



# White Paper

## A Land Surveyor's Guide To Defamation and Free Speech

Part 8 of 9

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## Table of Contents

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- I. Introduction
- II. The Tort of Defamation in California
  - A. The Definition of Defamation
  - B. The Definition of Libel
  - C. The Definition of Slander
  - D. Defenses To Defamation
    - 1. Truth/Opinion
      - A. The Surveyor As An Expert
    - 2. Public Figures/Public Forum – Generally A Different Standard
    - 3. Absolute and Qualified Privileges
- III. Anti-Slapp Motions
- IV. Confidentiality Agreements
- V. Conclusion
- VI. Disclaimers
- VII. Appendix A – Copy of California Code of Civil Procedure § 425.16 (with annotations)
- VIII. Appendix B – Copy of California Code of Civil Procedure § 425.17 (with annotations)

### ***Mission Statement***

*To promote the public’s perception of land surveying and to support all efforts by Professional Land Surveyors to elevate the stature of the profession. As an advisory organization, our purpose is to research, summarize, debate, and publish our findings on various topics relating to the principles and applications of the Professional Land Surveyors Act and the California Subdivision Map Act.*

*Adopted: June 12, 2009*

## I. Introduction

Pursuant to the First Amendment of the United States Constitution, the California Constitution, California Statutes and California case law, most speech is protected. This means that surveyors are usually free to provide professional non-negligent opinions and state accurate facts regarding the boundaries and conditions of real properties they are asked to survey. In most circumstances, the honest, non-negligent<sup>1</sup> opinion of a surveyor given (in the absence of malicious intent) is protected against liability. Similarly, verifiable facts stated by the professional surveyor are always protected speech immune from lawsuits. This holds true whether the surveyor is acting to survey a property for a client or if the surveyor is acting as an expert witness for either a plaintiff or defendant in litigation.

In this White Paper, the tort of defamation (both libel and slander) is discussed as well as the land surveyor's professional responsibilities of honesty, accuracy and the requisite absence of any malicious intent. First Amendment protections and privileges for surveyors against litigation by unhappy plaintiffs or defendants (in the case of expert witness testimony) are discussed including defenses to accusations of defamation, special circumstances dealing with public figures, special motions to strike the complaints of plaintiffs (called anti-SLAPP motions) and available privileges (absolute and qualified).

## II. The Tort Of Defamation In California

### A. The Definition Of Defamation

Defamation of character involves wrongfully hurting a person's good reputation. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases* (11<sup>th</sup> Ed. South-Western Cengage Learning 2009), pg. 126. The law imposes a general duty on all persons to refrain from making defamatory statements of fact<sup>2</sup> about others. *Id.* [emphasis in the original].

The tort of defamation also arises when a false statement of fact is made about a person's product, business or legal ownership rights. *Id.* False statements that represent something as a

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<sup>1</sup> The determination of "non-negligent" is of paramount consideration. If the surveyor offers opinions that involve his own negligent survey work or the negligent work of others (as an expert witness), he can rightfully be held liable for damages. As stated in the LSACTS White Paper WP 2010-002, negligence results from a breach of the standard of care (reasonable man doctrine). Arguments for and against negligent performance focus on the duty, skill, and knowledge ordinarily possessed by reputable surveyors currently practicing in a similar locality and under similar circumstances as compared to the surveyor in question. A failure of the surveyor in question to fulfill these duties to the same extent as would be done by a reputable surveyor in a similar locality and under similar circumstances is deemed to be negligence. In California, the California Code of Regulations, Title 16, Division 5, §400-476 define negligence in connection with the practice of land surveying. See also, Business and Professions Code, Section §8780. Section §404 (w) states "...negligence" as used in Sections 6775 and 8780 of the Code is defined as the failure of a licensee, in the practice of professional engineering or land surveying, to use the care ordinarily exercised in like cases by duly licensed professional engineers and land surveyors in good standing".

<sup>2</sup> It is usually, but not always, a requirement that this claim be false. In the case of public disclosure of private facts and the information is not of public concern, truth is not a defense for invasion of privacy.

fact are **not protected** by the First Amendment and can lead to liability by the person making the statement. *Id.*

**Defamation** is defined as:

“an intentional false communication either published or publically spoken, that injures another’s reputation or good name. Holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community; may be criminal as well as civil. Includes both libel and slander.”

Black’s Law Dictionary (6<sup>th</sup> ed. 1994).

Defamation includes statements that expose a person to contempt, hatred, ridicule or obloquy. *Id.* Also included are unprivileged communications of false statements, which naturally and proximately result in injury to another person. *Id.*

The basis of the tort of defamation is the **publication** of a statement that holds an individual up to contempt ridicule or hatred. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 126. “Publication” means that the defamatory statements are communicated (either intentionally or accidentally) to persons other than the defamed party (i.e. to a third party). *Id.* Defamatory statements made via the Internet are also actionable. *Id.*

Therefore, surveyors must be careful to provide accurate<sup>3</sup>, factual survey results, in both verbal and written reports, recognizing that these statements may affect the condition and marketability of real property or influence ongoing litigation (in the case of expert witness testimony). When giving professional opinions, surveyors should be clear to state that their comments and analysis is their own “opinion” based on credible and admissible evidence.

Although a representation of opinion is ordinarily not actionable (Witkin, 5 *Summary of California Law, Torts*, supra at § 678, pg. 779), misrepresentations of opinion are actionable where the defendant holds himself out to be specially qualified. *Id.* at § 680, pg. 781-782. The surveyor’s work is often viewed as an expression of professional opinion and may be considered as representations of fact. It only takes one false (intent/intentional is not a criteria) representation of a material fact (encroachment, gap or overlap in title, overlooked evidence i.e. existent monument, adjoining deed) to create a case for defamation, fraud<sup>4</sup> or other causes of action. *Cory v Villa Props.* (1986) 180 CA3d 592, 597 (size and length of lot); *Sodeling v Tomlin* (1959) 170 CA2d 169 (location of boundaries); *Edwards v Sergi* (1934) 137 CA 369 (boundary lines). A surveyor must never represent a false statement as a fact, particularly if that statement will injure a person or their property, and particularly if the statement is made with malicious

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<sup>3</sup> “Accurate” is applied in the context of completeness and conformance with acceptable professional surveying standards, not mathematical accuracy.

intent. A surveyor must not testify or make a statement as a fact that is not qualified or properly evidenced by established and accepted (typically written) procedures. If the surveyor does not follow these guidelines, he/she may be liable for defamation as detailed below.

## **B. The Definition Of Libel**

**Libel** is defined as:

“A method of defamation expressed by print, writing, pictures, or signs. In its most general sense, any publication that is injurious to the reputation of another. A false and unprivileged publication in writing of defamatory material. A maliciously written or printed publication which tends to blacken a person’s reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession.”

Black’s Law Dictionary (6<sup>th</sup> Ed. 1994) [emphasis added]

Similarly defined, libel is a publication which is false, defamatory and unprivileged, and which has a natural tendency to injure or which causes special damage. 5 Witkin, *Summary of California Law, Torts* (9<sup>th</sup> ed. 1988) § 471, pg. 558. California statutes define libel as a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. California Civil Code § 45.

Once a plaintiff has established a defendant’s liability for libel, general damages are presumed as a matter of law. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 127. General damages are designed to compensate the plaintiff for nonspecific harms such as disgrace or dishonor in the eyes of the community, humiliation, injured reputation, and emotional distress. *Id.* These are all damages that are difficult to measure. *Id.* In the case of libel, once liability of the defendant is established and no valid defense is asserted by the defendant, the plaintiff does not need to prove that he/she was actually injured in any quantifiable way in order to recover damages. *Id.*

This is an area where surveyors must take special care. Survey written reports or other written survey documents shared with third persons (i.e. published) that contain inaccurate statements of opinion asserted as facts, statements that are not clearly labeled as opinions and statements made negligently or with malicious intent may subject the surveyor to general damages.

## **C. The Definition Of Slander**

**Slander** is defined as:

“The speaking of base and defamatory words tending to prejudice another in his reputation, community standing, office, trade,

business, or means of livelihood. Oral defamation including the speaking of false and malicious words concerning another, whereby injury results to his reputation.”

Black’s Law Dictionary (6<sup>th</sup> Ed. 1994) [emphasis added]

The essential elements of slander are: (a) a false and defamatory statement concerning another; (b) an unprivileged communication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionable statement irrespective of harm or the existence of special harm caused by the publication. Restatement 2<sup>nd</sup> Torts § 558. Of special interest to surveyors is the concept of “Slander of title” which is defined as a false and malicious statement, oral or written, made in disparagement of a person’s title to real or personal property, or of some right causing him special damage. Black’s Law Dictionary (6<sup>th</sup> Ed. 1994). Slander of title is a complex area and will be addressed separately in another White Paper in this series.

In contrast to cases alleging libel, a plaintiff alleging slander must prove special damages to establish the defendant’s liability.<sup>5</sup> Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 127. The plaintiff must show that the slanderous statement caused him or her to suffer **actual economic or monetary loss**. *Id.* Courts impose this requirement in slander cases because oral statements have a temporary effect. (In contrast, a libelous written statement has the quality of permanence and can be circulated widely). *Id.*

## **D. Defenses To Defamation**

### **1. Truth/Opinion**

Truth is normally an absolute defense against a defamation charge – if the defendant can prove that the allegedly defamatory statements of fact are actually true, normally no tort has been committed. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 127. Therefore, if the statements by a surveyor are actually true, they cannot be held liable for defamation. Generally, a publication must contain a **false statement of fact** to give rise to liability for defamation. *Campanelli v. The Regents Of The University Of California*, supra, 44 Cal. App. 4<sup>th</sup> at 578. [emphasis added] (citing *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4<sup>th</sup> 958, 970).<sup>6</sup> California courts have consistently held that the determination whether a statement constitutes “fact” or “opinion” under pre-*Milkovich*<sup>7</sup> law is an issue of law for the courts to decide. *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal. App. 3d 991, 1002. Statements of opinion, without malice, also provide a defense to defamation. There is no such thing as a false idea. *Campanelli v. The Regents Of The University Of California*

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<sup>5</sup> In the case of “slander per se” (loathsome disease, professional improprieties, serious crime, person engaged in serious sexual conduct), special damages need not be proven. *Id.*

<sup>6</sup> For a private individual not acting as an expert, even if they are objectively unjustified or made in bad faith, publications which are statements of opinions rather than fact cannot form the basis for a libel action. *Campanelli v. The Regents Of The University Of California* (1996) 44 Cal. App. 4<sup>th</sup> 572, 578 (citing *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4<sup>th</sup> 958, 971).

<sup>7</sup>*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 20.

(1996) 44 Cal. App. 4<sup>th</sup> 572, 578 (citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339).

Generally, in litigation, the plaintiff bears the burden of proving that a defendant's statements are false. Furthermore, statements of fact that are not provably false are protected speech. *Weller v. American Broadcasting Companies, Inc.*, supra, 232 Cal. App. 3d at 1000. Under existing federal constitutional law, the court must determine whether the statements that form the basis of a defamation claim; (1) expressly or impliedly assert a fact that is susceptible of being proved false; and (2) whether the language and tenor is such that it cannot reasonably be interpreted as stating actual facts. *Id.* at 1001.<sup>8</sup> Thus, to state a defamation claim that survives scrutiny under the First Amendment, a plaintiff must present evidence of a statement of fact that is provably false. *Milkovitch v. Lorain Journal Co.* (1990) 497 U.S. 1, 20.<sup>9</sup>

Nevertheless, as stated in Section II(A) above, although a representation of opinion is ordinarily not actionable (Witkin, 5 *Summary of California Law, Torts*, supra at § 678, pg. 779), misrepresentations of opinion are actionable where the defendant holds himself out to be specially qualified. *Id.* at § 680, pg. 781-782. Therefore, statements by a surveyor that are professional opinions free from negligence or malice should be protected against charges of defamation.

#### **a. The Surveyor As An Expert**

A surveyor offering opinions as a licensed professional and expert must be cognizant of the legal limits of his/her function and qualifications. Generally, the surveyor acting as a retained expert cannot rely on the absolute privilege as stated in California Civil Code § 47. As stated previously, although a representation of opinion is ordinarily not actionable (Witkin, 5 *Summary of California Law, Torts*, supra at § 678, pg. 779), misrepresentations of opinion are actionable where the defendant holds himself out to be specially qualified. *Id.* at § 680, pg. 781-782. The surveyor's work is often viewed as an expression of professional opinion and may be considered as representations of fact.

“Even when a witness qualifies as an expert, he or she does not possess a *carte blanche* to express any opinion within the area of expertise. For example, an expert's opinion based on assumptions of fact without

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<sup>8</sup> Courts continue to look at the “totality of the circumstances” to determine whether a statement is an opinion or fact. *Global Telemedia Int'l, Inc. v. Doe 1* (C.D. 2001) 132 F. Supp. 2d 1261, 1267. This analysis entails examining the statement in its broad context, which includes the general tenor of the entire work, the subject of the statement, the setting, and the format of the work. *Id.* Then the specific context and content of the statement is examined, “analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation.” *Id.* Finally, the court must determine whether the statement is “sufficiently factual to be susceptible of being proven true or false.” *Id.*

<sup>9</sup> In the case of a private individual, a defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. Rest. 2d, Torts § 566, Comment c. Where a statement of “opinion” on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 1001.

evidentiary support or on speculative or conjectural factors has no evidentiary value and may be excluded from evidence. Therefore, an expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities.”

*Dee v. PCS Property Management, Inc.* (2009) 174 Cal. App. 4<sup>th</sup> 390, 404.

The litigation privilege of California Civil Code § 47, which protects attorneys, judges, jurors, witnesses, and other court personnel from liability arising from publications made during a judicial proceeding, did not apply to an expert witness from suit by his/her former client (“friendly expert witness”) because § 47 does not protect a negligent expert witness from liability to the party who hired him. *Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal. App. 4<sup>th</sup> 392. California precedent does not authorize, and the policies underlying the privilege do not support, its use to protect a negligent expert witness from liability to the party who hired that witness. *Id.* Several policies underlie the privilege. *Id.* at 402. First, it affords litigants free access to the courts to secure and defend their rights without fear of harassment by later suits. *Id.* Second, the courts rely on the privilege to prevent the proliferation of lawsuits after the first one is resolved. *Id.* Third, the privilege facilitates crucial functions of the trier of fact. *Id.* (citing *Abraham v. Lancaster Community Hospital* (1990) 217 Cal.App.3d 796, 813).

The litigation privilege of California Civil Code § 47 may, in limited cases, protect the expert witness when testifying against a party from subsequent lawsuits for defamation. Several cases have applied the litigation privilege to protect statements by an expert witness who functioned *adversely* to the plaintiff. *Id.* at 404 [emphasis added] (citing *ITT Telecom Products Corp. v. Dooley* (1989) 214 Cal.App.3d 307, 316-317 (holding that the privilege protected defendant's former employee who as consultant provided plaintiff with information based on his former employment); *Bernstein v. Alameda etc. Med. Assn.* (1956) 139 Cal.App.2d 241, 245-246 (holding that county medical association expelled physician for ethics violation based on defamatory statements about a pathologist's autopsy report prepared for use in worker's compensation litigation by decedent's wife - privilege protected physician as an expert witness); *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 392- 394 (holding that privilege protected coroner's erroneous report to district attorney from later suit by plaintiff subjected to criminal murder and child neglect charges); *Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 913-916 (holding privilege protected accountant hired by wife to value husband's medical practice in dissolution proceedings despite falsehoods in accountant's report)).<sup>10</sup>

Boundary establishment/determination generally consists of two parts including:

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<sup>10</sup> When there is a good faith intention to bring a suit, even malicious publications “are protected as part of the price paid for affording litigants the utmost freedom of access to the courts, otherwise, *adverse* witnesses would always be fearful of subsequent civil suits and would be extremely hesitant or unwilling to testify.” *Id.* at 405 (quoting *Carden v. Getzoff, supra*, 190 Cal.App.3d at 915). As this reasoning suggests, the litigation privilege does not exist to protect one's own expert witnesses, but to protect adverse witnesses from suit by opposing parties after the lawsuit ends. *Id.*



1. What is the boundary as defined by the California Civil Code and California Civil Procedures (statute of frauds)?, and;
2. Where is the boundary? This question is one of fact. In California, this question is answered by the professional land surveyor. In determining where the boundary is located, the surveyor must consider all available evidence and have an understanding of the legal elements of boundary establishment.

**Example:**

Consider a deed describing a parcel of land as follows: Lot 1 of Tract 12345, was 100' x 100'. The subsequent grants were granted as the East 50' and the West 50' of said Lot 1. A subsequent field survey determined that original underlying Lot 1 to be 105' (east/west) x 100'.

The result is that these two legal descriptions create a title gap between the two properties (each grantee's deed can be established on the ground without infringing on the adjoiner's rights). The surveyor has no authority to determine the "intent" of the original grantor or any other legal boundary doctrine (acquiescence). Improvements, if any, are facts that may lead to the determination of the legal question (under the authority of the court).

To determine the "intent" by closing the title gap or not properly recognizing the title gap is a treacherous leap to a legal determination and may subject the surveyor to the liability for resultant damages. In certain cases, the surveyor can change the circumstances to move the legal question back to a question of fact. For example, if the surveyor was able to find the original grantor and have any interest granted to either or both of the grantees, a Lot Line Adjustment could be filed to reconcile improvements with the conveyance (legal) and the facts (survey).

Negligent opinions by surveyors may be actionable, particularly by their own clients. As a general guideline, a surveyor should look at the Federal Rules of Civil Procedure ("FRCP") Rule 26. When testifying in federal court, FRCP Rule 26 instructs testifying experts, counsel and the courts regarding what an expert witness needs to do in order to testify in a federal case. (Similar instructions exist under California statutes). Specifically FRCP Rule 26 requires a written report and states in pertinent part:

*“(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:*

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;*
- (ii) the data or other information considered by the witness in forming them;*
- (iii) any exhibits that will be used to summarize or support them;*

- (iv) *the witness's qualifications, including a list of all publications authored in the previous 10 years;*
- (v) *a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and*
- (vi) *a statement of the compensation to be paid for the study and testimony in the case.”*

Negligent surveyors place considerable weight on their “opinion” without having evaluated all available evidence. This is dangerous ground. As a rule of thumb, if the surveyor cannot point to the procedure in a textbook, current case law or other written standard, his/her opinion will serve as the noose. The surveyor should consider if a written report would benefit the current, as well as the future users, of the information. As further guidance, FRCP Rule 702 includes the following standard:

*“If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”*

An example of negligent surveyor practices involves rotating a CADD model (drawing) of a record map or metes and bounds description (typically to two found monuments). Other, found monuments, if any, are then called out of position from their “record” location (or worse yet, shown as being in the record position when the contrary is true). No reputable textbook, written standard or case law prescribes this method of boundary “establishment”. In California, rotating record figures violate California Code of Civil Procedure § 2077<sup>11</sup> because it places the

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<sup>11</sup> CCP 2077. (Part 4/Title 6/Ch.1)

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.
2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.
3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.
4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.
5. When tide water is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.
6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

most weight on lesser “record” elements over actual physical monuments. Any opinions (expressed as maps, plats, exhibits) derived from these procedures are very likely negligent.

Another example of negligent surveyor practices involves the establishment of a metes and bounds, deed by exception, deed by area, or similar conveyance document without the surveyor reviewing the adjacent documents for conflicts (such as gaps and/or overlaps).

## **2. Public Figures/Public Forum – Generally A Different Standard**

In general terms, there are two forces that reshape the common law to conform to the First Amendment of the United States Constitution: (1) Whether the plaintiff is a public official or public figure or instead a private figure; (2) Whether the speech at issue is of public concern. 5 Witkin, *Summary of California Law: Torts* (9<sup>th</sup> ed. 1997) § 545, pg. 641. Section 580B of the Restatement of Torts 2d provides that a private person cannot prevail in an action for defamation unless he proves that the defendant was at least negligent regarding the falsity and defamatory character of the communication. 5 Witkin, *Summary of California Law, Torts*, supra at § 534, pg. 623.

Generally, there is a different standard for public figures. Public officials who exercise substantial governmental power and any persons in the public limelight are considered to be public figures. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 128. In general, public figures are considered fair game and false and defamatory statements about them that are published in the press will not constitute defamation unless the statements are made with actual malice. *Id.* To be made with actual malice, a statement must be made with either knowledge of its falsity or a reckless disregard for the truth. *Id.* (citing *New York Times v. Sullivan*, supra, 376 U.S. 254). See also *Reader’s Digest Association, Inc. v. The Superior Court of Marin County* (1984) 37 Cal. 3d 244, 256; *Robertson v. Rodriguez* (1995) 36 Cal. App. 4<sup>th</sup> 347, 359. According to the First Amendment, a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Milkovich v. Lorain Journal Co.*, supra, 97 U.S. at 14-15 (citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254).<sup>12</sup>

The *New York Times* standard<sup>13</sup> also applies to “public figures” who are not “public

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<sup>12</sup> “Section 580A of the Restatement of Torts 2d provides that, in case of a communication published about a person in his capacity as a public official or public figure, the plaintiff must prove, with convincing clarity, that the defendant published the matter with knowledge of or in reckless disregard of its falsity and its defamatory character. . .” *Id.* at pg. 623. Section 566 of the Restatement of Torts 2d further provides that there can be no recovery for a mere expression of opinion that does not carry by implication an expression of defamatory facts. *Id.*

<sup>13</sup> The “*New York Times*” standard (applicable to public figures and matters of public concern) protects false statements of fact as well as opinions (not including expert professional opinions), if made without actual malice; i.e., the privilege exists unless the statements were made with knowledge of falsity or in reckless disregard of the truth. 5 Witkin, *Summary of California Law: Torts*, supra, at §534, pg. 622.

officials”. 5 Witkin, *Summary of California Law, Torts*, supra, at § 536, pg. 625. There are two types of “public figures”. *Id.* The first are persons who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. *Id.* (citing *Gertz v. Robert Welch* (1974) 418 U.S. 323) See also *Reader’s Digest Association, Inc. v. The Superior Court of Marin County* (1984) 37 Cal. 3d 244, 253. The second type of public figures is “limited public figures” who are public figures only because they have voluntarily injected themselves into the resolution of particular controversies or issues of importance to the general public. *Id.* (citing Prosser & Keeton § 113, pg. 806). The “limited purpose” or “vortex” public figure is an individual who has voluntarily injected himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. *Reader’s Digest Association, Inc. v. The Superior Court of Marin County* (1984) 37 Cal. 3d 244, 253 (citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351).

When called upon to make a determination of public figure status, courts look for evidence of affirmative actions by which purported “public figures” have thrust themselves into the forefront of particular public controversies. *Id.* at § 536, pg. 625-626 (citing *Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 254). A public figure plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issues involved. *Brown v. Kelly Broadcasting Company* (1989) 48 Cal. 3d 711.

With regard to libel (printed publication), there can be no presumption of malice or bad faith consistent with freedom of the press under the First Amendment if the plaintiff is a public figure. 5 Witkin, *Summary of California Law, Torts*, supra, at § 536, pg. 625-626. In the case of a public figure, malice by the defendant must be proven based on a showing that the defendant published the material either knowing it to be false or in recklessly without regard as to whether it was true or false. *Id.* (citing *New York Times v. Sullivan* (1964) 376 U.S. 254).

Since a jury verdict in a defamation case involving a public figure can only be supported when actual malice is shown by clear and convincing evidence (rather than by a preponderance of evidence as in most other cases), the evidence and all the inferences which can reasonably be drawn from it must meet the higher standard. *Colt v. Freedom Communications, Inc.*, supra, 109 Cal. App. 4<sup>th</sup> at 1557 (citing *Reboza v. Washington Post Co.* (5<sup>th</sup> Cir. 1981) 637 F.2d 375, 381 as quoted in *Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 252). Furthermore, in California, the “fair comment” defense protects “expressions of opinion about public officials, scientists, artists, composers, performers, authors, and other persons who place themselves or their work in the public eye”. *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal. App. 3d 991, 1004 [emphasis added] (quoting *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 732, fn. 18). The fair comment defense also applies to false statements of fact if they are made without malice.

### **3. Absolute and Qualified Privilege**

In some cases, a person will not be liable for defamatory statements because he or she enjoys a privilege (immunity). Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 127. In the case of judicial and some governmental proceedings, absolute privilege is granted. *Id.* For example, statements made by attorneys and judges in the courtroom during a

trial are absolutely privileged as are statements made by governmental officials during legislative debate. *Id.* Surveyors testifying at trial as expert witnesses are not afforded this absolute privilege. See Section II (D) (1) (a) above.

In other situations, a person will not be liable for defamatory statements because he or she has a qualified privilege. *Id.* For example, an employer's statements in written evaluations of employees are protected by a qualified privilege. *Id.* Generally, if statements are made in good faith and the publication is limited to those who have a legitimate interest in the communication, the statements fall within the area of a qualified privilege. *Id.* Again, the qualified privilege is not afforded to surveyors acting as experts.

California Civil Code § 47(c) which provides in pertinent part:

A privileged publication or broadcast is one made . . . (c) In a communication, without malice<sup>14</sup>, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supporting the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.”

California Civil Code § 47(c).

“Interested persons” within the meaning of Section 47(c) have been defined as a communicator and a recipient with a common interest, although to be protected, the communication must be one “reasonably calculated to further that interest.” *Kelly v. General Telephone Co.* (1982) 136 Cal. App. 3d 278, 285. Communications between partners, corporate officers and members of unincorporated associations may be justified by the common interest of the group. 5 Witkin, *Summary of California Law, Torts*, supra, at § 524, pg. 614. If privileged, the communication may even be false, and the words defamatory per se. *Id.* If a communication is conditionally (qualified) privileged, in order to recover damages, a plaintiff must show that the privilege was abused. Clarkson, Miller, Jentz & Cross, *Business Law, Text and Cases*, supra, at pg. 128.

Nevertheless, surveyors testifying as expert witnesses, and/or whose opinions are relied upon as fact, in most cases cannot rely on the qualified privilege as protection against negligence claims. See Section II (D)(1)(a) above.

### **III. Anti-SLAPP Motions In California**

When a surveyor is accused of defamation due to a **non-negligent** professional opinion

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<sup>14</sup> For the purposes of California Civil Code § 47(3), malice is defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person – actual malice or malice in fact. *Brown v. Kelly Broadcasting Company* (1989) 48 Cal. 3d 711, 723 – 745.

made without malice, or in making a true statement, a party offended by the surveyor's statements may attempt to bring a *SLAPP* suit against the surveyor claiming defamation (either libel or slander) and resulting damages. *SLAPP* suits are defined as "Strategic Lawsuits Against Public Participation" and these *SLAPP* suits typically seek damages that would be ruinous to the defendants. 5 Witkin, *California Procedure, Pleadings* (4<sup>th</sup> ed. 1997) § 963, pg. 424. *SLAPP* suits are typically brought to threaten an individual into silence and to obtain an economic advantage over another rather than to vindicate a legally cognizable right. *Id.* *SLAPP* suits pretend to be ordinary lawsuits, but *SLAPP* lawsuits are distinguishable in that they are generally meritless lawsuits brought by large private interests to deter common citizens from exercising their political or legal rights or punish them for doing so. *Id.*<sup>15</sup>

That being said, all is not lost for the surveyor in California. In retaliation for a plaintiff filing a *SLAPP* lawsuit, the surveyor who was not negligent in forming his/her opinions (that are free from malice) or a surveyor who states verifiable true facts (with the assistance of legal counsel) can file a special motion to strike, called an anti-*SLAPP* motion, and attempt to dismiss a plaintiff's lawsuit. The anti-*SLAPP* suit may be a useful tool in dismissing a frivolous lawsuit by an unhappy plaintiff.

Generally speaking, any cause of action brought by an unhappy plaintiff "arising from" a defendant's act in further of his right of petition or free speech is subject to an anti-*SLAPP* motion. R. Weil and I. Brown, *Cal. Practice Guide, Civil Procedure Before Trial*, supra, at § 7:220, pg. 7-74. In the anti-*SLAPP* context, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity. *Id.* at § 7:221, pg. 7-74 and 7-75 (citing *City of Cotati v. Cashman* (2002) 29 Cal. 4<sup>th</sup> 69, 78). In litigation, whether a cause of action is based on a defendant's free speech or petitioning activity is determined by the pleadings in the lawsuit, the supporting and opposing affidavits stating the facts upon which the liability or defense is based. *Id.* A cause of action against a person arising from that person's act in furtherance of his right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue is subject to the anti-*SLAPP* motion to strike. Cal. Code. Civ. Proc. § 425.16(b). An "act in furtherance of a person's right of petition or free speech" in connection with a public issue includes the following . . . "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or issue of public interest." Cal. Code. Civ. Proc. § 425.16(e).

The term "public forum" has been construed broadly to include settings and contexts beyond those protected by the First Amendment. R. Weil and I. Brown, *Cal. Practice Guide, Civil Procedure Before Trial*, supra, at § 7:212, pg. 7-72. Statements posted on an Internet website message board or "chat room" constitutes statements in public forums.

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<sup>15</sup> The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. Cal. Code Civil Proc. § 425.16(a). To this end, this section shall be construed broadly. *Id.* [emphasis added]

*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal. App. 4<sup>th</sup> 993, 1006. See also *Global Telemedia Int'l, Inc. v. Doe 1* (C.D. Cal. 2001) 132 F. Supp. 2d 1261 (holding Internet website was public forum). Matters of public interest include, in addition to legislative and governmental activities, activities that concern a person or entity in the “public eye” or conduct that could affect a large number of people beyond the direct participants. R. Weil and I. Brown, *Cal. Practice Guide, Civil Procedure Before Trial*, supra at § 7:213, pg. 7-73 (citing *Rivero v. American Federation of State, County & Municipal Employees, AFL-CIO* (2003) 105 Cal. App. 4<sup>th</sup> 913, 924).

Ruling on a special anti-SLAPP motion to strike (Cal. Code Civ. Proc., § 425.16(b) (1)) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. *All One God Faith, Inc. v. Organic and Sustainable Industry Standards, Inc.* (April 13, 2010) 183 Cal. App. 4<sup>th</sup> Lexis 516. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant’s right of petition or free speech under the United States or California Constitution in connection with a public issue as defined in the statute. § 425.16(b) (1). *Id.* If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. *Id.*

To prevail on a motion to strike all or portions of a plaintiff’s complaint pursuant to California Code of Civil Procedure § 425.16, a defendant only needs to make a prima facie showing that plaintiff’s complaint “arises from” defendant’s constitutionally protected free speech or petition activity. R. Weil and I. Brown, *Cal. Practice Guide, Civil Procedure Before Trial*, supra, at § 7:244.1, pg. 7-79. California Code of Civil Procedure § 425.16 requires that the court scrutinize supporting and opposing affidavits stating the facts upon which the liability or defense is based and calls requires the plaintiff to meet the defendant’s constitutional defenses, such as lack of actual malice. *Robertson v. Rodriguez* (1995) 36 Cal. App. 4<sup>th</sup> 347, 359. This burden by plaintiff is met in the same manner the plaintiff meets the burden of demonstrating the merits of his cause of action - by showing the defendant’s constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses. *Id.*

Furthermore, the requirement that the offending comments by defendant were made in connection with a public interest, like all of California Code of Civil Procedure § 425.16, is to be construed broadly so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest. *Seelig v. Infinity Broadcasting Corporation* (2002) 97 Cal. App. 4<sup>th</sup> 798, 808. The burden shifts to plaintiff to establish as a matter of law that no such protection (for the surveyor) exists. *Id.*

#### **IV. Confidentiality Agreements**

When the surveyor is acting as an expert witness, his/her signing of a confidentiality agreement does not preclude the surveyor from filing a complaint with the Board of Professional

Engineers and Land Surveyors.<sup>16</sup> The surveyor, as an expert witness, should ask an attorney to explain the terms and consequences of the confidentiality agreement. The surveyor is seldom privy to the actual details of a settlement, but, the surveyor bound by the confidentiality agreement would benefit from language to protect him/her from a future defamation claim.

For example, if the plaintiff's expert was able to negotiate that the defendant could only file an injunction (no pecuniary loss) if the plaintiff's expert violated the confidentiality agreement, there could be no monetary claim. Generally speaking, unless contractually bound, the surveyor has no benefit to being a party to a confidentiality agreement as part of a settlement and the surveyor should seek separate legal counsel before deciding to sign a confidentiality agreement in connection with a litigated matter (where the surveyor acted as an expert witness).

As to codified regulations pertaining to confidential information in conjunction with the practice of land surveying reference California Code of Regulations, Title 16, Division 5, § 475 (d) which states:

*Confidential Information:*

*Confidential information obtained by a licensee, in his or her professional capacity, concerning a client, employer, or other related party shall not be disclosed by the licensee without the permission of the client, employer, or other related party except for the following:*

- (1) Disclosures made in response to an order of the court or to a subpoena or summons enforceable by an order of the court.*
- (2) Disclosures made in an adjudicatory proceeding.*
- (3) Disclosures made in response to an official inquiry from a governmental regulatory agency.*
- (4) Disclosures made when required by law.*
- (5) Disclosures made upon discovering a hazard within the licensee's field of professional expertise which may threaten the health, safety, and welfare of the public.*
- (6) Disclosures made when providing evidence to the Board regarding other licensees or unlicensed individuals who may have violated the Professional Land Surveyors' Act.*
- (7) Disclosures made regarding illegal conduct.*

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<sup>16</sup> Business and Professions Code § 8776.4 which states "Notwithstanding any other provision of law, a licensee shall not be considered to have violated a confidential settlement agreement or other confidential agreement by providing a report to the board as required by this article".



## V. Conclusion

Pursuant to the First Amendment most speech is protected. Typically, the honest, non-negligent opinion and verifiable facts stated by a professional surveyor given in the absence of malicious intent, is protected against lawsuits. The “non-negligent” qualification is of the utmost importance. There are particular defenses available to surveyors if they are sued for defamation (libel or slander). In the event a surveyor is sued as a business (corporation), his/her general liability policy may cover the cost of the defense. In the event the surveyor is sued as an individual, his/her homeowner’s policy may cover the cost of the defense. Surveyors should always check these policies to determine if this coverage is available, and if necessary, seek legal counsel, to interpret insurance coverages.

In reality, when a plaintiff files a defamation lawsuit the defendant surveyor is typically named as a corporation and as an individual. When named as an individual, plaintiff’s defamation case tends to be difficult to win and damage awards tend to be small. As a result, plaintiff’s attorneys usually shy away from taking cases on a contingency fee basis. If a plaintiff hires counsel on an hourly basis, legal fees for successfully litigating a matter may exceed the possible recovery by a plaintiff – i.e. it costs plaintiff more in lawyer fees than they actually recover.

It is not uncommon for one surveyor to threaten another with a defamation lawsuit when a boundary dispute arises. As this paper demonstrated, these claims are costly and difficult to win – as such it is unlikely that a claim is ever actually filed. On the other hand, slander of title<sup>17</sup> (damaging the real property) is far more likely and could result in large settlements – slander of title will be addressed in a separate White Paper in this series.

Recommended reading:

The author recommends reading this defamation case involving land surveying, a City Surveyor accused of defaming another surveyor’s work in connection a map and the defense (on appeal) being in the “public interest”; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal. App. 4<sup>th</sup> 364, 54 Cal. Rptr.2d 781 attached as Appendix C.

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<sup>17</sup> The State of California has adopted the definition of slander of title set forth in Section 624 of the Restatement of Torts reading as follows: "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." See also *Howard v. Schaniel*, 113 Cal. App. 3d 256 (Cal. App. 4th Dist. 1980)

## **VI. Disclaimers**

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David Woolley is a licensed surveyor with over 23 years of experience in the field. That being said, Mr. Woolley is not an attorney. As such, nothing in this article may be construed as offering any legal advice. The article is for basic informational purposes only and does not contain legal advice or legal opinions by the author. Any substantive legal questions should always be addressed to competent licensed legal counsel. As such, Mr. Woolley is not and cannot be liable for offering any legal advice or opinions in this informational article.

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## **VII. APPENDIX A**

California Code of Civil Procedure § 425.16 (with annotations)

**To view the Reference Material, please visit us at [www.lsacts.com](http://www.lsacts.com).**

## **VIII. APPENDIX B**

Copy of California Code of Civil Procedure § 425.17 (with annotations)

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#### **IV. APPENDIX C**

Copy of *Nizam-Aldine v. City of Oakland* (1996) 47 Cal. App. 4<sup>th</sup> 364, 54 Cal. Rptr.2d 781

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