

A Complaint Has Been Filed Against Me!
by
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Surveyors have often called me and admitted that they are seeking my advice because a complaint has been filed against them with their state board of licensure (Board). Being charged with a complaint of improper practice or behavior is usually a stressful experience. Competent surveyors and incompetent surveyors alike can expect to go through the experience during a lifetime of practice. In fact, my experience suggests that complaints are more often made against competent surveyors than the incompetent surveyors. I surmise that competent surveyors are often of firm conviction based on the knowledge they have faithfully performed their duties in a competent manner. The surveyor's conviction leads to such strong self-assurance and self-advocacy of their opinion that the surveyor fails to realize their opinion when placed in the heated environment of a boundary dispute is like gasoline on a fire – it causes an explosion that engulfs the surveyor. Also among competent surveyors are those surveyors that perform surveying services without fault but often are not as faultless when operating the business – especially when communicating with the client and client's neighbors. Conversely, I have seen incompetent surveyors move a corner pin around at the request of the client or neighbor with no conviction as to the propriety of their actions. However, the neighbor or client, seeing that their demands are being met, lack any inclination to file a formal complaint though the surveyor's incompetency must be obvious even to these laypersons.

In almost all cases, there is some lead-up to a person making a complaint. Surveyors can often avoid a formal complaint by recognizing the signs of an irate or frustrated client or neighbor and taking steps to prevent or alleviate the irritation or frustration. If a surveyor perceives there is an irate or disgruntled neighbor or client, the surveyor should keep written notes of events, actions, conversations, and contacts. Whenever possible, the surveyor should respond to the irate or frustrated party promptly, in writing, combining both tact and reasonable rationale. The time spent responding to an irate party may reap many benefits, the biggest being the prevention of much time, effort, cost, and stress resulting from a formal complaint to the licensing board.

Ms. XXX:

This morning you called my office and left a message indicating you were very upset with my delay in completing services on your behalf. My records indicate it has been three weeks since I have been able to work on your project. Given the adverse weather

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Note: In this article several examples have been used. Names have been deleted and in some cases wording and facts changed to preserve confidentiality.

conditions this region has experienced during the last three weeks, this delay is not atypical. However, my opinion does not justify dismissing your expectations or failing to give them due regard in responding to your phone message you left this morning.

I not only have the unenviable position of asking your forgiveness in not meeting your expectations, I must also beg your indulgence in asking for at least two more weeks to complete your project.

I operate a small firm with only two employees. Both employees are members of the Army National Guard. Two weeks ago, they received notice of pending overseas deployment to Afghanistan. Given the possibility of combat and a year-long absence from their family, both employees wish to spend as much time as possible with their families in the short time remaining before they leave their home. Their higher duty to their families and country require that I exhibit a graciousness that prevents demanding they work a normal 40 hour work week in their remaining two weeks before going on active duty.

In presenting these circumstances that are outside my control, I do not mean to imply that you are compelled to share them or even accept them. I understand if you must seek the services of another surveyor.

Finally, in your message, you stated that if I do not call you and act within 48 hours you will file a complaint with the Board of Licensure. It is no longer within the realm of possibility to act with the timeliness and diligence you demand. I fear there is nothing I could say on the phone that would mollify your anger; yet, every reason to believe I might further contribute to your distraught by inadvertently using ill-conceived words a phone conversation often allows. Accordingly, I am sending this letter in lieu of a phone call to beg your indulgence and apologize for not meeting your expectations.

EXAMPLE 1: AN EXAMPLE OF A BOTH TACT AND REASONABLE RATIONALE

The surveyor should always communicate to the irate party in a manner that assumes the communication will eventually be examined by the Board (or court). The Board could form their first impression of the accused surveyor after reading the surveyor's communication.

Regardless of the effort, competency, and thoroughness of the surveyor, there is a good chance all surveyors, including the most competent surveyors, will have to respond to a complaint filed with the licensing board.

I hired XX to survey my property. This surveyor performed some surveying work and I paid him \$1,000 for the work he said he did. Since then it has been two weeks and I have not seen him do any work on my property. I called him and left a message on his phone on three separate times. Finally, he calls me to say he needs to look at more deeds. I gave him my deed so he is a liar too. I really need my lines marked. I'd hire another surveyor but I'm afraid I'd never see the \$1,000 I paid XX and would have to pay another surveyor to start all over. I didn't want to complain and have his license taken away but I feel I don't have any recourse.

EXAMPLE 2: THIS IS A SAMPLE OF A COMPLAINT SENT TO THE BOARD.

If a surveyor receives notice of a complaint from the Board, here is my advice:

1. Take the complaint very, very seriously. Many surveyors fail to give the notice of a complaint from the Board the attention the notice deserves. The surveyor believes the complaint will quickly be dismissed by the Board because the surveyor believes it should be dismissed.

In most cases, when a complaint is made against a surveyor, the process is on “auto-pilot.” Much to the dismay of the accused surveyor, a critical and common sense review and analysis of the complaint is not part of the initial process. A review does not occur until after the surveyor has gone through the effort and cost of responding to the complaint.

Notice of Complaint

Dear Mr. XX

Ms. XXX has filed a complaint against the license issued to you by the Board of Licensure for Professional Land Surveyors. A copy of the complaint is enclosed. Please mail to this office a detailed response to the complaint within 30 days of your receipt of this letter. Your response must include: (1) a copy of the written confirmation of services and any modifications thereof in connection with the work, (2) **four copies** of the final plan as signed, sealed and delivered to your client, and (3) a copy of your report of the survey. Failure to include these documents with your response may result in disciplinary action against you. Documents submitted will not be returned. A copy of your response will be forwarded to the complainant.

A complete description of the complaint process is included in the Administrative Complaint Procedures enclosed with this letter.

If you have any questions, feel free to call me. **Do not** contact any members of the board. This prohibition is necessary to prevent board members bias.

EXAMPLE 3: THE ABOVE IS AN EXAMPLE OF A NOTICE OF A COMPLAINT ISSUED BY THE MAINE BOARD OF LICENSURE FOR PROFESSIONAL LAND SURVEYORS.

When the complaint is received, a Board clerk (not ordinarily a voting member of the Board) generates the notice (see Example 3). A complaint officer or investigator is assigned to the complaint. This person is equivalent to the detective in charge of a criminal case. In some states, the complaint officer may be a designated member of the Board or a surveyor under contract with the Board. In other cases, the individual is a trained investigator hired or employed by the Board or the Board’s umbrella agency.

The investigator or complaint officer takes each complaint seriously and asks the accused surveyor to respond. (An exception is an unsigned complaint that is usually rejected for fairness and due process reasons.) It is only after hearing both sides that the investigator or complaint officer will make a preliminary determination that the complaint should be dismissed or further proceedings are warranted.

2. The accused surveyor should consult with legal counsel. With every complaint, there is a possibility of fine and/or suspension of a professional license. In extreme

cases, there is the possibility that the Board will revoke a license. Even with a simple letter of reprimand, professional reputation may suffer. The surveyor should not take the chance that the system will ferret out inappropriate or unfounded complaints without the accused surveyor putting forth their best efforts to have the complaint dismissed or adjudicated in the accused surveyor's favor.

It is wise to obtain legal help to deal with the complaint. Competent legal counsel will ensure there is a critical review of the complaint, the process, and the surveyor's response. The legal review may be invaluable and prevent some inappropriate *faux pas*.

An accused surveyor doesn't necessarily need to bring an attorney to the hearing if they feel competent to argue their own case. However, the accused surveyor should remember that the complainant's side could be represented by an assistant attorney general.

3. The accused surveyor should not send the Board any material beyond what has been requested unless the accused surveyor has determined that the material is necessary as an aid to their case and will lead to dismissal or acquittal. Too often a Board dismisses the original complaint but goes on to act on some deficiency found in extraneous material the accused surveyor sent to the Board.

Dear XX:

At its regular meeting held on 19 June, the X Board of Licensure for Professional Surveyors (BPS) voted to dismiss the complaint filed against you by XXX. The BPS has determined that there was no ethical foundation upon which the neighbor's complaint could be prosecuted. The investigator has agreed with your assertion made in your response that it was not unethical for you to enter upon the complainant's land to set "a stake" where "the stake" was within the public right of way.

However, after reviewing your plan, dated 24 August 2007, that you submitted with your response, the investigator was unable to determine if you complied with minimum standards, section X regarding monuments. The investigator also noted that the confirmation of services you sent to your client and included in the documents you submitted to the investigator failed to include a time period or date for the completion of your services as required by the minimum standards, section X. Accordingly, the Board has set a hearing for 12 December at 1:00 p.m. at which date and time you will be required to show there was compliance or explain the apparent minimum standard deficiencies set forth above.

EXAMPLE 4: AN EXAMPLE OF "GOOD NEWS" / "BAD NEWS" LETTER FROM A BOARD

It should also be stressed that members of the Board are not going to be impressed by an accused surveyor that has sent the Board copies of all the deeds along with a copy of all the calculations, plans, and reports (a stack 2 inches thick) when the complaint focuses on the failure to adequately communicate to the client.

4. The surveyor should carefully review any documents before the documents are sent to the Board. There are times that the surveyor needs to or is required to send certain designated documents to the Board (see Example 3). The surveyor should carefully scrutinize all the material that is being sent to the Board. At this point, it is usually too late to change or modify documents – not to mention changing or modifying documents after the fact may be improper. It is prudent to deal with each charge and document requested. Identify any deficiencies and be prepared to explain (or apologize for) the deficiencies.

Dear Mr. XX:

In your capacity as complaint officer, you have asked me to respond to the complaint from my client's neighbor, Mr. XXX. You have also asked me for certain documentation. In this response, I have identified and numbered each charge along with my response. I have also identified each request for documentation you have made. In some cases I have included comments regarding the requests.

1. In the complaint, Mr. XXX has asserted, in part, that I have "failed to follow established rules of evidence that enjoy widespread acceptance within the surveying profession." In my response to his accusations, I maintain that the gist of the dispute and Mr. XXX's fault with my service (as I believe and understand his accusations against me lie) all revolve around what evidence I have accepted or rejected in order to reestablish the location of the common boundary. Until such time as the Board may demand further explanation, I believe and do hope that a fair reading of Mr. XXX's complaint will convince the Board that the complaint is founded upon a disputed boundary and not a violation of standards on my part that would warrant discipline.

I would be happy to go into detail on the evidence I found, the credibility I attached to the evidence, and the analysis/decisions I made based on the evidence. I stand ready to explain in detail either with documentation or at a hearing should the Board determine this information is necessary. I hesitate to go into more detail because in public forums Board members have often stated that the Board is not a proper forum to litigate a boundary dispute. I have (hopefully) made the decision that the Board seeks a general response to Mr. XXX's complaint rather than be burdened with all the deeds, discourse of an analysis, and the lengthy contemplations that attenuated the decision I made and so upsets Mr. XXX.

4. You have requested "a copy of the written confirmation of services and any modifications thereof in connection with the work." I have attached the e-mails that establish the terms of the contract and the confirmation of the services performed. There is one modification to the contract. By e-mail dated 18 September 2007 (enclosed), my client has suspended my services as a result of the ongoing litigation involving the client and his neighbor (complainant).

5. You have requested "**four copies** of the final plan as signed, sealed and delivered to [my] client." I am unable to comply with this request because I have not completed the survey and therefore have not prepared a final plan. At this time and for the last year, my client has been in litigation with his neighbor, the complainant. My client has suspended my services until the court issues a verdict. Until such time, my client believes the monuments I am required to set will be removed by the other party or their agent as the result of the animosity generated over the disputed boundary location. Parts of my services will then have to be duplicated at his great expense.

EXAMPLE 6: ORGANIZING THE RESPONSE

5. All possible and conceivable arguments must be made at the hearing or these claims will not be available upon appeal. The law is clear that the accused surveyor must make ALL arguments (even the complex legal ones) to the board of licensure at or prior to the hearing, or these arguments will be barred from the appeal.

For example, if the surveyor believes the Board is acting contrary to the Constitution, the surveyor must make this claim during the hearing. (Hence another reason for following advice #2.)

Dear Members of the Board:

At the conclusion of the hearing today, it is my fondest hope and strong belief that I will be able to persuade the Board that the merits of the case are on my side. Nevertheless, on the advice of legal counsel, I am submitting these claims in addition to the testimony I will make at the hearing. These claims are no less important than the testimony I give at the hearing. It is my assertion that each is sufficient and proper justification for dismissal (with prejudice) of the complaint against me. For the sake of time, I would respectfully request the members of the Board adopt this missive as a part of the official hearing record. Should the members of the Board rule against my case on the merits, I would ask that they consider these claims and rule on them as well.

1. On 4 March, according to the Board minutes, the Complaint Officer appeared before this Board and reviewed the evidence in order to persuade the Board that there was sufficient evidence to hold a hearing. In so doing, the Board had ex parte communications that violated due process according to the Administrative Procedures Act, Article 5, section 9055(1), State Constitution, Article 1, Sections 6 & 19, and the Fifth Amendment of the United States Constitution.

2. I have been notified that the complainant will not be present at the hearing today. His failure to appear, be sworn, and testify under oath violates the Administrative Procedures Act, Article 5, section 9057(3).

3. The failure of the complainant to appear deprives me of my right to cross examine the witness and violates the Administrative Procedures Act, Article 5, section 9056(2) & 9057(5), State Constitution, Article 1, section 6, and the Sixth Amendment to the United States Constitution.

Respectfully Submitted...

EXAMPLE 7: SUPPLEMENTAL DEFENSE AND CLAIMS FOR ACQUITTAL THAT ARE PLACED ON THE RECORD FOR PRESERVATION ON APPEAL

6. All avenues of defense must be examined and exploited if deemed to be advantageous for acquittal or dismissal. In this regard, the accused surveyor must analyze their defense from at least four areas:

a. The facts do not warrant discipline. Arguing the facts of the complaint and justification of the accused surveyor's actions is usually the first and only

defense employed by the accused surveyor. Arguing the merits is an important defense but should not be the only defense considered. In preparing the defense, the accused surveyor should take care to specifically address each and every one of the complainant's assertions – no matter how absurd or obvious the surveyor's justification.

6. In his complaint, Mr. XXX has stated that he "showed [me] a stone that marked [his] common corner with [my client]." He further stated "it was improper and unethical for [me] to hide another monument below ground level without notifying [him] that I disagreed with [him]." (Underline mine)

In my defense against his charge, I was directed by my client not to communicate my opinion to the neighbor. As a surveyor, I am required to comply with Ethics § X that mandates that I respect client confidences. Furthermore, minimum standards § X require monuments be set. In order to comply with both standards, I set a monument below the ground level thereby obscuring its existence and my opinion from the neighbor. Finally, I had informed Mr. XXX at the time he showed me the stone that my opinion may not recognize the stone as the common corner. I further informed Mr. XXX at the time he showed me the stone that the stone was not cited in any deeds as marking the common corner including his own corner. To tell him at a later time that the stone was not the corner would have required me to violate my client's mandate not to communicate an opinion to the neighbor.

EXAMPLE 8: ARGUING THE FACTS

b. There may exist a common law or statutory immunity or defense that prevent prosecution or permit the acts complained of. One or more statutory or common law immunities or defenses may apply and relieve the accused surveyor of prosecution.

I respectfully bring to the Board's attention that this complaint was sent to the Board by Ms. XXX who is a litigant in the case of XXX v. XXXX, CV-2008-XX. Her basis for my wrongdoings as stated in her complaint was my testimony and the evidence I presented as an expert witness on behalf of Mr. XXXX. As such, there is recognized public policy that witnesses not be intimidated or fear vexatious litigation or charges resulting from the testimony or acts performed in contemplation of the testimony. Accordingly, the law in this state recognizes that experts have an absolute privilege regarding statements made prior to or during a judicial proceeding. The common law has been codified in the RESTATEMENT (SECOND) OF TORTS § 588(b) (1976) and protects the expert from any prosecution, litigation, or civil procedure arising out of or in contemplation of their services as an expert; the only exception being the charge of perjury or contempt of court. Based on this absolute immunity the law accords me in this situation, I ask the Board to dismiss the complaint.

EXAMPLE 9: ARGUING A COMMON LAW IMMUNITY

c. The Board or investigator may have violated process that would allow for the complaint to be dismissed. In this regard, the accused surveyor or the surveyor's counsel must closely examine the State's administrative procedures act (APA), state Constitution, and Federal Constitution. The accused surveyor and surveyor's counsel must determine if the Board and investigator had to and did follow the proper process up to and during the hearing. In particular did the

Board and investigator follow proper notice procedures, act under a sworn complaint, have ex parte communications, act with bias, act outside of mandatory time constraints, etc.

I have done my best in the previous paragraphs found in this missive to respond to the charges that Mr. XXX has made against me. His charges are vague and accusatory charges that do not allow me to provide a focused response dealing with behavior that the law or rules deal with. In forwarding Mr. XXX's complaint to me, the Department has not included "a reference to the particular substantive statutory and rule provisions involved" (APA, 5 M.R.S. § 9052(4)(B)) Violations of substantive statutory and rule provisions are not obvious from the statements made by Mr. XXX. Accordingly, I would request that the charges Mr. XXX has asserted against me be dismissed since there is no proper notice, as required by the APA, of the substantive statutory and rule provisions I have violated.

EXAMPLE 10: ARGUING A VIOLATION OF PROCESS

d. The Board may have exceeded their authority or jurisdiction and therefore their actions must stop or a decision against the surveyor reversed. The statute creating and governing Board actions should be examined, as well as the State and Federal Constitution.

I have been accused of violating minimum survey standards. For the reasons stated, I believe I have provided good and acceptable reasons for proving that I have not violated minimum standards or if I had, I had good and sufficient reason that logic or the law would permit.

In conclusion, I note that under XXXX § 13, the Board of Professional Land Surveyors requires a quorum of no less than 4 members out of the total of 7 members to act and perform official functions. At this time, the governor has failed to appoint members to two open seats on the Board, one member is on active duty in southwest Asia, and a fourth member is unable to attend Board meetings due to health reasons. Accordingly, at this time, the Board lacks a quorum to act on the complaint and perform official duties. I respectfully ask the complaint be dismissed for lack of authority to proceed.

EXAMPLE 11: ARGUING A LACK OF AUTHORITY

7. Always have another person perform a competent review of any written response before sending the response to the Board. The response to the complaint is the best opportunity to argue that the complaint should be dismissed. Most complaints are dismissed without a hearing after reading the accused surveyor's response.

A contemplative, concise, and focused response will aid the Board or investigating officer to determine sufficient reasons exist to dismiss the complaint. Unfortunately, more than one surveyor has built their own coffin with their response. Responses that are vindictive, irrational, and unfocused can harm the surveyor's cause by giving additional claims for the investigator to pursue or giving credibility to the complainant. Such simple things such as unprofessional writing will often persuade the Board investigator to dig deeper. A belligerent or quarrelsome response in lieu of a clear, complete, and persuasive response to the complaint will often instigate a

greater scope and intensity of investigation against the accused surveyor. (The underlying thought is that if the surveyor communicates in this irrational or unprofessional manner to the licensing board, imagine how the surveyor communicates to neighbors and clients.)

I have been a surveyor for over 50 years. I have forgot mor surveying then most survoyors know. I have done everything that the client wanted me to do including putting his corner pin where he wanted. Now the SOB doesn't want to pay me for all the extra work Ive done to try to please him and he files this bogus complaint. Now a bunch of surveyors, who gave money to the governor and got appointed to the licensing board all without nearlie my experience want my license are not going to take it.

EXAMPLE 12: HOW NOT TO RESPOND

Accordingly, the accused surveyor should choose someone who will give the response to the complaint a thorough review both for its content, persuasiveness, tact, and tenor.

8. The Board members should not to be considered your friends. In all but a very few and rare cases the Board members are remarkable, hard working, competent, and intelligent members of the profession or public. Some of them have had complaints filed against them and have been in the same situation as the accused surveyor. The professional members on the Board subconsciously along with their legal obligation, presume the surveyor is innocent of charges until the charges have been proven.

The accused surveyor may know one or more Board members and count them as friends. However, the surveyor should not depend on friendly familiarity to aid the surveyor in having charges dismissed or being acquitted of the charges in the complaint.

In some cases a familiarity with one or more board members will hurt the surveyor. There may be a hidden grudge or, more likely, in an effort to show there is no bias, the Board members will be more meticulous in forcing the process to a formal conclusion where the board member may otherwise have voted to dismiss a complaint against an accused surveyor they did not know.

There are some situations though where past interactions raise a real concern that there may be a bias or possibility of vindictive behavior by one or more members of the Board. The possibility of a bias against the accused surveyor must be raised prior to the hearing. This presents the accused surveyor with a need to tactfully attempt to try and remove the member from involvement in their case.

Dear Members of the Board of Licensure:

I have been informed that a hearing for the complaint against me has been set for 15 December. Under the Administrative Procedures Act, X, I am asking that Mr. X, a current member of the Board of Licensure step aside and refrain from participating in all matters

pertaining to my complaint and hearing.

The close proximity of my office to Mr. X, breeds a close familiarity with each other's work. It also means that Mr. X and I have often been on opposite sides of boundary disputes. It is often the case that competent surveyors can look at the same information and arrive at different opinions. Yet, it is human nature to believe that such differences are not viewed as differences resulting from ancient, scant, and conflicting boundary information but rather the result of an individual deficiency in training, analysis, knowledge, or a host of other factors. I know that I am not immune from these tendencies to judge others less when they appear to exhibit a propensity to disagree with me more - despite my best efforts not to prejudge.

Now I face a hearing in which I am to be judged for professional services that I have rendered. Prudence requires that I take all actions that the law allows to ensure I am judged in an impartial manner only on the facts of one particular survey. Accordingly, I ask that Mr. X be disqualified from further proceedings where I am involved.

Respectfully...

EXAMPLE 13: ENSURING THERE IS A FAIR HEARING

9. Pray for Devine intervention. Last but not the least of my advice is what my own observations in one case has revealed — prayers help. In one case a very devout surveyor had to deal with a complaint. While not serious, the charges against the accused surveyor had merit and some form of admonishment would likely survive a hearing after the accused surveyor attempted to explain his actions. The surveyor continued to believe, based on his trust in God and prayers, that the hearing would turn out in his favor. Several months passed after the hearing. Finally the surveyor heard from the Board. It appears the paperwork had been lost or misplaced and the Board was compelled to dismiss the complaint.

In closing, I wish to make it clear that there is nothing wrong (and is exemplary behavior) that an accused surveyor be willing to admit to deficiencies or violations. More than one Board member viewing a complaint has thought: "But for the grace of God, that would be me" or similar thoughts. Contrition among sinners often buys considerable forgiveness. Where a Board has the power to fine, suspend, or revoke a license, contrition will often result in a much less severe punishment. By admitting to a violation and negotiating a consent decree the formal hearing can be avoided along with a great deal of stress and some publicity.