form indemnification and hold harmless provision. Land surveyors should not agree to contract language that specifies the land surveyor will indemnify and hold harmless the client from any and all losses where liability, claims and costs however caused. Such a broad form hold harmless agreement should be strongly opposed. The client may also seek to include indemnification language in a contract that provides very broad indemnification including for parties with no relationship to the survey work. Again, such broad indemnification language should be challenged.

Further, an agreement or contract that includes a broad form hold harmless or indemnification obligation exposes a land surveyor to potential risks that may not be covered under their Victor E&O insurance policy. It is important to remember that your Victor E&O insurance policy is intended to defend and indemnify you for errors, omissions or negligent acts in the performance of professional services you provide to others. It is not intended to defend and indemnify for any and all losses, claims or costs. Furthermore, it specifically excludes coverage for the liability you may have assumed under contract unless such liability would have existed in the absence of such a contract.

Production of a land surveyor's E&O insurance policy

A client may seek the production of a land surveyor's insurance policy. Providing certified copies of your E&O insurance policy should not be agreed to as part of any contract. It is, however, acceptable to agree to provide confirmation of your insurance policy limits by providing the client with a Certificate of Insurance, which Victor can issue upon your request. It is worthy to note that in various jurisdictions a land surveyor's insurance policy is not producible until a matter becomes litigious and even then, there are certain jurisdictions where an insurance policy is never producible.

Waiver of subrogation

Land surveyors may be faced with requests to include a waiver of subrogation in their contract with their clients.

Subrogation is the right provided for in an insurance policy that allows an insurer to pursue a third-party (i.e., not a party to the insurance contract, that caused an insurance loss to an insured). This right of subrogation allows an insurer to recover all or some of the amount of a claim paid on behalf of an insured.

Any request for a waiver of subrogation should not be agreed to by a land surveyor in relation to their professional liability policy. In particular, your Victor E&O insurance policy contains a condition, which requires you to not do anything—which prejudices the insurer's rights or recovery against any other party. By agreeing to a waiver of subrogation in your contract, you may potentially jeopardize coverage, which would have otherwise been available to you under your insurance policy.





It is important to manage the risk of claims to the extent possible and not prejudice your insurer by the contract language. Land surveyors can provide some measure of protection by implementing a practice of obtaining written contracts to provide certainty to the parties as to the nature of the contractual arrangement. Land surveyors should also ensure that they carefully review and when necessary, challenge the contractual language proposed by clients. In appropriate circumstances, land surveyors should negotiate forcefully to ensure no undue expansion of their potential liability. It is strongly encouraged that land surveyors obtain legal advice at their own expense concerning rights, obligations and risks associated with written contracts. In addition, Victor is also available to provide contract review services from an insurance perspective when requested. An ounce of prevention can be worth many pounds of cure.

Visit us at victorinsurance.ca to learn more.

This document is for illustrative purposes only and is not a contract. It is intended to provide a general overview of the program described. Please remember only the insurance policy can give actual terms, coverage, amounts, conditions and exclusions. Program availability and coverage are subject to individual underwriting criteria.

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