Comments on Professional Responsibility

by
Knud E. Hermansen, P.L.S., P.E., Ph.D., J.D.

An ongoing debate among professional surveyors focuses on the responsibility of the surveyor toward the client. Part of this debate focuses on where the surveyor's responsibility ends and where the attorney's begins. In other words, at what point does the surveyor stop practicing surveying and begin practicing law. Unfortunately, where the two seem to meet there are no fixed rules or bright lines of professional conduct to guide the surveyor between the practice of law and practice of surveying. As a result, the concept of proper professional behavior varies between surveyors, attorneys, and clients. For example, some surveyors, attorneys, and clients feel the surveyor's professional responsibility should take the form of a "fact-gatherer;" that is, someone who gets information but does not give an opinion. At the other end (some would say extreme end) are the surveyors, attorneys, and clients who feel the surveyor should be the client's "hired-gun." This takes the form of a surveyor who feels it is their professional obligation to zealously advocate their client's position, right or wrong. There are, of course, shades of these and others with every surveyor having a slightly different opinion.

In order to begin and understand, lets start where most surveyors agree. Most surveyors agree that the surveyor's responsibility in regard to a boundary retracement survey is to "follow in the footsteps of the original surveyor." This maxim can be expanded by saying the surveyor's professional responsibility is to: "identify the location of boundaries, verify the location of boundaries, or help resolve conflict among conflicting boundary locations (i.e., gather data for litigation)." Applying this definition to the three recognized boundary categories, the surveyor's responsibility is to identify, verify, or help resolve conflicting locations among or between record, possession, and ownership boundaries. To further help determine where the practice of surveying stops and the practice of law begins, the following maxims are useful and worth considering:

Surveyors Are Trained to Deal With Questions of Fact, not Questions of Law: Surveyors are trained to gather and analyze facts and apply them to a situation using as guides legal principles and rules of law. Therefore, any decision the surveyor makes should be founded on questions of fact (guided by principles of law), not questions of law. An example to show this dichotomy is where one surveyor shows the location of a fence and calls it a possession boundary while another surveyor shows the location of a fence and calls it the client's ownership boundary (based on the surveyor's understanding of adverse possession). The first is an opinion based on the facts, the second involves a factual opinion coupled with a legal assumption the client has marketable, fee-simple title (adverse possession generally requires an action to quiet title in order to give marketable title). The courts have held that boundary location generally involves the application of facts while adverse possession involves a question of law. As one early survey practitioner said in the 1800s: "Old fences must generally be accepted by right of possession; though such questions belong to the lawyer [rather] than to the surveyor."[1]

Be Knowledgeable But Prudent: Surveyors should not be reluctant to give an informed opinion to their client -- that is why the client has hired a professional. (Most jurisdictions allow the surveyor to give his or her professional opinion on the location of the boundary even if the opinion appears to answer the ultimate question in dispute.[2]) However, the surveyor should refrain from opinions or action in areas where the surveyor lacks the training, knowledge, or experience. As a general rule to avoid undue liability and problems, surveyors should avoid acting on or giving unrestricted opinions when: (1) the matter is outside the scope of the contract with the client; (2) the surveyor is made aware of a potential problem that is outside of the scope of the surveyor's training or experience; and (3) the surveyor suspects a problem but may not be sure, does not have, cannot obtain, or refuses to get additional facts.

Start From the Proper Assumptions: Surveyors frequently find themselves working or having to come to a decision in a situation beyond the scope of their professional knowledge because they incorrectly diagnosed the client's problem at the outset. This situation frequently occurs where the surveyor has assumed the client's problem is a boundary dispute rather than a title dispute or vice versa. A title dispute involves an area that is encompassed (or thought to be

encompassed) in two or more deeds. Where there should be one common boundary between the parcels, there are, instead, two separate and recognizable boundaries, each, when properly located, reside on land that appears to belong to the other landowner. (In fact, one party has title to the area and the other party has "color-of-title.") Title disputes are normally resolved in favor of the landowner with senior title, although adverse possession and estoppel may provide for a different outcome. On the other hand, a boundary dispute is where there is only one boundary but each party feels the boundary should reside in a different location. This problem is generally resolved by gathering the facts, applying principles of law, and coming to a decision based on the preponderance of evidence.

Keep Your Client Informed: Lack of poor communication between the client and surveyor is the common basis for most complaints to surveyor registration boards. Therefore, one important maxim is to keep the client informed. Professionals should and are generally required to keep their client informed. In some cases, professionals are required to obtain their client's consent before taking certain actions that may be detrimental to their health or their property (Doctrine of Informed Consent). This doctrine in no way suggests that the surveyor act as a hired gun or an advocate for the client's position if it runs counter to the surveyor's professional opinion. On the contrary, the surveyor is expected to perform services in a competent manner; arrive at a professional opinion based on his or her knowledge, training, and experience; and communicate the favorable or unfavorable opinion to the client. As a general rule, the surveyor should inform the client any time the surveyor's opinion, recommendations, or actions: (1) could initiate or increase the possibility of litigation, (2) conflict with or depart from another plausible boundary location, or (3) run counter to another professional surveyor's opinion.

Practice as a Professional: The last maxim is to remember surveying is a profession and the surveyor should act as a licensed professional. A professional is someone who possess some particular knowledge and skill that is beyond the ken of the average member of the public. Licensing of professionals is done to compensate for the public's lack of knowledge and thereby protect the public by insuring that any person offering his or her professional services has the requisite minimum knowledge and skill to provide professional services in a competent manner. In theory, licensing should eliminate the concept of caveat emptor that is generally paramount when members of the public deal with peers and tradesmen.[3]

With these comments in mind, hopefully it should be easier to determine the surveyor's professional responsibility and define where the practice of surveying ends and the legal practice begins. In all cases of doubt or where legal problems could be involved it is always good practice to recommend (in writing) that the client consult with an attorney.

References:

1. Gillespie, *A Treatise on Land-Surveying* at page 155 (Appleton & Company, New York, NY: 1881)
2. See e.g., *Koenig v. Skaggs*, Missouri, 400 S.W.2d 63, 67 (1966) also see King v. Browning, 246 Ga. 46, 268 S.E.2d 653, 655 (1980)
3. Rona, *The Rise and Fall of the Learned Professions*, at page 6 (College of Engineering, West Virginia University, Morgantown: 1977)