



TEXAS STATE BOARD OF REGISTRATION  
FOR PROFESSIONAL ENGINEERS

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OFFICIAL NEWSLETTER

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## SUPLANTING RULE RESCINDED

On July 18, 1985, the Board deleted Disciplinary Rule (DR) 5.5 from the Code of Responsibility for Professional Engineers, pertaining to the prohibition of supplanting. This action was the culmination of negotiations with the Federal Trade Commission (FTC), with the assistance of the Texas Attorney General's antitrust division.

In September, 1984, the FTC advised that investigations were being made of various restrictions on competitive activity by state-licensed professionals to determine whether they unreasonably restrain competition and injure consumers. In that connection, the Board's DR 5.5 was viewed as a possible antitrust violation under Section 5 of the Federal Trade Commission Act. The goal was to correct any antitrust problems that were found.

The Code of Responsibility was adopted in 1973 and DR 5.5 provided that:

The engineer shall not supplant, nor attempt to supplant, directly or indirectly, another engineer in a particular engagement, after definite steps have been taken toward such other engineer's employment.

Since the Board is empowered to take disciplinary action against a registrant on a finding of guilt, and with the Board composed largely of fellow professionals and competitors, the use or threat of disciplinary action for attempting to supplant another practitioner raised antitrust concerns.

Regarding a ban on attempts to supplant a fellow practitioner, the FTC was relying on an earlier federal court decision wherein a similar rule had been held to violate the antitrust laws. That case was cited as *Mardirosian v. American Institute of Architects*, 474 F. Supp. 628 (D.D.C. 1979). The involved rule was found too broad to be justifiable as an attempt to prevent interference with contracts and professional deception.

The ban on encroachment by DR 5.5 was considered to have effects even broader than intended because of the rule's inherent ambiguity. The phrase "after definite steps have been taken" might apply to a number of stages in the consultation and negotiation process prior to the formation of a contract. Erroneous interpretation by engineers might thus restrict their attempts to solicit customers even when the Board would not in practice consider a violation to have occurred.

The need for some remedy was evident. As it stood, DR 5.5 had two major problems. First, because it discouraged an engineer from contacting a potential client before that client had entered into a contract with another engineer, the rule had anticompetitive effects. Second, the rule may have been so vague as to discourage an engineer from contacting a potential client even before the client had begun serious negotiations with another engineer. The existence of a contract is required before an act of supplanting can occur.

In this regard, the FTC proposed an amendment to DR 5.5 which stipulated that the original engineer be "employed in a particular engagement pursuant to a final, unbreached contract, not terminable at the will of any party to the contract, and which is at that time in full force and effect." The Board considered such wording too legalistic and difficult to understand.

A second FTC proposed amendment to the rule stipulated that the supplanting "conduct would constitute an unlawful or tortious act pursuant to the statutory or common law of the State of Texas." This, too, was considered as highly legalistic and uninformative, and would provide no guidance to the engineer.

All things considered, the Board opted to delete DR 5.5, to let the courts deal with tortious contracts, and the Board would handle unethical conduct by other disciplinary rules.

As a matter of interest, the Board had no record of processing a complaint alleging any action by an engineer that was deemed to be a violation of DR 5.5. Most instances involved a client who desired to change engineers, which is his right, and he approached a second engineer rather than the engineer initiating any solicitation for the engagement.

## ABOUT THE NEWSLETTER

Based on several suggestions submitted to the Board, an attempt will be made to publish future Newsletters twice a year, in about March and September. Each publication will be numbered, starting with this issue, No. 9, so that recipients will know if they have missed an issue. Past Newsletters were published in July, 1978; April, 1979; August, 1979; January, 1981; August, 1981; October, 1982; February, 1984; and January, 1985.

As a matter of policy, Newsletters are also being mailed to engineers whose licenses are not current but have not been expired for two years or more. Receipt of this publication may induce them to reinstate their licenses if so required.

## RENEWAL FEES REDUCED

The annual license renewal fee will be reduced to \$12 effective January 1, 1986. This is not due to any legislative requirement or reduction of services but rather because of reduced expenditures over the past few years, increased efficiency in part gained through computer usage, and a need to keep fund reserves at an acceptable level. It is always nice to print good news!

## CURRENT BOARD OFFICERS

The Board has elected from among its members the officers to serve from July 18, 1985, until the July 1986 Board Meeting. Elected to the position of Chairman is James Ken Newman, the

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first public member to hold the chairmanship. Robert Navarro, P.E., of El Paso, was elected as Vice Chairman; and W. Clay Roming, P.E., of Eddy, is now serving as Board Secretary. The remaining Members of the Board are Edwin H. Blaschke, P.E., and Frank B. Harrell, P.E., who have both completed two six-year terms; Dillard S. Hammett, P.E.; Bill W. Klotz, P.E.; and public members Ronald M. Garrett, DC; and Jack M. Webb, attorney at law.

## BOARD MEMBER APPOINTMENTS

At press time, no official word had been received as to the appointment or reappointment by Governor Mark White of Board Members for the next biennium. It is expected that two engineer and two public positions will be affected by the Governor's action.

## WHAT'S YOUR PHONE NUMBER?

Registrants will notice on their next license renewal form that the Board is requesting the *business* telephone number where they can be reached. The Board has experienced some difficulty in contacting engineers for various requirements, especially when trying to determine if a registrant has unwittingly allowed his license to lapse. This is critical when there is a need for a current license and especially before the certificate of registration expires after two years.

Similarly, Reference Statements used in support of applications for registration provide for the reference to submit his *business* name, address and phone number. Your fullest cooperation in this regard will be appreciated.

## A COMMENT ON COMPETITIVE BIDDING

In the January 1985 Newsletter, the lead article pertained to the affect that Attorney General Opinion No. JM-155 had on engineers involved in competitive bidding for public works. The opinion constituted an interpretation of the Professional Services Procurement Act (Art. 664-4, Vernon's Texas Civil Statutes), which prohibits competitive bidding as public policy. Since the opinion

concluded that Art. 664-4 did not prohibit an agency from eliciting information regarding fair and reasonable fees or cost estimates and that cost must be one factor considered by an agency before awarding a contract, the Board needed to reevaluate DR 5.4 in the Code of Responsibility which prohibits competitive bidding activities in violation of either state or federal procurement laws.

A revised DR 5.4, with selection and negotiating provisions paralleling the federal Brooks Act (40 U.S.C. 541-544), was sent to the Texas Attorney General for approval. The proposed rule was summarily disapproved as not being within the Board's authority, in light of Opinion No. JM-155. A more detailed explanation has been sought for guidance in adopting an acceptable, yet affectively prohibitive rule under the current law.

In the interim, the Board's previous admonition to registrants who wish to respond to requests for proposals which ask for estimates of the cost or fully qualify whatever cost information they choose to submit. In this regard, the Board suggests that engineers determine that specific information about competency and qualifications is also being requested and will be a part of the selection criteria. The engineer should stipulate that any price submitted is not a firm price but only an estimate or range proposed for negotiation of a contract after his selection and final scope of services has been agreed upon.

## INQUIRE BEFORE YOU HIRE!

It is surprising the number of situations investigated by the Board wherein legitimate engineering firms have hired individuals who have claimed to be Texas registered engineers but who are in fact imposters. It is understandable where a client, even an architect, might merely accept the word of an individual that he is a professional engineer in many instances. However, a knowledgeable licensee would surely be expected to take the simplest of measures to confirm the licensure of a new employee, not known to him, by reviewing the latest roster of engineers or calling the Board for the most current information.

Victims of such misrepresentations range from the single-licensee business to the prestigious corporations. Revelation of an imposter after employment

may be embarrassing, but it is almost guaranteed to be disruptive and costly. If you have misplaced your roster or desire up-to-date data, we urge you to call the Board at (512) 475-3141 or write to P. O. Drawer 18329, Austin, Texas 78760.

When it has been determined that an individual is not who he claims to be, we need your cooperation by supplying evidence of the misrepresentation as normally reflected on resumes, applications or other associated documents, including copies of purported certificates of registration proudly displayed on the office wall. Further, unless circumstances would pose an unreasonable hardship on the company's activities, it is always preferred that the imposter be retained long enough for the Board to get a court's restraining order served on the individual. If the person must be discharged immediately, all pertinent information about his residence, phone number, past residences and employment, references, and other possible sources of information as to his background and his whereabouts will materially assist the Board in effecting prosecution. Do not become a victim!

## MANDATORY REVOCATIONS

On December 31, 1984, the Attorney General issued Opinion No. JM-290 as an interpretation of Texas Civil Statutes Art. 6252-13c. This 1981 law pertains to the affect of certain misdemeanor and felony convictions on persons requiring state or local licenses for particular trades, occupations, businesses, vocations and professions.

Under Section 4(a) of the law, the Board can use its own discretion in evaluating past crimes of applicants and misdemeanor convictions of current licensees when the crime directly relates to the duties and responsibilities of the licensed profession. Section 4(e), however, provides that "Upon a licensee's felony conviction, felony probation revocation, revocation of parole, or revocation of mandatory supervision, his license shall be revoked." This provision appeared to apply to any felony, to be mandatory, and thus to preempt the Board in considering any lesser disciplinary action as it would have under Section 4(a).

The opinion notes that every felony is an "infamous" offense, the conviction

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of which, under common law principles, is an indication of bad character; and the public has a right to expect, and the state has a legitimate interest in requiring, that persons licensed by the state (and thus given its approval as warranting public confidence in their licensed transactions) will be, and will remain, persons of good character. It was thus reasoned that "licensed persons of bad character pose a threat to members of the public dealing with them, and a current felony conviction of a licensee connotes an immediate character flaw . . ."

Therefore, the summary conclusion of Opinion No. JM-290 states: "It is mandatory that the Texas State Board of Registration for Professional Engineers revoke the registration of a registered professional engineer upon his conviction of a felony while so licensed."

One registration has already been revoked on the basis of Art. 6252-13c and its interpretation as provided in Opinion No. JM-290.

## **USE OF SEALS AND OTHER PROFESSIONAL IDENTIFICATIONS**

Registrants are reminded that their seals are required on "plans, specifications, plats and reports . . . when filed with public authorities . . ." as stipulated in Section 15 of the Act. The specifications associated with an engineer's design drawings are frequently overlooked during the sealing process. Also, by provision of Board Rule 131.138(8), when the seal is required, registrants must place their normal signatures and date of execution in close proximity to their seal impressions.

It is recognized that the engineer does not always perform the actual filing of his sealed documents, but he is expected to reasonably anticipate when his engineering efforts will be filed with some public authority by his client or other end user.

Registrants are further reminded that Section 1.3 of the Act provides that all registrants shall in the professional use of their names on any sign, directory, listing, contract, document, advertisement, signature, or any other such means of professional identification use one of the following legally required identifications: Engineer, Professional Engineer, or P.E.

By means of official seal or profes-

sional name, the public has a right to be able to identify those individuals duly authorized to practice engineering and fix responsibility for services performed.

## **VALID COMPLAINTS**

Complaints to the Board alleging violations of the Act or Board Rules should be accompanied by sufficient information or factual evidence to establish a probable cause. It is not the responsibility of the Board to prove the basis of a complaint. While complainants are not expected to investigate, per se, they should be knowledgeable of the offensive situation and make their submittal in writing along with copies or originals of available supporting evidence. As a policy, the Board does not automatically respond to anonymously submitted complaints or unsupported newspaper articles; however, at the discretion of the executive director, it will initiate an inquiry based on any information that establishes probable cause.

The Board will only act when the basis of the complaint would be a violation of the Act or Board Rules. The Board will not be used as a means of discovery by the complainant or his attorney in developing or attempting to develop an action against a person that is not within the jurisdiction of the Board and may, upon receipt of a valid complaint, proceed independently of any action by the complainant to enter into litigation with the defendant or to abandon the complaint.

Complaints against unlicensed persons and business entities normally require a minimum of evidence if in the public domain. Directories, advertisements, stationery, brochures, business cards, unsealed plans and specifications, etc., would be acceptable.

Complaints against registered engineers most often involve a rule infraction, many of which are subjectively interpreted. To facilitate the Board's need to proceed with due process, the use of an officially devised complaint form is preferred. These forms are available from the Board office upon request and will be sent with an informational letter and a copy of the Act and Board Rules.

Remember, a valid complaint includes a probable cause of a violation by an identifiable person (or business entity) and within the jurisdiction of the Board.

## **COURT ACTIONS**

Since publication of the January 1985 Newsletter, several court matters have been disposed. An injunctive suit against B&S Diagnostic Engineers in Houston is being dismissed due to voluntary action to change the company name. James D. Herbert of Austin was convicted of a misdemeanor for practicing engineering without a license and was fined \$300 plus court costs. Injunctions were granted against William M. Smith, Jr., of Arlington and Stephen Thomas Hines of McKinney for practicing without a license. Texas Sales Engineering Company in Houston was enjoined from using the word "engineering" in its name. Four additional injunctive suits for the unlicensed practice of engineering are pending in the courts.

## **DISCIPLINARY ACTIONS**

As a change of Board policy, starting with the next issue of the Newsletter in about March, 1986, the names of all registrants who have received disciplinary actions will be included.

Since publication of the January 1985 Newsletter, the following disciplinary actions have been taken. The certificate of registration of a Louisiana resident was revoked under the mandatory provisions of Texas Civil Statutes Art. 6252-13c which is explained elsewhere in this Newsletter. One license was suspended for two years with the last 18 months probated for irregular sealing activities; a second was suspended for 90 days with the last 60 days probated, and a third suspended for 30 days for practicing with an expired license. Seven reprimands were issued, respectively, for sealing irregularities and aiding the unlicensed practice of technicians; use of pre-signed seals; misrepresenting firm of association to the public and the Board; sealing incomplete plans; practicing with an expired license; and use of other professionals' work without permission.

## **NEW RULE ALLOWS FOR APPLICATION WITHDRAWALS**

On July 18, the Board adopted Rule 131.59 to provide for the withdrawal of an application under certain circumstances. The rule in its entirety is as follows:

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131.59. Withdrawing An Application.

(a) With the approval of the board, an application for registration may be withdrawn from further consideration by the board.

(b) A request for withdrawal shall be made in writing by the applicant stating the reasons for requesting withdrawal. No such request for withdrawal will be considered if received after the applicant is notified the board has approved, not approved, or proposed to reject his application.

(c) The board may, for reasons it deems sufficient, refuse to grant the request to withdraw and continue to process the application.

(d) An application withdrawn from consideration by action of the board will be so designated on the records of the board and the application fee shall be retained by the board. Future action by the applicant to become registered will require a new application and application fee under requirements in effect at the time of submittal.

## FIRE PROTECTION SPRINKLER SYSTEMS

It was previously reported in our February 1984 Newsletter that the design of fire protection sprinkler systems intended for buildings which are not exempt by Section 19 or 20(f) of the Texas Engineering Practice Act must be done by registered engineers. This had followed passage of Senate Bill 234 by the

68th Legislature, amending Chapter 5 of the State Insurance Code, requiring the licensing of fire sprinkler contractors.

At its January 1985 meeting, the Board issued a new position statement regarding the planning of fire protection sprinkler systems after consultations with engineers in the industry. The current Board position provides as follows:

"The State Board of Registration for Professional Engineers has completed a study of SB.234 concerning the licensing of fire protection sprinkler system contractors. In implementing the requirements of this Act, the State Fire Marshal's Office (State Board of Insurance) has adopted rules that included certain National Fire Protection Association standards together with certain requirements of the State Board of Insurance. These rules also set out procedures and requirements for licensing persons skilled in planning and installing fire protection sprinkler systems in compliance with the adopted standards and to regulate the practice of these licensees. The Board has therefore arrived at the following conclusions:

"1. The planning and installation of a fire protection sprinkler system in strict compliance with NFPA Standards does not constitute the practice of engineering. Any variation from these standards, that is not considered an error requiring correction, will be a violation of the Texas Engineering Practice Act if not performed by a professional engineer.

"2. The determination that the structure of a building is adequate to support

the fire protection sprinkler system as installed is the practice of engineering and must be made by a qualified professional engineer."

The rules adopted by the State Fire Marshal's Office require certificates of registration for firms engaged in the business, and each firm shall have at least one full-time licensed Responsible Managing Employee (RME). These employees qualify for licensure by the Fire Marshal's Office by either being a registered professional engineer or meeting the other stipulated requirements for non-engineers. It is expected that any professional engineer being held out as the RME for a particular registered firm, under the Fire Marshal's rules, would qualify as a bona fide employee under similar conditions of this Board's Rules 131.162 and .163. It would not be acceptable for the engineer to be available to perform service only on a part-time, independent contractor basis at the call of such firm, or to be RME in name only, or be available on retainer for if-and-when needed consulting service.

## 1986 EXAMINATIONS

Examinations are scheduled to be administered on April 12, with an application cutoff date of February 12. The fall examinations are scheduled for October 25, with an application cutoff date of September 8. Persons interested in taking an examination for record purposes are reminded that examination sites are provided for examinees' convenience in the cities of Austin, Dallas, and Houston.

FROM  
TEXAS STATE BOARD OF REGISTRATION  
FOR PROFESSIONAL ENGINEERS  
P.O. Drawer 18329  
Austin, Texas 78760

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