

Whose Records Are They?

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Editor's Note: Following last issue's discussion of the Copyright and Fair Use of Surveyors' Real Property Reports, we are pleased to present this article which describes some possible solutions to unauthorized copying and alteration of plans.

At the termination of the surveyor's services, some clients demand that the surveyor turn over all work products, including the surveyor's plats, designs, reports, and descriptions. Most surveyors refuse to turn over the reproducible work products such as the mylar or vellum plans, the CAD data file, the "hard copy" sketch, the original computer-generated report, etc. If a dispute ensues and accusations are exchanged, the ultimate question is: "Who has the *right* to retain possession of the reproducible work products"?

The client believes he or she has the right to retain possession of all work products, including the reproducible products. After all, the work products were prepared at the client's request and the client paid for the surveyor's time and costs to prepare the reproducible products. Furthermore, the documents sometimes contain sensitive information the client does not want to be published or made known to others.¹ The client can be expected to point out that a builder would not have the right to retain possession of a house that was built at the request of and paid for by a home buyer. So why should the surveyor be treated any differently?

The difference is that in dealing with a surveyor, the client has sought and paid for a professional service and not a product. The surveyor's work products are generated as part of the surveyor's service, much as an attorney may prepare trial notes while representing a client, or as a doctor might complete a patient's chart in caring for the patient. The service performed by the surveyor is delivered in the form of an opinion or design concept. Thus the client has a right to receive from the surveyor a *defensible professional opinion on the location of the boundaries communicated in a useful and understandable manner*. In the case of a development design, the client has a right to receive a *design prepared and communicated in a manner and form that uses good engineering and design*

principles, that will facilitate government approval, that will help in the profitable sale of units, and is acceptable as a permanent public record.

These definitions support the surveyor's position that the client has not purchased a particular product, document, or result.² Payment is made to the surveyor for services necessary to render an opinion and to communicate the opinion; payment is not made for the purchase of the documents themselves. Consequently, once the client has received a legible *copy* of the surveyor's work product, the client has received what they paid for and the surveyor has met his or her professional obligation.

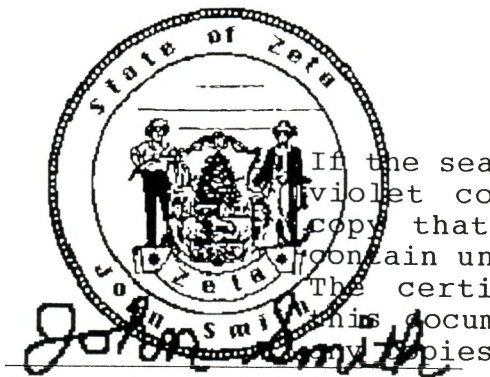
In most cases, the surveyor has a duty to retain possession of the originals to prevent fraudulent alterations.³ Once the original has left the surveyor's possession and control, the risk of undetectable modifications or alterations without benefit of proper professional supervision increases substantially.⁴ This, in turn, increases the risk of unwarranted liability for the surveyor, as well as harm to third parties who, in good faith, rely on what appears to be the surveyor's own original work and opinion.

Finally, the surveyor who does not retain control of the reproducible docu-

ment has made it difficult to prove what was or was not done under his or her supervision and control. Without the reproducible document, it becomes difficult to prove the original contents of the work product when the extent or contents of the surveyor's work and opinion are questioned.⁵

Obviously, these reasons for retaining the reproducible document are not as critical so long as the surveyor has *not* signed or sealed the document. A document without any evidence of professional preparation and without the identity of the surveyor loses part or all of its value to the client, and poses little risk to the surveyor or wary member of the public. However, the reasons for retention continue to be valid when the document can be identified as originating in whole or in part from a particular licensed surveyor.

There are several preventative measures the surveyor can take to reduce the chance of dispute with the client or undetectable alterations of the surveyor's work product. First and foremost, the agreement between the client and surveyor should make clear who retains possession of the originals. To allay the client's worry about confidentiality, the agreement could include provisions that any information will remain confidential.



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If the seal and signature are not violet colored, the plan is a copy that should be assumed to contain unauthorized alterations. The certification contained or this document shall not apply to copies

Second, to prevent undetectable alterations, the surveyor should not seal and sign the reproducible document or digital media retained by the survey firm.⁶ This reduces the harm an altered document can cause if it is stolen from the firm's record storage, and it ensures that the firm will not send out revisions of the plan without coming to the surveyor for review and approval.⁷

Third, the surveyor should use a crimp seal on documents copied from the reproducible document and given to the client. As an alternative to the crimp seal, the surveyor should use a different colour for the ink seal and signature.⁸ A note should be included that partially defaces the seal and signature and that contains a warning about the document.⁹

In conclusion, the surveyor contracts to provide a service and not a product. By providing an opinion or design concept in a legible, readable, and useful format, the surveyor meets his obligation to the client. In many cases, the surveyor has a duty not to relinquish possession of the original manuscripts if they can be altered without detection. Unsupervised or

fraudulent alterations that are undetectable cause harm to the public and increase the surveyor's liability.



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REFERENCES

1. For example, to perfect title by adverse possession, a client may not want the neighbour to know that the client is encroaching on the neighbour's property.
2. This is supported by *Tennessee v. Watts*, 670 S.W.2D 246 (Tenn. 1984). Furthermore, if the practitioner is selling a product, a sales tax should be charged. *Timken Company v. Lindley*, 504 N.E.2d 455, 29 O.B.R. 211, 29 Ohio App.3d 181 (1985).
3. The surveyor may be required to give possession to a neutral third party such as a recorder of deeds. Many subdivision

regulations require that the original development plan be recorded. Consequently, undetectable alterations may be made to the recorded document but not without a high risk of detection when the deceptive party is attempting to make the alterations on the document.

4. It is difficult, if not impossible, to make undetectable pen or ink changes to a copy. Changes are made to a copy that is then subsequently copied would also be detectable, assuming the surveyor takes other precautions.
5. The widespread adoption of the discovery rule, coupled with the rejection of the privity-of-contract defense in certain tort actions requires long-term care and possession of all work-products.
6. Some surveyors have scanned their seal and signature and placed them on CAD files, thereby multiplying the chance of mischief or deceit.
7. This assumes the surveyor retains exclusive possession of the seal and has not authorized another person to sign for the surveyor.
8. Both the signature and seal should be in an off-colour since a seal can be purchased from a manufacturer without proof of licensure.
9. Partially defacing the seal and signature may make the note difficult to read but will make it difficult to remove the note without defacing the seal and signature.