

# ◆ The Construction Report ◆

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## Coping With The Texas Engineering Practice Act

**T**he Texas Engineering Practice Act (Texas Occupations Code §§1001.001, et seq.) ("Act"), governs the livelihood of professional engineers in Texas. The Act defines the practice of engineering so broadly that it includes virtually anything requiring engineering judgment. The Act is intended to protect public health, safety, and welfare, and to fix responsibility for engineering work or services. The Act makes it clear that the practice of engineering in Texas is a privilege that may be suspended or revoked.

### -Exceptions & Exclusions

Despite its broad reach, the Act has exceptions and exclusions. The Act does not prohibit a person from testifying or providing evidence before an administrative or judicial tribunal regarding the negligence, in-

***The Act sets bounds for acceptable conduct and prohibited conduct.***

competency or misconduct of an engineer. Also, the Act does not apply to "a person who does not offer to the public to perform engineering services." For example, the employees or subordinates of an engineer are exempt from the Act's licensing requirements if the person's practice does not include responsible charge of design or supervision. Small public works projects are ex-

empted. County road maintenance or improvements are exempt. Federal officers and employees are exempt. Persons installing, operating, repairing or servicing mechanical, electrical or other equipment are exempt as long as they do not sign an engineering plan or specification or use the term "engineer" or "engineering."

Persons who do not offer engineering services to the public may without violating the Act erect, con-



struct, enlarge, alter or repair, or prepare drawings and specifications for a private dwelling or apartments not exceeding eight units for each one-story building or four units for each two-story building. Persons employed by private corporations do not violate the Act by making reasonable modifications to existing buildings, facilities, or other real property fixtures provided that they do not represent that they are legally qualified to practice engineering.

Architects, landscape architects, and interior designers, each licensed under other Texas laws, are exempt from the Act.

*(Continued as "The Act" on page 2)*

## Lawyer Quips and Quotes

An old man on his death bed wanted badly to take some of his money with him. He called his priest, his doctor and his lawyer to his bedside. "Here's \$30,000 cash to be held by each of you. I trust you to put this in my coffin when I die so I can take my money with me."

At the funeral, each man put an envelope in the coffin. Riding away in a limousine, the priest suddenly broke into tears and confessed, "I had only put \$20,000 into the envelope because I needed \$10,000 for a new baptistery."

"Well, since we're confiding in each other," said the doctor, "I only put \$10,000 in the envelope because we needed a new machine at the hospital which cost \$20,000."

The lawyer was aghast. "I'm ashamed of both of you," he exclaimed. "I want it known that when I put my envelope in that coffin, it held my personal check for the full \$30,000."

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What's wrong with lawyer jokes?

Lawyers don't think they're funny, and nobody else thinks they're jokes.

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Why are lawyers like nuclear weapons?

If one side has one, the other side has to get one.

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Why are lawyers like nuclear weapons?

Once launched, they can't be recalled.

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(Continued from "The Act" on page 1)

### **-Bounds of Acceptable Conduct**

The Act sets bounds for acceptable conduct and prohibited conduct. The Act broadly declares that a person may not practice engineering unless the person holds a license issued under the Act. An unlicensed person cannot use any title containing or referring to "engineer".

An unlicensed person may not receive any fee or compensation or the promise of any fee or compensation for practicing engineering.

Once licensed, an engineer must obtain a seal to stamp plans, specifications, plats or reports. The person may not seal a document if the person's license has expired or has been suspended or revoked. Public officials can only accept a plan, specification, or other related document if such documents were prepared by an engineer, as evidenced by the engineer's seal.

A licensed engineer must use the term "Engineer," "Professional Engineer," or "P.E." in the professional use of the person's name. A business entity cannot engage in the practice of engineering unless it is

***The State may not construct a public work unless the plans have been prepared by an engineer.***

registered with the Board, and the practice is carried on by engineers.

A business entity cannot represent to the public that it is engaged in the practice of engineering or use any variation of the term "engineer" unless the firm is registered with the Board, the firm is actively engaged in the practice of engineering, and the engineering work or services are performed by or directly supervised by an engineer who is a regular full-time employee of the firm.

If caught, the Board may allow an unregistered entity to register without discipline within thirty days of the Board's notice to register.

The state or a political subdivision may not construct a public work involving engineering and public health, welfare, or safety unless: an engineer has prepared engineering plans, specifications, and estimates; and engineering construction will be performed under an engineer's direct supervision.

### **-Board Powers**

The Board may in the appropriate case issue any of the following disciplinary measures: (1) deny an application for a license; (2) revoke, suspend, or refuse to renew a license; (3) probate the suspension of a license; or (4) formally or informally reprimand a license holder.

A person is subject to disciplinary action for: (1) a violation of the Act; (2) fraud or deceit in ob-



taining a license; (3) retaliation by an applicant against an individual who has served as a reference for that applicant; (4) gross negligence, incompetency, or misconduct in the practice of engineering; or (5) failure to timely provide plans or specifications to the Texas Department of Licensing and Regulation.

Upon suspension or probation, the Board may require the person to: (1) report regularly on relevant matters; (2) limit practice to Board prescribed areas; or (3) undertake specified professional education.

### **The Editor's Corner**

*The Construction Report is published periodically by Quilling, Selander, Cumiskey & Lownds, P.C., to highlight construction matters of interest to at least the Editor, Brian W. Erikson. The information we provide is a community service and is not intended to displace the legal judgment of real (expensive) attorneys. We invite your comments. Write us c/o **Brian W. Erikson**, 2001 Bryan Street, Suite 1800, Dallas, Texas 75201. Call us at (214) 880-1844.*

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The Board may order a violator to pay restitution to an aggrieved consumer, but not more than the amount paid for engineering services. The order cannot include other damages or estimated harm.

The Board may review a license holder's status if the Board believes that the license: (1) may have been issued through fraud or error; or (2) may threaten the public health, safety, or welfare.

### **-The Disciplinary Actions**

The Board may suspend or revoke a license while the status is reviewed.

A person affected by Board action is entitled to a hearing. A person whose license has been revoked may file suit to annul or vacate the Board's order in district court where the person resides or where allegedly offending conduct has occurred.

The Board may impose an administrative penalty on violators. An administrative penalty may not exceed \$3,000 for each violation. However, each day a violation continues or occurs is a separate violation. The amount of the penalty is based on a number of factors including the seriousness of the violation; economic harm to property or the environment; the history of previous violations; the amount necessary to deter a future violation; and efforts or resistance to

(Continued as "The Act" on page 3)

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efforts to correct the violation.

The Board may assess within the penalty the actual costs of investigating and prosecuting the violation. The person fined has 30 days to pay and/or seek judicial review.

If the person does not pay the administrative penalty, and enforcement is not otherwise stayed, the Board may refer the matter to the Texas Attorney General for collection. The Texas Attorney General is the Board's legal advisor.

A court may uphold or reduce the amount of the administrative penalty, and order an appropriate refund or otherwise issue equitable relief.

The Board may sue to enjoin a person from violating the Act or the Board's rules. Suit must be filed in Travis County district court.

A person commits a Class A misdemeanor and criminal penalties may be imposed if the person: (1) practices engineering without being licensed or exempted from the Act's licensing requirement; (2) violates the Act; (3) presents or attempts to use as the person's own the license or seal of another; or (4) gives false evidence of any kind to the Board or a Board member in obtaining a license.

Public officials are required to report violations of the Act to the proper authorities.

The Board is required to compile an annual summary of its opinions in a single reference document available on the Internet. The posting lists the results of formal investigations. Having now read this report, hopefully your name will not be among those disciplined.

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A jury consists of twelve persons chosen to decide who has the better lawyer.

-Robert Frost (1874-1963)

*(Continued from "Board Rules" on page 4)*

Board staff presents a report to the executive director detailing the investigation and recommendation for the complaint's final resolution. If sufficient evidence exists to substantiate a violation of the Act or Board Rules, the Board will proceed with enforcement. Resolution may include entry into a voluntary compliance agreement; or an informal consent order or agreed Board order with administrative penalty and compliance requirement; or referral of injunctive or criminal action to the proper authorities; or referral of a final order to the State Office of Administrative Hearings.

If sufficient evidence is lacking, the Board staff recommends that the Board dismiss the complaint.

The Board is required to keep statistics on the number of complaints filed and resolved, and the length of time necessary to resolve the complaints.

The Board is empowered to retain technical consultants.

Rule 139.31 concerns enforcement actions for violations of the



Act. Under this Rule, the Board may seek any one or more of the following: revocation of a license; suspension of a license; probation of a suspended license; refusal to renew a license; issuance of a formal or informal reprimand; notice to cease and desist; voluntary compliance agreement; or assessment of an administrative penalty under the Act.

All Board actions take the form

of an order, and are permanently recorded and made available to the public. Except for an informal reprimand, all enforcement actions are published in the Board newsletter and on the Board website.

If the Board concludes that a violation of the Act or Rules has occurred, the executive director will notify the person or entity (the "respondent") of the alleged violation by personal service or certified mail. The respondent may present rebuttals, arguments or evidence to the Board prior to initiation of disciplinary proceedings. If the respondent does not respond, the Board may proceed with a contested case hearing.

If the Board decides to pursue an alleged violation, the respondent can request an informal conference to resolve the matter informally. At the informal conference, the respondent may present additional evidence and discuss details of the allegation. The informal conference is an excellent opportunity for a respondent to resolve a complaint. Following the informal conference, the Board's committee can recommend: dismissal; a proposed agreed order for disciplinary action; or scheduling of a formal hearing.

The minimum administrative penalty under the Rules is \$100 per violation. The maximum administrative penalty is \$3,000 per violation. Each day a violation continues or occurs is considered a separate violation for assessing an administrative penalty.

If there is no settlement, contested case hearings are conducted by the State Office of Administrative Hearings in accordance with the Texas Administrative Procedures Act.

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Lawyers, I suppose, were children once.

-Charles Lamb (English critic & essayist (1775-1834))

**Rules for the Texas Board of Professional Engineers**

**T**he Texas Board of Professional Engineers has rules to implement the Texas Engineering Practice Act.

Chapter 139 lists the Enforcement Rules, and details the complaint filing process. A complaint may be filed at the Board's website: <http://www.tbpe.state.tx.us>.

Upon receipt, the Board assigns a complaint number, and reviews the complaint for sufficiency. If the Board determines that a potential violation exists, the Board staff proceeds with an investigation. If the Board staff concludes that the complaint lacks merit, the Board staff recommends that the executive director close the investigation and dismiss the complaint. If the executive director concurs, the Board notifies the complainant, and closes the investigation.

If a potential violation exists, and the Board has authority and jurisdiction over the complaint, the Board staff initiates disciplinary proceedings against the violator. In processing complaints, the Board's highest priority is reserved for those matters that could potentially harm



the public. Such complaints include those alleging incompetence, gross negligence, plan stamping, or practicing without a license. The Board staff is required to return a preliminary determination to the executive director and complainant

within 45 days of receiving a high priority complaint.

Rule 139.17 concerns complaint investigations. The rule requires the Board staff to investigate complaints and provides authority to subpoena information. The rule allows the respondent an opportunity to respond to the complaint. If the Board intends to dismiss the complaint, the Board staff will inform the complainant of the rationale prior to reporting the dismissal to the Board. A complaint withdrawal does not terminate or disrupt an ongoing investigation. At least quarterly during the complaint investigation, the Board is required to notify the parties involved as to the complaint's status, unless notice would jeopardize an undercover investigation.

Rule 139.19 concerns the final resolution of a complaint. Once an investigation is completed, the

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