

1 **DISCLAIMER**

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2 **A NEW PRACTICE MODEL**

10 Principles of Retracement Surveying Which you May or May Not Know

3 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

I. YOU ARE EITHER AN ORIGINAL SURVEYOR OR YOU ARE A FOLLOWING SURVEYOR

The fundamental precepts of boundary surveying are, you are either an original surveyor setting out new lines for the very first time for a common grantor, or you are a following surveyor finding where the lines have become established on the ground.

4 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"While the original surveyor has a right or responsibility to establish new boundaries when he surveys previously unplatted land or subdivides a new tract, the sole duty of all subsequent or following surveyors is to locate the points and lines of the original survey by locating existing boundaries. No following surveyor may establish a new corner or line, or correct erroneous surveys of earlier surveyors, when they track the original survey in locating existing boundaries."

McGhee v. Young, 606 S.2d 1215 (Fla.App. 1992).

5 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"It has been declared that all the rules of law adopted for guidance in locating boundary lines have been to the end that the steps of the surveyor who originally projected the lines on the ground may be retraced as nearly as possible; further, that in determining the location of a survey, the fundamental principle is that it is to be located where the surveyor ran it.

Wood v. Starko, 197 S.W.3d 255, 259 (Tenn.App.2006). Citing 11 C.J.S. Boundaries § 3, p.540.

6 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"Any call, it has been said, may be disregarded, in order to ascertain the footsteps of the surveyor in establishing the boundary of the tract attempted to be marked on the land; and the conditions and circumstances surrounding the location should be taken into consideration to determine the surveyor's intent."

Wood v. Starko, 197 S.W.3d 255, 259 (Tenn.App.2006). Citing 11 C.J.S. Boundaries § 3,

p.540.

7 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"In ascertaining the lines of land or in re-establishing the lines of a survey, the footsteps of the original surveyor, so far as discoverable on the ground by his monuments, should be followed and it is immaterial if the lines actually run by the original surveyor are incorrect."

Wood v. Starke, 197 S.W.3d 255, 259 (Tenn.App.2006). Citing 11 C.J.S. Boundaries § 3, p.540.

8 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

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Olson v. Jude, 73 P.3d 809 (Mont.2003).

9 **CUPP v. HEATH**

TENNESSE COURT OF APPEALS
AT KNOXVILLE
E2010-02364-COA-R3-CV
August 11, 2011

10 **BUTLER v. COYLE**

Washington Court of Appeals
Case No. 29198-7-III, 29517-6-III
February 2, 2013

11 **Butler v. Coyle**

"At trial, [Emerson, Coyle's surveyor,] could identify no reason why he relied on the metes and bounds description from the deeds rather than the actual center line in depicting the boundary line between the Coyle and Butler properties."

Butler v. Coyle, Nos. 29198-7-III, 29517-6-III (Wash.App.2012). Unpublished.

12 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

II. THE "FIRST SURVEYOR" CONCEPT IS PURE SURVEYOR MYTHOLOGY

Despite every court in every jurisdictions saying, basically, the same thing about retracement surveying, land surveyors had to interject a new surveyor-contrived concept—the "first surveyor" concept based on one misguided case and one misguided surveyor.

13 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

“When a parcel or parcels are created on paper, without a survey being conducted, and the surveyor is later requested to place one of these paper-described parcels on the ground, this survey should be considered the ‘first’ survey, in that it is the first survey to be placed on the ground after the description.”

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location*, Fifth Edition, 2006, John Wiley & Sons, Inc., Hoboken, New Jersey, at 310.

14 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

“The difference is that whereas the original survey controls, the first survey is nothing more than an opinion by the surveyor of where the written description should be placed. As such, it is always open to collateral attack.”

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location*, Fifth Edition, 2006, John Wiley & Sons, Inc., Hoboken, New Jersey, at 310.

15 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

The results of this philosophy are not hard to find. The pincushion corner is the physical manifestation of our collective confusion over our duties and responsibilities towards property boundaries.

16 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

“Always open to collateral attack.”

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location*, Fifth Edition, 2006, John Wiley & Sons, Inc., Hoboken, New Jersey, at 310.

17 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

III. THE BLM MANUAL REPUDIATES THE “FIRST SURVEYOR” CONCEPT

Not only does the BLM Manual not support the “First Surveyor” concept, it repudiates it.

18 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

“By law, (1) the corners marked in public land surveys shall be established as the proper corners of sections, or of the subdivisions of the sections, which they were intended to designate, and (2) the boundary lines actually run and marked shall be and remain the proper boundary lines of the sections or subdivisions for which they were intended, and the lengths of these lines as returned shall be held as the true length thereof...”

1973 Manual, Sec. 3-4; 2009 Manual, Sec. 3-4.

19 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The original corners must stand as the true corners they were intended to represent, even though not exactly where professional care might have placed them in the first instance."

1973 Manual, Sec. 3-4; 2009 Manual, Sec. 3-4.

20 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The local surveyor is employed as an expert to identify lands which have passed into private ownership. This may be a simple or a most complex problem, depending largely upon the condition of the original monuments as affected principally by the lapse of time since the execution of the original survey."

1973 Manual, Sec. 3-76; Also see 2009 Manual, Sec. 3-131 thru 3-136.

21 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The work usually includes the subdivision of the section into the fractional parts shown upon the approved plat. In this capacity the local surveyor is performing a function contemplated by law. He cannot properly serve his client or the public unless he is familiar with the legal requirements concerning the subdivision of sections."

1973 Manual, Sec. 3-76; Also see 2009 Manual, Sec. 3-131 thru 3-136.

22 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The Bureau of Land Management assumes no control or direction over the acts of local and county surveyors in the matters of subdivision of sections and reestablishment of lost corners of original surveys where the lands have passed into private ownership, nor will it issue instructions in such cases."

1973 Manual, Sec. 3-76; Also see 2009 Manual, Sec. 3-131 thru 3-136.

23 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Title 43 U.S.C. 752 and 753 (Rev. Stat. 2396 and 2397) contain the fundamental provisions for the subdivision of sections into quarter-sections and quarter-quarter sections. Sections are not subdivided in the field by Bureau of Land Management cadastral surveyors unless provision is made in the special instructions, but certain subdivision-of-section lines are protracted upon the official plat."

2009 Manual, Sec. 3-99.

24 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"In the public land survey system a corner is fixed in position by operation of law.

Corners marked in official surveys followed by use are fixed in position by monuments. Only a small portion of corners are marked on the ground in original surveys. Subdivision-of-section corners are generally not marked. Their positions are fixed on the plat by protraction. Their positions are fixed on the ground by the survey process of running (and marking) line between marked corners, and setting monuments."

2009 Manual, Sec. 3-99.

25 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"A decision to set aside previously fixed local survey *legal subdivision corners* must be supported by evidence that goes *beyond mere demonstration of technical error*, reasonable discrepancies between former and new measurement, and less than strict adherence to restoration and subdivision rules."

2009 Manual, Sec. 3-137.

26 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The position of a tract of land, described by legal subdivision, is absolutely fixed by the original corners and other evidences of the original survey.... Under fundamental law the *corners of the original survey are unchangeable*. Even if the original survey was poorly executed, it still controls the boundaries of land patented under it."

1973 Manual, Sec. 6-15.

27 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"Were the Federal Government obliged to open the question as to the location of a particular tract or tracts over technical differences or reasonable discrepancies, *controversies would constantly arise, and resurveys and readjudication would be interminable*. The law gives these activities *repose*."

2009 Manual, Sec. 3-137.

28 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"*Always open to collateral attack.*"

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location*, Fifth Edition, 2006, John Wiley & Sons, Inc., Hoboken, New Jersey, at 310.

29 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

IV. THE STANDARD IS THE REASONABLY PRUDENT PRACTITIONER AND THE CRITERION IS THE BEST AVAILABLE EVIDENCE

These two factors put together create a litmus test for boundary surveying decisions. The practitioner gathers and weights the best available evidence as would the

reasonably prudent practitioner in rendering a well-reasoned opinion on the location question.

30 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"This court has not had occasion to define a particular standard of care for surveyors; to that extent, this is a case of first impression in the District of Columbia. However, from our own cases involving other professions and from pertinent cases in other jurisdictions, we conclude that a surveyor should apply the proper standard of care any other surveyor of ordinary skill and prudence would exercise under the same or similar circumstances."

Bell v. Jones, 523 A.2d 982 (D.C.App.1986).

31 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Mere difference of professional opinion does not establish professional negligence. Moreover, professional negligence is not established by proving that a professional opinion turned out to be erroneous. Rather, to recover for professional negligence based on an incorrect professional opinion, one must establish that the professional fell below the standard of skill and knowledge commonly possessed and utilized by members within the profession when rendering his opinion."

Lawson v. Winemiller, 1995 Ohio App. LEXIS 2043 (Ohio App.1995).

32 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Surveyors are not insurers. Their duty is to complete a survey using the best evidence available to them according to the accepted rules and regulations."

Yellowstone Basin Properties v. Burgess, 843 P.2d 341 (Mont.1992).

33 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The surveyor must find the best available evidence that determines the location of the deed on the ground. In those areas in which there is widespread obliteration and loss of evidence, it may become necessary to accept evidence of an inferior type, such as hearsay and reputation, but whatever is accepted, it must be the best of that found after an extensive and complete search of the record, the ground, and adjoiners is complete."

Robillard, Walter G., Donald Wilson, Curtis M. Brown, *Evidence and Procedures for Boundary Location, Fifth Edition*, at 39.

34 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"For a corner to be lost it 'must be so completely lost that (it) cannot be replaced by reference to any existing data or other sources of information.' (Citation omitted). The decision that a corner is lost should not be made until every means has been exercised that might aid in identifying its true original position."

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

35 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Even though the physical evidence of a corner may have entirely disappeared, a corner cannot be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location."

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

36 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"There is no clearly defined rule for the acceptance or non-acceptance of the testimony of individuals. It may be based upon unaided memory...or upon definite notes and private marks. The witness may have come by his knowledge casually or...had a specific reason for remembering. Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced."

U.S. v. CITKO, 517 F. Supp. 233 (U.S. Dist. 1981).

37 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The young Civil Engineer with his diploma and precise instruments feels it beneath his dignity to get down to earth and scratch around and hunt and look until he finds the exact points, and then run backward and forward until he finds the true line and true variation from point to point and accept it as it is on the ground regardless of all scientific calculations and then be governed accordingly; and bear in mind that this alone constitutes a true retracement and correct survey.

E.E. Todd, Letter to J.M. Faircloth, dated August 16, 1946.

38 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"I wish young surveyors could feel the joy I have felt by finding the proof as a section corner I had off and on looked for twenty-five years though I had been close to it all the time."

E.E. Todd, Letter to J.M. Faircloth, dated August 16, 1946.

39 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The surveyor analyzes the evidence, and decides, on the basis of laws of surveys and court decisions, what weight is to be given to each fact, and how this will guide the resurvey. These decisions are subject to revision as new evidence is discovered. Most disagreements between surveyors arise from failure to find all available evidence."

Sipe, Henry F., *Compass Land Surveying*, 1974, McClain Printing Company, Parsons, West Virginia, at 115.

40 **DILLEHAY v. GIBBS**

Tennessee Court of Appeals
No. M2010-0170-COA-R3-CV
June 16, 2011

41 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

V. MONUMENTS ARE THE PHYSICAL MANIFESTATION OF THE TRUE INTENT OF THE GRANTOR AND THE GRANTEE

The only reason monuments have their superior standing is that the courts generally assume that they are the physical manifestation of intent.

42 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Purchasers of town lots have a right to locate them according to the stakes which they find planted and recognized, and no subsequent survey can be allowed to unsettle their lines."

Flynn v. Glenny, 17 N.W. 65 (Mich.1883). Opinion by Cooley

43 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The question afterwards is not whether the stakes were where they should have been in order to make them correspond with the lot lines as they should be if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case they must govern, notwithstanding any errors in locating them."

Flynn v. Glenny, 17 N.W. 65 (Mich.1883). Opinion by Cooley

44 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Where a plat delineates an actual survey, the survey rather than the plat fixes the location and the boundaries of the land. The plat is a picture, the survey the substance. In a conveyance referring to such plat, the lot bounded by the lines actually run upon the ground is the lot intended to be conveyed."

Neeley v. Maurer, 195 P.2d 628 (Wash.1948).

45 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The plat may be all wrong, but that does not matter if the actual survey can be shown. Thus, where there is a dispute as to the boundary line between a street and the abutting lots, the original survey will control the recorded plat. Where a surveyor of the land marks the division lines on the ground by monuments, such lines control calls and distances indicated on his map."

Neeley v. Maurer, 195 P.2d 628 (Wash.1948).

46 **JEFF'S 10 COMMANDMENTS on**

RETRACEMENT

"Parol evidence is admissible to show the position of the monuments and boundary marks mentioned in a deed."

DD&L v. Burgess, 753 P.2d 561 (Wash.App.1988).

47 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"In cases of conflicting calls, the priority of calls is: (1) lines actually run in the field, (2) natural monuments, (3) artificial monuments, (4) courses, (5) distances, (6) quantity or area."

DD&L v. Burgess, 753 P.2d 561 (Wash.App.1988).

48 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Where it is shown by competent evidence that a monument does not accord with a survey or plat, the monument as established on the ground must control."

DD&L v. Burgess, 753 P.2d 561 (Wash.App.1988).

49 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"If the property is resurveyed, the resurvey must rediscover where the original surveyors placed the boundaries rather than determine where new and modern surveys would place them."

DD&L v. Burgess, 753 P.2d 561 (Wash.App.1988).

50 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The surveyor who is attempting to relocate a tract of land must remember that the original survey is presumed to be absolutely correct, no matter how inaccurately the work may have been done. Thus, wherever an original corner can be found, that corner shall be considered correctly located."

Clark, Frank Emerson, *Fundamentals of Law for Surveyors*, 1939, International Textbook Company, Scranton, Penn. at 23.

51 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"A basic rule is that boundaries are controlled, in descending priority, by monuments, courses, distances, and quantity, unless this priority produces absurd results. The physical disappearance of a monument does not end its use in defining a boundary if its former location can be ascertained."

Therault v. Murray, 588 A.2d 720 (Me.1991).

52 **LARSEN v. RICHARDSON**

MONTANA SUPREME COURT
2011 MT 195
August 16, 2011

53 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

VI. RETRACEMENT SURVEYING IS LARGELY AN EVIDENTIARY EXERCISE,
NOT A MEASUREMENT TASK

An "original survey" is a measurement and math task; the object being to precisely set out new lines in accordance with the intent of a common grantor. A "retracement survey" is not dependent on measurements; the object being to find where the lines have become established on the ground.

54 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"In resurveying a tract of land according to a former plat or survey, the surveyor's only function or right is to relocate, upon the best evidence obtainable, the corners and lines at the same places where originally located by the first surveyor on the ground. ... If the original corners can be found, the places where they are originally established are conclusive without regard to whether they are in fact correctly located."

Gilbert v. Geiger, 747 N.W.2d 188 (Wisc.App.2008).

55 **BOAK v. BEAVER**

Circuit Court of Meade County
46th Judicial Circuit - Kentucky
Civil Action No. 10-CI-00269
September 10, 2015

56 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"Mr. Smith testified that when a surveyor is required to re-trace a survey, he is required to first find the line and then to measure it. A retracement of the survey does not mean that one measures to create the line, because the line is already there. Retracement surveys require the surveyor to find the line and then to measure it."
Boak v. Beaver, Civil Action No 10-CI-00269 (KY Cir.Ct.2015).

57 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

VII. THE RESOLUTION OF ANY BOUNDARY PROBLEM IS A TWO-PART QUESTION:
WHAT IS THE BOUNDARY AND WHERE IS IT LOCATED?

The legal question is "what is the boundary?" the factual question is "where is it located on the face of the earth?"

58 **JEFF'S 10 COMMANDMENTS on**

RETRACEMENT

"The question of what is a boundary line is a matter of law, but the question of where a boundary line, or a corner, is actually located is a question of fact."

Walleigh v. Emery, 163 A.2d 665, 668 (Pa.Super.Court. 1960)

59 **McGHEE v. YOUNG**

Florida Court of Appeals

Fourth District

606 So.2d 1215

October 7, 1992

60 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

VIII. ANSWERING THE LOCATION QUESTION IS ESSENTIALLY A DETERMINATION OF OWNERSHIP LIMITS

The location of the property on the ground, is the identification of the limits of ownership. This is not a title or legal question; this is a factual question of location.

61 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"A survey of a description does not determine title to land but seeks to find and identify the land embraced within the description."

Gilbert v. Geiger, 747 N.W.2d 188 (Wisc.App.2008).

62 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

"The mere matter of the locating the boundary of lands, however, does not involve the title. It relates only to the limit to which the land covered by the title extends."

Shaw v. State, 28 So. 390 (Ala.1899).

63 **JEFF'S 10 COMMANDMENTS on
RETRACEMENT**

There are two things the public knows about land surveyors:

- Land surveyors are those people standing on the side of the road taking pictures; and
- Land surveyors determine where their property lines is located.

64 **JONES v. GRESHAM**

Mississippi Court of Appeal

965 So.2d 581

August 21, 2007

65 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

IX. THE BOUNDARY ESTABLISHMENT DOCTRINES ARE THE SURVEYORS TOOL-KIT FOR RENDERING WELL-REASONED OPINIONS ON THE LOCATION QUESTION

"In cases of disputed boundary, all evidence, whether documentary or parol, which bears upon the point in issue and which is not inadmissible on general principles, may be received in evidence, including records of original proprietors, their plans and maps and the location of lands by ancient settlers"

Pounders v. Nix, 130 So. 537 (Ala.1930).

66 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

There are two types of Uncertainty:

1. Subjective Uncertainty, and
2. Objective Uncertainty.

67 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

The Boundary Establishment Doctrines:

- Adverse Possession – Title and Location Doctrine
- Common Grantor Doctrine – Location
- Doctrine of Monuments - Location
- Original Surveyor/Following Surveyor – Location
- Acquiescence – Location
- Oral Agreement – Location
- Practical Location – Location
- Repose – Location
- Estoppel – Location
- Junior/Senior Conveyances – Location Issue

68 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

X. THE SURVEYOR IS DE FACTO JUDGE AND JURY OVER THE DETERMINATION OF BOUNDARY LINES

"The Surveyor in the field has no opportunity to consult authorities, to counsel with others, or hold under advisement for subsequent adjudication. He must think and act for himself, and that quickly and firmly. In the discharge of his duties he combines the three-fold character of attorney, jury and judge."

Enos, A.Z., *The Early Surveyors and Surveying in Illinois*, 1891, Springfield Printing Company, Springfield, Illinois at 7.

69 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"Surveyors are not and cannot be judicial officers, but in a great many cases they act in a quasi-judicial capacity with the acquiescence of the parties concerned; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions."

Cooley, Thomas M., *The Judicial Functions of Surveyors*, reprinted in *Surveying and Mapping*, April-June 1954, Vol.XIV, No.2, pages 161-168.

70 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"In an old settled country, the principal work of the surveyor is to retrace old

boundary lines, find old corners, and relocate them when lost. In performing this duty, he exercises, to a certain extent, judicial functions. He usually takes the place of both judge and jury, and acting as arbiter between adjoining proprietors, decides both the law and the facts in regard to their boundary lines. He does this not because of any right or authority he may possess, but because the interested parties voluntarily submit their differences to him as an expert in such matters, preferring to abide by his decisions rather than go to law about it."

Hodgeman, F., M.S., C.E., *A Manual of Land Surveying*, The F. Hodgman Co., Climax, Mich. 1913, at Page 289.

71 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"When a surveyor is employed to establish the position of a point or line in which two or more persons are interested he should act as an honorable, unprejudiced party and seek to find the true position, regardless of consequences. ... It is therefore of the utmost importance that the surveyor should act in the same manner as does a judge on the bench rather than as a partisan employee of one of the persons concerned. By performing his duties in this way, the surveyor makes friends and also gains the reputation of being just."

Clark, Frank Emerson, *Fundamentals of Law for Surveyors*, 1939, International Textbook Company, Scranton, Penn. at 1.

72 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor."

Williams & Onsrud, *What Every Lawyer Should Know about Title Surveys*, circa 1986.

73 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The surveyor makes so-called quasi-judicial decisions when he decides such items as a stone is the original stone, that a fence intersection is the best evidence of an obliterated corner, or that a north bearing in a description meant parallel to the east boundary of the section. Most of these decisions are never questioned, and if so never got to court, and become final."

Dean, Darrell R., Jr., and John G. McEntyre, "Establishment of Boundaries by Unwritten Methods and the Land Surveyor," *ISPLS Surveying Publication Series*, circa 1974, page i.

74 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The surveyor therefore makes the final decision in most boundary cases. In reality these are final judicial decisions. The only factor which makes them quasi-judicial is that they are subject to review and possibly changed by the courts if a case goes to court."

Dean, Darrell R., Jr., and John G. McEntyre, "Establishment of Boundaries by Unwritten

Methods and the Land Surveyor," ISPLS Surveying Publication Series, circa 1974, page i.

75 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

The judicial system we inherited from England recognized two types of judges:

- The Law Judge, and
- The Equity Judge.

76 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The object of the suit, therefore, is to ascertain the true boundary line between the contiguous estates, and not to try the question of title on either side of the boundary. All that a survey does is to establish the line, and it does not determine the title to the real estate."

Krause v. Nolte, 75 N.E. 362 (Ill.1905).

77 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"The object [of a survey] is not to try the question of title on either side of the line, but to mark the place of the old line, where the ancient monuments are gone. [Similarly a] court of equity will not try title to land in a suit to establish boundaries. This question, being purely legal, was one for the courts of law, assisted as they are in respect to the findings of fact by a jury."

Krause v. Nolte, 75 N.E. 362 (Ill.1905).

78 **JEFF'S 10 COMMANDMENTS on RETRACEMENT**

"Law and equity do not undertake to do the same things. In equity the object of the bill is to ascertain and fix the boundaries, without reference to the possession, and without affecting any legal rights that either of the parties may have acquired. ... It may be asked, of what avail is it to do this, if no conclusion follows as to title or possession? But this is a question with which we have nothing to do, as it affects the wisdom of the law."

Krause v. Nolte, 75 N.E. 362 (Ill.1905).

79 **A NEW PRACTICE MODEL**

10 Steps to a New Practice Model to Save Traditional Land Surveying

80 **A NEW PRACTICE MODEL**

1. DIFFERENTIATE BETWEEN GOOD PRACTICE AND BAD

We must differentiate between good surveying practice and bad practice. In other words, Results Matter.

81 **A NEW PRACTICE MODEL**

Differentiate Between Good Practice and Bad:

- We would do well to understand the difference between accurate results and precise measurement.

82 **A NEW PRACTICE MODEL**

A New Practice Model is Already Out There:

- Have you really considered the requirements of the 2016 ALTA/NSPS Minimum Standards?

83 **2016 MINIMUM STANDARDS**

Sec. 1. Purpose - ... For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client, the title company, the lender, and the surveyor professionally responsible for the survey. [Emphasis added.]

2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Sec. 1, Para. 2. Effective Date of Feb. 23, 2016.

84 **2016 MINIMUM STANDARDS**

Sec. 1. Purpose

... In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats and maps that are of a professional quality and appropriately uniform, complete and accurate. [Emphasis added.]

2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Sec. 1, Para. 3. Effective Date of Feb. 23, 2016.

85 **2016 MINIMUM STANDARDS**

Sec. 1. Purpose

... To that end, and in the interests of the general public, the surveying profession, title insurers and abstracters, the ALTA and the NSPS jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/NSPS Land Title Surveys. A complete 2016 ALTA/NSPS Land Title Survey includes: ...

[Emphasis added, and a list of criteria follows.]

2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Sec. 1, Para. 3. Effective Date of Feb. 23, 2016.

86 **2016 MINIMUM STANDARDS**

Sec. 3. D. Boundary Resolution - The boundary lines and corners of any property being surveyed as part of an ALTA/NSPS Land Title Survey shall be established and/or retraced in accordance with appropriate boundary law principles governed by the set of facts and evidence found in the course of performing the research and fieldwork. [Emphasis added.]

2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, Section 3.D.

87 **2016 MINIMUM STANDARDS**

Sec. 3. E. iii. Measurement Standards - ... Relative Positional Precision is a measure of how precisely the surveyor is able to monument and report those positions; it is not a substitute for the application of proper boundary law principles. A boundary corner or line may have a small Relative Positional Precision because the survey measurements were precise, yet still be in the wrong position (i.e. inaccurate) if it was established or retraced using faulty or improper application of boundary law principles. [Emphasis added.]

2016 *Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys*, Sec.3.E.iii.

88 **2016 MINIMUM STANDARDS**

Sec. 7. Certification –

This is to certify that this map or plat and the survey on which it is based were made in accordance with the 2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items of Table A thereof. The fieldwork was completed on _____. [Emphasis added.]

2016 *Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys*, Sec.3.E.iii.

89 **A NEW PRACTICE MODEL**

An Evidentiary Exercise, Not a Measurement Task:

- We need true "Standards of Practice," not the technical standards we currently have.
- We need recognize that the survey of property is an evidentiary exercise, not a measurement task, and our standards of practice need to reflect this.
- We have to define the standard of care in our standards of practice.
- And we need to understand that the preponderance of the best available evidence is the evidentiary standard.

90 **A NEW PRACTICE MODEL**

"I have been led to adopt in my own work the 'Principle of Cumulative Evidence.' It seems that, either rightly or wrongly, it is incumbent on the surveyor to collect all the evidence in each case and to carry his work along the lines of the preponderance of probability. In nearly all cases, while some of the data are either ambiguous or even conflicting, there is usually a large preponderance of evidence which point more or less clearly to one solution of the problem, and my own experience, containing some few examples, leads me to believe that this generally indicated solution is probably the right one."

Mulford, A.C., "Boundaries and Landmarks," 1912, D.Van Nostrand Co., New York, at 42-43.

91 **A NEW PRACTICE MODEL**

Standard of Care:

- As true professionals, we have the privilege of liability. If not, we are mere technicians.

92 **A NEW PRACTICE MODEL**

“Since we as surveyors are liable, one of the greatest deterrents to substandard work is this liability. While liability to the individual may be considered a disadvantage, it is an advantage to a profession as a whole. Without liability, I fear that those willing to do poorer work for less money would soon ruin the professional standing of all land surveyors. And so I say, professional liability is a privilege tending to prove the land surveyor’s professional standing.

Brown, Curtis M., *The Professional Status of Land Surveyors*, 1961, “Surveying and Mapping,” Vol. XXI, No. 1, at 63-71.

93 **A NEW PRACTICE MODEL**

Surveying Property:

- After defining the standard of care, we have to define what it means to survey property.
- Then, you are either surveying property or you are doing something else.
- How about some true in advertising?

94 **TRUTH IN ADVERTISING**

Deed-Staker
or
Boundary Surveyor?

95 **A NEW PRACTICE MODEL**

Alabama Statutes

Title 8. COMMERCIAL LAW AND CONSUMER PROTECTION

Chapter 19. DECEPTIVE TRADE PRACTICES

§ 8-19-5. Unlawful trade practices

The following deceptive acts or practices in the conduct of any trade or commerce are hereby declared to be unlawful: ...

96 **A NEW PRACTICE MODEL**

(2) Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.

97 **A NEW PRACTICE MODEL**

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. ...

(9) Advertising goods or services with intent not to sell them as advertised. ...
(27) Engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce.
Tennessee's Act is found at: § 47-18-104. *Unfair or deceptive acts prohibited.*
Tennessee Statutes.

98 **ADVERTISING DEFINED**

"To advise, announce, apprise, command, give notice of, inform, make known, publish. To call a matter to public attention by any means whatsoever. Any oral, written or graphic statement made by the seller in any manner in connection with the solicitation of business."
Black's.

99 **A NEW PRACTICE MODEL**

2. DEFINE WHAT IT MEANS TO SURVEY PROPERTY
You are either surveying property or you are doing something else.

100 **A NEW PRACTICE MODEL**

Here is the Problem:
NCEES Model Law
Licensure of Engineers and Surveyors
110.20 Definitions
B.4. Practice of Surveying—The term "Practice of Surveying," as used in this Act, shall mean providing, or offering to provide, professional services Professional services include ... information related to any one or more of the following: ...
c. Locating, relocating, establishing, reestablishing, or retracing property lines or boundaries of any tract of land, road, right of way, or easement

101 **A NEW PRACTICE MODEL**

Here is the fix:
NCEES Model Rules
Introduction
210.20 Definitions
x.i. The terms "locating," and "establishing" used in the NCEES Model Law, Section 110.20 para. B.4.c., refer to an "original survey" of property being conducted for the owner(s) of a parent tract of land in order to:
a. delineate new property lines for a subdivision of the parent tract;

102 **A NEW PRACTICE MODEL**

Here is the fix:
210.20 Definitions
b. re-configure existing property lines under common ownership for a new

subdivision of property; or

- c. subdivide a section or portions of a section of land as a part of the Public Land Survey System (PLSS), that is under common ownership, where no such subdivision has ever been previously conducted on the ground.

The purpose of an original survey is to create an original subdivision or re-subdivision of land under common ownership.

b.

103 **A NEW PRACTICE MODEL**

Here is the fix:

NCEES Model Rules

Introduction

210.20 Definitions

x.ii. The terms "relocating," "reestablishing" and "retracing" used in the NCEES Model Law, Section 110.20 para. B.4.c., refer to a "retracement survey" of existing property lines or the boundaries of any tract of land in order to determine where the property lines have become established on the ground, either through a previous original survey of the property lines being retraced or by the application of appropriate boundary law principles governed by the facts and evidence found in the course of performing the retracement survey.

104 **A NEW PRACTICE MODEL**

Here is the fix:

210.20 Definitions

A proper retracement survey shall include, but is not limited to:

- a. appropriate record and field research;
- b. gathering and evaluating the best available evidence indicating where the property lines being retraced have become established on the ground;
- c. if necessary, interviews with local landowners familiar with the property boundary lines in the community; and

105 **A NEW PRACTICE MODEL**

Here is the fix:

210.20 Definitions

- d. reporting these findings on an appropriate map of survey indicating the corners and the lines retraced, the monuments found or set during the course of the survey, and an explanation of the boundary law principles employed by the surveyor in making such determination.

Any survey of property includes setting or resetting appropriate boundary monumentation, unless appropriate monumentation already exists.

106 **A NEW PRACTICE MODEL**

Surveying Property, or Doing Something Else:

- You are either doing that, or your are doing something else.
- If you are doing something else, you are not allowed to set monuments.

107 **A NEW PRACTICE MODEL**

Surveying Property, or Doing Something Else:

Forensic Survey - The application of surveying science to the elucidation of questions before courts of law and equity. Forensic surveys are not boundary surveys and, as such, no opinions are given as to the status of property lines or property corners, nor are property corners established or re-established as a result. The most common utilization of forensic surveys is for courtroom exhibits to advance legal theories, to support facts to be proven and to buttress expert witness testimony

108 **A NEW PRACTICE MODEL**

3. DEVELOP A NEW PRACTICE MODEL

We need a New Practice Model that will level the playing field and increase our success rate.

109 **A NEW PRACTICE MODEL**

A New Practice Model:

- Fence-Line Surveyor or Deed-Staker, works the same either way.
- In the vast majority of cases, there is always a status quo.
- Conduct your survey and you will either be maintaining the status quo or your will not.
-

110 **A NEW PRACTICE MODEL**

Maintain the Status Quo:

- If the results of your survey maintains the status quo, there is nothing left for you to do other than finish your survey and move on.
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111 **A NEW PRACTICE MODEL**

Upset the Applecart:

- If the results of your survey are going to upset the applecart (break the status quo), then before the survey is completed the following actions must be taken:
-

112 **A NEW PRACTICE MODEL**

Action List:

1. Consult all available boundary location doctrines to see if any apply that will maintain the status quo. If not then,
2. Explain to your client why you feel you must upset the status quo;
3. Then have a conference with your client and any other affected landowner;
4. Explain to all affected parties why you feel you must change the status quo. From this conference will come one of three possible outcomes:

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113 **A NEW PRACTICE MODEL**

Three Possible Outcomes:

1. They will agree with you.
2. They will disagree with you.
3. They tell you to go away.

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114 **A NEW PRACTICE MODEL**

They Agree with You:

- At this point your job becomes to help them memorialize the agreement and finish the survey.

115 **A NEW PRACTICE MODEL**

They Disagree with You:

- They disagree with you and want to maintain the status quo. At this point your job becomes to help them memorialize their agreement to maintain the status quo no matter how much you want to upset the applecart.

116 **A NEW PRACTICE MODEL**

They Tell you to Go Away:

- At this point you go away. No harm no foul.

117 **A NEW PRACTICE MODEL**

4. OUR MANTRA MOVING FORWARD MUST BE:

“MAINTAIN THE STATUS QUO.”

Rightly seen, the Land Surveyors role in society is that of Stewards of the Nation’s Property boundaries. As such, we should be focused on maintaining the status quo as opposed to upsetting the applecart.

118 **A NEW PRACTICE MODEL**

Stewards of the Nation’s Property Boundaries:

“I see passion for this profession in the vast majority of surveyors I encounter.

Without it, they wouldn’t be land surveyors. You could certainly make more money doing something else. We’ve got to channel that passion into why we do what we do.

That discussion has to start with the word ‘because.’”

Lucas, Jeffery N. , “Why? Because...” P.O.B. Magazine, August 2014.

119 **A NEW PRACTICE MODEL**

Stewards of the Nation’s Property Boundaries:

“Because land surveyors are the stewards of the Nation’s property boundaries. That’s why.”

Lucas, Jeffery N. , “Why? Because...” P.O.B. Magazine, August 2014.

120 **A NEW PRACTICE MODEL**

Stewards of the Nation's Property Boundaries:

- Recognize first what our role in society is. We are the Stewards of the Nations Property Boundaries.
- New mantra: "MAINTAIN THE STATUS QUO."

121 **A NEW PRACTICE MODEL**

5. STANDARD CONTRACTS FOR BOUNDARY SURVEYING SERVICES

We need standardized contracts, like the architects have, when performing property boundary survey. This will help level the playing field and tend to ensure that all surveyors are all working off the same page.

122 **A NEW PRACTICE MODEL**

Standard Contracts

- Defines the services to be performed
- Professional services—the rendering of a well-reasoned opinion on the location question
- Contingency clause
- Termination clause
- Addresses guarantees and warranties
- Limitation on liability
- Etc.

123 **A NEW PRACTICE MODEL**

6. A TIERED LICENSE

A "Masters" license for boundary surveying, whereby only "Master Property Surveyors" can perform boundary surveying, mark boundary lines, set & rehabilitate boundary corners.

124 **A NEW PRACTICE MODEL**

Master Property Surveyor (MPS)

- Boundary Surveys
- Right-of-Way Surveys

Land Surveyor (LS)

- Topographic Surveys
- Hydrographic Surveys
- Geodetic Surveys
- Construction Staking
- Record (As-Built) Surveys
- Quantity Surveys

125 **A NEW PRACTICE MODEL**

7. A MULTI-JURISDICTIONAL LICENSE

Allow the Master Property Surveyor to operate across jurisdictional boundaries.

- 126 **A NEW PRACTICE MODEL**
Master Property Surveyor (MPS)
- Operate Across Jurisdictional Boundaries with Similar Land Tenure Systems
 - This Would Help with our Critical Mass Problem
 - This Would Help to Insure that Only the Qualified were Able to Practice Property Boundary Surveying

- 127 **A NEW PRACTICE MODEL**
8. WE WILL NEED TO DEVELOP NEW SKILLS MOVING FORWARD
In order to create a successful New Practice Model, focused on solving people's problems as opposed to just finding them, are going to need new skills moving forward.

- 128 **A NEW PRACTICE MODEL**
Needs Moving Forward:
- ADR Training and Skills.
 - Standardized Contracts.
 - Contingency and Termination Clauses.
 - Establishment Doctrines and How They Apply.
 - Various Vehicles for Memorializing Boundary Agreements/Adjustments.
 - Legislative Efforts.
 - Revised Standards of Practice.

- 129 **A NEW PRACTICE MODEL**
9. WE NEED TO CREATE A TIPPING POINT THAT WILL WIN PRACTITIONERS OVER TO THE NEW MODEL
A Tipping Point is what got us into the mess we are currently in, we need to go back to the way surveying was once practiced—before Brown.

- 130 **A NEW PRACTICE MODEL**
How do we Create a Tipping Point?
- How can we go from our current failed practice model to a new practice model in keeping with why we do what we do?

- 131 **A NEW PRACTICE MODEL**
10. WE NEED TO ADVERTISE OUR SERVICES BASED ON THE NEW PRACTICE MODEL
A Tipping Point is what got us into the mess we are currently in, we need to go back to the way surveying was once practiced—before Brown.

- 132 **A NEW PRACTICE MODEL**
Our 30 Second Sound-Bite:
"Buying a home, making improvements, putting up a fence? Do you know where your property lines are located? Land surveyors are the stewards of the nation's property boundaries. We ensure the American Dream of real property ownership by providing

reliable property boundary location services. No other professional can do that. Do not entrust your most valuable asset to chance. Call a licensed land surveyor today. And when you do, make sure they are a member of the National Society of Professional Surveyors.”

133 **A NEW PRACTICE MODEL**

START WITH “WHY”

“People don’t buy what you do, they buy why you do it.” Simon Sinek

The “why” is your passion—you do what you do because of why you do it, not the reverse.

134 **A NEW PRACTICE MODEL**

Doing Nothing is not an Option if we are to Remain Relevant well into the 21st Century.