

OUT OF THE FRYING PAN...BUT WHAT THEN?
Protecting Your Professional Licensure and Livelihood Before
the Architectural and Engineering Boards in Texas¹

by

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Presented Through HalfMoon Seminars
March 31, 2006

¹ The information included in this paper and presentation is offered as guidance to design professionals who operate in the construction industry in Texas, as well as the attorneys who represent them. This is not legal advice, nor is it intended to create an attorney-client relationship with any reader. Legal practitioners should review each particular project in light of its own merits and circumstances, and registrants with the Texas Board of Architectural Examiners and Texas Board of Professional Engineers should be sure to enlist the services of a legal professional before tailoring any one form or strategy to a given case.

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Perhaps one of the most chilling experiences a registered professional in any field can face is a notice that his or her licensure has been threatened. This strikes at the very heart of one's livelihood and career, which has been the focus of years of schooling and training, followed by further years of hard work and amassing a reputation, a process that can literally take decades. One complaint, should it gain momentum, could be the first in a series of dominoes that can tarnish a career, or perhaps bring it down altogether.

This paper's purpose is to illuminate some of the provisions that may already be well known to design professionals, but which may be incompletely understood. The discussion will also focus on other, less well-known rules governing design practice in an effort to help registrants avoid landing in front of the boards in the first place. For those unlucky individuals who find themselves the subject of an investigation or formal enforcement action, this paper will strive to demystify some of the proceedings and serve as a guide for conduct and decorum in this arena.

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The Boards

Architects, landscape architects, and interior designers in Texas are all governed by the Texas Board of Architectural Examiners (“TBAE”), which has existed since 1937. That was the same year the entity governing professional engineers in Texas—the Texas Board of Professional Engineers, or “TBPE”—was born. The precipitating factor in creating the engineering board was the death of an estimated 300 people in East Texas after a natural gas explosion.

The boards are generally charged by statute with the protection of the public’s health, safety, and welfare, an extremely broad mandate. The TBPE is comprised of nine board members, including six engineers and three public members, while the TBAE—with its four architects, one interior designer, one landscape architect, and three public members—is a product of its governance of those varying disciplines.

These boards have clear jurisdiction over those individuals and firms who have voluntarily registered and can initiate investigations based on complaints from third parties or on their own. They are also assigned to enforce the rules applicable to non-registrants who engage in the unauthorized practice of architecture, landscape architecture, interior design, or engineering. Indeed, should the TBAE, for example, learn that an out-of-state architect is practicing in Texas without first having registered, it may request that an Assistant Attorney General press forward in the state courts to obtain an injunction against that offending party.

The TBAE and TBPE, like most regulatory agencies, find themselves whipsawed by a broad statutory mandate, a large body of registrants to be regulated, and insufficient staffing and other resources to handle the job. This can result in cases languishing for

months, and sometimes years, without any activity apart from quarterly letters advising that an investigation is ongoing. This can create serious problems, since memories fade over time and documents are either lost, destroyed, or shipped away. The attached reports from the Texas Sunset Advisory Commission contain graphs and charts that help show the volume of work that these boards must contend with every year.

Both of these boards, of course, also regulate the examination and registration of design professionals seeking new admission into the ranks of existing practitioners. The structure and general nature of these processes are beyond the scope of this paper, though the referenced rules should provide ample input on this front. The boards' staffs are also available to respond to questions regarding out-of-state practitioners' entry into the ranks of Texas registrants, as well as the requirements for unlicensed individuals who wish to be admitted to practice.

The Sunset Commission: Dictating a Harder Enforcement Line

Many state agencies, including the two boards, are covered by what are called "sunset" provisions in their enabling legislation. This means that these agencies will expire and cease to exist if not renewed by the Texas Legislature. Leading up to the 2003 state legislative session, the state's Sunset Review Commission undertook a comprehensive study of each board's history, policies, procedures, successes, and failures.

Ultimately, both of the boards were continued in existence until 2015 by the 2003 Legislature, but both of them also received substantial criticism. Among the issues raised

with each of them were the following (as drawn from each of the reports issued by the Sunset Commission):

TBAE ISSUES AND RECOMMENDATIONS

I. The Board's Enforcement Process Does Not Adequately Protect the Public

Key Recommendations:

- **Increase the Board's enforcement authority by authorizing the issuance of cease and desist orders; increased administrative penalties; including fine amounts in the Board's penalty matrix; and the ability to require restitution as part of the Board orders.**
- **Increase the Board's enforcement efforts by requiring the Board to direct additional resources toward enforcement activities; establish time lines for enforcement processes; consult with design professionals in complaint investigations; and develop a system of compliance checks of Board disciplinary orders.**
- **Improve the Board's ability to gain compliance with statutes by requiring the Board to increase outreach to licensees, the public, and individuals; provide an enforcement grace period after the establishment of new rules and laws; improve coordination with building officials; and provide information about state and federal accessibility laws on the Board's Web site.**

II. The Board's Registration of Firms Is Not the Best Use of Limited Agency Resources

Key Recommendations:

- **Clarify that the Board does not have authority to require firms to register.**
- **Direct the Board to reallocate firm registration resources to actual enforcement tasks.**

III. Key Elements of the Board's Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices

Key Recommendations:

- **Standardize the Board's licensing functions by requiring the Board to address felony and misdemeanor convictions, exam accessibility, and**

examination fee refunds; and streamline the process used for exam administration.

- **Revise the Board’s enforcement activities by requiring common licensing model elements, such as standards of conduct and rules for the complaint process; standardizing Board statutes regarding grounds for disciplinary action; conforming the statute with procedures at the State Office of Administrative Hearings; and ensuring that all disciplinary actions are made public.**

IV. Texas Has a Continuing Need for the TBAE, but Could Benefit from Greater Coordination With the TBPE

Key Recommendations:

- **Continue the TBAE for 12 years.**
- **Require the Board to form a joint practice committee with the TBPE.**

The TBPE came in for similar, though seemingly less extensive, criticism, as summarized below:

TBPE ISSUES AND RECOMMENDATIONS

I. The Board’s Enforcement Activities Create a Burden on Complainants, Focus on Minor Infractions, and Provide Little Tracking Capabilities

Key Recommendations:

- **Require the Board to establish a simple, accessible process for accepting, opening, and investigating complaints, defined in rules, and available on its Web site.**
- **Require the Board to prioritize complaints and focus its efforts on those complaints that could harm the public.**
- **Authorize the Board to employ advisors and consultants to provide technical assistance on enforcement cases.**
- **Require the Board to track complaint information and report this information annually.**

- **Authorize the Board to establish a 30-day grace period for firms to register with the Board.**

II. Key Elements of the Board’s Licensing and Regulatory Functions Do Not Conform to Commonly Applied Licensing Practices

Key Recommendations:

- **Revise elements of the agency’s licensing authority to reflect standard practices in the way the Board accepts applications for licensure, makes exams accessible to individuals with disabilities, addresses applicants’ criminal history, and processes renewals.**
- **Update elements of the agency’s enforcement activities to improve the way the Board makes decisions on complaints, require staff to update the Board about administratively dismissed complaints, adopt a probation guide, and provide restitution as an option during informal conferences.**
- **Eliminate fees set and capped in statute and encourage the Board to increase coordination with other state agencies that have overlapping responsibilities.**

III. Texas Has a Continuing Need for the TBPE, but Could Benefit from Greater Coordination With the TBAE

Key Recommendations:

- **Continue the TBPE for 12 years.**
- **Require the Board to form a joint practice committee with the TBAE.**

Many of the recommendations have already been enacted as actual policy changes and directives by the boards. Furthermore, as a result of the Sunset Commission’s review and findings, registrants may expect to see a distinctly harder line taken with enforcement actions by each of the boards. Indeed, the TBAE’s Executive Director has stated as follows in a recent Board newsletter:

“One of the concerns that I hear from registrants is that they want to see more stringent application of the law. They want architects, interior designers, and landscape architects to be held to a higher standard. I agree and so

does the Legislature. Recent legislation has given TBAE the authority to charge higher penalties and to prioritize penalties. This authority strengthens our position as an enforcement agent.

“TBAE is also resolving more cases involving nonregistrants and is now authorized to issue a cease and desist order to a nonregistrant who violates the law.

“We are committed to ensuring that those who break the law and put the public at risk are dealt with firmly. By taking a solid stand in enforcing the law, everyone benefits—from the citizens of Texas to the professionals who practice ethically and competently.”

--TBAE NEWSLETTER, APRIL, 2004

Copies of the Sunset review reports for both the TBAE and TBPE are attached to this paper. These documents probably warrant reading, not only for the criticisms and praise directed at each of the boards and their policies over the last several years, but also to learn more about the likely future direction of enforcement and registration activities. Additionally, registrants responding to investigations may find valuable nuggets of policy criticisms or directives that can aid in their defense before the Boards.

One potentially unfortunate side effect of the Sunset Commission’s review and report is that the boards may now show a strong disinclination to informally dispose of cases (this has, in fact, been the author’s experience thus far, in the wake of the Sunset reports). This could result in a difficult “either-or” situation where a registrant must either obtain an outright dismissal of the case against him or her or face the reputational and professional albatross of a permanent—and published—blemish on the registrant’s disciplinary record.

As noted above, the Sunset review also resulted in the creation of a Joint Advisory Committee on the Practice of Engineering and Architecture, aimed at least in

part toward helping the two boards find some symmetry in their enforcement and regulatory functions. One specific mandate for this committee, which will meet semi-annually and includes three members of each board plus one architect and one engineer, is as follows:

To issue advisory opinions to the TBPE and TBAE on matters relating to the practice of engineering and the practice of architecture, including:

- (1) opinions on whether certain activities constitute the practice of architecture or the practice of engineering;**
- (2) specific disciplinary proceedings initiated by either agency; and**
- (3) the need for persons working on particular projects to be licensed/registered by the TBPE or TBAE.**

The Complaint

Complaints to the architectural and engineering boards have, unfortunately, become a tool of competition and oppression in this state. An aggrieved client, a bitter neighbor who has lost a battle over nearby property development, a vanquished fellow bidder for a lucrative new project, a disgruntled employee or ex-employee, and vengeful opposing expert witnesses may all file complaints with the boards, sometimes with a deeply damaging effect on a registrant's license and future livelihood.

Naturally, one way to help avoid such problems is to select only clients with whom one has, or can build, an easy rapport and outstanding relationship. Few are so lucky, though, to be this choosy and still make ends meet. Another way of building a bulwark against a future complaint is to respond to each and every request for

information or other communication, preferably in writing, and to leave no “unanswered bullets.” Allowing an attack, or even a caustic comment, to pass by without response can have potentially disastrous consequences.

These are the same tools that lawyers will tell their design professional clients to use in avoiding an implied admission of wrongdoing, in case a civil lawsuit later arises. Generally speaking, many of Texas’ most senior and successful construction lawyers advise their construction clients to have one “paper person” and one “construction person” involved every day during a project. From time to time, this may have to be the same person, but trouble usually arises when one of these priorities suffers at the hands of the other.

If a dispute arises and threatens to turn into litigation, it is important when ultimately settling the case to set forth in clear terms that the entirety of the dispute—and anything relating to it—is being resolved through that written document. There is substantial doubt as to whether one can obtain a legally enforceable agreement from a client not to file a complaint with either of the boards. Just the same, it is important to strike a settlement agreement that contains a continuing denial of liability or wrongdoing, as well as a full release from the claimant, and perhaps a confidentiality clause—though this may be a double-edged sword that could prevent you from later using the settlement as a shield against prosecution.

Most importantly, registrants have, in the past, been able to point to settlement agreements as the documents in which the warring parties agreed to resolve *all* of their differences at once. Presenting the circumstances of a dispute’s resolution can help the boards form their own views of what might truly be an embittered client whose sole

purpose is to fire a parting shot after settlement, in an emotional and perhaps scurrilous attack on an architect's or engineer's career and reputation.

The boards' enforcement staffers have claimed to understand that any given complaint may be the instrument of unfair bitterness, emotion, resentment, and improper and unjustified attack. While some registrants may disagree, this statement may be supported by the rate at which the staff will dismiss grievances filed with the boards. See the attached Sunset Review Commission reports for charts and statistics on the dismissal rates and types of complaints received by the TBAE and TBPE.

The Other Shoe Drops: An Investigation is Born

What happens when one becomes the unlucky, or at least unwanted, target of such a complaint, and it is not dismissed outright? Both boards have the ability to accept third-party complaints and launch their own investigations, based on information ranging from interagency information sharing to newspaper articles. The attached Sunset reports contain useful flow charts that can help registrants understand the steps involved in the boards' processing of complaints, investigations, and enforcement actions.

Upon receipt of a complaint or the institution of a staff-originated concern, the boards will typically undertake an in-house investigation of the matter. If the functional equivalent of "probable cause" is found, it will usually be then that the boards' enforcement staff will issue a notice letter to the registrant in question, indicating that a formal investigation has begun.

The boards' letters typically set forth the alleged actions that have caused concern, as well as the specific rules or statutes at issue. In almost every case, the staff will attach copies of the laws or rules involved, together with a request for the registrant

to respond in detail to the allegations, as well as specific questions that may have occurred to the enforcement division representative assigned to the case. Most often, the complainant will not be identified in the letter, and that information may be kept secret through most, or all, of the investigation. In many cases, however, the nature of the complaint may do more than enough to reveal the identity of the accuser.

It is at this point, at the very outset, that it is crucial to pay full attention to the matter, because the earliest stage of board investigations can present more than just an early path to the exit door. This period can also present an unparalleled opportunity to avoid the sometimes staggering expense—financial, psychological, and professional—associated with an enforcement matter lasting several months or even years. The matter can also, however, balloon into a full-fledged threat to one’s professional existence, if serious enough in nature or if not properly handled.

Another reason why registrants should seek to resolve board cases as early as possible is because insurance coverage may not apply, leaving the registrant—or her employer—to pay attorneys’ fees. Insurance companies may refuse to cover the matter unless (a) the policy expressly provides for the situation, or (b) the complaint is a “springboard” or surrogate for a negligence claim. In any case, registrants should strongly consider reporting the investigation to the carrier (or at least discussing the idea with one’s insurance agent), because attorneys’ fees can rise dramatically even at the very outset of a case, and because coverage cannot possibly arise if the question is never presented to the insurer.

Even in an age where job security and workplace loyalty may be relatively low, registrants may be pleasantly surprised to learn that one’s employer—or even ex-

employer—is willing to pay for a legal defense. Since design professionals often work on a billable hour basis, time spent by the registrant investigating and responding to board inquiries represents a lost billing opportunity, which itself can lead not only to decreased invoices, but also to neglected customers who themselves might become dissatisfied enough to file a grievance with the board. On many levels, it can be exorbitantly expensive to be around this type of action, both for employee and employer, and it is even more expensive to remain in the boards’ sights long enough to battle through an informal conference or an on-the-merits “trial” before an Administrative Law Judge, as discussed below. For all of these reasons, a targeted registrant should seek as early a resolution of his or her board file as possible.

At this first stage, the registrant should also probably decide whether or not to hire an attorney. Depending upon the nature of the case, particularly including the severity of the alleged offense and the possible sanction associated with it, there may be distinct advantages or disadvantages to proceeding with or without counsel, as the case may be. Without a doubt, an attorney’s time spent interviewing a client (and possibly others with factual knowledge), assimilating the facts and law, and working to prepare a proper response to the board in question can quickly add up to \$1,000.00, and sometimes significantly more, depending upon the complexity of the case and the intensity of the effort.

Too often, registrants will call a lawyer for the first time a day or two before a response to the TBAE or TBPE is due. While this complicates matters and can even increase the cost of the representation by increasing the intensity, the boards’ staffers routinely grant generous time extensions if presented with credible justification (e.g.,

pending work deadline that could lead to another such claim, the complexity of the investigation topic, inability to attend fully to response due to other demands on time, etc.).

Soon after learning of the pending board case, a registrant should set aside time to gather documents relating to the investigation and then contact those with relevant knowledge of the underlying circumstances. By the time the architect or engineer hears about the case, chances are good that the board's staff has already delved deeply into the available documents and witnesses with knowledge of the applicable facts. Make sure that your memories are adequately refreshed, and that your representations generally coincide with the true facts of the case. Should you anticipate a sharp conflict in factual recollections, alert the board staff to this as early as possible, to avoid the disastrous appearance of no credibility at the earliest stage of the case.

It is also important at this stage to ensure that one's first response to the board does not inadvertently open up another avenue for disciplinary action. A statement to the TBAE, for example, that one has no records of a project that occurred six years ago due to corporate document destruction policy could lead to more trouble, due to the rule requiring architects to maintain copies of all sealed documents for ten years, at a minimum. Another relevant focus in dealing with a new investigation is the list of (very similar) considerations that each board must take into account in arriving at a punishment, since these factors can help support an argument for lenient treatment by the enforcement staff. Finally, one should also pay close attention to the "grid" of suggested sanctions associated with violations of the applicable rules and statutes, as enshrined in each board's set of rules.

Walk Softly, and Choose the Right Stick: Responding to and Dealing With the Board

Given the differing circumstances and sensitivities of each case, there are few general principles that apply uniformly when responding to a board inquiry. Alleged violations can run the gamut from a simple failure to submit documents for accessibility review or failure to register a firm, on the one hand, to a criminal conviction, gross incompetence, plan-stamping, or an act of fraud or dishonesty, on the other.

Unsurprisingly, the boards' enforcement personnel tend to respond well to those who address them professionally, respectfully, and with articulate answers to the questions presented. As in other walks of life, candor is particularly valued and might even engender lenient treatment from the board staff, which is given considerable leeway by the rules in determining the punishment to apply for any given breach of the rules or law. Ignoring the staff's questions is clearly not an option, and indeed, this may constitute grounds for a separate violation.

The response to a board's original notice letter is almost always the registrant's first, and probably best, chance to present a substantive defense and establish a good working relationship with the enforcement staffer assigned to the case. Painstaking care should be taken to review and analyze the rules cited by the staff, and the response itself should be thorough yet concise, avoiding the appearance of an intentional distraction from the central issues in the case.

Getting Into the Board's Own Files: The Open Records Request

In support of the response effort, registrants may also request copies of the documents amassed by the Board in its processing of the case. This is done through a

vehicle known as an Open Records Request, which is sometimes also called a Public Information Request. This type of request can simply take the form of a letter with a reference to two things: (1) the specific enabling statutory provision, which is Chapter 552 of the Texas Government Code, and (2) a description of the specific materials or categories of documents sought.

The entity receiving the Open Records Request has ten days from receipt to process the inquiry. If time is a factor, a faxed request is highly recommended. While internal memos, investigator notes, and other similar board work product will likely be withheld by the enforcement staff, this type of request can sometimes produce documents that will illuminate the field of inquiry before a response is due. Witness statements, correspondence between the board staff and people with relevant factual knowledge, documents obtained from project files or public records, and documents relating to past investigations of a similar nature may all be found through this type of request.

Registrants should be warned, however, against the urge to cast too broad a net in describing the “target” documents, because the Government Code provides that the requesting party must pay the reasonable costs for the entity’s time spent gathering the materials, as well as for the copies made. Should you ask for a mountain of documents, you will not only receive it, but you will also have to pay for a full copy of the entire paper mountain. Open and frequent communication with a board representative may eliminate confusion and undue expense, so registrants should work to improve and maintain their relationships with staff as the case wears on.

Mulling it Over: The Board’s Consideration of the Registrant’s Response

Once the enforcement staff receives a substantive response from the registrant, the case will most likely go into a silent period for at least several weeks, if not months. Some cases have languished literally for years without anything other than quarterly notices from the board in question that the case is still under investigation. This may be as good a sign as any that the boards' resources are heavily taxed by the enormous body of complaints that they must evaluate and process.

Ultimately, however, the investigator or other enforcement staffer assigned to the case will analyze the response and then either tender further questions, if necessary, or issue a proposed resolution of the investigation. This can range anywhere from an outright dismissal, if the case against the registrant is found to be without merit, to a suggested punishment that can include a reprimand, suspension, or even revocation. It is at this stage that, absent a staff decision to dismiss the case, the board will most likely transmit a proposed Agreed Board Order that explains the resolution recommended by the enforcement division.

The Informal Conference: A Chance to State Your Case in Person, and an Opportunity Not to Be Missed

If a registrant does not agree with the enforcement division's recommended resolution, both the TBAE and TBPE allow the design professional to request an "informal conference," which amounts to a private, in-person audience with board representatives. At the TBPE, the board is represented by one board member, an assistant attorney general who typically focuses on board matters, and the executive director, as well as one or more enforcement staff members. In contrast, the TBAE informal conference is attended by the executive director, the board's general counsel (or

a special counsel for enforcement matters), and one of the enforcement division's leading figures associated with the case.

In the past, the TBAE has been known to make a video recording of the proceeding. The TBPE, to this author's knowledge, keeps no such record, either magnetically or stenographically, of the informal conference. Given the conference panel's ability to ask direct questions that may or may not have been posed in the past, the recording of the meeting should cause the registrant to think twice about the contents of the presentation, or indeed, whether to schedule one at all. In any case, it is important to state for the record, once a recording has begun, that the registrant is attending the meeting in the spirit of settlement. An attorney would be well advised to declare that the entire proceeding should be considered a settlement discussion pursuant to Rule 408 of the Texas Rules of Evidence, since this may afford some later protection from the TBAE trying to use purported "admissions" against the registrant.

Despite the need for some caution, it is difficult to overstate the value of this opportunity. The registrant may come to the discussion at the particular board's offices with or without counsel, but may also bring along fact witnesses, or even character witnesses, to testify on his or her behalf. A video presentation of Power Point slides, reports, exhibits, and other tangible materials can help focus the conversation, and a concise articulation of the registrant's defenses can then be made. One should keep the presentation concise, because such meetings are typically budgeted for just one hour.

More than anything else, the chief value of the informal conference lies in the registrant's own ability to state why he or she took certain actions, and what the intent behind those actions was. At the end of this meeting, the board's representatives will

either retire for deliberation or indicate that they will take the matter “under advisement,” with a proposed resolution to be forwarded within a short time. The author has found the informal conference vehicle to be a remarkably successful means of bringing the sympathetic human element of the license holder directly before the executive director and others on the panels. While this is a procedure that has certain shortcomings, this may be the only chance that a registrant will have to present defenses on the merits to board representatives before going through an expensive administrative trial.

Telling It to the Judge: The State Office of Administrative Hearings

The informal conference may be the registrant’s last, best chance to present a defense on a low-impact and relatively low-cost basis. This is because the TBAE’s and TBPE’s next step, if they and the registrant cannot reach an agreed resolution after the conference, is to submit the matter as a contested case to the State Office of Administrative Hearings, or “SOAH.”

SOAH was created by the Texas Legislature in 1991. Its “Compact With Texans” states, “The mission of the State Office of Administrative Hearings is to conduct fair, objective, prompt, and efficient hearings and alternative dispute resolution proceedings and to provide fair, logical, and timely decisions.” This organization employs dozens of administrative law judges (“ALJs”) who have cases dealing with everything from the Public Utility Commission to the Department of Housing and Community Affairs to the Texas Commission on Environmental Quality. SOAH also hears contested cases between the boards and their registrants, though not frequently, since very few cases make it so far through the process.

Before SOAH, hearings examiners were employed by each governmental agency that held contested cases at the administrative level, and this included the TBAE and TBPE. SOAH was created to centralize the administrative hearing function and to diminish the sense that hearings examiners were somehow beholden to the very entity that held their future employment in hand.

A contested case at SOAH is essentially the administrative equivalent of a trial on the merits, and it can involve some of the same procedures, such as depositions, written discovery, hearings, and motion practice—all with similar levels of expense to the litigants. (The fact that a recent search produced only seven published board-related cases in all of Texas case law may be some proof of the deterrent effect of carrying forward with board disputes, because of both the expense and the risks involved.) At the end of the proceeding, the ALJ does not issue an order granting or denying claims, but rather prepares a proposal for decision (“PFD”), which contains the ALJ’s findings of fact and conclusions of law.

This PFD is then forwarded to the parties, who have an opportunity to request changes to it by the ALJ. The board, upon receiving it, may consider the findings and decide whether it wishes to adopt or change them before issuing its own ruling. Before it can change any of the recommendations in the PFD, however, the board must articulate a clear reason for doing so.

In practically every case, it is only after this entire procedure is complete that parties will have the right to appeal the board’s decision and actions to a state district court. Even then, the standard of review is typically very deferential to the decisionmakers below, making it extremely difficult to convince a court that the factual

findings and legal conclusions at SOAH were erroneous. All of this further emphasizes the critical importance of “getting it right”—both procedurally and substantively—at every possible stage leading up to the boards’ final decision.

Words to Live By: The Rules and Statutes Applicable to Design Professionals

A copy of each board’s rules is available at their respective websites, as follows:

Texas Board of Architectural Examiners:

<http://www.tbae.state.tx.us/LawsEnforcement/StatutesRules.shtml>

Texas Board of Professional Engineers:

<http://www.tbpe.state.tx.us/downloads.htm>

The author has not attached a copy of them to this paper because these rules change frequently and, indeed, may well have changed since the completion of this paper. The boards strive to alert their registrants to rule changes, both actual and suggested, through newsletters and public meetings and announcements, but busy design professionals may still not have the time to keep themselves fully updated on the changing provisions governing their practices.

One possible means of responding to this perpetually changing landscape is to ensure that one’s correct and updated address information is on file with the Board, so that newsletters are virtually assured of making their way to your mailbox. Also, both boards maintain a “listserv” on their respective websites, and the updates from these

sources are more frequent and instantaneous in their delivery format. The URL for each signup location is listed below:

TBAE: <http://www.tbae.state.tx.us/listserve/>

TBPE: <http://www.tbpe.state.tx.us/list.htm>

All registrants should periodically review and refresh their memories on the statutory provisions and rules applicable to their design field and discipline(s). The oral presentation accompanying this paper will help registrants focus on potential traps in the rules, as well as provisions that may not be well known in the design community.

Sanctions: How Much Is Too Much?

The issue of punishment is often one of the most difficult to resolve when attempting to settle a case with either of the boards. Each board's rules call for any sanction other than an informal reprimand to be published in the applicable board newsletter, on the board's website, and perhaps elsewhere. Unfortunately for registrants, the recent Sunset reviews and reports calling for stronger punishments for proven violations make informal disposition of cases highly unlikely in the future.

If an architect or engineer is being deposed or is testifying as an expert in a lawsuit, many attorneys will consider asking about his or her disciplinary history. For this reason, and because of general reputational concerns, design professionals are justifiably concerned when presented with a suggested rebuke from a board, not to mention a proposed suspension or revocation. Future potential clients may request background information on one's registration history, and business competitors have been known to use their adversaries' disciplinary histories against them.

Each of the boards has its own “matrix” of suggested punishments, each element of which is intended to tie a category of possible sanction with a given rule violation. The enforcement staff at each board can exercise discretion in determining an appropriate sanction, and registrants should refer to the factors enshrined in the rules to support their own arguments for lenient treatment. Ultimately, however, the enforcement division must present agreed board orders and proposed dismissals to the full board, which must give its formal approval before any sanctions or dismissals can be effective.

Lessons Learned From Prior Cases

- **Be careful how you phrase your proposals to prospective clients.** Three different architect clients of the author have been brought under investigation for allegedly offering something of value in exchange for future public work. TBAE Rule 1.144(c) specifically prohibits this. All of the cases involved innocent intent, but a poor choice of language arose from a desire to make a proposal sound attractive to the prospective client. One of the cases was resolved in fairly short order through an informal conference, which simultaneously showed (1) the power of an in-person presentation by a registrant to the executive director and her enforcement staff, (2) the value of bringing a respected “character witness” to the informal conference, and (3) the confusion that can be created by clumsy or inopportune wording in project- or bid-related correspondence. Through careful use of language, registrants should be able to avoid the appearance of a bribe or other inducement when dealing with public entities, thereby avoiding the expense of defending against a board investigation.

- **Consider obtaining legal counsel if the facts are sufficiently unclear, disputed, or threatening.** The last thing a registrant needs is to be caught by the boards

in a misstatement, however innocent the intent may have been. A board's enforcement division might consider a false statement made directly by the registrant during an investigation to have a compounding effect on the punishment warranted in a case. This "multiplier" action could cause the entire inquiry to graduate to the level of a suspension or revocation type of case. Involving a lawyer may very often be expensive, but if the facts are hotly disputed and perhaps not fully known, it is safer for a lawyer—who is recognized as an advocate and does not fall under the Board's jurisdiction, in any event—to make the strong claims that may be necessary in mounting a defense.

- **Nothing comes to those who don't ask.** An insurance company will never have the chance to approve or deny coverage on a claim if it is never made aware of it. Despite the strong likelihood that the carrier will refuse to provide a defense for a board disciplinary action, successful requests for coverage have occurred in the past, and the granting of coverage for defense costs is more likely if the basis for the investigation arises out of a possible errors and/or omissions claim by an aggrieved client.

Likewise, a registrant might be reluctant or fearful about disclosing a pending investigation to superiors within the company, particularly during times of a weak economy when feelings of job security may be quite low. Just the same, registrants should give long, careful thought to the notion of reporting one's status as the target of an investigation, weigh the relative benefits and risks, and then decide on the wisdom of notifying one's employer. Leaving aside the question of what will happen if the employer later learns that it was not informed of the problem while pending, it is distinctly possible that steps will be taken to defend a valued, loyal employee who is made the subject of a board inquiry. The cost savings to the employee can be immense,

as board representations frequently run into the thousands of dollars for legal representation.

Indeed, on several occasions, the author has been hired by design firms to handle the defense of an ex-employee. If nothing else, this will emphasize the importance of avoiding burned bridges with former employers and colleagues.

- **What you don't know can—and probably will—hurt you.** Design professionals who are inexperienced and unfamiliar with the rules governing the use of one's seal may find themselves accused of “plan stamping” if they do not fully understand the circumstances under which one may sign and seal a drawing. Some of the boards' rules—particularly those dealing with supervisory control and responsible charge of the design process—are exceedingly particular in what they demand from the sealing registrant.

Design professionals may also not understand the overlap of rules when an architect or engineer works on a project that, under the rules, does not require a licensed design professional to be involved. The author has been told that one of the most common misconceptions among design professionals is that a project's lack of a technical absolute need for a registered professional means that a registrant who does work on the project need not apply his or her seal to the work. This is not at all true.

Furthermore, most design professionals know that drawings issued for permitting or construction must be submitted for accessibility review within five days of applying the seal. What some may not know is that board staff expects the architect or engineer to follow through on the submission to ensure receipt and timely transmission of the materials.

Indeed, once the door to an accessibility inquiry is opened, the boards' enforcement staff may begin to look harder at the overall project and the documents relating to it. This could ultimately lead to a wider inquiry about the circumstances of a registrant's supervision and control of the design, for example, which could quickly escalate the case from one involving a relatively minor violation, to one with a potential suspension or revocation at risk. The lesson to be learned is that, while some investigations and discoveries by the boards' staff are unavoidable, keeping free of even the most minor violations will help avoid the type of attention that could blossom into a full-blown inquiry into the designer's handling of the entire job.

More generally with regard to knowing and understanding the rules, every registrant governed by the TBAE and TBPE is charged with a duty not only to practice competently, but also to take reasonable measures to ensure that one's colleagues in a firm comply with the relevant and applicable codes, statutes, rules, and guidelines. Even if a registrant is intimately familiar with the rules and is ruthless about keeping abreast of changes in board policy and procedures, it is difficult, if not impossible to maintain and control others' knowledge and understanding within an entity.

Design professionals in supervisory positions should, therefore, commit some firm resources to periodic educational and supervisory efforts that will increase younger registrants' understanding of the process. The boards may, if later confronted with such efforts, find that there was a good faith effort toward compliance with the rules.

- **Focus on the message, not the messenger.** In a recent series of engineering cases focusing on TBPE Rule 137.63(b)(5) and an alleged unprofessional use of language, a client was engaged in a struggle with an opposing expert whose opinions

seemed unjustifiable and, frankly, determined by the insurance company who had been paying the opposing expert's bills. The registrant used fairly direct and harsh language to criticize the opposing expert and the bases for his opinions.

This case raised questions about the constitutionality of the speech restrictions that the Board sought to enforce under a very vague "unprofessional language" standard, and it raised a more practical (and equally troubling) question about the Board's regulation of the conduct of "battling experts," both of whom had clients to serve and causes to champion. There is a clear tension between the rights and need to serve a client well, and zealously, and the engineering rules' mandate to use "professional" language. This is particularly so in the arena of litigation, where stakes are high and emotions can soar, both for the litigants themselves and the expert witnesses seeking to help them.

Ultimately, the client had to take two trips through the TBPE's process, due to a second report containing similar criticisms against the same opposing expert. This overall experience came at enormous expense to the client and his family, since he was a solo practitioner—with the first case resulting in a steep administrative penalty and an informal reprimand. During the second phase of the investigation, the engineer successfully convinced the panel that he had taken reasonable steps to mend his ways, leading to an outright dismissal of the case against him. This again underscores the power of the in-person presentation (and, in that case, the character witness) at an informal conference.

All of this might have been avoided, however, through the use of less severe language and a more specific focus on the engineering company and its theories and methods, rather than the individual shortcomings and intent of the engineer in question.

“Hot button” and/or legally operative terms, such as “cognizant negligence,” “intent to mislead,” and other harsh language by the registrant also led the TBPE to declare openly that it intended to make an example of the registrant. The clear lesson for other registrants is that verbal attacks directed at another engineer should be made against the conclusions, scientific and analytical validity, and general work product, not the individual.

More generally on this same front, making an effort to take the “high road,” even in the face of a baseless attack against one’s livelihood, can resonate with the board staffers by creating the appearance of a credible, instead of reactionary, defense. Generally speaking, whenever possible in the heat of battle, write fiery letters and then leave them for the following day to be revised and dramatically toned down.

• **Hell hath no fury like a client—or ex-employee—scorned.** Those who have had claims, or worse, litigation with employees or clients know the wide array of recriminations that can arise over relationships that have been literally years in the making. An unfortunate side issue that can develop during, or in the wake of, such disputes is a vindictive complaint filed against the registrant with his or her respective board. A case before one of the boards literally contained a reference to “payback” by a former employee of a design firm.

In a nutshell, while a complainant’s motivations may properly be brought into discussions with the boards, the central lesson to be learned from such cases is that an ounce of prevention may be worth much more than a pound of cure. “Papering up” one’s settlement documents with articulate, comprehensive releases, and detailing one’s human resources records with histories of activities and disciplinary actions can go a long way

toward preventing (or containing) future conflicts. And of course, this entire subject only underscores the critical importance of responsiveness to client concerns, discussing and maintaining realistic expectations throughout the engagement, and maintaining a good “bedside manner” with one’s clients—and co-workers and adversaries, for that matter.

- **Treat the TBAE and TBPE representatives like human beings.** These individuals, whether investigators, administrative aides, supervisory officials, board members, or the executive director, are all people who simply have jobs to do, and when treated with courtesy, they respond professionally and in kind. The author has literally never had a request for a time extension denied by a representative of either board. A high-handed response, in contrast, will probably engender only negative sentiment. This is further reason why one should focus on the message and the allegations themselves, rather than the individuals involved in the process. Respect the process and you can usually expect respect and fair administrative handling in return, despite what you may think of the rule, policy, or judgment call at the heart of the matter.

Miscellaneous Issues

As some may know, the 2003 Texas Legislature mandated that any lawsuit alleging professional malpractice against an architect or engineer must now be accompanied by what is called a “Certificate of Merit.” This certificate must be sworn out by an active (not just forensic) design professional in the same field as the accused, and it must be attached to any lawsuit filed after September 1, 2003.

Herein lie further traps. First, one must contend with the boards’ rules about truthful, scientifically supportable statements in the affidavit. Second, the author has already seen one certifying architect swear out an affidavit that effectively causes her to

confess to a violation of the board rules governing her practice. This brings home the notion that registrants must maintain a solid knowledge and understanding of the rules under which they operate.

Procedurally, for lawyers, if a lawsuit fails to include the Certificate of Merit, a judge will have the option to dismiss the suit “with prejudice,” which means that the matter will be lost forever, with no chance to refile it again. Given the very new nature of this requirement, however, it seems unlikely that the judge would apply such a “death penalty” sanction against the case. What is more likely is that the lawyer and his consultant(s) will be given a chance to amend the lawsuit, and this is what we have seen thus far from new cases. Our law firm has already seen several failures by other firms to do so, but we have also seen just as many opportunities given to fill in the gap with the missing document.

Additionally, the TBPE has recently welcomed a new Executive Director. This may result in changes to the current enforcement philosophy, depending upon the potential for new policy views and the continuing effects of Sunset Commission’s findings. Also, both of the boards are in a constant (though slow) state of flux, with members of each board rotating on and off. Each new individual’s philosophies and experiences can affect his or her respective board’s enforcement and registration policies.

Finally, the Texas Legislature convenes every other year, and new policy discussions are virtually inevitable each time the representatives gather together. Having passed the 2003 requirement for the Certificate of Merit discussed above in Chapter 150 of the Civil Practice & Remedies Code, the “Lege” may always consider other issues in the future that did not garner enough support to become law during prior sessions. One

issue that will likely be of fundamental concern to design professionals and firms across the state is a proposal that each engineer (or firm) must maintain some form of errors and omissions insurance coverage, not unlike the requirement that motorists in Texas must not drive without minimum levels of liability insurance.

While it is no certainty that this issue will officially come into public discussion in any given session, such a proposal was introduced to the Legislature in 2003, only to die in committee. Industry and professional trade organizations such as the Consulting Engineers' Council, the Texas Society of Architects, local chapters of the American Institute of Architects, and the Texas Society of Professional Engineers will probably all have a strong interest in hearing individual registrants' views on this topic before establishing and pursuing their legislative advocacy positions, so readers of this paper may want to consider and offer their own views on these—and other—topics of concern to the profession.

Finally, to avoid trouble, registrants should be sure to calendar their fee renewal deadlines in accordance with the relevant board rules. Failing to do so can result in monetary penalties, but leaving a license expired for too long can actually result in a complete rollback of prior admission efforts, leaving the design professional to take qualifying examinations and find references all over again. Maintaining updated contact information in the board's records can help ensure receipt of renewal notices as well—and the boards' rules require these updates, in any case.

Conclusion

The complexity of avoiding complaints and dealing with the boards matches that of the design disciplines themselves. For this reason, a knowledge of the rules, a

calendaring mechanism for registration renewal, and an attentiveness to clients—particularly the “problem” clients—can all help to keep board registrants not only out of the proverbial frying pan, but also from vaulting themselves into the fire. Registrants are advised to read the rules that apply to their respective professions carefully and reflect on what elements of their practices might be improved by incorporating these strictures into their daily practices.

Ultimately, when in doubt, remember that your board’s enforcement staff is available to answer questions, including, for example, whether a seal is required under certain circumstances, whether a risk of public endangerment exists, or whether a given workplace dynamic satisfies the “responsible charge” supervisory requirement. Whether it is through providing advisory opinions or simply fielding informal phone inquiries on job- or practice-specific issues, registrants can actually assist the boards in meeting their statutory mandate to protect the public’s health, safety, and welfare by obtaining answers and interpretations at the outset, rather than when potentially hazardous actions have already been taken. When protecting one’s registration and livelihood, it is far better to ask for permission, rather than forgiveness.