By Joel Leininger, LS

Joel Leininger is a principal of S.J. Martenet & Co. in Baltimore and Associate Editor of the magazine.

Controlling Authority

In the last issue I promised to explore the topic of "controlling authority," by which I mean those entities responsible for defining correct doctrine. All professions are subject to rules of one sort or another, either codified or through established custom, dictating sound conduct. In this era of wide-area communications, it has become increasingly important to recognize the diversity of controlling authority in existence, and understand what bears on our individual practice and what does not.

Some Leininger-paraphrased definitions as a preamble to our discussion: (1) *controlling authority*: any one of a number of entities that promulgate rules governing (or interpreting) correct retracement; (2) *jurisdiction*: the geographic regions under the dominion of the entities defined in (1). Jurisdictions frequently overlap one another. For example, every state has its own courts, and is also within one of the federal judicial circuits. (3) *persuasive*: influential, but not compulsory.

The Situation

Correct doctrine handed down from controlling authorities has varied, many times in substantive ways, from location to location. Some practices might be required in one state but would border on misconduct in another. Each place has its own legislative and judicial history resulting in the current situation, and my intent here is not to complain, but to underscore the potential diversity of "correctness."

Most of our retracement guidance originates from our state–primarily through its appellate court decisions. Other design professions are also influenced by court decisions, of course, but in my experience none to the degree that are surveyors.

My sense is that decisions of the federal courts comprise more of the body of retracement doctrine in the Public Lands states than they do in metes and bounds states because of the prominent role of the federal government as a former land owner. Since federal courts have jurisdiction in cases where one of the parties is the federal government, and since land owners of every stripe are potential court litigants, this vast body of federal land litigation is to be expected. We don't see as much of that in the older states. I don't pretend to be an expert on overlapping court questions (indeed, many volumes have been written on the wrinkles involved with state court/federal court jurisdiction), but not all federal courts from your jurisdiction count as controlling authority. Consult a litigator in your state.

> **Doctrine only becomes correct when the appropriate controlling authority adopts it.**

Authoritative derailment

Several years ago I was invited to speak in Maine to its state society; as I prefer to do, I arrived a day early to attend another seminar. Speaking on retracement at that seminar, a nationally known speaker reinforced all his points with *Arkansas* court cases. With all due respect to our brothers and sisters in Arkansas, Maine surveyors should not be interested in Arkansas retracement case law. Here's why: foreign jurisdiction authority is at *best* only persuasive (see definition above); and it is only persuasive if the home jurisdiction is *silent* on the matter, otherwise it's a waste of time. (My very limited exposure to Maine case law convinces me that there is ample material from that state upon which to base a retracement discussion.) Worse, it is possible that Maine courts have handed down decisions specifying a different treatment on a particular point than did the Arkansas courts. Thus, there were two things horribly wrong with what happened that day: first, the speaker wasted the audience's time by citing authority which, in Maine, was not authority; second, *no one in the audience objected*. Perhaps we were all too polite. Let's put a different spin on the discussion here. If a speaker to Maine attorneys had cited Arkansas cases all day, those attorneys would have been jumping up and demanding their money back. Politeness has its limits.

Retracement can also be controlled by statutes. For instance, in my state (Maryland) a statute was passed in 1892 mandating how deed calls "to the side of a road" are to be interpreted. Identical lan-

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guage in a deed executed prior to April 7th of that year is to be interpreted in a different manner than in a deed subsequent to that date. Thus, in Maryland April 7, 1892 is a watershed date in the analysis of road calls. Since the origin of this anomaly was a statute passed by the Maryland legislature, it would be foolish for anyone to assume that Virginia or Pennsylvania or any other jurisdiction would consider 1892 as any different than any other year where roads are concerned. For all I know, Maine has a similar law, with a different watershed date. Or not.

In part, this is a justification for having state-issued surveying licenses. The presumption is that there are various state-specific "knobs and buttons" on the otherwise general practice of surveying that "correct" retracement must take into account. Conversely then, retracement ignoring these anomalies must be viewed as incorrect. Any other conclusion would be illogical.

Lest we be dismayed at this apparent Babel, all is not utter confusion. There have been serious attempts to standardize real estate transactions across the country in an effort to encourage the mortgage markets. Among other things, this results in transaction documents looking similar no matter where you sit. When I speak of Schedule B in the title commitment, for instance, nearly every surveyor in the commercial market will recognize my reference.

Additionally, there are general principles of retracement that are common in nearly every jurisdiction, such as monuments being at the top of the Rules of Construction, etc. We probably have English common law to thank for that since all of our courts trace their roots eventually back to that country. (Except you, Louisiana!)

But doctrine, even if in place elsewhere, only becomes "correct" for you when your controlling authority adopts it.

So What?

Why does any of this matter? Understanding the impact of controlling authority is the foundation of correct practice, for it points to which authorities are in the game and which are in the stands; which writings are obligatory and which are merely interesting. In effect, there are many rule-books, all in effect somewhere, but only a couple count right here, right now. Can you tell which ones?

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