



**By Joel Leininger, LS**

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## Can Retracements Be Confidential?

**D**o your clients have a right to expect that the survey you conduct for them will be confidential? Let's assume for a moment that mandatory survey recording laws did not exist (and indeed, they do not exist in most areas) and that no other obligation to divulge the results of the investigation existed. Can clients restrict access to our work?

I've had several clients ask me not to place markers at property corners until I have pointed out to them where the corners fell. Although most would not admit their reasoning, it seemed clear to me that their delay was to deny their *neighbor* knowing where the line fell, unless they themselves liked the location. Of course, we have no jurisdiction over our clients' motives, and even if we did, clients are very capable of removing markers after we drive off. Nevertheless, those clients at least presumed a right of disclosure (or not).

Other professions clearly have confidentiality between client and provider as a core tenet of the profession's *ethos*. Attorney-client privilege is such an inviolable trust that the lawyer can lose his license for breaching it. Doctors, accountants, the clergy, financial planners, etc., all have a client's privacy as a paramount objective. But does it extend to us?

I think not, at least not automatically. Clearly we have the ability to enter into confidentiality agreements with clients (or others) who wish to ensure that their private affairs are not exposed merely by hiring a surveyor. And, in some instances, sensitive negotiations can be endangered by the premature disclosure

of intentions. In litigation, disclosing the strategy to the other side is a surefire way to not get hired by that attorney again.

### The Ethics of Disclosure

Some surveyor codes of ethics dictate that the licensee must "hold the affairs of his client in confidence." Perhaps someone can write in and tell us where "affairs" stop and "property" starts. I see property as wholly within people's

employed by the firm? How about after the surveyor leaves for another firm? If clients own (and control) the survey, who owns it when they die? Who "owns" the data anyway? For what, exactly, did the client pay?

Sticky, sticky, sticky. The very thing that separates our business from that of other professions—our heavy reliance on records—is the thing that complicates privacy in years out. Think about it:

**How can our work be private when we often monument our results?**

affairs. Most folks agree with me—just try and take some property without their permission. And if property is within that sphere, the retracement of the limits of that property must necessarily be a part of those affairs. So, that is to be held in confidence?

To assume that our dealings—with or on behalf of clients—are private is to impose several constraints on our future use of that survey. First, can we consider that data in a later survey in the vicinity? Can we separate the survey from its supporting data? Can the control be re-used in the future? Must we relocate all the evidence previously gathered? Second, who at the firm would be authorized to later view the survey? Only the surveyor who signed the finished work, or anyone

doctors have no need of patient records to treat other patients. Obviously accountants do not need to consult the files of one client to assist another. But we do. What happens then?

### Agreements

As for those confidentiality agreements, we would do well to examine them carefully before signing. In most instances, the need for privacy is a temporary one, just until an anticipated event takes place. Inserting time-limiting language in the agreement can mitigate most of the concerns outlined above (unless, of course, the time specified is measured in decades!). Our firm has threatened to refuse work because of overly-broad

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confidentiality language we felt would adversely impact our future operations in an area. Explaining to the client how the quality of their project will be enhanced by our consideration of previous work in an area usually convinces them of the perpetual utility of records.

Beyond all that, how can our work be presumed confidential when we often monument our results? The very nature of monumentation is to put others *on notice*; notice is repugnant to confidentiality. The recordation of our plats is another form of notice. On one hand we piously claim to safeguard our client's secrets, while on the other we document their holdings in the most accessible and permanent of repositories—the land records. Frankly, given the public nature of our results, it seems hard to assert privacy with a straight face.

But, some surveyors do. I have had surveyors balk at releasing information on former surveys because their clients had not authorized the release, even in instances when the surveys were decades old. In some cases, both the client and the original surveyor were dead. We know these are merely ploys to avoid releasing the data. A former boss of mine (now dead) routinely took that position. Looking back, I realize that no agreement ever existed between him and his clients curtailing access to the data. He just didn't want to give the records out, period. What goes around, comes around. Since our firm now has his records, they are available to all. Come and get 'em.

## **The Big Picture**

Although it is not our place to decide what should be and what should not be important to our clients, we have a duty to the public in preserving (and making available) information on property boundaries. In our society's form of land ownership, that of an interconnected fabric of holdings, the very interconnectedness implies that others have an interest in knowing property limits. Sadly, because of the threats confronting on-the-ground evidence of those holdings, the preservation of those locations is a central task for us. We surveyors are stewards of that knowledge, holding it in trust for society at large. Few clients begin conversations with us with that in mind, but we must never forget it.

Confidentiality flies in the face of that. Just between you and me. *AS*