

Surveyor Licensing Boards -- Are They Doing Their Job?

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by
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Licensing boards were created to protect the public from unscrupulous, incompetent, or untrained surveyors. Limited protection is accomplished by licensing professionals and regulating professional conduct. One option a licensing board has to help regulate professional conduct is to discipline practitioners that deviate from acceptable or mandatory behavior. Complaints in discussions and articles by some members of the profession and the public assert licensing boards have always failed and continue to fail in disciplining practitioners -- allowing them to continue to prey on the public. The complaints are not so easily sidestepped by saying they are mutterings among disgruntled clients or efforts by overzealous professionals attempting to reduce their competition. The number and frequency of complaints call for examination of the question: Are surveyor licensing boards doing their job?

Are Licensing Boards Willing or Able to Discipline Professionals?

Critics argue that licensing boards are unwilling to prosecute complaints because of professional bonding and common unity. Board members that are members of the profession are said to have an "us versus them" attitude that works against any complainants. Certainly, when board members are also members of the profession, there is the appearance of a conflict of interest. Under these circumstances, the argument is that as long as the board composition is entirely or a majority of professional members, the boards will be unwilling to discipline their fellow professionals.

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Consider the rising number of verdicts judging surveyors liable. In spite of the increasing number of liability awards against surveyors, most licensing boards seldom discipline more than one or two practitioners a year (if that). Adding to the suspicion that the board is unwilling to discipline members of the profession is the fact that many boards should be able to do more than a court of law since they are not encumbered with strict rules of evidence that hamper litigation in civil court.

The counterargument is that the public benefits when licensing boards are composed of members who are licensed in the profession. This allows board members to sift through the facts, see the problem quickly, and come to a just and equitable decision without needless public fact-finding expense. In addition, most board members, as leaders in their profession, are naturally the strongest advocates against the unscrupulous, immoral, or incompetent practitioners. The profession and board members feel that bad practitioners tarnish the entire profession's reputation. Therefore, there is a strong incentive among professional members of the board to encourage well-founded complaints, identify unscrupulous or incompetent practitioners, and prosecute them diligently.

The increasing number of lawsuits involving surveyors does not necessarily mean there are more negligent surveyors -- just more litigious clients. People seem more willing and able to litigate their grievances at the present time than anytime in the past. In many of the cases, the courts dismiss the complaint against the surveyor, return a verdict in the surveyor's favor, or return a verdict against the surveyor only by imposing more stringent standards on the surveyor.

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Board members point out that they face competing interests and they must deal fairly and impartially with all groups. There is generally an ongoing interaction among the licensing board and its members, the members of the profession, prospective members of the profession, and the surveyors' clients. This arrangement has been described from a board member's perspective as trying to float on a triangle in a tempest. One corner signifies licensed members of the profession; the second corner signifies the client; and the last corner signifies people training to become licensed members of the profession. In the middle of the triangle, attempting to keep the triangle stable on the surging sea of regulations and due process, stands a movable weight -- the licensing board. The licensing board must attend to each corner with the knowledge that if it gets too close to any one corner that corner will sink causing the other two corners to rear up and capsize the triangle and all the competing interests. The result is the licensing board must strike a balance between the three diverse groups and recognize they are constrained, motivated, and influenced by regulations, codes, political policies, and board member's interests.

Between the arguments and the counterarguments is the acknowledgment by some boards that although they may be willing, they are unable to discipline professionals. Many licensing boards lack the power, funds, time, training, and resources. These problems are compounded by the fact that many board members volunteer considerable time to board business without adequate compensation for their expenses. Under these conditions the board members can only be expected to perform immediate and pressing board functions such as preparing exams and reviewing applications. They do not have time to investigate any but the most incompetent surveyors or well-documented

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complaints.

Are Complaints Properly Handled?

Assuming that the board is able and willing to discipline professionals, it appears that many complaints, seemingly justified, do not result in disciplinary action. Critics of licensing boards say the boards frequently dismiss a complaint with only cursory investigation and, if they decide to pursue an in-depth investigation, the board seems less than diligent in prosecuting the complaints in a timely fashion to conclusion. There are three reasons often cited by critics for pursuing disciplinary action in most instances.

First, the surveyor should be held *prima facie* blameworthy in the first instance where there is wrongdoing because of their professional status and the public trust that has been bestowed on them. The client is, in effect, almost always forced to trust the surveyor's professional judgment and expertise. Second, the business acumen and experience of the professional surveyor in dealing with the public gives them the upper hand in most arrangements or contracts with the typical client. If there is a problem with communicating information about price, quality of service, or procedures, who but the surveyor is more knowledgeable on such matters and, therefore, should be held accountable? Third, surveyors should be held accountable because they are in a better position to realize potential problems and foresee consequences of their actions -- more so than their clients. As a result of their superior knowledge, training, and education they should be the first to realize that their decisions may result in damage to clients and third party interests. Boards and accused surveyors often presume that clients possess equal or superior surveying savvy, such that they could

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deal on equal terms with the surveyor when discussing surveying specifications and requirements. In reality, the typical client who is a layperson cannot be expected to elaborate on the specifications, survey procedures, or particular type of survey they desire.

he counter argument often raised against the previous arguments and similar ones is that the basis for most complaints fall outside of the board's scope of review. For example, one complaint the board frequently rejects is a complaint about the fees the surveyor has charged -- improper or not. The factors that predicate what fee is reasonable or should be charged is beyond the scope of the board's concern and responsibility. The board can only focus on the surveyor's scruples, knowledge, and competence. Other complaints stem from the surveyor's failure to place corners where directed by the landowner (to do so would in fact be considered unscrupulous); the surveyor choosing a location other than a location the landowner perceived to be a proper one; the landowner having expected standards that are higher than the normal standard; and so on.

Is It Fair For the Board to Discipline Surveyors?

Many surveyors think not. Many licensing boards act as investigators, prosecutor, judge, and jury. This commingling of functions within one body presents a problem if boards, in their haste and eagerness to discipline the surveyor, violate the surveyor's right to due process. On the other hand, if boards are recalcitrant or biased against complainants there is no separate authority to make them take action.

Second, many licensing boards have failed to publish adequate standards that justify professional discipline

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Either boards have promulgated too many outdated standards or they have not promulgated enough standards to provide even minimum guidance or basis for discipline. In between these two extremes are some standards that actually reduce the quality of services offered to the public. For example, the requirement that all urban property surveys be conducted using a closed traverse may actually restrict the use of the modern and, in some cases, more accurate Global Positioning Systems (GPS). In other cases, standards meant to increase the quality of surveys may in fact increase the time, effort, and eventual cost of the survey without necessarily increasing accuracy. A magnetic compass and tape could locate former boundaries originally surveyed by compass and tape just as accurately, if not more so, than more sophisticated equipment. Yet some boards would consider continued use of early methods and equipment akin to professional malpractice.

The other side of the problem concerns the boards that fail to publish any standards. In these cases, it is difficult, if not improper to criticize surveyors for performing a survey improperly when there are no performance standards for guidance. How can a board find that a surveyor has done a survey incorrectly when the board or legislature has never described how to perform one correctly. In addition, the lack of mandated standards or their enforcement compel many surveyors to lower their standards in order to remain competitive. Is it fair to discipline one surveyor for actions that all surveyors routinely practice in an area?

What Is Fact and What Is Fiction?

These various arguments and counterarguments are all true in part. There is probably some truth to a complainant's perception that the profession protects its

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own -- although it is probably not present, as some complainants suggest, in the form of a conscientious effort on the part of the professional members on the board. Bias, when it does exist, is more a subconscious feeling, surreptitiously and unintentionally clouded in what the board member perceives is an effort to give the accused surveyor the benefit of the doubt.

Bias can generally be attributed to five factors: First, undue sensitivity about their own professional fallibility may preclude a board member giving fair and impartial deliberation to a complainant. Every practicing professional has made mistakes and may think: "people that live in glass houses shouldn't throw stones" or, put in other words, "there but for the grace of God would I stand accused." Board members should realize they are not a member of the board to "cast stones" on their own behalf but were selected as members of a board with the duty and responsibility to protect the public (i.e. to "cast stones" on behalf of the public).

Second, many board members feel the surveyor has a vested property right in their license -- they can't be revoked except for the most outrageous conduct. The misconception about the sanctity of a license is improper. States do not make irrevocable contracts where the public's health, safety, and welfare are concerned. Although a license deserves protection through due process, it does not require the protection afforded a vested right.

Third, unsure of the standards of practice themselves, the board members are reluctant to condone practices that do not appear unreasonable, even if somewhat unusual or extreme. This reasoning acts as an injustice toward the complainant. The complainant did not bargain for a "not unreasonable" survey -- he or she bargained for a

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competent survey, performed in a reasonable manner, to standards consistent throughout the profession.

Fourth, many board members are leery of disciplining marginal complaints for fear of encouraging more marginal complaints, raising the standards of survey practice beyond reason, and imposing more rigorous standards on the profession and themselves. Unfortunately, their reluctance encourages the court to set and apply higher standards without benefit of professional insight. Most jurisdictions hold surveyors to a local if not a national "similarly situated person" standard of care -- why not at least accept that standard or proceed from there. What better group is there to elevate and define professional standards and enforce professional conduct than professional members of the board acting for the public's benefit?

Finally, many board members are reluctant to pursue legal protocol and confrontations that accompany the imposition of penalties, choosing instead to take the easy way out by dismissing or making light of the complaint. This reluctance can be overcome by more training or soliciting help from others trained in legal protocol.

The argument that the boards lack the resources, power, or time to enforce discipline on their members is many times a poor excuse simply because some boards fail to take any action, even action that requires minimal resources (such as letters of censure, reprimands, etc.). At the very least, the licensing board can reprimand the surveyor, fail to renew the license, or ask the surveyor to voluntarily turn in his or her license.

Judicial decisions involving surveyors as a party in a civil action should not be used as an argument. A judicial

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decision in favor of a surveyor or the surveyor's client should not always be accepted as a carte blanche stamp of approval or disapproval of the surveyor's conduct and competency. The court, when it is not specifically charged, does not take on the burden or hear evidence necessary to arrive at a decision concerning the surveyor's competency, morals, ethics, and knowledge -- that is left to the licensing board. In most civil actions, the courts are fixing liability by weighing equity rather than determining a surveyor's competence.

Many complaints are properly dismissed or must be dismissed through no fault of the board or its members. On the other hand, even though boards cannot investigate all complaints, they should admonish surveyors who do not communicate fee information, limitations of survey practice, and potential consequences of surveys to their clients. There is a great deal of truth to the argument that more of a burden should be put on the surveyor to educate the client, communicate information to the public, and accept responsibility for the problems caused by lack of communication. If other professions have a duty imposed on them to disclose all relevant standards, problems, concerns, information, and foreseeable consequences resulting from their actions; isn't it time for surveyors to accept this responsibility and for boards to discipline accordingly?

Finally, challenges concerning the combination of powers (commingling of functions) in a board have met with little success. Nevertheless, boards should take a critical look at their procedures, standards, and practices to make them more fair and improve their efficiency. All boards should publish standards that are flexible enough to take advantage of emerging technology and handle needs of particular areas or clients. Standards expected from

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similarly situated professionals can be applied in almost all situations where a surveyor stands accused of incompetence or misconduct. In fact, one of the justifications for including professional members on the board is to establish and enforce professional standards.

Recommendations

The scope and frequency of communication between the licensing board and the profession should be increased to show that the licensing board is actively investigating and prosecuting valid complaints. Proposed regulations, pending disciplinary actions, procedures, applications received, experience required, the names of applicants sitting for the licensing exam, and so on could be included in the communications between the licensing board and profession. This would improve relations and help to avert complaints from practitioners.

To solve the problem of inadequate resources, some jurisdictions and professional licensing boards have increased licensing fees or imposed fines to pay for investigation and prosecution, established a system of professional monitoring or continuing education to educate or remove incompetents, or amended the licensing act to provide the board with more remedies.

Providing a wider variety of remedies increases the ability of boards to take action against non-licensed persons and allows for structuring the relief to the infraction. Such remedies include: letters of warning, caution, and censure; injunctions; reprimands; probation; peer review of work; mandatory education or training; reexamination; restriction of practice; fines; criminal penalties; and license revocation, suspension, or refusal to renew.

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For example, mandatory or prohibitory injunctions could be used by the board to prevent non-licensed persons from practicing or to require surveyors to correct mistakes or bring a particular survey up to standards. This has the advantage of correcting a problem without necessarily reprimanding or disciplining the surveyor. Reprimands and letters would be applied where the surveyor used poor judgment or made a mistake that is isolated to one case and does not reflect their normal practice. License suspension could be applied if the surveyor's work has consistently exhibited a tendency toward incompetency or the surveyor has shown immoral behavior or gross negligence. The harshest discipline, license revocation or failure to renew, can be applied in circumstances where the surveyor is incompetent to practice (e.g. senility), behaves in an unscrupulous manner, repeats violations, refuses a board directive, or obtained his or her license by fraud. Finally, criminal penalties or fines could be used against unlicensed practitioners who knowingly offer professional services or practitioners whose behavior is criminal or fraudulent.

Board procedures and functions can be revised. For example, boards can use trained investigators to help prosecute complaints. Getting the profession more involved with monitoring and communicating with its members may also help. In addition, an effort should be made to standardize surveying procedures, tolerances, and rules of professional conduct among surveyor licensing boards. Boards should provide more training to board members in areas of due process, injunctions, the Administrative Procedures Act, and enacting regulations.

Conclusions

Some states are lax in disciplining members of the

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surveying profession. When the profession fails to police its own ranks aggressively the profession loses stature and the public will find other ways to seek justice through civil litigation. In extreme cases, professional recognition is lost altogether and the licensing board dismantled.

The first consequence is perhaps the most surreptitious. One recognized characteristic of a profession is its ability to hold its members to high standards and foster the public's trust and esteem. The consequence is increased litigation, which, for the surveyor, means negative exposure, higher cost for errors-and-omission's insurance, and the increased risk of lawsuit. Finally, when the point is reached that the public perceives it must deal with a professional starting with a basis of mistrust, the need for licensing is removed.

Better communication among boards, licensed professionals, and members of the public is needed. Flexible remedies and improved procedures and functions within the boards are crucial alternatives. Standards should be established and monitored in a consistent manner. A better understanding of the problems and by adopting these and other recommendations will give a resounding "YES" when the question is asked: "Are licensing boards doing their jobs?"

References

This article has been edited from a research paper prepared by Knud Hermansen. For a copy of the complete paper with references, you can contact Knud Hermansen at the University of Maine, Surveying Engineering Department, 107 Boardman Hall, Orono, ME 04473 or the editors of this publication.

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