



ETHICS IN ENGINEERING

SPEE – Northern Rockies Chapter

Tuesday, April 28, 2015

Casper Petroleum Club, Casper, Wyoming

**Presented By:
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I. What Ethical Obligations Apply to Professional Engineers?

A. State Statutes

B. Regulatory Board Rules

C. Code of Ethics – Associations/Organizations

- Society of Petroleum Evaluation Engineers (SPEE)
- National Society of Professional Engineers (NSPE)
- National Council of Examiners for Engineering and Surveying (NCEES)

II. Disciplinary Action for Ethical Violations.

A. What is Disciplinary Action?

Adverse action taken by a State regulatory (licensing) or professional association which may result in formal sanctions, including limitation of practice

B. Wyoming Statutes

The Engineers and Surveyors Practice Act -- Wyo. Stat. Ann. §§ 33-29-201 through 33-29-709

Grounds for Discipline and Authorized Disciplinary Sanctions

Wyo. Stat. Ann. § 33-29-702. Grounds for disciplinary action.

- (a) An individual or business entity is subject to disciplinary action for:
 - (i) A violation of this act, board rule, order or code of ethics[.]

C. Wyoming Board of Professional Engineers and Professional Land Surveyor Rules

Grounds for Discipline and Authorized Disciplinary Sanctions

Section 7. Rules of Professional Conduct.

- (a) All licensees and interns shall comply with the following standards. In the event the referenced engineering code of ethics or surveying creed and canons conflict with the following standards, the standards in this section shall control.

D. Complaints, Investigations and Hearings



(See Handout)

E. Survey of Reported Cases (See Handout)

What have we learned?

- ❖ Don't get into battles with Boards regarding the evidence.
- ❖ Don't get into contests with Courts regarding the legal issues.
- ❖ Must be able to articulate what constitutes the practice of professional engineering.
- ❖ Must be able to show discipline for violation of ethical codes is necessary for public protection.
- ❖ Must be able to demonstrate the reasonableness of disciplinary sanction.

III. Conclusion

IV. Q&A



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NSPE Code of Ethics

Code of Ethics for Engineers

Preamble

Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.

I. Fundamental Canons

Engineers, in the fulfillment of their professional duties, shall:

1. Hold paramount the safety, health, and welfare of the public.
2. Perform services only in areas of their competence.
3. Issue public statements only in an objective and truthful manner.
4. Act for each employer or client as faithful agents or trustees.
5. Avoid deceptive acts.
6. Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.

II. Rules of Practice

1. Engineers shall hold paramount the safety, health, and welfare of the public.
 - a. If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.
 - b. Engineers shall approve only those engineering documents that are in conformity with applicable standards.
 - c. Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.
 - d. Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe is engaged in fraudulent or dishonest enterprise.
 - e. Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.
 - f. Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.
2. Engineers shall perform services only in the areas of their competence.
 - a. Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.
 - b. Engineers shall not affix their signatures to any plans or documents dealing with subject matter in which they lack competence, nor to any plan or document not prepared under their direction and control.
 - c. Engineers may accept assignments and assume responsibility for coordination of an entire project and sign and seal the engineering documents for the entire project, provided that each technical segment is signed and sealed only by the qualified engineers who prepared the segment.
3. Engineers shall issue public statements only in an objective and truthful manner.
 - a. Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.
 - b. Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.
 - c. Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.

4. Engineers shall act for each employer or client as faithful agents or trustees.
 - a. Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.
 - b. Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.
 - c. Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.
 - d. Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.
 - e. Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.
5. Engineers shall avoid deceptive acts.
 - a. Engineers shall not falsify their qualifications or permit misrepresentation of their or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint venturers, or past accomplishments.
 - b. Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.

III. Professional Obligations

1. Engineers shall be guided in all their relations by the highest standards of honesty and integrity.
 - a. Engineers shall acknowledge their errors and shall not distort or alter the facts.
 - b. Engineers shall advise their clients or employers when they believe a project will not be successful.
 - c. Engineers shall not accept outside employment to the detriment of their regular work or interest. Before accepting any outside engineering employment, they will notify their employers.
 - d. Engineers shall not attempt to attract an engineer from another employer by false or misleading pretenses.
 - e. Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.
2. Engineers shall at all times strive to serve the public interest.
 - a. Engineers are encouraged to participate in civic affairs; career guidance for youths; and work for the advancement of the safety, health, and well-being of their community.
 - b. Engineers shall not complete, sign, or seal plans and/or specifications that are not in conformity with applicable engineering standards. If the client or employer insists on such unprofessional conduct, they shall notify the proper authorities and withdraw from further service on the project.
 - c. Engineers are encouraged to extend public knowledge and appreciation of engineering and its achievements.
 - d. Engineers are encouraged to adhere to the principles of sustainable development¹ in order to protect the environment for future generations.

3. Engineers shall avoid all conduct or practice that deceives the public.
 - a. Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.
 - b. Consistent with the foregoing, engineers may advertise for recruitment of personnel.
 - c. Consistent with the foregoing, engineers may prepare articles for the lay or technical press, but such articles shall not imply credit to the author for work performed by others.
4. Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.
 - a. Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.
 - b. Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer.
5. Engineers shall not be influenced in their professional duties by conflicting interests.
 - a. Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.
 - b. Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the engineer in connection with work for which the engineer is responsible.
6. Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.
 - a. Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.
 - b. Engineers in salaried positions shall accept part-time engineering work only to the extent consistent with policies of the employer and in accordance with ethical considerations.
 - c. Engineers shall not, without consent, use equipment, supplies, laboratory, or office facilities of an employer to carry on outside private practice.
7. Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.
 - a. Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.
 - b. Engineers in governmental, industrial, or educational employ are entitled to review and evaluate the work of other engineers when so required by their employment duties.
 - c. Engineers in sales or industrial employ are entitled to make engineering comparisons of represented products with products of other suppliers.
8. Engineers shall accept personal responsibility for their professional activities, provided, however, that engineers may seek indemnification for services arising out of their practice for other than gross negligence, where the engineer's interests cannot otherwise be protected.
 - a. Engineers shall conform with state registration laws in the practice of engineering.
 - b. Engineers shall not use association with a nonengineer, a corporation, or partnership as a "cloak" for unethical acts.
9. Engineers shall give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others.
 - a. Engineers shall, whenever possible, name the person or persons who may be individually responsible for designs, inventions, writings, or other accomplishments.
 - b. Engineers using designs supplied by a client recognize that the designs remain the property of the client and may not be duplicated by the engineer for others without express permission.
 - c. Engineers, before undertaking work for others in connection with which the engineer may make improvements, plans, designs, inventions, or other records that may justify copyrights or patents, should enter into a positive agreement regarding ownership.
 - d. Engineers' designs, data, records, and notes referring exclusively to an employer's work are the employer's property. The employer should indemnify the engineer for use of the information for any purpose other than the original purpose.
 - e. Engineers shall continue their professional development throughout their careers and should keep current in their specialty fields by engaging in professional practice, participating in continuing education courses, reading in the technical literature, and attending professional meetings and seminars.

Footnote 1 "Sustainable development" is the challenge of meeting human needs for natural resources, industrial products, energy, food, transportation, shelter, and effective waste management while conserving and protecting environmental quality and the natural resource base essential for future development.

As Revised July 2007

"By order of the United States District Court for the District of Columbia, former Section 11(c) of the NSPE Code of Ethics prohibiting competitive bidding, and all policy statements, opinions, rulings or other guidelines interpreting its scope, have been rescinded as unlawfully interfering with the legal right of engineers, protected under the antitrust laws, to provide price information to prospective clients; accordingly, nothing contained in the NSPE Code of Ethics, policy statements, opinions, rulings or other guidelines prohibits the submission of price quotations or competitive bids for engineering services at any time or in any amount."

Statement by NSPE Executive Committee

In order to correct misunderstandings which have been indicated in some instances since the issuance of the Supreme Court decision and the entry of the Final Judgment, it is noted that in its decision of April 25, 1978, the Supreme Court of the United States declared: "The Sherman Act does not require competitive bidding."

It is further noted that as made clear in the Supreme Court decision:

1. Engineers and firms may individually refuse to bid for engineering services.
2. Clients are not required to seek bids for engineering services.
3. Federal, state, and local laws governing procedures to procure engineering services are not affected, and remain in full force and effect.
4. State societies and local chapters are free to actively and aggressively seek legislation for professional selection and negotiation procedures by public agencies.
5. State registration board rules of professional conduct, including rules prohibiting competitive bidding for engineering services, are not affected and remain in full force and effect. State registration boards with authority to adopt rules of professional conduct may adopt rules governing procedures to obtain engineering services.
6. As noted by the Supreme Court, "nothing in the judgment prevents NSPE and its members from attempting to influence governmental action . . ."

Note: In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer, and it is incumbent on members of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.

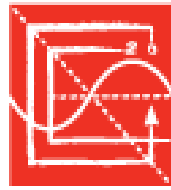


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NCEES Model Rules



NCEES
*advancing licensure for
engineers and surveyors*

MODEL RULES

Revised August 2014

Excerpts

* * *

240.15 Rules of Professional Conduct

To safeguard the health, safety, and welfare of the public and to maintain integrity and high standards of skill and practice in the engineering and surveying professions, the rules of professional conduct provided in this section shall be binding upon every licensee and on all firms authorized to offer or perform engineering or surveying services in this jurisdiction.

A. Licensee's Obligation to the Public

1. Licensees shall be cognizant that their first and foremost responsibility is to safeguard the health, safety, and welfare of the public when performing services for clients and employers.
2. Licensees shall sign and seal only those plans, surveys, and other documents that conform to accepted engineering and surveying standards and that safeguard the health, safety, and welfare of the public.
3. Licensees shall notify their employer or client and such other authority as may be appropriate when their professional judgment is overruled under circumstances in which the health, safety, or welfare of the public is endangered.
4. Licensees shall, to the best of their knowledge, include all relevant and pertinent information in an objective and truthful manner within all professional documents, statements, and testimony.
5. Licensees shall express a professional opinion publicly only when it is founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter.
6. Licensees shall issue no statements, criticisms, or arguments on engineering and surveying matters that are inspired or paid for by interested parties, unless they explicitly identify the interested parties on whose behalf they are speaking and reveal any interest they have in the matters.
7. Licensees shall not partner, practice, or offer to practice with any person or firm that they know is engaged in fraudulent or dishonest business or professional practices.
8. Licensees who have knowledge or reason to believe that any person or firm has violated any rules or laws applying to the practice of engineering or surveying shall report it to the board, may report it to appropriate legal authorities, and shall cooperate with the board and those authorities as may be requested. (*Section 150, Disciplinary Action, NCEES Model Law*)
9. Licensees shall not knowingly provide false or incomplete information regarding an applicant in obtaining licensure.
10. Licensees shall comply with the licensing laws and rules governing their professional practice in each of the jurisdictions in which they practice.

B. Licensee's Obligation to Employer and Clients

1. Licensees shall undertake assignments only when qualified by education or experience in the specific technical fields of engineering or surveying involved.

2. Licensees shall not affix their signatures or seals to any plans or documents dealing with subject matter in which they lack competence, nor to any such plan or document not prepared under their responsible charge.
3. Licensees may accept assignments and assume responsibility for coordination of an entire project, provided that each technical segment is signed and sealed by the licensee responsible for preparation of that technical segment.
4. Licensees shall not reveal facts, data, or information obtained in a professional capacity without the prior consent of the client, employer, or public body on which they serve except as authorized or required by law or rules.
5. Licensees shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties in connection with work for employers or clients.
6. Licensees shall disclose to their employers or clients all known or potential conflicts of interest or other circumstances that could influence or appear to influence their judgment or the quality of their professional service or engagement.
7. Licensees shall not accept compensation, financial or otherwise, from more than one party for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to in writing by all interested parties.
8. Licensees shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves as a member. Conversely, licensees serving as members, advisors, or employees of a government body or department, who are the principals or employees of a private concern, shall not participate in decisions with respect to professional services offered or provided by said concern to the governmental body that they serve. (*Section 150, Disciplinary Action, NCEES Model Law*)
9. Licensees shall not use confidential information received in the course of their assignments as a means of making personal profit without the consent of the party from whom the information was obtained.

C. Licensee's Obligation to Other Licensees

1. Licensees shall not falsify or permit misrepresentation of their, or their associates', academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in prior assignments nor the complexity of said assignments. Presentations incidental to the solicitation of employment or business shall not misrepresent pertinent facts concerning employers, employees, associates, joint ventures, or past accomplishments.
2. Licensees shall not offer, give, solicit, or receive, either directly or indirectly, any commission, or gift, or other valuable consideration in order to secure work, and shall not make any political contribution with the intent to influence the award of a contract by public authority.
3. Licensees shall not injure or attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other licensees, nor indiscriminately criticize other licensees' work. (*Section 150, Disciplinary Action, NCEES Model Law*)
4. Licensees shall make a reasonable effort to inform another licensee whose work is believed to contain a material discrepancy, error, or omission that may impact the health, safety, or welfare of the public, unless such reporting is legally prohibited.

Source: <http://cdn1.ncees.co/wp-content/uploads/2012/11/Model-Rules.pdf> (last visited March 15, 2015).

SPEE Code of Ethics

Code of Ethics of Engineers

The Fundamental Principles

Engineers uphold and advance integrity, honor and dignity of the engineering profession by:

- 1) using their knowledge and skill for the enhancement of human welfare;
- 2) being honest and impartial, and serving with fidelity the public, their employers and clients;
- 3) striving to increase the competence and prestige of the engineering profession; and
- 4) supporting the professional and technical societies of their disciplines.

The Fundamental Canons

- 1) Engineers shall hold paramount the safety, health and welfare of the public in the performance of their professional duties.
- 2) Engineers shall perform services only in the areas of their competence.
- 3) Engineers shall issue public statements only in an objective and truthful manner.
- 4) Engineers shall act in professional matters for each employer or client as faithful agents or trustees, and shall avoid conflicts of interest.
- 5) Engineers shall build their professional reputation on the merit of their services and shall not compete unfairly with others.
- 6) Engineers shall act in such a manner as to uphold and enhance the honor, integrity and dignity of the profession.
- 7) Engineers shall continue their professional development throughout their careers and shall provide opportunities for the professional development of those engineers under their supervision.

SPEE – Principles of Acceptable Practices



PRINCIPLES OF ACCEPTABLE EVALUATION ENGINEERING PRACTICE

Article I Fundamental Canons

Engineers, in the fulfillment of their professional duties, shall:

- Hold paramount the safety, health and welfare of the public.
- Perform services only in areas of their competences.
- Issue public statements in an objective and truthful manner.
- Act for each employer or client as faithful consultants or trustees.
- Avoid deceptive acts.
- Conduct themselves honorably, responsibly, ethically and lawfully so as to enhance the honor, reputation and usefulness of the profession.

Article II General Practice

1. The Society may adopt and issue from time to time guidelines for the preparation of reserve estimates and evaluation reports.
2. Members will ascertain that their reports include a full disclosure of the reserve definitions used, either by reference to a known industry set of definitions or by actual inclusion of the definitions used. The reference or inclusion of the definitions shall be clearly presented so as to enable the reader to easily ascertain the definitions used.
3. If the member preparing the report has a vested interest in the properties being evaluated, the nature of this interest shall be disclosed.

Article III Relation of Members to the Public

1. Members will make oral and written statements that are honest and fair, avoiding exaggeration and sensationalism.
2. Members will control the use of maps and reports to assure they are used only for legitimate purposes. For example, limitations in the data relied upon or the method of analysis employed or the assumptions made must be explained. Also the specific use of the maps and reports will be defined.
3. Members will give professional opinions, prepare reports or give legal testimony only after adequate preparation. The extent of that preparation shall be disclosed.
4. Members will publish business and professional announcements, but shall not advertise their work or accomplishments in a self-laudatory or conspicuous manner. Members should not misrepresent their experience nor professional or academic qualifications.
5. Members shall report violations of this Code of Ethics to the appropriate professional bodies.

Article IV Relation of Members to Employer and Client

1. A member shall protect, to the fullest extent possible, the interest of his employer or client so far as it is consistent with the laws of the state, the public welfare, and professional obligations and ethics.
2. A Member will not use or divulge, directly or indirectly, any client's or employer's confidential information without express written consent. To do so is unethical and may constitute a theft.
3. A Member retained by one client will not accept, without that client's consent, an engagement by another if the interest of the two is in any manner conflicting.
4. A Member who has made an investigation for any employer or client will not seek to profit economically from the information gained unless permission to do so is granted or until it is clear that there can no longer be a conflict of interest with the original employer or client.
5. A Member shall not seek or accept a contingent fee arrangement for preparing a report, giving a professional opinion or providing legal testimony. This destroys the credibility of the product.
6. Member shall not accept a concealed fee for referring a client or employer to a specialist or for recommending petroleum evaluation services other than his own. Such an undisclosed payment is a kick-back.

Article V Relation of Members to Peers

1. A Member will not falsely nor maliciously attempt to injure the reputation or business of another person.
2. A Member will freely give credit for work done by others, will refrain from plagiarism in oral or written communications and will not knowingly accept credit rightfully due another person.
3. A Member will endeavor to cooperate with others in his profession and will encourage the ethical dissemination of petroleum evaluation knowledge.

Article VI Duty to the Society

1. In making application to become a member or continuing as a member in the Society, a member agrees to uphold the NSPE Code of Ethics for Engineers and these Principles of Acceptable Evaluation Engineering Practice by precept and example.
2. A Member of the Society will aid in preventing the election of a person to membership in the Society who does not abide by the NSPE Code of Ethics for Engineers and these Principles of Acceptable Evaluation Engineering Practice or who does not have the required education and experience.

WY Board PEPLS

Rules & Regulations

STATE OF WYOMING

BOARD OF PROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS



RULES AND REGULATIONS

Revised December 23, 2013

Excerpts

* * *

CHAPTER 5

Practice of Professional Engineering and Professional Land Surveying

* * *

Section 7. Rules of Professional Conduct.

(a) All licensees and interns shall comply with the following standards. In the event the referenced engineering code of ethics or surveying creed and canons conflict with the following standards, the standards in this section shall control.

(i) A licensee or intern shall not submit any materially false statements or fail to disclose any material facts requested in connection with the application for license;

(ii) A licensee or intern shall not engage in fraud, deceit, misrepresentation, or concealment of material facts in advertising, soliciting or providing professional services to members of the public;

(iii) A licensee or intern shall not knowingly seal, sign and date any plans, drawings, blueprints, land surveys, reports, specifications or other documents not prepared or without thorough technical review by the licensee or under the licensee's direct supervision;

(iv) A licensee or intern shall not knowingly violate any federal or state statute concerning bribery;

(v) A licensee or intern shall comply with all federal, state, and local building, fire, safety, real estate, and mining codes, and any other laws, codes, ordinances, or regulations pertaining to the licensee's professional practice. A licensee shall not provide any professional services in violation of any such laws, codes, ordinances, or regulations;

(vi) A licensee or intern shall not violate any state or federal criminal statute involving fraud, misrepresentation, embezzlement, theft, forgery or breach of fiduciary duty, where the violation is related to his/her professional practice;

(vii) A licensee shall apply the technical knowledge and skill which would be applied by other qualified licensees who practice the same profession;

(viii) A licensee shall not accept an assignment where the duty to a client or the public would conflict with the licensee's personal interest or the interest of another client without full disclosure of all material facts of the potential conflict to each person who might be related to or affected by the project or engagement in question;

(ix) Licensees shall not accept compensation for services related to the same project or professional engagement from more than one private party without making full disclosure to all parties involved and obtaining the express written consent of all parties involved;

(x) Licensees who serve governmental or quasi-governmental organizations or departments, or are board members of any organization which receives government funds, as members, advisors, or employees shall recuse themselves from any conflict of interest decision and act in the best interest of that organization;

(xi) Except as provided in Subparagraph (xiv) below, a licensee shall not accept any professional engagement or assignment outside the licensee's professional license unless: (a) the licensee is qualified by education, technical knowledge or experience to perform such work and (b) such work is both necessary and incidental to the work of the licensee's profession on that specific engagement or assignment;

(xii) Except as otherwise provided by law, code, ordinance, or regulation, a licensee may act as the prime professional for a given project and select collaborating professionals; however, the licensee shall perform only those professional services for which the licensee is qualified and shall seal, sign and date only the work prepared by the licensee or under the licensee's direct supervision;

(xiii) A licensee shall make full disclosure to all parties concerning: (a) any transaction involving payments to any person for the purpose of securing a contract, assignment, or engagement, except for actual and substantial technical assistance in preparing the proposal; or (b) any monetary, financial, or beneficial interest, the licensee may hold in a contracting firm or other entity providing goods or services, other than the licensee's professional services, to a project or engagement;

(xiv) A licensee shall not solicit, receive, or accept compensation from material, equipment, or other product or service suppliers for specifying or endorsing their products, goods, or services to any client or other person without full written disclosure to all parties;

(xv) If a licensee's professional judgment is overruled or not adhered to under circumstances where a serious threat to the public health, safety, or welfare results or would result, the licensee shall immediately notify the client or employer. If the client or employer does not take appropriate remedial action within a reasonable amount of time under the circumstances, the licensee shall also notify the Board of the specific nature of the public threat;

(xvi) If called upon or employed as an arbitrator to interpret contracts or to judge contract performance, or to perform any other arbitration duties, the licensee shall render decisions impartially and without bias to any party.

(b) Failure to comply with any provision of this section shall be deemed to be evidence of gross negligence, incompetence, or other misconduct.

PE Reported Cases

Reported Cases Involving Disciplinary Actions Taken by Professional Engineering Licensing Boards

Professional Engineer Cases

1. *H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Engineers & Land Surveyors*, 113 Idaho 646, 747 P.2d 55 (1987).

Engineering firm and its engineers appealed a decision by the Idaho State Board of Professional Engineers and Land Surveyors revoking the licenses of some of the engineers and suspending the licenses of the others due to their alleged “misconduct” and “negligence” in connection with work on wastewater treatment projects.

The engineers conceded that difficulties arose in connection with some of the projects. The Board’s inquiry focused principally on matters such as design, supervision of construction, and administrative matters such as assignment of personnel, handling of documents, and the relationship of the firm with clients and funding agencies, finding numerous flaws and occasions of misfeasance. The applicable statute provided that “[a]ny affected party may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct or violation of any provision of this chapter, or violation of any of the rules promulgated by the board against any individual licensee or certificate holder or against any business entity holding a certificate of authorization or against a person applying for a license or against a business entity applying for a certificate of authorization. Repeated acts of negligence may be considered as a gross act for disciplinary action.”

The engineers argued that because the grounds for discipline were not defined by statute nor by the Board itself, those grounds fail to adequately warn them as to what conduct is prohibited. For example, they challenged the Board’s finding that the engineers developed an adversarial relationship with the agencies which reviewed, supervised and funded wastewater treatment projects. The Board concluded in their findings that this adversarial relationship was the result of “poor judgment on the part of the engineers, hence misconduct.” The engineers contended that standards for discipline are unconstitutionally vague because nowhere do any regulations define the grounds for discipline; for example, no regulation defines “poor judgment” as “misconduct.”

The appellate court agreed and held that the Board violated engineers’ due process rights because then-applicable regulations failed to adequately warn them as to what conduct would subject them to discipline.

2. *Duncan v. Missouri Bd. for Architects, Prof'l Engineers & Land Surveyors*, 744 S.W.2d 524 (Mo. Ct. App. 1988).

In 1981, the second and fourth floor walkways of the Hyatt Regency Hotel in Kansas City collapsed and fell to the floor of the main lobby. Approximately 1500 to 2000 people were in the lobby. The walkways together weighed 142,000 pounds. One hundred and fourteen people died and at least 186 were injured. The National Bureau of Standards conducted an investigation of the tragedy and made its report in May 1982. Subsequently, in 1984, the Missouri Board for Architects, Professional Engineers and Land Surveyors filed its complaint seeking a determination that the engineering certificates of registration of Daniel Duncan and Jack Gillum and the engineering certificate of authority of G.C.E. International were subject to discipline. After a hearing, the hearing commission

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found that such certificates were subject to suspension or revocation. Upon remand for assessment of appropriate disciplinary action, the Board ordered all three certificates revoked.

On appeal, Duncan argued that the statute authorizing disciplinary action for “gross negligence” was unconstitutionally vague, which the court did not embrace. The court stated:

While the parties are in disagreement as to the correct definition of the term “gross negligence” it is clear that the term connotes an improper conduct greater either in kind or in degree or both than ordinary negligence. It is to be presumed that any licensed professional knows that he is to perform his professional duties with the degree of care required under the particular circumstances involved, i.e. free from negligence. The statute serves to advise the professional engineer that improper conduct greater in kind or in degree than lack of ordinary care will subject him to disciplinary action. The phrase provides a guideline sufficient to preclude arbitrary and discriminatory application.

Duncan also made challenges to the factual findings – *i.e.*, that each of several different acts or omissions constituted gross negligence justifying discipline. However, the court would not require a finding that *each* of these acts or omissions had to be grossly negligent to support discipline because this would place upon the Board a greater burden than was required. The court was willing to accept that finding that the overall conduct of engineers was grossly negligent was supported by competent and substantial evidence.

3. *Slatton v. Tennessee State Bd. of Architectural & Eng’g Examiners*, No. 88-47-II, 1988 WL 69508 (Tenn. Ct. App. July 6, 1988) -- **Unpublished**

The Tennessee State Board of Architectural and Engineering Examiners revoked the certificate of registration to practice engineering of the Petitioner, Gregory B. Slatton, and barring him from applying for reregistration for 10 years. The trial judge affirmed the decision of the Board on judicial review, which Slatton appealed.

Slatton was licensed to practice engineering in 1975. From 1975 to 1985, he was assistant city engineer of the City of Chattanooga. In 1985, he began to engage in the private practice of engineering. The basis of the complaint against him before the Board alleged that Slatton, in late July-early August, 1985, affixed his seal and signature to 7 pages of design plans for an office and shopping center project. Slatton also was alleged to have sized the structural members for the project, but did not personally prepare the design plans, nor were they prepared under his responsible supervision, direction or control. The plans were prepared by Mr. Ronnie Rothwell of Rothwell Enterprises, who then paid Slatton to sign and seal them. Slatton also affixed his seal and signature to drawings depicting the floor plan and the civil and structural engineering phases of the building project. Slatton was a structural engineer and was not qualified by reason of his education or experience to perform the floor plan or the civil engineering phase of the aforementioned building project.

The grounds for discipline included the following: (1) Statutory violation that no engineer shall affix his seal or stamp to any document which has not been prepared by him or under his responsibility; (2) Rule violation that no engineer shall affix his signature and/or seal to any plan or document dealing with subject matter in which he lacks competence acquired through education or experience; (3) Rule violation that an engineer shall not knowingly associate with, or permit the use of his name or firm name in, a business venture by any person or firm which he knows, or has reason to believe, is engaging in business or professional practice of a fraudulent or dishonest nature; and (4) Statutory violation of act and conduct amounting to gross negligence and misconduct in the practice of engineering.

Slatton did not attend the hearing and his primary attacks to the Board’s decision related to bias of the Board members, admission of evidence, as well as procedural irregularities. As he was not present at the hearing to raise the issues then, the Court essentially ignored them and considered them without merit. He also attacked the Board’s decision of lacking substantial evidence. However, the court

determined that there was evidence that he in fact affixed his seal and signature to seven pages of plans for a construction project that were not prepared “under his responsibility,” but were prepared by a person unlicensed by the Board, which amounted to misconduct in the practice of engineering. Slatton also challenged the statutory grounds as unconstitutionally vague, which the Court rejected. He also asserted that there was no evidence that lives or property were actually endangered by his misconduct, which the Court considered irrelevant and because he admitted conduct which could have endangered lives and property.

4. *Matter of Bruce*, 97 N.C. App. 138, 387 S.E.2d 82 (1990) – *Bruce I*

Following a hearing, the North Carolina State Board of Registration for Professional Engineers and Land Surveyors fined Petitioner William Bruce, a professional engineer, \$500 and suspended his license to practice for two years upon findings and conclusions that in approving two school building designs that were structurally deficient in several respects he demonstrated professional incompetence and was grossly negligent. Bruce was the engineer responsible for the structural integrity of two building designs. The Board’s decision was affirmed on judicial review, which was appealed. On appeal, Bruce challenged the Board’s decision as follows: (1) The Board’s findings of fact as to the deficient designs were inadequate and unsupported by competent evidence and did not support the conclusions of law that he was grossly negligent and demonstrated professional incompetence; (2) the hearing was unfair because one of the Board’s members was biased against him; and (3) the Board had no authority to both fine and suspend his license to practice.

The appellate court summarily disposed of the challenge to the evidentiary sufficiency of the Board’s decision as they adequately specified the structural deficiencies that Bruce approved and they are supported by the competent testimony of three qualified professional engineers. The findings included that: The design for one building failed to provide for an adequate piling foundation; the design for the other was deficient in regard to the structural beams, the steel roof joists, certain steel columns, the thickness of the masonry bearing walls in view of their height, the footings for certain columns and sections of the building, and the roof system was not properly anchored to the building. The court determined that these facts clearly indicated the designs Bruce approved did not provide for the structural integrity of the buildings involved in several fundamental respects and thus supported the Board’s conclusion that in approving the designs Bruce exhibited professional incompetence and was grossly negligent.

The appellate court agreed with Bruce’s contention, however, that the Board exceeded its authority in both suspending his license to practice and fining him. The relevant statutory provision provided: “The Board may suspend, refuse to renew, or revoke the certificate of registration, require reexamination, *or* levy a fine not in excess of five hundred dollars[.]” (Emphasis supplied). The court determined that the Board was authorized to “suspend,” etc. petitioner’s certificate of registration *or* to fine him up to \$500, but was not authorized to do both.

Matter of Bruce, 103 N.C. App. 81, 404 S.E.2d 480 (1991) – *Bruce II*

On remand to the Board, by an amended decision and order, the Board only suspended Bruce’s license for two years. Bruce appealed the amended decision of the Board. He also provided proof that his attorney issued a check payable to the Board in the amount of \$500 in payment of the fine. The record also contained a check issued by the Board, payable to the law firm representing Bruce, in the amount of \$500. A letter written by the Board to Bruce states that the Board was refunding the fine paid by Bruce’s attorney, and that the Board was retaining the two year suspension of Bruce’s license.

The issue presented was whether the Board can refund the \$500 fine and suspend Bruce’s license for two years. Bruce argued that the Board’s action in refunding the money and suspending his license violates the Double Jeopardy Clause. The court disagreed and stated that “We assume without deciding that the Double Jeopardy Clause of the Fifth Amendment, if applicable, would prevent the

Commission from refunding the \$500 fine and suspending Bruce's license. * * * However, on the facts of this case, the Double Jeopardy Clause does not apply. While the Double Jeopardy Clause can apply to penalties or sanctions rendered in civil cases, as well as criminal, [] it does so only when the penalty or sanction 'may not fairly be characterized as remedial.' A civil penalty or sanction is punitive in nature and not remedial when the "sanction [is] overwhelmingly disproportionate to the damages ... [the offender] has caused." The small amount of the fine was considered remedial as opposed to punitive given the Board's obligation to police the professions of engineering and land surveying, which necessarily requires investigations and the holding of hearings." Since Bruce asserted no other impropriety regarding the Board's decision, the court held that it was within its authority to refund the \$500 fine already paid by Bruce and enter a suspension of the license.

5. *Indiana State Bd. of Registration for Prof'l Engineers & Land Surveyors v. Nord*, 600 N.E.2d 124 (Ind. Ct. App. 1992)

The Indiana State Board of Registration for Professional Engineers & Land Surveyors charged Kenneth Nord, an Indiana licensed architect and engineer, with placing his engineer's seal on building construction plans not prepared by him or by his regularly employed subordinate. Subsequent to a disciplinary hearing, the Board ordered Nord's engineering registration suspended indefinitely. Nord was prohibited from petitioning for the reinstatement of his registration for a period of two years. If reinstated, Nord's registration would be probationary for two years. Nord sought judicial review and the trial court reversed the Board's order as contrary to law, which the Board appealed, contending that the trial court improperly reweighed the evidence.

In 1988, Allen C. Sheldon, a registered engineer in the State of Indiana, employed by MSKTD and Associates, Inc., designed and prepared construction drawings for a commercial office. In 1989, a second building, similar to the first, was to be added to the office park, although Sheldon was not retained to design or prepare design drawings for the new building. In 1990, Nord submitted design drawings for the new building and an Application for Construction Design Release to the Plan Review Division of the Indiana Department of Fire and Building Services (Department). Nord certified that "The plans and specifications to be filed in conjunction with this application ... were created by me and/or my employees." Some of the design drawings submitted to the Department by the Nord were identical reproductions of those originally done by Sheldon for the first building. Other drawings submitted by Nord were reproductions of the original drawings prepared by Sheldon with minor modifications. Prior to the submission of the drawings by Nord to the Department, the title block of Felderman Construction, Inc. was substituted on the drawings for the title block of MSKTD and Associates, Inc. and said plan sheets were shown to be drawn by a G. DeWeese. All drawings referenced and submitted to the Department were signed and sealed by Nord. In his testimony at the hearing, Nord admitted that only certain changes were made by him, and that the basic drawings were copies and not prepared by him or his regularly employed subordinates. During the relevant period, DeWeese was not an employee of Nord or his company, CE & M, Inc. DeWeese was an employee of Felderman Construction.

In addition, the preparation of a set of building design plans required the substantiation of soil conditions for the purposes of proper foundation design. Since the second building was to be erected on a different location near some questionable soil conditions, Nord recognized the need for additional soil borings and requested they be made. The developer, however, submitted a letter to Nord indicating that the original soil information was satisfactory and that he would accept responsibility for the foundation design. On the basis of this letter, Nord then submitted the original foundation design without further testing or design.

The Board based disciplinary action on a violation of a statute and corresponding rules related to the application of the engineer's seal, which provided that the "seal shall be affixed to documents and

instruments ... only on such documents and instruments which have been created by the Registrant or by the regularly employed and directly supervised subordinates of the registrant.”

The trial court determined that the record before the Board supported its findings but not its legal conclusion. Nord engaged in the practice of engineering and performed both a professional service and creative work when he evaluated and proposed substantive investigation as to certain specifications in accordance with his best judgment upon existing plans and supervised the construction of the building. Nord evaluated and directed substantive investigation of some of the specifications and supervised the ministerial act of drafting. The ostensible owner of the plans and of the project, however, waived Nord’s best advice. But for the developer’s waiver, Nord would have directed and evaluated new soil bearing strata testing. The certification of his efforts was all that was legally necessary regardless of whomever else may have also contributed to the plans. Nord certified his professional judgment not another’s.

The appellate court indicated that the trial court addressed a question of law: whether Nord’s efforts relative to the plans for second building constituted preparation of the plans, which triggers statutory construction. The appellate court agreed with the trial court that under the plain and ordinary meaning of “prepare” and stated: “construction of the word ‘prepared’ which required complete redrawing of plans in every circumstance would be arbitrary and unreasonable and would create unreasonable expense and hardship for clients without promoting the protection of the public against improper acts and motives of the profession. The trial court determined that Nord in fact prepared the plans at issue. The appellate court did not consider the trial court’s legal conclusion.

6. *Nims v. Washington Bd. of Registration*, 113 Wash. App. 499, 53 P.3d 52 (2002), *as amended* (Oct. 14, 2002)

In 1998, the Board of Registered Professional Engineers commenced a disciplinary proceeding against James Nims. Then and in amended charges filed in 1999, the Board accused Nims of engaging in various acts and omissions that amounted to “incompetence, gross negligence and/or other acts contrary to the accepted standard of practice of professional engineers.” At least one charge involved conduct more than two years old. Nims’ license was due to expire in late 1999. He made no effort to renew his license, so it lapsed on that date. After a hearing, the Board revoked Nims’ engineering license, which was affirmed on judicial review. He subsequently appealed.

Nims asserted various challenges. One of his contentions was that the Board lacked jurisdiction to take disciplinary action against due to the lapse of his license. The appellate court disagreed and determined that the Board had jurisdiction at the outset of this disciplinary proceeding against Nims because charges had been filed when he still retained his license. The appellate court also concluded that the Board did not lose jurisdiction when Nims chose not to renew his license, stating: “we hold that once a professional disciplinary tribunal lawfully acquires jurisdiction over a proceeding, its jurisdiction continues until the proceeding is concluded. Here then, the Board’s jurisdiction did not terminate merely because Nims chose not to renew his license.”

Nims also argued that a two year statute of limitations applies to this proceeding. He alternatively argues that even if a two year statute of limitations does not apply to this proceeding, the Board is *collaterally estopped from denying* that it does. As a result, he says, the Board was barred from addressing any charge “based on alleged conduct that was discovered by the Board more than two years before the statement of charges was filed.” The appellate court rejected the statute of limitation argument noting that courts uniformly have held that statutes of limitation do not apply in disciplinary proceedings.

7. *Sheils v. Florida Engineers Mgmt. Corp.*, 886 So. 2d 426, 426-27 (Fla. Dist. Ct. App. 2004).

John F. Sheils appealed the decision of the State of Florida, Board of Professional Engineers, which following a hearing before an administrative law judge (ALJ) concluded that he committed

professional misconduct. The Board concluded that the ALJ's findings of fact were supported by substantial, competent evidence, and adopted the ALJ's findings of fact and conclusions of law. The Board also followed the ALJ's recommended penalty of a reprimand, an administrative fine of \$1,000, two years probation, and costs. Additionally, the Board required appellant to take an approved course in professionalism and ethics.

At issue was a residence that Sheils inspected and prepared a report. The homeowners previously hired a contractor to replace the roof. After a dispute arose over the quality of the contractor's work, the homeowners hired a roofing consultant who opined that the roof work had serious defects. The contractor hired Sheils to examine the roof and issue a report. Appellant conducted a physical examination of the visible portions of the interior and exterior of the roof. Appellant then sent the April 12, 2001 inspection report/letter that is the basis for the finding of professional misconduct. The ALJ determined that the issue of concern to the county building department and the homeowners was the peril of an inadequately attached roof detaching from the house during a design storm event. Sheils' references to "major storms" and 70 miles per hour, in the absence of any mention of the design storm and whether the roof meets this more demanding design standard, constituted a deliberate attempt to mislead the homeowners and possibly the county building department concerning the adequacy of the means by which the contractor had attached the roof to the house. The ALJ found this to be a deliberate attempt to mislead, which constitutes misconduct in engineering. Sheils argued that FEMC failed to prove that he engaged in any deceit or fraudulent behavior regarding the issuance of the letter and he did not intend to mislead anyone. However, the court held that professional misconduct is not only synonymous with fraud and deceit -- misconduct may occur if the engineer is "untruthful, deceptive, or misleading in any professional report."

The appellate court held that the evidence before ALJ was sufficient to support finding that engineer's report regarding integrity of roof of residence was deliberate attempt to mislead homeowners and county building department to believe that roof met sheathing integrity standards of building code, which constituted professional misconduct. Sheils failed to apply standards mandated by building code for sheathing, and his report of shingle integrity was irrelevant to purpose of inspecting roof integrity, and professional misconduct did not require that anyone was actually misled.

8. *McKinney v. Kentucky State Bd. of Registration for Prof'l Engineers & Land Surveyors*, No. 2003-CA-002555-MR, 2005 WL 928642 (Ky. Ct. App. Apr. 22, 2005) -- **Unpublished**

Earl McKinney had been a licensed professional engineer since 1964. Through reciprocity, he also held engineering licenses in forty-eight other states. The Kentucky State Board of Licensure for Professional Engineers and Land Surveyors brought nine allegations of negligence against McKinney based on allegations of his habit of signing and sealing projects with inadequate review, unauthorized sealing of a land survey plat, and making false representations on his National Council of Examiners for Engineers & Surveyors (NCEES) license renewal forms. Most of McKinney's work consisted of reviewing prototype plans for restaurant chains, hotels and retail stores. He was the president of A & E Designers, Inc. which had its main office in Lexington, Kentucky. Most of the plans he reviewed were for projects located in other states, and McKinney would sign them under the seal for the state in which the projects were to be built.

A hearing officer found McKinney guilty of five of the nine charges and the Board revoked his license, which was upheld on judicial review. McKinney appealed the Board's decision claiming that the Board exceeded its authority in revoking his license for his alleged negligence in reviewing engineering projects from other states in which he is also a licensed engineer.

On appeal, McKinney argued that the Board improperly exercised extraterritorial authority in examining his work on projects located outside Kentucky and sealed with engineering licenses from other states. He also claims that the Board had insufficient evidence to determine that he was guilty of the charges of negligence against him. Specifically, McKinney disputed the Board's findings that he

spent insufficient time reviewing plans, that he was untruthful on his NCEES forms, that he misrepresented the number of states in which he was a licensed electrical engineer, and that his statement regarding the number of engineers he employed was untrue. In addition, McKinney contends that revocation of his license was an excessive sanction as a matter of law.

The appellate court determined that McKinney's acts in the practice of engineering actually occurred in Kentucky. Consequently, the court held that the Board did not overstep its authority to regulate McKinney's conduct in reviewing plans for out-of-state projects.

McKinney also argued that the hearing officer engaged in speculation to reach a determination that he spent insufficient time reviewing engineering plans. The court rejected this argument because it discounted additional evidence introduced by a former employee of his company who testified that he had personal knowledge that McKinney would sign and seal plans the same day that he received them and without conducting a review. In addition, there was evidence that McKinney accidentally signed and sealed a survey plat even though he was not a professional surveyor and, thus, not authorized to do so. We are unable to say that the Board had insufficient evidence upon which to base its finding that McKinney conducted insufficient reviews of engineering plans that he signed and sealed.

The remaining evidentiary issues related to McKinney's alleged misrepresentations regarding the status of his license, the number of states in which he was licensed, and the number of engineers he employed. The court noted that McKinney filled out NCEES renewal forms indicating that his license was not suspended in any state, nor under investigation. There was evidence that McKinney in fact had been suspended by a number of states and that, at least in Texas, he had formal disciplinary charges pending. McKinney argued, however, that since some of the suspensions were probated, he could not have known that he needed to include that information on his NCEES forms. He also argued that the Texas disciplinary charges were filed at the conclusion of that state's investigation, so McKinney argued he was technically no longer under investigation. Despite these contentions, the court indicated that McKinney failed to persuade it that the Board had insufficient evidence to support its finding that he was untruthful in filling out his NCEES forms. The court also determined that there was substantial evidence to support the Board's findings that McKinney made untruthful representations regarding his licensure as an electrical engineer and the number of engineers he employed.

Finally, McKinney argued that revocation was excessive as a matter of law. He pointed out that there was no evidence that any of the plans he signed and sealed contained defects which might have posed a risk to the public health or safety. The court held that the Board had the authority to revoke McKinney's license due to the numerous misrepresentations regarding his license and his practice of signing and sealing plans without an adequate review.

9. *Kany v. Florida Engineers Mgmt. Corp.*, 948 So. 2d 948, 949 (Fla. Dist. Ct. App. 2007).

Robert Kany, PE, appealed the Florida Board of Professional Engineers' order revoking his license to practice engineering because he affixed or permitted to be affixed his seal, name, or signature to final drawings that were not prepared by him or under his responsible supervision, direction, or control, as well as aiding/assisting an unlicensed person to practice engineering, and for professional negligence.

Robert Thomas, a draftsman, operated a business pursuant to which he contracted with homeowners to draft plans to improve two existing residential properties. Both projects included some engineering. Thomas was not a licensed engineer, however, so he brought the drawings he had prepared to Kany, who reviewed Thomas' drawings, made comments and corrections, and checked to make sure that the plans complied with code. He subsequently signed and sealed the plans.

In its final order, the Board rejected the hearing officer's rule interpretation. The Board interpreted the rule to require that the engineer in responsible charge to initiate concepts; weigh and investigate alternatives; select development, design standards and methods and the materials to be used. There was no evidence in the record that Kany ever had an opportunity to undertake those engineering tasks because he was presented with a set of drawings to be checked and stamped. The Board thus

determined that any engineer who sealed plans containing a design that he did not initiate is guilty of misconduct, which was basis of appeal against Kany.

On appeal, the court disagreed with the Board's interpretation of the rule to require both initiation and drafting. The court also noted that the rule defined "responsible charge" to include: "that degree of control an engineer is required to maintain over engineering decisions made personally *or by others over which the engineer exercises supervisory direction and control authority*." The court interpreted the rule to mean that it was the engineer's responsibility for what goes into the *final* plan because the final plan is the one that will be built from and thus will have the potential to pose a danger to the public. Whether the engineer exercised control over the decisions that went into creating initial or intermediate drafts of plans mattered less because those plans would not be built from. Nothing expressed in the rule precluded an engineer from exercising the requisite supervisory direction or control authority over engineering drawings prepared by others. The court also indicated that if an engineer were to merely take a fee to "stamp plans," *i.e.*, affix his seal without verifying that the engineering is correct, he/she would be in violation and such practice would be properly condemned.

Note: The court cited *Puig v. Florida Engineers Management Corp.*, 939 So.2d 1146 (Fla. Dist. Ct. App. 2006), which held it was error for the Board to reject the findings and conclusions by an administrative law judge (ALJ) where the ALJ could have arrived at the findings and conclusions contained in his recommended order based upon the evidence presented. The *Puig* court also remanded the matter with instructions that the ALJ's recommended order be approved. The *Puig* case was similar to the Kany case where the licensed engineer sealed plans to two projects that an unlicensed person had contracted to undertake. At the evidentiary hearing, Puig affirmed that he reviewed the work done prior to his involvement, directed and instructed the unlicensed person and his employees in drafting work, and oversaw completion of the design work before finally affixing his signature and seal to the plans. The ALJ concluded that Puig established through his testimony that the plans he had signed and sealed were prepared under his "responsible supervision, direction, and control. The Puig court had remanded the case back to the Board to approve the ALJ order.

10. *Bird v. Missouri Bd. of Architects, Prof'l Engineers, Prof'l Land Surveyors & Landscape Architects*, 259 S.W.3d 516 (Mo. 2008), *as modified on denial of reh'g* (Aug. 26, 2008)

The Missouri Board for Architects, Professional Engineers, and Professional Land Surveyors and Landscape Architects brought a disciplinary proceeding against Bruce Bird, a professional engineer, after he was hired to complete plans and drawings for a commercial building project when the architect the owner originally retained for the project refused to complete them. The architect's refusal was based upon the owner's refusal to pay an additional fee for completing the drawings after the original plans were disapproved by the planning commission of city where the project was located.

The grounds for disciplinary action were based upon a reading of the licensing statute as requiring that the work that Bird signed and sealed be done by him or under his "immediate personal supervision." Bird did not supervise the prior work of the architect, whose work Bird reviewed and modified to submit the final plans. There was no contention that the plans Bird submitted were substandard. Because of the lack of supervision of the architect, however, the Administrative Hearing Commission (AHC) concluded that Bird was subject to discipline. Based upon the AHC's conclusion, the Board suspended Bird's license for three years to be followed by a year of probation. The trial court on judicial review determined that the AHC's decision to authorize discipline by the board was "unlawful, unreasonable and unsupported by substantial and competent evidence on the record as a whole." The court then remanded the case for rehearing and findings consistent with the court's decision.

On appeal, and in reversing disciplinary action by the Board, the appellate court noted that under the statute, affixing one's seal to a document makes an engineer "personally responsible for the contents of all such documents sealed by such licensee" *unless* the licensee specifically disclaims responsibility

for some document relating to or intended to be used for *any* part of the engineering project. The AHC acknowledged that, in modifying the plans, Bird thoroughly reviewed both his changes and the prior architect's work to ensure the safety and quality of the plans – thus, by affixing his seal to the plans, Bird became personally responsible for any defect in both his modifications and the architect's original plans. The court also noted that the relevant statutes and rules impose an *affirmative* duty on engineers to ensure the quality of the work they complete and to accept personal responsibility for documents they seal.

The court determined, however, that in authorizing the Board to punish Bird for affixing his seal to the modified plans originally drafted by the architect, the AHC misconstrued those statutes and rules as being prohibitive in nature. Instead, the court held that by affixing his seal to the plans, Bird fulfilled his affirmative duty under both the statute and the rules. Since he fulfilled his affirmative duty under the statute, the AHC's authorization of Bird's discipline was improper. The court further held that the AHC misinterpreted the statutory authorization underlying the regulation. The purpose of the statute is to impose liability upon licensees in the case of defect by requiring a licensee who affixes his or her seal to be fully responsible for the work. The regulation, therefore, may define "immediate personal supervision" only for the *purpose of a licensee's personal liability*. The court further indicated that the interpretation by the AHC and the Board went well beyond the purpose and authority of the statute. Contrary to the AHC's decision in this case, the rules did not function to protect the property interest of other co-licensees – i.e., the architect.

The court also held that another rule the Board applied did not apply to situations in which two licensees work separately on a project. As indicated by the use of the statutory term "immediate personal supervision," the rule is limited to prohibiting a licensee from affixing his seal to the work of non-licensees in the absence of immediate personal supervision. The court indicated that this prohibition ensures that engineers supervise the work of non-licensee employees in order to ensure the safety and quality of their work which, in turn, protects public safety. Because it applies to supervision of non-licensee employees, and not to prior work of licensees such as architect, the regulation cannot require that Bird supervise the architect, another licensee.

The court noted that the relevant statutes and regulations were enacted to ensure that a licensed professional such as Bird take full personal responsibility for the documents that are prepared, affixed with his seal, and submitted to the governmental authorities for permits and provided to the builders to use in constructing a project. After Bird reviewed the plans, drawings and other documents, he made modifications so that they would be accepted by the city. The court thus concluded that Bird conducted a thorough review of the documents and there was nothing in the record to suggest that Bird did not check and re-calculate, as appropriate, all of the computations, measurements, and drawings, including those that had been drafted by the architect and his associates. In doing so, Bird "prepared" the documents—within the meaning of the statute—for submission to the city and for use in building the project. By affixing his seal, and thereby accepting responsibility for the entire project, Bird acted in compliance with the statute.

11. *O'Wesney v. State Bd. of Registration for Prof'l Engineers & Surveyors*, 2009-Ohio-6444, No. 2009-CA-00074, 2009 WL 4682229 (Dec. 7, 2009) -- **Unpublished**

Thomas J. O'Wesney appealed a decision of a trial court following judicial review, which affirmed the decision of the Ohio State Board of Registration for Professional Engineers and Surveyors to suspend his engineering license for six months.

O'Wesney had been practicing engineering for over forty (40) years, is licensed in seven (7) states, including Ohio, without any prior disciplinary action. In 2007, an investigator for the Board, filed charges with the Board naming O'Wesney, alleging that he made an inspection of the existing foundation of a manufactured building and erroneously approved the foundation as structurally adequate. The complaint further alleged that the structure did not meet or exceed the HUD Foundation

Guidelines for Manufactured Housing as reported by O'Wesney. At the evidentiary hearing -- in which he elected to represent himself -- in 2008, the following evidence was adduced at the hearing:

In 2006, O'Wesney was requested by a realtor to do a structural inspection of the foundation of a prefabricated manufactured home. He subsequently conducted an on-site inspection of the concluded that those supports were adequate to carry all loads required by State and local building codes, and also concluded that the structure met or exceeded the HUD Foundation Guidelines. O'Wesney sent a letter to the realtor detailing his findings and conclusions. Another engineer sent a letter to the Board questioning O'Wesney's conclusion that the home at met or exceeded the HUD Foundation Guidelines because there were no visible anchors to secure the building to the foundation and the masonry piers supporting the structure were "dry stacked," meaning they were not cemented together. This engineer had previously inspected the foundation for the home at the request of the same realtor and determined that the structure did not meet the HUD Foundation Guidelines. He notified the realtor of his conclusions prior to O'Wesney's conclusions to the contrary.

O'Wesney submitted a letter to the Board in response in which he stated that he determined the structure was more than adequate to meet the requirements of the required building codes as well as standard engineering practice. He also stated that he concluded the structure met the HUD Foundation Guidelines. Qualified independent professionals inspected the home to determine whether it met the HUD Foundation Guidelines and concluded that the HUD Foundation Guidelines were not met. O'Wesney provided a further response, indicating that he performed calculations that led him to conclude that it was structurally sound and in good shape. O'Wesney also indicated that he believed he saw the required anchorage to the foundation. He further noted that he found the foundation satisfactorily supported the structure for over 16 years with no settlement or movement.

The Hearing Officer found no deceptive or misleading intent by O'Wesney, but found that sufficient evidence was presented to conclude that Appellant's actions were in violation of statutes and regulations, further recommending that Appellant receive a public reprimand and a fine of \$1,000.00. The Board generally adopted the Hearing Officer's determination but modified the recommended sanction by including a six-month suspension of Appellant's engineering license.

On appeal, the appellate court considered certain procedural challenges to the trial court's actions, as well as challenge regarding the sufficiency of the evidence to impose discipline and other issues. The relevant statutes authorized disciplinary action for violation of the practice act and any rule adopted by the Board, including the code of ethics adopted by the Board, which provided as follows:

In order to safeguard the life, health, property and welfare of the public and the state of Ohio, to maintain integrity and high standards of skills and practice in the professions of engineering and surveying, the following rules of professional conduct ...shall be binding upon every person holding a certificate of registration as a professional engineer or as a professional surveyor.

The engineer or surveyor, who holds a certificate of registration from the Ohio state board of registration for professional engineers and surveyors, is charged with having knowledge of the existence of the reasonable rules and regulations hereinafter provided for his or her professional conduct as an engineer or surveyor, and also shall be deemed to be familiar with their several provisions and to understand them. Such knowledge shall encompass the understanding that the practice of engineering, or of surveying, is a privilege, as opposed to a right, and the registrant shall be forthright and candid in statements or written responses to the board or its representatives on matters pertaining to professional conduct.

The appellate court agreed with the trial court that reliable, probative, and substantial evidence existed to support a finding that O'Wesney failed to include all relevant and pertinent information in his report and the result of the omission would, or reasonably could, lead to a fallacious conclusion. Accordingly, disciplinary action could be taken against O'Wesney for such violations.

12. *Ritter v. State, Bd. of Registration for Prof'l Engineers & Land Surveyors*, 161 Wash. App. 758, 255 P.3d 799 (2011)

The Washington State Board of Registration for Professional Engineers and Land Surveyors suspended Dennis Ritter's professional engineering license for five years because he was convicted of three counts of first degree child molestation.

Ritter was a licensed professional engineer since 1991, and he began work in 1996 as public works director for the City of Lacey. In 2007, Ritter was convicted of three counts of first degree child molestation involving a family member that occurred in 1998. Ritter did not commit these offenses in the workplace or otherwise in any other professional capacity. Ritter's child molestation convictions were his first criminal convictions, and he had not since been accused of other similar conduct. In 2008, the Board initiated disciplinary proceedings against Ritter, based solely on his child molestation convictions, on the basis that he had committed unprofessional conduct.

The Board argued that a professional engineer makes essential decisions that affect the health, safety, and welfare of the public and that, due to his child molestation convictions, Ritter could no longer be trusted to execute his responsibilities as a professional engineer. Ritter argued that the child molestation convictions did not affect his technical skill as a professional engineer. Ritter testified that after the molestation occurred, he continued to sign city engineering plans, attesting that they were ready for construction and that they met all city requirements. The Board entered findings of fact that Ritter was convicted of three counts of third degree child molestation and that such conviction constitutes unprofessional conduct and prohibited conduct under the relevant statutes, for which discipline may be imposed. The Board suspended Ritter's professional engineering license for a minimum of five years. Ritter appeals the trial court's decision that upheld the Board's suspension.

The appellate court employed statutory construction of the statutes at issue and noted that every provision involved an affirmative act or failure to act while in the course of professional duties. The statutes were interpreted to require a nexus between the alleged misconduct and professional conduct. The court thus held that in order for the Board to suspend the license of a professional engineer for a proscribed act "relating to" professional engineering, the Board must first find a nexus between the misconduct and the profession.

The court also noted that the underlying child-abuse incident had been committed more than a decade earlier and Ritter subsequently did not deviate from his established track record of maintaining a high degree of professionalism in his engineering activities. In the court's view, the record did not contain indicia of evidence that Ritter had or would use his profession to abuse children. The court also stated that "Child molestation is certainly a heinous crime, but, absent substantial evidence to support a nexus between Ritter's conviction and his practice as a professional engineer, even though his convictions may undermine his individual standing in the community, his convictions cannot be said to undermine the collective profession." Accordingly, reversing the Board's decision, the court held that the Board misinterpreted and misapplied the applicable law when it suspended Ritter's professional engineering license based solely on his convictions for child molestation that had no relation or nexus to his profession.

13. *Dimalanta v. Bd. for Prof'l Engineers & Land Surveyors*, No. A131485, 2012 WL 363924 (Cal. Ct. App. Feb. 6, 2012) -- **Unpublished**

Rudolfo Ventura Dimalanta appealed a judgment that affirmed the decision of the California Board for Professional Engineers and Land Surveyors, which imposed a five-year suspension on appellant's civil engineer license due to his negligence and/or incompetence in the practice of civil engineering; unlawful practice of land surveying; and unprofessional conduct. The Board also stayed the suspension and placed him on probation.

It was alleged that while working as a licensed civil engineer, Dimalanta prepared and stamped a Tentative Parcel Map for the development of four single-family residences for submission to the city

planning department. The tentative map included spot elevations inconsistent with contour lines and proposed retaining wall heights as much as five feet below the actual heights necessary to retain the grade. The tentative map prepared by Dimalanta also included boundary and lot line representations that can only be made by a professional land surveyor. Dimalanta was not a licensed land surveyor or a registered civil engineer authorized to practice land surveying when he prepared and stamped the tentative map.

Following an administrative hearing, the administrative law judge (ALJ) found the Board had established by clear convincing evidence all three grounds for discipline, which included negligence/incompetence, unprofessional conduct and unauthorized practice of land surveying. The ALJ also determined there were several matters in aggravation and none in mitigation. With respect to the factors in aggravation, the ALJ noted that Dimalanta had engaged in the practice of land surveying for the prior decade, despite the fact that he surrendered his original civil engineer license, which had enabled him to engage in land surveying. The ALJ further noted that Dimalanta “showed no remorse, concern or acknowledgement” for his unlawful and unprofessional conduct in preparing the tentative parcel map. The ALJ further noted that Dimalanta’s unpersuasive argument that when no physical act of surveying of the property is involved in a project, surveying does not occur. But as the Board’s expert witness demonstrated, the exercise of professional judgment regarding boundary information can only be accomplished by a licensed surveyor.

Dimalanta challenged the evidentiary sufficient of the decision that he was negligent or incompetent, which the appellate court rejected and determined that there was sufficient evidence to support the findings. With respect to his challenge that he did not engage in the unlawful practice of surveying, the court engaged in statutory construction of the applicable statutes and determined that Dimalanta did engage in surveying practice. The court indicated that Dimalanta would exclude his activities from the expansive purview of applicable statute based on the faulty premise that he only copied information from the prior map onto the tentative map. However, the court further indicated that the record established that he did more than just copy prior information onto the tentative map. By his own testimony, Dimalanta established that he located survey monuments and personally measured between them to determine if the measurements “fit” the prior specifications. He further explained that he used the distance between the monuments to ensure that he was in the right place. The court determined that at minimum, Dimalanta’s conduct reestablished or “relocated a boundary and he used “principles of land surveying” to determine “the position for any monument or reference point” which marked the property line or boundary. The court stated: “Surveying is a profession that depends to a great extent on the skill of the surveyor. [Citations.] To perform a legally reliable survey, the surveyor must be skilled in ‘the science of land measurements, ... the laws and customs that define the boundaries of real property, and ... the art of evaluating the evidence needed to prove the location of a boundary.’ By its enactment of [the applicable statute], the Legislature has prescribed regulations that are reasonably necessary for protecting the public against the consequences of ignorance or incapacity in the pursuit of land surveying in this state.”

14. *Affleck v. State Bd. of Prof’l Engineers & Land Surveyors*, No. 56971, 2012 WL 444021 (Nev. Feb. 10, 2012) -- **Unpublished**

In 2010, the Nevada State Board of Professional Engineers and Land Surveyors issued a decision and order that revoked Lynn Affleck’s license to practice civil engineering in the State of Nevada and precluded him from reapplying for a license for two years later. The Board found that Affleck’s conduct in preparing an engineering inspection report concerning a client’s residence, which was to be submitted to the State Contractors’ Board, violated the terms of his probation, and constituted grounds for disciplinary action, since he was not licensed as a structural engineer and the discipline previously imposed on him precluded him from performing engineering involving structures. Affleck petitioned for judicial review, which the trial court denied. Affleck appealed, arguing that he did not

engage in work that was prohibited by the terms of his probation as clarified by the State Board in an earlier disciplinary proceeding, and thus revocation of his license was unwarranted.

On appeal, the court noted that there was conflicting evidence whether his report required an engineering license to prepare, which the State Board determined involved engineering concerning a structure, which he was not authorized or licensed to perform. The court declined to substitute its judgment for that of the Board and held that because he was restricted from engaging in structural engineering under the terms of his probation, the evidence supported the State Board's finding that he violated the terms of his probation.

Affleck also challenged the revocation of his license as "out of balance" with the magnitude of the offense charged, and was thus arbitrary and capricious. The court noted that the Board is authorized to revoke the license of a professional engineer if it finds him guilty of violating the code of conduct. The code does not require progressive disciplinary measures, but instead gives the Board discretion to determine what is appropriate. The court also noted that the record indicated that the Board considered whether revocation was too harsh in light of its previous orders and the terms of appellant's probation, and determined that the discipline imposed was appropriate. The court thus concluded that the revocation of his license with the stipulation that he not seek reinstatement for two years was not an abuse of discretion.

15. *In re Carpenter*, 221 N.C. App. 666, 727 S.E.2d 404 (2012) -- **Unpublished**

Randy Carpenter was a professional engineer and land surveyor, formerly licensed by the North Carolina Board of Examiners for Engineers and Surveyors. In 2010, the Board served Carpenter with a Notice of Contemplated Action to revoke his licenses. The Notice was issued as a result of a North Carolina State Bar investigation regarding petitioner's participation as an attorney, engineer, and land surveyor in a land development venture. Although the Board and the Administrative Law Judge (ALJ) presiding over the proceedings directed petitioner to request a hearing on the charges before the Board, he never did so. In 2011, the Board issued a decision and order revoking petitioner's licenses based upon the charges set forth in the Notice. Carpenter filed a petition for judicial review and the trial court affirmed the Board's decision and order, which he appealed.

On appeal Carpenter raised a number of procedural challenges, which were summarily rejected by the appellate court. He also contended that the Board's initiation of proceedings against him was barred by the applicable statute of limitations, relying on a statute under which certain civil actions must be brought within one year. However, the court held that the disciplinary action at issue in this case is not an "action or proceeding" as used in the statute.

Carpenter also argued that the Board's final decision revoking his licenses was erroneous because the Board failed to follow proper procedure and failed to include findings of fact and conclusions of law in its final decision as required by statute. The court noted that the Board's decision and order revoking his license was based on evidence of his violations of the Rules of Professional Conduct, which is governed by the Administrative Procedure Act (Act). However, the court further noted that Carpenter did not request a hearing on the charges. Thus, the Board properly proceeded without conducting a hearing. With respect to the lack of findings of fact and conclusions of law, the court indicated Carpenter relied on a statute, which was not considered applicable since a hearing on the merits did not take place. The court further indicated that even to the extent that findings of fact and conclusions of law were required, the Board did include the findings and conclusions that were the basis of its Order. It was not necessary for the findings and conclusions to be formally laid out, so long as a reviewing court could determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. Thus, the court upheld the Board's decision to revoke his license.

WHAT HAVE WE LEARNED

from court cases over the last couple of decades?



- ❖ **Don't get into battles with Boards regarding the evidence.** (Deference to licensing board's consideration and weighing of evidence. Courts will not get into highly technical areas – evidence supporting decision will be accepted or embraced UNLESS no real factual basis.)
- ❖ **Don't get into contests with Courts regarding legal issues.** Statutory interpretation is the court's domain. (No deference to licensing board interpretation.)
 - ❖ Obscure (but creative) legal arguments are not embraced, particularly if comparisons made to constitutional law in civil or criminal procedure. (Maybe some overlap, but overriding policy is public protection vs. individual rights.)
 - ❖ Due process is merely about **fairness** of notice and opportunity to be heard. (Cards are stacked against licensees to begin with.)
- ❖ **Must be able to emphasize what constitutes the practice of professional engineering.** (Must be meaningfully articulated.)
- ❖ **Must be able to show violation of ethical codes is necessary for public protection.** (As opposed to some vague concept.)
- ❖ **Must be able to demonstrate the reasonableness of disciplinary sanction.** (Does punishment fit the crime?)

Professional Land Surveyor Cases

1. *Adams v. N. Carolina State Bd. of Registration for Prof'l Engineers & Land Surveyors*, 129 N.C. App. 292, 501 S.E.2d 660 (1998).

James Adams, PLS, appealed the decision of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors revoking his land surveyor's license on grounds of gross negligence and misconduct in practice of his profession, which was affirmed on judicial review. The court of appeals held that: (1) statute under which Board acted did not violate separation of powers provision of North Carolina Constitution; (2) Board's decision was neither arbitrary nor capricious; and (3) substantial evidence supported Board's decision.

After a hearing, the Board made findings of fact and concluded as a matter of law that Adams had: (1) represented surveys as his own without an actual survey; (2) affixed his seal to surveys not done by him or under his direct supervisory control; (3) certified plats which did not comply with statutory requirements; and (4) had failed to conform to the Standards of Practice for Land Surveying in North Carolina.

On appeal, Adams challenged the revocation as arbitrary and capricious, contending that contends that the Board revoked his license without articulating any discernible standard by which his conduct could be distinguished as more culpable than the conduct of other surveyors who were issued lesser sanctions. He also argued that the Board's failure to allow him to supplement the record with his complete survey notes was arbitrary and capricious, particularly in light of the fact that he was not represented by counsel. The appellate court held that he failed to show that the decision was "whimsical" or in "bad faith."

Adams also challenged the Board's decision being supported by substantial evidence. He contended that there was no evidence that an "actual survey" was not prepared. He also argued that the fact he borrowed from the work of another surveyor is irrelevant because the Board's rules do not prohibit reliance on the work of previous surveys. He maintained that he satisfied the Board's rules by ensuring that the properties at issue were physically measured by his crews and by relying on the field notes of those measurements in producing the survey plats at issue. Petitioner also argued that there was not substantial evidence that he committed gross negligence or wanton misconduct because he did no more than make a calculation error and may not have complied with each detail of the Standards of Practice for Land Surveying in North Carolina.

The appellate court noted, however, that the record revealed evidence that Adams copied the work of others and put his name and seal on it, as well as evidence of improper surveys and surveying errors. In one survey Adams relied on a non-surveyor to provide survey information on an individual property line rather than going to the Register of Deeds and researching the necessary background information. Adams rationalized his reliance that the information would be accurate because it had been obtained from professional real estate brokers or lawyers. He also inserted a line call from a very dated deed description rather than rely on survey information provided by a crew of surveyors. This resulted in a difference of 1 degree 44 minutes in the property line call and the survey failed to close because of the erroneous call. The appellate court determined that taken altogether, the evidence was sufficient to support the Board's decision.

2. *Satterfield v. Ohio State Bd. of Registration For Prof'l Engineers & Surveyors*, No. 98CA670, 1999 WL 339234 (Ohio Ct. App. May 20, 1999) -- **Unpublished**

The Ohio State Board of Registration for Professional Engineers and Surveyors suspended a professional surveyor's license of Robert Satterfield for a one-year period. Satterfield appealed a judgment from judicial review of the trial court that affirmed the Board's order of suspension

Satterfield was a registered professional surveyor since 1952, performing approximately 22,000 surveys during his career. In June 1994, after a year-long investigation into the appellant's professional

activities, the Board filed charges relating to eight surveys he had performed, setting forth various facts alleged to constitute misconduct or incompetence in the practice of surveying. Among the chief allegations were that the appellant signed and sealed inaccurate and incomplete surveys, failed to survey property accurately, and failed to set proper monumentation in performing surveys.

In 1997, after a lengthy hearing, the Board's hearing officer filed a written report and recommendation, which found Satterfield guilty of misconduct and/or incompetence in seven of the eight surveys and recommended that his certificate of registration as a professional surveyor be suspended for at least one year and that his registration be "perpetually limited" to require that all his surveys be reviewed by another licensed surveyor. The Board unanimously adopted the hearing officer's findings of fact and conclusions of law. In its final order, the Board agreed with the hearing officer's recommendation that Satterfield's certificate of registration be suspended for at least one year, but chose not to follow the hearing officer's recommendation regarding the perpetual limitation on his certificate. Instead, the Board ordered that his certificate would remain suspended until he successfully completed two Board-approved boundary surveying courses.

On appeal, among other things, Satterfield contended that the Board employed various rules to justify suspension of his license. He argued that violations of administrative rules cannot form the basis of his suspension because the applicable statutes did not empower the Board to make rules governing the "Minimum Standards for Boundary Surveys" and did not enumerate violation of administrative rules as a basis for suspending a registrant's license. Satterfield further argued that the administrative rules themselves did not state that violations of such rules may provide grounds for discipline.

The appellate court determined that an agency's authority to enact certain regulations may be predicated on a grant of authority that is either express or implied. The court indicated that it would imply a power to be vested in an administrative agency if it is "incidental" to the powers expressly conferred by the legislature and held that the "Minimum Standards for Boundary Surveys" were merely incidental to its powers conferred by law and were thus valid rules promulgated pursuant to the Board's implied power.

As further proof of contrary legislative intent, Satterfield pointed out that the legislature had expressly granted authority to the Board to promulgate a Code of Ethics and make violation of it a specific ground for discipline. Satterfield thus argued that the administrative rules governing the minimum standards for boundary surveys conflicted with the statutory enactments governing the Board's power. The court found this argument unpersuasive as it relied on the faulty premise that he was disciplined on the sole basis of violating administrative rules. The court noted that neither the hearing officer's conclusions nor the final order filed by the Board stated that the appellant violated *only* administrative rules regarding the minimum standards for boundary surveys. In all cases where the hearing officer found a violation of the rules, the hearing officer also found proof of "misconduct" or "incompetence" within the meaning of the applicable statutes. Simply because the acts constituting "misconduct" or "incompetence" under such statutes also happened to violate administrative rules did not mean that the Board overstepped its authority. The Board has the authority to discipline a licensed professional surveyor if his conduct ran afoul of the practice act, regardless of whether the Board has promulgated a rule governing the particular conduct involved.

3. *Schulze v. Bureau of Prof'l & Occupational Affairs*, 794 A.2d 984 (Pa. Commw. Ct. 2002).

Kenneth L. Schulze, PLS, and his company sought judicial of an order of the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors and Geologists finding that he had violated the Engineer, Land Surveyor and Geologist Registration Law because he did not employ a licensed engineer and practiced engineering without having a licensed professional engineer among its employees.

Schulze initially hired Walter Hull, a professional engineer licensed in Pennsylvania and Maryland, as the sole professional engineer employed. Hull subsequently was laid off, rehired, and then laid off again. As Hull remained laid off, no W-2 statement was issued for him. In one year, Hull in fact worked for Schulze on one project, for which Schulze did not deduct payroll taxes, did not withhold federal income tax and did not issue a W-2. Schulze maintained phone directory listings for the years in question under the categories “Engineers—Civil” and “Engineers—Consulting.” Schulze performed work in which it used business correspondence, a survey plat, drawing title blocks, and business letterhead in which it referred to itself as “Engineers”, “Planners”, and “Surveyors”.

Schulze was charged with offering to practice engineering without having a licensed professional engineer among its directing heads or employees. Specifically, Schulze’s use of the word “engineer” for those years in which Hull was not an employee was a violation of laws prohibiting unlicensed practice. The Board concluded he violated the law and imposed civil penalties on him.

On appeal, Schulze argued that the Board’s decision came outside the 180-day requirement after the record was closed and his case should have been dismissed. The court held that the language at issue was directory, and not mandatory, and that the order of the Board was not untimely.

The rejected Schulze’s contention that although Hull was not paid during portions of the years in question, he was still considered an employee. The court noted the Board’s finding that Schulze’s testimony that Hull was an unpaid employee not credible. The Board found credible a letter from Schulze’s attorney that, although Hull was paid for his work for Schulze, he was not “acting as an employee such that wage withholding was required,” and that Hull was providing services to Schulze merely as a sub-contractor. The court thus found no error in the Board’s findings.

4. *Gilmore v. Arkansas Bd. of Registration for Prof’l Engineers & Land Surveyors*, 2011 Ark. App. 139, 381 S.W.3d 860 (2011)

Terry Gilmore, a professional land surveyor, appeals the order of the trial court affirming the decision by the Arkansas Board of Registration for Professional Engineers and Land Surveyors to revoke his surveyor license based on its finding that he committed gross negligence in the practice of surveying.

The client alleged that in March 2001, she engaged Gilmore to prepare a survey for her to be completed and returned within 90 days. Gilmore took payment from the client but failed to properly file, or to even provide her with a copy of, the survey. Over two years later, the client, desiring to sell her property, discovered that the plat had not been filed at the county property-records office, and she called Gilmore, expressing her dissatisfaction and asking for a copy of the completed plat. Gilmore promised to send the plat to her but subsequently took no action and then failed to return her calls. She eventually filed a complaint with the Board.

At his first hearing in 2003, not represented by legal counsel, the then-executive director indicated that he thought Gilmore was on probation pursuant to a prior Board order, which he claimed was not true. Both the hearing officer and the Board’s counsel informed the Board that they were not to consider any such evidence because it had not been presented to the Board in the current matter. Certain Board members nevertheless discussed the comments regarding whether Gilmore was on probation prior to the Board’s decision. Gilmore testified that he had not heard from the client since he finished the survey, and when he received her complaint from the Board, he promptly filed the survey. Gilmore also testified that she never paid him in full, but that as a showing of good will, he waived the remaining \$1,300 of his fee after apologizing to her for the delay and filing the survey. The client was not present at the hearing, but her affidavit was presented to the Board. The Board fined Gilmore \$50 and voted to revoke his license.

During the following four years, the Board renewed Gilmore’s license each year, even though Gilmore had ceased doing business in Arkansas after the 2003 hearing. Because of the renewals, Gilmore believed that the Board had reconsidered its decision from the 2003 hearing. On October 5, 2007, the

Board issued an amended show-cause order and notice of hearing to Gilmore, which demanded that Gilmore appear at a second hearing and show cause why the Board should not enforce its order from the 2003 hearing and revoke his license.

Gilmore appeared before the Board for a second time second hearing in 2007, represented by counsel. At the hearing, Gilmore argued that the Board's prior discussion of his alleged probation was improper, and that such evidence was false. Gilmore also presented evidence of other Board decisions and argued that the Board's punishment was not commensurate with the offense of failing to timely file a survey. At the conclusion of the 2007 hearing, the Board refused to reconsider its decision from the 2003 hearing and revoked Gilmore's license. Gilmore sought judicial review of the Board's order from the 2003, which was consolidated with the Board's decision at the 2007 hearing.

Gilmore disputed that the Board had substantial evidence for both decisions and challenged the revocation sanction on the basis that the only previous revocations of licenses by the Board were for offenses significantly more serious than his allegedly untimely filed survey. The Board's records showed only three previous revocations of a surveyor's license during the seven years preceding the his hearing. One involved an admission to multiple errors in multiple surveys and the entry into a consent judgment with the Board. The individual subsequently violated the consent judgment, which led to the Board's revocation of his license. Next, in an almost identical case, another individual admitted to multiple errors in multiple surveys, and entered into a consent judgment. That individual also violated his consent judgment, and as a result, the Board revoked his license. Finally, in the last case, the Board revoked an individual's license for multiple errors in multiple surveys.

Gilmore contended that his license was the only license revoked based on a single offense, despite mitigating circumstances and the fact that he was charged with a mere failure to timely file a survey. He urged that no allegation was made of the quality of the survey itself, noting that a Board member indicated that his survey was very detailed and implied that he found no flaws in it. Gilmore also argued that surveyors charged with the same or similar offenses did not have their licenses revoked. He cited twelve separate cases where surveyors were charged with the same or similar offenses and noted that in none of those cases—many involving at least one failure to file a survey and each including multiple offenses—was any surveyor's license revoked. The respective punishments ranged from corrections to erroneous surveys, monetary fines, continuing professional education requirements, unsupervised and supervised probation, to up to a single-year license suspension.

The appellate court noted, however, that the record illustrated that Gilmore did not merely fail to file a single plat -- he also failed to complete the work for which he was paid and failed to communicate with the client with whom he contracted. Gilmore gave testimony blaming his computer, his wife, his stepson, his memory, and even the victim. The court noted that the Board found Gilmore not to be a credible witness and determined that his contracting to perform work in 2001, with a promise to complete the work in ninety days, combined with the failure to complete the work more than two years later, and only when threatened with disciplinary action, constituted gross negligence, incompetence, or misconduct. The court also indicated that Gilmore's examples of other disciplinary hearings are fact-intensive cases and do not address or squarely meet the allegations and factual findings found in this case. The court upheld the Board's expertise over issues affecting the public trust, along with the Board's authority and discretion to apply such expertise, which would not be upended simply because Gilmore has merely offered examples of other cases of different treatment. Accordingly, the court held that ample evidence supports the Board's decision.

5. *Grant v. Kansas State Bd. of Technical Professionals*, 268 P.3d 506 (Kan. Ct. App. 2012) -- **Unpublished**

Greg Grant appeals the trial court's decision affirming the order of the Kansas State Board of Technical Professions decision that he failed to comply with the Kansas Minimum Standards for Boundary

Surveys (Minimum Standards), imposing a \$10,000 fine, and a 2-year restriction on future surveys performed by Grant.

Grant had been a licensed land surveyor in Kansas since 1998. In 2006, the County Surveyor filed two complaints with the Board alleging that he violated the Minimum Standards and/or statutory filing requirements on six land surveys for six properties. An independent licensed land surveyor was hired by the Board to investigate the complaints against Grant. The independent LS filed a detailed “Report of Investigation,” in which he concluded that Grant consistently failed to file section corner reports over the years. In addition, he indicated that there were several commonly accepted surveying practices that Grant’s surveying philosophy were in direct conflict. He then indicated opinions that the health, safety and welfare of the public was not being protected by certain practices as follows: (1) Grant’s interpretation of the applicable law resulted in the rejection of all but court ordered or court accepted surveys. Consequently, he rejected any permanent surveyor or other survey (of record or not) that he deemed “wrong” or “improperly done,” and (2) he did not treat quarter and center corners as independent corners. The independent LS thus opined that Grant had a lack of understanding of the role of a land surveyor as it related to title, perpetuation of corners and historical retracements. The cemetery survey and note also were in conflict with commonly accepted surveying practices.

The Board concluded that Grant used improper surveying techniques in the surveys at issue because of “his belief that it is necessary to ‘correct’ prior surveyors’ work if, in [Grant’s] opinion, they were wrong—for whatever reason.” The Board fined Grant \$10,000 and conditioned his surveyor’s license for two years, requiring him to submit copies of all boundary surveys he performed and evidence of timely filing of corner reports with the Kansas State Historical Society. Failure to comply with the conditions would result in a summary order suspending or revoking his license. On judicial review, the trial court affirmed the Board’s decision.

On appeal, Grant challenged that the Board had substantial evidence for its decision, which the appellate court rejected, indicating that there was substantial evidence to support the Board’s finding that he engaged in improper surveying techniques. Grant alternatively argued that the Board should not have disciplined him for failing to file his section corner reports within 30 days. He claimed that even though the reports were filed late, there were no complaints and this technical violation did not warrant the punishment imposed by the Board. The court noted that it was undisputed that Grant did not timely file the corner reports as required by law for four of the surveys. The court determined that the applicable statute clearly authorized the Board to suspend Grant’s surveyor’s license for failing to comply with the filing requirements.

Grant also challenged the fine and restriction. However, the court determined that the Board’s assessment of the fine and license restriction were authorized by statute, also indicating that the facts weighed against him. With respect to any willfulness of the violations, the multiple submissions of improper surveys certainly suggested that if his errors were not willful, the surveys were at least prepared with great indifference to the Minimum Standards. This was also evidenced by Grant’s failure to immediately file section corner reports after being made aware of the mandatory filing requirements. Noting that it was admirable that Grant has been a licensed surveyor since 1998, the court further indicated that it was clear the Board was critical of Grant’s surveying techniques and that a surveyor with such experience should be knowledgeable about the statutes and Minimum Standards regulating the profession. The court ultimately held that there was no evidence to suggest that the Board acted arbitrarily, unreasonably, or capriciously in ordering Grant’s fine and license restrictions.

6. *Curd v. Kentucky State Bd. of Licensure for Prof’l Engineers & Land Surveyors*, 433 S.W.3d 291 (Ky. 2014).

Joseph B. Curd, Jr., a licensed land surveyor sought judicial review of Board of Licensure for Professional Engineers and Land Surveyors’ suspension of his license based on finding that his expert testimony in prior judicial proceeding violated professional standards. The trial court found that Board

had jurisdiction to discipline surveyor but that statutes supporting Board's sanctions were unconstitutionally vague. Both parties appealed.

Curd testified as a trial expert on behalf of defendants in a quiet-title action in Circuit Court. In the course of his testimony, Curd—operating solely off of an historic deed's calls and distances—opined in support of the defense theory that the disputed boundary extended across a highway traversing the disputed area. Unconvinced by Curd's testimony, the trial court—sitting without a jury—ultimately ruled in favor of the plaintiffs. After the case was over, the Board conducted disciplinary proceedings against Curd for his allegedly misleading and inaccurate trial testimony. The Board found Curd's performance as an expert witness violated professional standards and suspended Curd's surveyor's license for six months.

On appeal, the appellate court determined over Curd's challenge that the Board's decision was supported by substantial evidence. Noting that this determination did not insulate the decision from constitutional challenge, the appellate court focused upon whether the applicable statutory and rules used by the Board to sanction Curd were unconstitutionally vague and were unconstitutionally vague as applied to him.

The appellate court further noted that expert witness opinion testimony has been given First Amendment protection in other contexts, and also concluded that a licensee sanctioned for expert opinion testimony has a colorable First Amendment claim. Given the First Amendment, closer review of the statutes was necessary because “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” Furthermore, “[b]road prophylactic rules in the area of free expression are suspect, and allowing such broad rules could result in a chilling effect on the candor of expert testimony.

The statute at issue related to the Board's disciplinary authority when it finds that an applicant or licensee “[e]ngaged in gross negligence, incompetence, or misconduct in the practice of engineering or land surveying[.]” The rule provisions at issue included the following:

Section 3: A licensee shall issue all professional communications and work products in an objective and truthful manner.

(1) A licensee shall be objective and truthful in all professional reports, statements or testimony and shall include all material facts.

(2) If serving as an expert or technical witness before any tribunal, a licensee shall express an opinion only if it is founded on adequate knowledge of the facts in issue, on the basis of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of that testimony, and shall act with objectivity and impartiality. A licensee shall not ignore or suppress a material fact.

Section 9: The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession.

The court found that land surveyors of common intelligence would have to guess at the meaning of “gross negligence” or “incompetence” or further, what is “likely to deceive the public” in this context. The appellate court stated:

The evidence in this case indicates Curd's opinion was based on research and actual deed language. Of course, the Board argues his opinion was grossly negligent or incompetent because he had to ignore monumentation to reach his conclusion; but, while this may be true, without further indication of what constitutes gross negligence, incompetence, or misconduct, we remain unsure how Curd would grasp his testimony would subject him to sanction. And when a land surveyor testifies based on the research he performed, cites actual deed language,

and acknowledges the proper role of monumentation in the context of surveying, it is difficult to perceive how he would expect to be sanctioned for deceiving the public.

The court also indicated that it was unable to comprehend how Curd would expect his testimony would in any way impact the public health, safety, or welfare. The court acknowledged that Curd testified dishonestly, was financially compensated for his testimony, caused the owners years of stress and thousands of dollars in expenses, and was an essential player in the “conspiracy” to deprive them of their land. However, the court further indicated that the Board failed to show how this impact on the owners related to the endangerment of the public health, safety, or welfare. In addition, the court also indicated that the applicable rule would ask a land surveyor to guess somehow at what testimony may bring dishonor to his profession. On its face, the court did not consider the rule to be vague. However, when applied to expert testimony, the court considered it difficult to imagine what testimony would not bring about the potential for dishonor to the profession. In the context of expert opinion testimony, the court considered this rule to have the potential for arbitrary enforcement as a result of perhaps controversial or disagreeable testimony.

With respect to another rule, the court noted that it allowed punishment for more than simply untruthful testimony. In the strict sense, Curd’s testimony was not false; although in the eyes of the Board, his testimony was slanted to mislead the judge and was, therefore, contrary to the ethical standards required of land surveyors. The court determined that the Board’s findings adequately supported the conclusion that Curd’s testimony failed to be objective. The court further recognized that Curd ignored proper land-surveying methodology in an attempt to support a desired result -- *i.e.*, misleading testimony is not objective testimony.

The case was remanded back to the Board for further consideration in light of the court’s order.

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For additional summaries of older cases, see: ANNOT., Revocation or suspension of license of professional engineer, 64 A.L.R.3d 509 (Originally published in 1975).