



**Board for Professional Engineers,
Land Surveyors, and Geologists**

**Meeting of the Board for Professional
Engineers, Land Surveyors, and
Geologists**

**October 10, 2013
9:00 a.m.**



**Board for Professional Engineers, Land Surveyors,
and Geologists
2535 Capitol Oaks Drive
Third Floor Conference Room
Sacramento, CA 95833
(916) 263-2222**

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BOARD MEETING LOCATION

OCTOBER 10, 2013

Board for Professional Engineers, Land Surveyors, and Geologists
2535 Capitol Oaks Drive, Third Floor Conference Room
Sacramento, CA 95833

BOARD MEMBERS

Board Members: Erik Zinn, President; Kathy Jones Irish, Vice President; Diane Hamwi; Carl Josephson; Coby King; Mike Modugno; Philip Quartararo; Hong Beom Rhee; Ray Satorre; Jerry Silva; Robert Stockton; and Patrick Tami

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I. ROLL CALL TO ESTABLISH A QUORUM

II. PUBLIC COMMENT

III. EXECUTIVE OFFICER'S REPORT

- A. Legislation
 - 1. Discussion of Legislation for 2013: AB 186, AB 1057, AB 1063, SB 152, SB 207, SB 679, and SB 822 (Possible Action)
- B. Strategic Plan 
 - 1. Presentation by DCA SOLID Representative
- C. Personnel
- D. Administrative Task Force (Possible Action)
- E. BreEZe Status Update

Board for Professional Engineers, Land Surveyors, and Geologists

2013 Legislative Session

- AB 186** Maienschein. Professions and vocations: military spouses: temporary licenses. This bill would authorize a board within DCA to issue a temporary license for 12 months to an applicant who meets certain requirements.
STATUS: Introduced 1/28/13. Last amended 6/24/13. Passed Assembly. Heard in SEN B,P&ED Committee 7/1/13 - testimony taken. Further hearing to be set – this is now a 2 year bill.
BOARD POSITION: Oppose unless amended
- AB 1057** Medina. Professions and vocations: licenses: military service. This bill would require each Board within DCA to inquire in every application for licensure if the applicant is serving in, or has previously served in, the military – commencing January 1, 2015.
STATUS: Enrolled and sent to the Governor 9/9/13.
BOARD POSITION: Watch
- AB 1063** Eggman. Surveyors and engineers. (Amends Sections 6732, 8751, 8772 of, and adds Section 8764.6 to the B&P Code) This bill would prohibit the use of certain titles using the words engineer or surveyor unless the person is appropriately licensed. Additionally it would authorize a licensed surveyor to include additional information, as specified, with a record of survey. This bill would require any monument set by a land surveyor or civil engineer to be marked as specified, and to be marked with the name of the agency and the political subdivision it serves, if set by a public agency.
STATUS: Introduced 2/22/13. Last amended 5/6/13. Heard in ASM Appropriations 5/24/13 – held under submission. This is a 2 year bill.
BOARD POSITION: Oppose unless amended
- SB 152** Roth. Geologists and Geophysicists: written contracts. (Add Section 7839.2 to B&P Code) This bill would require Geologists and Geophysicists to use a written contract when contracting to provide geological or geophysical services, as specified. It will provide for consistent operations among engineers, land surveyors, geologists and geophysicists. This bill also repeals temporary authorizations for engineers, geologists and geophysicists. This is a Board sponsored bill.
STATUS: Signed by the Governor. Chapter 178, Statutes of 2013.
BOARD POSITION: Support

Board for Professional Engineers, Land Surveyors, and Geologists

- SB 207** Cannella. Department of Consumer Affairs: license information. (Amend Section 27 of B&P Code) This bill will eliminate the requirement that the Board for Professional Engineers, Land Surveyors, and Geologists disclose its licensee's address of record. This is a Board sponsored bill.
STATUS: Introduced 2/8/13. Scheduled to be heard in SEN BP&ED Committee 4/15/13 - bill pulled by author. This is a two year bill.
BOARD POSITION: Support
- SB 679** Berryhill. Licensees: reporting requirements. (Amend Sections 6770, 6770.1, 6770.2, 8776, 8776.1, and 8776.2 of the B&P Code) This bill would revise the amount for a licensed engineer or Land surveyor to report a civil action judgment, settlement, arbitration award, or administrative action to the Board from "\$50,000 or more" to "more than \$50,000." It also reduces the reportable amount of any civil action judgment or binding arbitration award or administrative action of \$25,000 or greater.
STATUS: Enrolled and sent to the Governor 9/5/13.
BOARD POSITION: Watch
- SB 822** Committee on Business, Professions and Economic Development. Professions and vocations. (Amend Section 7887 of, and add Section 7851 to, the B&P Code) This is one of the Committee's omnibus bills. Among other things it creates a "retired registration" for geologists and geophysicists. Language provided by the Board.
STATUS: Enrolled and sent to the Governor 9/5/13.
BOARD POSITION: Support

BPELSG Action Plan 2011-2014

	Completed	In Progress	Remaining
<p>Goal 1: Protect consumers by effectively discouraging violations of the law before they happen and by aggressively investigating and adjudicating violations.</p>			
<p>Objective 1.1 – Reduce the aging of enforcement cases to align with DCA’s standards.</p>	<p>2/1/2011</p>	<p>7/1/12, 7/1/13</p>	<p>7/1/2012</p>
<ul style="list-style-type: none"> • Reorganize work assignments to focus on citation process improvement • Increase staff through Budget Change Proposal - Fingerprint BCP, Geologist Registrar BCP • Develop and submit a Budget Change Proposal for a Geologist Registrar • Focus on reducing aging while maintaining high quality standards for enforcement cases 		<p>✓</p>	<p>✓</p>
<p>Objective 1.2 – Develop and implement a proactive plan to expand the enforcement outreach program.</p>	<p>4/18/2012</p>	<p>✓</p>	<p>✓</p>
<ul style="list-style-type: none"> • Contact several like-minded local organizations and agencies • Contact Outreach unit in DCA headquarters • Develop an Outreach Plan in conjunction with the DCA Outreach Unit 		<p>✓</p>	<p>✓</p>
<p>Objective 1.3 – Discourage unlicensed and incompetent activity through efficient enforcement actions.</p>		<p>✓</p>	<p>✓</p>
<ul style="list-style-type: none"> • Collaborate with Division of Investigation to accomplish sting operations and sweeps • Increase Outreach to consumers focused specifically on the dangers of Unlicensed Activity • Collaborate with other local agencies by sharing information and educating them on the Board’s function 		<p>✓</p>	<p>✓</p>
<p>Objective 1.4 – Improve consumer friendliness of the Board’s Web site.</p>	<p>7/5/2012</p>	<p>3/21/2012</p>	<p>7/5/2012</p>
<ul style="list-style-type: none"> • Create web mapping to combine the Professional Engineers and Geology Web sites • Develop online address changes and incorporate a paperless process • Establish text recognition on all online documents in accordance with ADA compliance • Streamline the information flow and usability of the Web site 		<p>✓</p>	<p>✓</p>
<p>Objective 1.5 – Establish web accessible information, including linking businesses with licensees.</p>		<p>✓</p>	<p>✓</p>
<ul style="list-style-type: none"> • Coordinated with the release of BreZe. (Breeze dependent) 		<p>See objective 1.1</p>	
<p>Objective 1.6 – Significantly reduce the number of backlogged enforcement cases.</p>		<p>See objective 1.1</p>	
<ul style="list-style-type: none"> • See objective 1.1 		<p>✓</p>	<p>✓</p>
<p>Objective 1.7 - Encourage DCA to improve their license lookup functionality on the Web site.</p>		<p>✓</p>	<p>✓</p>
<ul style="list-style-type: none"> • Pending the release of BreZe. (Breeze dependent) • Coordinate with the BreZe team to express business needs on decision posting. (Breeze dependent) • Coordinate with the BreZe team to express business needs on license functionality. (Breeze dependent) 		<p>✓</p>	<p>✓</p>
<p>Objective 1.8 - Participate in preparations towards the BreZe conversion.</p>		<p>See objective 1.7</p>	<p>See objective 1.7</p>
<ul style="list-style-type: none"> • See objective 1.7. (Breeze dependent) 		<p>✓</p>	<p>✓</p>
<p>Objective 1.9 - Publish enforcement actions on the Board’s Web site.</p>		<p>✓</p>	<p>✓</p>
<ul style="list-style-type: none"> • Update and post final disciplinary decisions on the Board’s Web site 		<p>✓</p>	<p>✓</p>

BPELSG Action Plan 2011-2014

	Completed	In Progress	Remaining
Goal 2: To promote laws and regulations that are clear, relevant, unambiguous, and functional.			
Objective 2.1 - Evaluate current laws and regulations and pursue changes where appropriate, with due consideration for economic impact.			
<ul style="list-style-type: none"> Review licensing and certification fees for businesses as potential legislative action. (see objective 2.6) 			See objective 2.6
Objective 2.2 - Seek fingerprinting and criminal history authority through legislation.			
<ul style="list-style-type: none"> Received authority for applicants in approved 2011 Sunset legislation. SB 543, Statutes of 2011. Move forward with legislation to obtain authority for licensees Submit Budget Change Proposal for the hiring of fingerprinting staff Develop and adopt regulations to implement applicant fingerprinting 	2011		✓
Objective 2.3 - Implement restructuring of examination and application fees.			
<ul style="list-style-type: none"> Restructure fees and receive regulation approval for both PELS and Geologists & Geophysicists programs Publicize the fee restructure once regulations are approved 	4/30/2012		✓
Objective 2.4 - Review delinquent reinstatement requirements and act on the findings if appropriate.			
<ul style="list-style-type: none"> Consult the Board for proper direction 			✓
Objective 2.5 - Conduct a review of the penalty structure for unlicensed activity.			
<ul style="list-style-type: none"> Review has been conducted. General statutory language affects the maximum fine. Any changes affect other boards/programs. 			✓
Objective 2.6 - Seek statutory authority to require Certificates of Authorization for businesses.			
<ul style="list-style-type: none"> Consult Board for further direction Identify staffing requirements of Implementing business authorization 			✓
Objective 2.7 - Eliminate Business and Professions Code section 6760 (temporary authorization to practice engineering).			
<ul style="list-style-type: none"> On November 2011 Board agenda. Research has been completed. Staff are currently pursuing legislation. SB 152. 	11/1/2011		✓
Objective 2.8 - Amend regulations that allow appeals of national examinations.			
<ul style="list-style-type: none"> Completed - effective June 18, 2012. 			✓
Objective 2.9 - Review statutes and regulations regarding Geologist in Training certification.			
<ul style="list-style-type: none"> Qualification requirements added to statute during 2011 legislative session 	6/18/2012		✓
Objective 2.10 - Review statutes and regulations to provide consistency among all of the Board's regulated professions.			
<ul style="list-style-type: none"> Review statutes and regulations for consistency across both programs 	1/1/2012		✓

BPELSG Action Plan 2011-2014

	Completed	In Progress	Remaining
Goal 3: Increase Licensure			
Objective 3.1 - Participate in development, grading, and standard-setting of national examinations.			
<ul style="list-style-type: none"> Contract with professional community volunteer as Subject Matter Experts (pending travel freeze exemptions) Increase outreach to colleges and professional societies Add information to Web site's "Exams" tab including links to NCEES and ASBOG Get report from NCEES on California licensees overall involvement in exam development and track for future reporting 		✓ ✓	
Objective 3.2 - Convert all State-specific examinations to computer based testing and provide flexible testing dates.	8/12/2013 1/1/2013		
<ul style="list-style-type: none"> Geotechnical Engineer California Specific Examinations for Professional Geologist & Professional Land Surveyor Traffic Engineer/Civil Engineer/ Certified Engineering Geologist/ Certified Hydrogeologist / Geophysicist Phased implementation for flexible testing dates - Civil 	10/1/2011 3/1/12, 4/1/12 9/1/12, 10/1/12 10/1/2012		✓
Objective 3.3 - Review applications and respond to applicants in a timely manner.			
<ul style="list-style-type: none"> Contact DCA Strategic Planning & Development Unit to engage in process improvement sessions Streamlining of cashiering and EMS approvals pending BreEZe. (Breeze dependent) 			✓ ✓
Objective 3.4 - Maintain and expand the pool of licensees to help develop State-specific examinations.			
<ul style="list-style-type: none"> Recruit for development of exams through outreach and direct contact professional associations 		✓	
Objective 3.5 - Protect the validity of the content and security of examinations.			
<ul style="list-style-type: none"> Consistently monitor exam validity of each test and begin administering through CBT Engage NCEES in the administration of national exams for PELS Continue auditing exam information for security, and monitor how it is presented to the CBT vendor Provide occupational analysis as required for each exam 	10/1/2012 10/1/2012 2011-2013	✓	
Objective 3.6 - Accept credit card and PayPal payments for application and examination fees.			
<ul style="list-style-type: none"> Credit transactions pending BreEZe. (Breeze dependent) 			✓
Objective 3.7 - Participate in ABET visits.			
<ul style="list-style-type: none"> Coordinate Board Member / Staff participation as observers at ABET visits every fall pending travel freeze exemptions. Encourage public board member participation 	10/1/2012 11/1/2012		
Objective 3.8 - Pursue the National Council of Examiners for Engineering and Surveying (NCEES) and the Associate of State Boards of Geology (ASBOG) administration of national examinations.			
<ul style="list-style-type: none"> Begin National Council of Examiners for NCEES administration Researched ASBOG implementation. Determined to be unfeasible at this time. 	10/1/2012	✓	
Objective 3.9 - Actively participate and attend NCEES and ASBOG meetings to vote on new policies and procedures relating to examinations.			
<ul style="list-style-type: none"> Pending out-of-state travel exemptions Organize NCEES Western Zone meetings In San Francisco, California 	5/1/2013 4/18/2013		

BPELSG Action Plan 2011-2014

	Completed	In Progress	Remaining
Goal 4: To pursue and obtain adequate resources to meet the Board's mission and vision.			
Objective 4.1 - Develop incentives and restructure compensation to retain a quality Executive Order.	✓		
• Completed	7/1/2011		
Objective 4.2 - Pursue authorization and funding, if needed, to increase attendance at NCEES meetings and ASBOG meetings.		✓	
• Justify approval & funding for out-of-state and in-state travel to required meetings	2012/2013	✓	
• Justify representing the interest of the licensees and consumers of California at zero-cost events and pre-paid events to Agency and the Governor's office	2012/2013	✓	
Objective 4.3 - Develop and implement career succession plan for Board Staff.		✓	
• Establish a protocol/manual for managers/staff to identify recruiting of current staff for upward mobility to disseminate to staff		✓	
• Develop a Knowledge Retention Plan which includes overlapping retiring staff with new hires		✓	
Objective 4.4 - Pursue funding and hiring freeze exemptions for additional staff in all units and programs as needed.	✓		
• Seek hiring freeze exemptions - currently lifted.	2011		
• Budget Change Proposal for Enforcement Unit staff and Geologist Registrar have been approved at agency level	7/1/2013		
• Budget Change Proposal for the hiring of fingerprint staff	7/1/2012		
Objective 4.5 - Pursue limited-term positions for specific projects.		✓	
• Issue dates to be digitally recorded		✓	
• Scan enforcement actions and organization record forms		✓	
Objective 4.6 - Pursue authority and funding to hire a staff geologist.		✓	
• Rewrite class specifications		✓	

BPESLG Action Plan 2011-2014		Completed	In Progress	Remaining
Goal 5: Outreach				
<i>Objective 5.1 - Expand Enforcement Outreach Program to local and state agencies, professional associations, and consumer groups.</i>				
• See objective 1.2		See objective 1.2		
<i>Objective 5.2 - Obtain resources, including staff, funding, and out-of-state travel approval, to fully support outreach.</i>				
• See objective 1.2		See objective 1.2		
<i>Objective 5.3 - Expand the licensure outreach programs to associations, college career fairs, and schools (e.g. Math Counts, Trigstar).</i>				
• Review engineering magnet schools		✓		✓
• Publicize at college career fairs				
<i>Objective 5.4 - Develop and revise the Board's publications, as needed.</i>				
• Develop and release new tri-annual newsletter. (See Objective 5.6)		See objective 5.6		✓
• Revise the local officials guide to include all disciplines				✓
• Update and revise consumer guide to include all disciplines				✓
• Develop paper promotional materials for colleges				
<i>Objective 5.5 - Regularly attend NCEES, ASBOG, and ABET meetings.</i>				
• See objective 3.9		See objective 3.9		
<i>Objectives 5.6 - Regularly develop and distribute an electronic newsletter.</i>				
• See objective 5.4. (Develop and release new tri-annual newsletter)		✓		
<i>Objective 5.7 - Keep abreast of emerging technologies and apply them appropriately.</i>				
• Research feasibility of creating a Board "app" for smartphones, and contact DCA Public Affairs office to discuss social networking opportunities. (Breeze dependent)				✓
• Develop license lookup through smartphone "app". (Breeze dependent)				✓
• Develop business lookup through smartphone "app". (Breeze dependent)				✓
• Make website more user friendly and "mobile app" friendly. (Breeze dependent)				✓
• Explore Use of Social Media to Improve Communication (i.e. Facebook, Twitter, LinkedIn)				
		Spring 2013		

IV. ENFORCEMENT

- A. Enforcement Statistical Reports
- B. Presentation regarding Selection of Technical Expert Consultants
- C. Presentation regarding Reimbursement of Enforcement and Investigative Costs pursuant to Business and Professions Code section 125.3

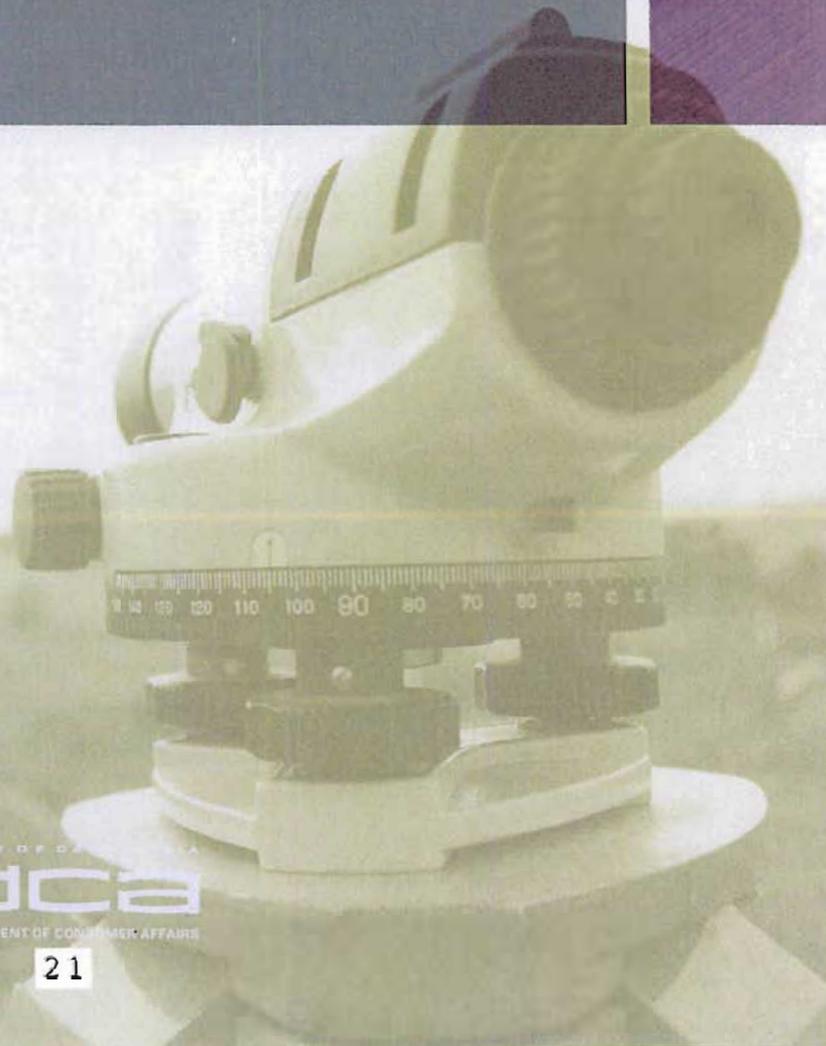
SELECTION OF INDEPENDENT TECHNICAL EXPERT CONSULTANTS FOR ENFORCEMENT CASE REVIEW

At its August 28-29, 2013, meeting, the Board requested that staff provide a presentation at a subsequent meeting regarding the selection of independent technical expert consultants (referred to as “technical experts” or “expert witnesses”) for enforcement case review.

Staff will provide an oral presentation at the October 10, 2013, meeting. Included in the agenda packet for reference are the Technical Expert Training Manual, one of the “help wanted” pages from the Board's website, and two of the Areas of Expertise forms that technical experts are requested to complete. The manual was published just before the Board took over the regulation of geology and geophysics. As such, it only references engineering and land surveying, although the information regarding expert review is the same for all of the professions under the Board's jurisdiction. Prior to reprinting the manual, it will be updated to include all of the professions. We are currently in the process of updating the Areas of Expertise form for geology and geophysics.



TECHNICAL EXPERT TRAINING MANUAL



Acknowledgements

ENFORCEMENT UNIT WRITERS AND EDITORS

Julie A. Baker, Enforcement Analyst

Brook Grabowski, Enforcement Analyst

Nancy Eissler, Enforcement Program Manager

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Introduction

This Technical Expert Training Manual contains information that will assist technical experts in reviewing a complaint case to determine whether or not specific departures from the standard of practice of a professional engineer or land surveyor or other violations of the Professional Engineers Act, the Professional Land Surveyors' Act, or of the Board Rules have occurred and will further assist in the preparation of the technical experts' written report of their conclusions.

The Board

The mission of the Board for Professional Engineers and Land Surveyors is to safeguard the life, health, property, and public welfare by regulating the practices of professional engineering and professional land surveying.

The Board qualifies and licenses individuals, establishes regulations, enforces laws and regulations, and provides information so that the public can make informed decisions.

The Board operates semi-autonomously under the umbrella of the Department of Consumer Affairs, regulating the practices of engineering and land surveying through its administration of the Professional Engineers Act (Sections 6700 through 6799 of the Business and Professions Code) and the Professional Land Surveyors' Act (Sections 8700 through 8805 of the Business and Professions Code). The Board Rules are found in Division 5, Title 16 of the California Code of Regulations, sections 400 through 476.

There are 13 Board members: seven public members, one licensed land surveyor, and five licensed engineers. The Governor appoints 11 of the members for four-year terms that expire on a staggered basis. Additionally, the Assembly Speaker and the Senate Rules Committee appoint one public member each.

The Board conducts examinations, issues certificates and licenses, and appropriately investigates complaints against licensees and unlicensed individuals. The Board is empowered to discipline licensees. The Board has the authority to issue citations containing orders of abatement and administrative fines and to revoke or suspend a person's license for violations of the Professional Engineers Act, the Professional Land Surveyors' Act, or the Board Rules.

The Investigative Process

The Enforcement Unit of the Board is charged with the responsibility of ensuring that all complaints the Board receives are investigated promptly and efficiently. The development of the technical expert's report is one of the most important steps in the investigative process because the expert possesses the skills necessary to review the more technical aspects of the case and to evaluate the standard of practice used by the subject of the complaint.

It is the technical expert who reviews the work of the subject of an investigation to assist in determining if any violations of the Professional Engineers Act, the Professional Land Surveyors' Act, or the Board Rules, has occurred. The Board relies on the expert's written report to find, confirm, or deny violations. The Board may take disciplinary action against an individual's license based upon the findings of the technical expert.

If violations warranting prosecution are substantiated by the expert, he or she may also be called upon to testify at a hearing before an Administrative Law Judge (ALJ) regarding his or her conclusions. This is not a common occurrence. Once our office has referred a case to the

Office of the Attorney General for further review, the case is assigned to a Deputy Attorney General (DAG). The DAG is the legal representative for the Board. The DAG will prepare an Accusation to be served on the subject. Most cases are settled between the DAG and the subject or the subject's attorney. If they are unable to reach a settlement agreement, the DAG will contact the technical expert to prepare for the hearing. Hearings are usually scheduled in San Diego, Los Angeles, Oakland, or Sacramento. Travel expenses incurred by the expert are reimbursed (hotel, mileage, flight, etc.)

If the Executive Officer issues a citation based upon the expert's findings, the expert may be requested to provide expertise at an informal conference or at a hearing before an ALJ.

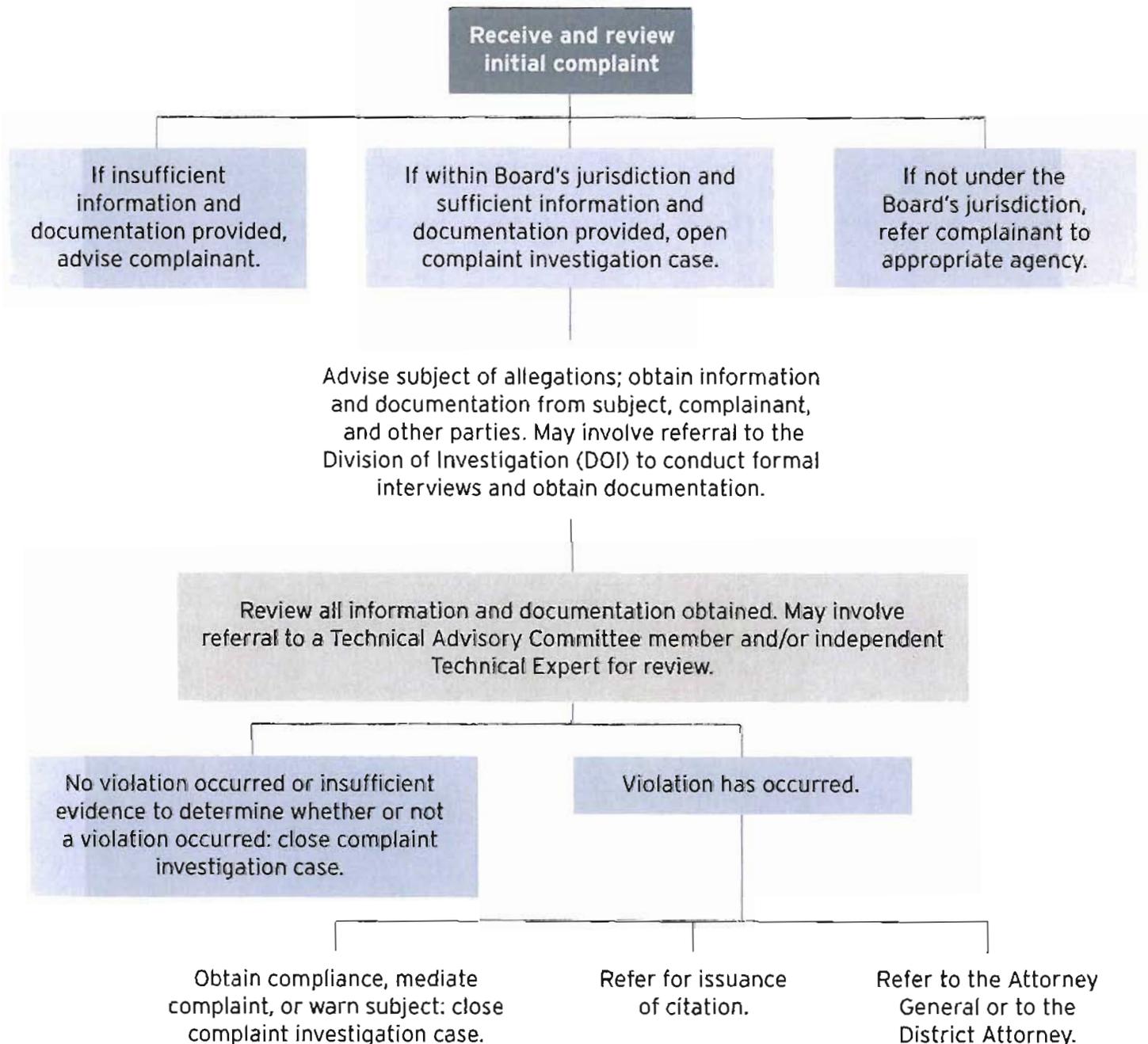
The following flow chart shows a condensed version of the complaint process.



BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

General overview of the complaint investigation process

This flow chart provides a general overview of the complaint investigation process. However, each complaint investigation case is handled on an individual basis and may not go through all of the steps or may not go through the steps in the order shown.



Case Review and Report Preparation

In choosing a technical expert, the Enforcement Analyst reviews the résumés and Areas of Expertise forms to find available experts in the relevant branch of licensure and appropriate geographical area.

If it appears that the complaint case is suited to your expertise, an Enforcement Analyst will contact you to request that you review the case.

Typically you will receive a telephone call from an Enforcement Analyst to ask if you are interested and available to conduct an expert review, if your schedule will permit a prompt review, and if you may have a conflict of interest. The Enforcement Analyst will also check to make sure that you have no knowledge of the subject, complainant, or the project involved. It is necessary that you are candid in your response to these questions to ensure there is no conflict or even the appearance of a conflict of interest. The technical expert is contacted, and if he or she is available to work the case, the specifics of the case are discussed, including the identities of the parties involved. To assure that an unbiased, objective report is prepared, the technical expert must NOT be familiar with the complainant or the subject. If you accept the assignment, the Enforcement Analyst will provide a transmittal letter with the documents intended for your review. You should only accept the case if your schedule will allow for a timely review (typically 30 days) and if you feel the nature of the case fits your qualifications.

TYPES OF ENFORCEMENT CASES

There are two types of enforcement cases: cases against licensed engineers or land surveyors and cases against unlicensed individuals.

Your review of a case against a licensee is necessary to determine whether there have been violations of any section of the Professional Engineers Act, Professional Land Surveyors' Act, or Board Rules. Section 6775 of the Professional Engineers Act and Section 8780 of the Professional Land Surveyors' Act are included, along with the transmittal letter, for your reference. However, please keep in mind that if any other violations are found, they should be noted in your final report. Please do not rely solely on the allegations made by the complainant, since the complainant is most likely not aware of all of the laws and regulations set forth by the Professional Engineers Act, Professional Land Surveyors' Act, or Board Rules.

If you are reviewing a case against an unlicensed individual you will be requested to review the case for violations of §6787 of the Professional Engineers Act and §8792 of the Professional Land Surveyors' Act, as these are the sections related to unlicensed practice. You may also be asked to determine whether the actions of the unlicensed individual constitute the practice of professional engineering or land surveying.

There are circumstances where you may be requested to review related cases in which a licensee and an unlicensed individual have collaborated on a project. You should take care in your review of these types of cases to determine whether or not there is evidence to support the possibility of aiding and abetting.

ACCEPTING THE CASE

Once you accept the case, the Enforcement Analyst will send you the case file along with a letter that lists specifically what is needed from your review. Please be sure to review this letter in its entirety even if you have previously reviewed other enforcement cases since there may be changes or differences specific to the case. For example, you will receive different instructions for reviewing a case against a licensee, as opposed to an unlicensed individual. A complete copy of the original case file will be mailed to you along with the letter of instructions. As some cases may be quite voluminous, you may receive multiple packages. The Enforcement Analyst will make an effort to ensure that you are informed if more than one package will be arriving.

RECEIVING THE CASE FILE

Once you have received the entire enforcement case, you should start commencing your review so that in the event additional items need to be requested, it can be done in a timely manner. Upon receipt of the documents, briefly review each one for a general overall understanding of the project. You are likely to notice some documents that have little or no significance to your review. Once you identify items that have no relevance to your report you can mark them with a sticky note or clip but it is important not to rearrange anything in the case file. Please refrain from writing on any of the case materials provided to you for review.

If you are concerned that you have been provided with inadequate or incomplete documentation, please contact the Enforcement Analyst to request additional information. If the information you need is of a detailed, technical nature, please direct your request to the Enforcement Analyst in writing. The Enforcement Analyst will request the information

from the appropriate party (subject, complainant, local jurisdiction, etc.). We want to be very certain that the information/documentation we request is precisely what you need to complete your review. Please remember that an expert is not permitted to contact the subject, complainant, or other involved parties directly. In the rare event that your preliminary review reveals the subject matter is outside of your expertise, please inform the Enforcement Analyst immediately to arrange return of the case file.

It is important to review **ALL** of the contents of the case file even though you think some material may be irrelevant. Once you have completed your review, it may be advisable to contact the Enforcement Analyst to discuss your review. This can be helpful to the Enforcement Analyst so that they may gain a better understanding of the case and the opinion that you have formed.

It is important that all information regarding the complaint case be kept confidential. Please see the section titled "Confidentiality" on page 14.

APPLYING THE LAW CORRECTLY - GUIDELINES ON NEGLIGENCE AND INCOMPETENCE

It is important to know the difference between negligence and incompetence. California Code of Regulations, Title 16, §404(n) defines incompetence as **the lack of knowledge or ability in discharging professional obligations as a professional engineer or land surveyor.** Section 404(w) defines negligence as **the failure of a licensee, in the practice of professional engineering or land surveying, to use the care ordinarily exercised in like cases by duly licensed professional engineers and land surveyors in good standing.** An error or omission is more significant if it has the potential to cause injury, loss of life, catastrophic collapse, or result in substantial damage rather than if the consequences are innocuous.

“STANDARD OF PRACTICE”

Industry standards help establish the “standard of practice” of the engineering or land surveying profession. The basis of review is the “standard of practice” of professionals practicing in the State. If your firm has established stricter standards than are generally accepted by the profession, you should not base your opinions of those stricter standards. Keep in mind that there may be more than one method of practice and that alternate methods might be acceptable. Your responsibility is to honestly and fairly evaluate the work of another professional.

WRITING YOUR REPORT

When you are ready to write your report, please pay close attention to the Report Instructions described in the letter included with the case. Please be sure to follow the requested format as referenced in the letter and sample report included in this handbook (please see page 15). Identify whether or not violations exist and state the basis for your determination. If you have found violations, reference specific sections of the Professional Engineers Act, Professional Land Surveyors’ Act, Board Rules, and any other applicable laws, such as local building codes, local ordinances, the Subdivision Map Act, etc. Ensure that you are using the edition of the laws that was applicable during the time the subject project took place and that you have used any modifications that the governing jurisdiction may have adopted. If there are no violations please also explain how you came to that conclusion. This is important as the Enforcement Analyst will later need to explain to the complainant the reasoning for the outcome of the case.

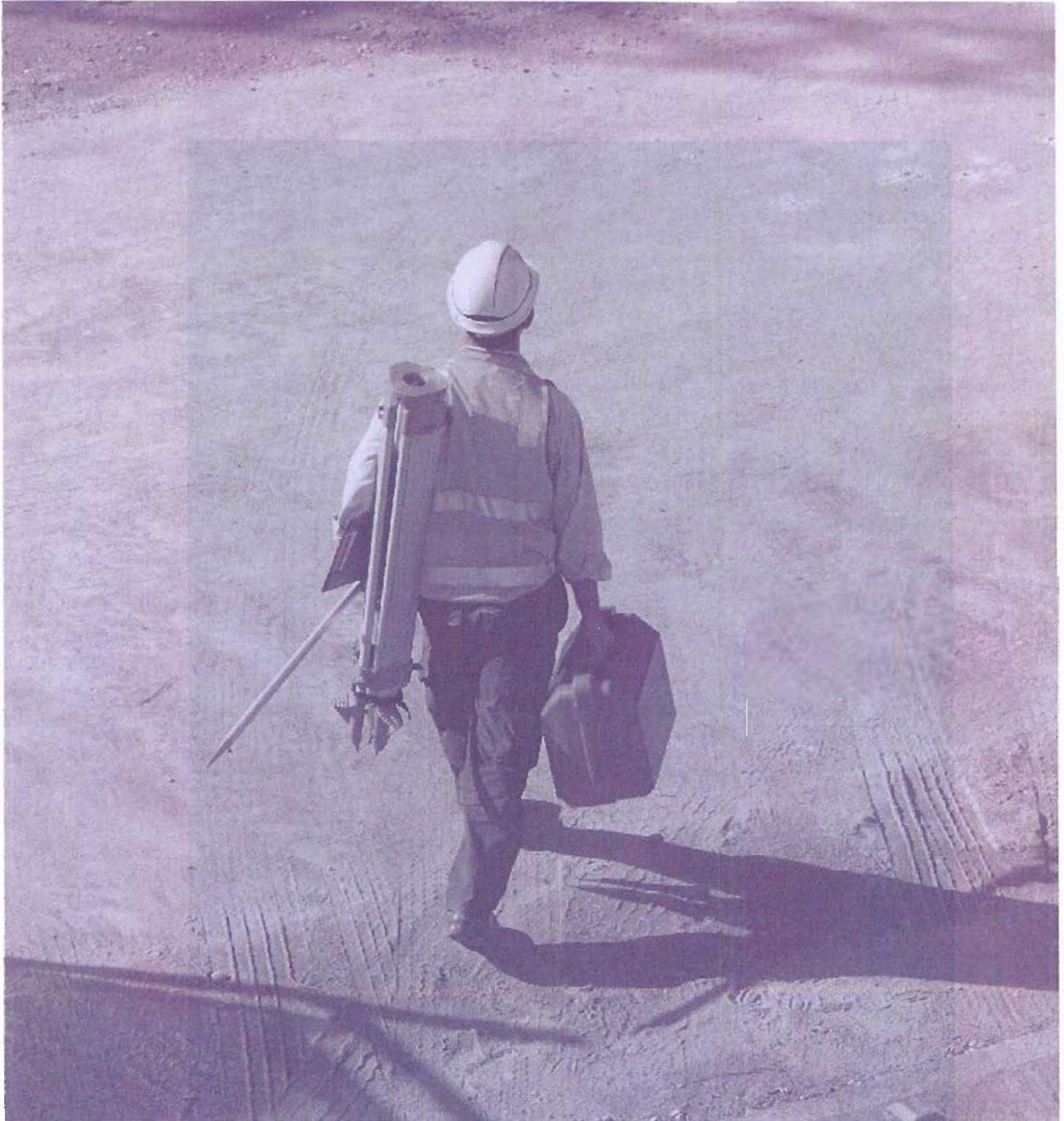
Your report should be clear and concise. Keep in mind that those reviewing your report may be individuals who may not understand technical language used within your profession, so if you are using

technical language, you need to also explain in terms an unlicensed individual outside of your profession can understand.

Please refrain from offering any recommendation about what action or disciplinary order should result from the matters in question. In addition, please refrain from commenting on the actions of other parties which do not directly affect your opinion of the subject's actions or conduct. If it is your opinion that other involved parties have committed acts which may constitute a violation of the Professional Engineers Act or the Professional Land Surveyors' Act, please contact the Enforcement Analyst immediately for direction.

Once you have completed your report, please mail or e-mail a copy of your draft report to the Enforcement Analyst for review. The Enforcement Analyst will contact you either to discuss your report or to request that you finalize your report and return the contents of the case, report, and any related information. Your final report needs to include your stamp and signature, as well as your typed name and contact information (address, phone, fax, e-mail). Your stamp, signature, and contact information must be included on your report, not just on a transmittal or cover letter.

Under normal circumstances, please use the most cost effective shipping method (usually USPS.) Unless instructed by the Enforcement Analyst, overnight shipping is not necessary.



Confidentiality

All the information contained in the case is confidential. Please remember the sensitive nature of the complaint. If you need additional information or documentation to resolve technical questions concerning the project, contact the Enforcement Analyst assigned to the case to request the information.

PLEASE:

- **DO NOT** contact any of the parties involved in the case.
- **DO NOT** discuss the case with anyone, including associates or other professionals, other than the Enforcement Unit staff.
- **DO NOT** post comments about your review of a case on the Internet, including on discussion forums.
- **REMEMBER** that an innocent professional's reputation could be compromised merely by being a party to an investigation.

Sample Technical Expert's Report

Subject: Case number assigned by the Board for Professional Engineers and Land Surveyors' (BPELS)
Name of subject and professional license number

Project: Physical address of project under review

Date: Date that expert's report is sent into BPELS

Prepared by: Name, License Number, Address, and phone number of expert

Materials provided by BPELS for review:

It is important to list, in chronological order, the items that were received for review in order to alert those who must review this report (and make judgments based on the findings and conclusions) of the documents used to determine the facts of the case.

Documents may include maps/drawings, calculations, records of surveys, deeds, collections of correspondence, building department plan check lists, historical summary of the project and its stages of development, legal briefs or memos, and others. Include a list of correspondence between BPELS and the subject or other parties involved in the project under review.

SECTION 1: INTRODUCTION

Case Specifics and Complaint

Summarize the complaint case specifics. Include a summary of what is alleged by the complainant, persons involved in the project, and a timeline (if helpful to understand the issues of a more complex project).

References

REFERENCES USED TO SUPPORT THE CONCLUSIONS OF THIS REPORT INCLUDE THE FOLLOWING:

Resources accepted by the industry as professional standards publications may include the adopted building code at the time the project was completed, the local jurisdictional requirements, other state laws (such as the Subdivision Map Act), the Board Rules, the Professional Engineers Act, and the Professional Land Surveyors' Act. Other resources include textbooks, papers published in a nationally-recognized engineering or surveying periodical, and other books published on the subject under scrutiny (i.e. wood design, steel fabrication, foundation analysis and accepted survey methods)

SECTION 2: FINDINGS AND CONCLUSIONS

1. Subject's procedures and work:

A. METHODOLOGY, ASSUMPTIONS & CONCLUSIONS:

First, identify the subject's assumptions regarding project parameters.

Next, offer conclusions as to the validity of the subject's overall project assumptions and whether there was a valid conflicting opinion offered by a building official, county surveyor, or other party.

Finally, offer a discussion of the subject's approach to his or her methodology if there was some dispute over how the subject went about the engineering or surveying, which will have some bearing in the final decision making process related to the case. These decisions by the subject may or may not actually qualify as "errors," but if they can appropriately be labeled as such, the specifics as to WHY and HOW should be discussed in the errors and omissions section.

Sample Technical Expert's Report (CONTINUED)

2. **Relevant standard of practice for engineering or surveying:**

As stated in the report instructions, provide a statement describing the relevant standard of practice or custom for the engineering or surveying procedures or tasks set forth.

Please refer to item #2 in the report instructions for further details.

3. **Errors and omissions by the subject that constitute negligence (if applicable):**

Negligence: Failure by the licensee, in the practice of professional engineering or land surveying, to use the care ordinarily exercised in like cases by duly licensed professional engineers or land surveyors in good standing.

Please refer to item #3 in the report instructions for details.

4. **Errors and omissions by the subject that demonstrate incompetence (if applicable):**

INCOMPETENCE: Lack of knowledge or ability in discharging professional obligations.

Please refer to item #4 in the report instructions for details.

Note: In some cases, there are subtle differences between "negligence" and "incompetence" that may be difficult to distinguish. If you are unable to come to the conclusion as to whether the subject lacks the knowledge or ability to discharge his or her professional obligations but opine that the care ordinarily exercised by duly licensed engineers or land surveyors in good standing was not met, please indicate such in your findings. Please contact the analyst assigned to the complaint if you need further discussion and/or direction in these instances.

5. **Violations of any other provisions of the laws and regulations pertaining to the practice of professional engineering or land surveying:**

Other provisions include additional sections of Business and Professions Code sections 6700 and 8700, et. seq., Title 16 of the California Code of Regulations Sections 400-476, and other applicable sections of California Codes.

NOTE: There may also be extenuating circumstances that occurred during the course of a project that have bearing on the working conditions the subject had to endure, or incorrect accusations raised to which the subject had to respond. These conditions do not excuse negligence or incompetence but may help to illuminate the factors involved in the case and help to define the expected standard of care.

6. **Bodily injury or monetary loss:**

Please also state whether this conduct actually resulted in or may foreseeably cause bodily injury or monetary loss.

SEAL AND SIGNATURE OF TECHNICAL EXPERT

Contents of the case file and case file organization

The case file you receive contains a complete copy of the original case file. The Enforcement Analyst assigned to the case keeps the original file.

The Enforcement Analyst's transmittal letter will explain what is included in the case file. Your report is due within 30 days of receipt of the case file. Please contact the Enforcement Analyst immediately if you determine you need additional information or will not be able to complete your review within 30 days. Initially, we authorize 15 hours of billable time for the review and completion of the report. Most experts can review a case and prepare a report within the allotted 15 hours. In some situations, additional time may be needed. Please contact the Enforcement Analyst to request authorization for additional hours. A Technical Expert Statement of Services form and a Payee Data Record form will be included for you to complete to be paid for your review and report. You must complete and submit both of these forms for payment; unfortunately, we cannot pay from other invoices or forms.

Because each case is unique, the type of information and documentation you receive with each case file will vary.

The following is a description of the organization of our case files:

Section 1. Original complaint and its attachments

Section 2. Correspondence to and from the complainant

Section 3. Correspondence to and from the subject

Section 4. Correspondence to and from all other involved parties

Section 5. Correspondence to and from the technical expert

In addition, the case file may contain memos, correspondence, and reports prepared by any Board staff who may have reviewed the case.

All the documents are in descending date order, so that the newest information is always on top.

The Division of Investigation report is a separate bound report with its own attachments. (See next page for more information about the Division of Investigation)

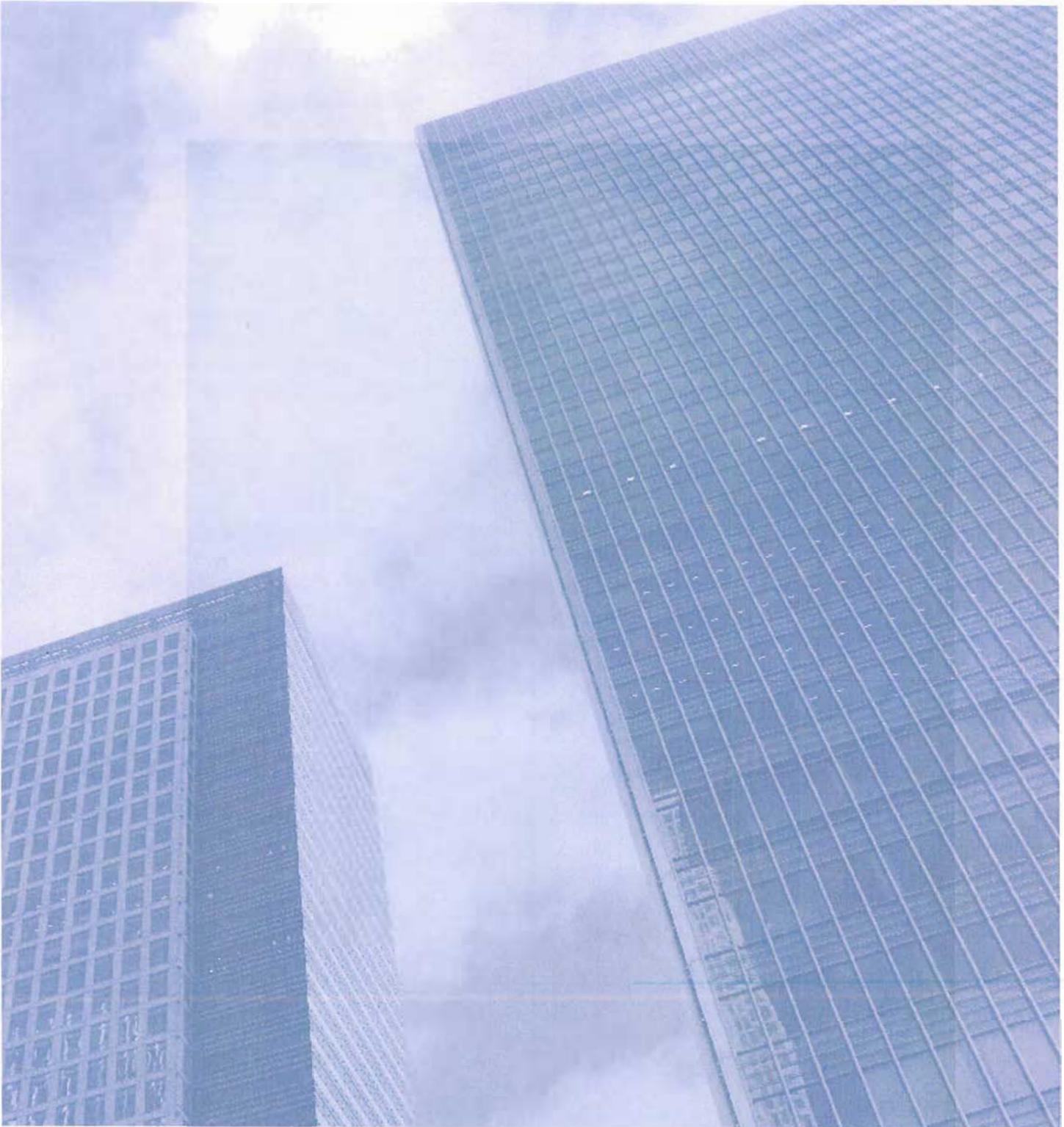
Reports prepared by the Division of Investigation

Most of the investigation of complaints is done by the Enforcement Analyst. However, when necessary, cases are also submitted to the Division of Investigation (DOI), a unit within the Department of Consumer Affairs, the Board's umbrella agency. The DOI investigators have received Police Officer Standards and Training certification in addition to other extensive training as investigators. They are authorized to use resources such as the Department of Motor Vehicles and the Department of Justice records to locate and identify individuals. Also, as sworn peace officers, DOI investigators can issue subpoenas to obtain documents, take declarations from witnesses, refer cases to the District Attorney's Office, and, if necessary, make arrests.

Need to visit the project site?

It is rarely necessary for an expert to visit a project site. In the unusual event that you feel it is necessary to visit the project site, please contact the Enforcement Analyst to discuss the matter further.

It is important that you discuss the matter with the Enforcement Analyst **first** because your presence at a project site could cause difficulty for the owners of the site. You might meet the complainant in the case which could compromise, or appear to compromise, your objectivity. You or another could be injured at the site, and you could be liable for any damages that might result from an unauthorized visit.



Completing the statement of services form and payee data record

Before payment can be made to an expert, the Board's Technical Expert Statement of Services and Payee Data Record forms must be completed. Itemized statements may be attached to the form.

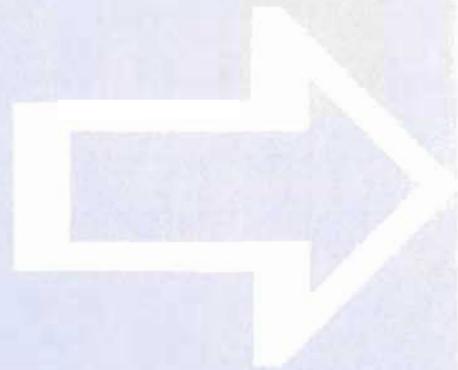
The Statement of Services is approved at the Board office and is then submitted to the accounting office of the Department of Consumer Affairs for further processing and payment. Checks are sent directly to you from the accounting office. The Board office is not notified that the checks have been sent. Processing of the forms for payment generally takes six to eight weeks.

Please make sure that the name and tax number on the Statement of Services form corresponds with what is on the Payee Data Record form. If the Statement of Services lists a taxpayer identification number, it must also include your company name (as well as your name). If the Statement of Services form lists your name and Social Security number, but the Payee Data Record form lists your company name and taxpayer identification number, the Enforcement Analyst will need to contact you to clarify which way you intended to complete the form and have you correct one of the forms.

IMPORTANT: IF THE INVOICE CROSSES FISCAL YEARS, PLEASE COMPLETE TWO FORMS. (THE NEW FISCAL YEAR BEGINS ON JULY 1.)

If you have not received your check approximately 10 weeks after submitting the final report and Statement of Services, please call the Enforcement Analyst so he or she can ask the accounting office to research the matter. Remember that the processing time for payment requests may increase at the end of the fiscal year (during the months of May through July).

You must complete and submit these forms for payment; unfortunately, we cannot pay from other invoices or forms. (See next few pages for samples of these forms.)





BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS
2535 Capitol Oaks Drive, Suite 300, Sacramento, CA 95833-2944
Telephone: (916) 263-2222 Toll Free: 1-866-780-5370
Facsimile: (916) 263-2246
www.pels.ca.gov



TECHNICAL EXPERT STATEMENT OF SERVICES

(see next page for instructions)

PLEASE LEGIBLY PRINT OR TYPE THIS FORM

NAME OF SUBJECT: _____ CASE NO.: _____

Name of Expert: _____

Business Name, if payment to be made to business: _____

Social Security Number OR Taxpayer ID Number if listing business name: _____

Mailing Address: _____

Table with columns DATES and HOURS. Rows include: CASE REVIEW & REPORT PREPARATION, MEETING WITH OR REVIEWING CASE FOR DEPUTY ATTORNEY GENERAL, TESTIFYING AT HEARING, OTHER EXPENSES AS DESCRIBED: (See reverse for approved expenses), and TOTAL \$ _____

This is to certify that the services specified above were rendered in connection with the named subject and complaint and that this statement constitutes a request for full payment for these services.

Signature of Technical Expert _____ Date _____

BOARD USE ONLY

This Statement of Services is hereby approved by the Board for payment to the Technical Expert.

Signature _____ Date _____

DATE RECEIVED FOR PAYMENT: _____ FISCAL YEAR: _____

Instructions for Technical Expert Statement of Services

The Board for Professional Engineers and Land Surveyors pays its technical experts at an established hourly rate for the time the expert spends reviewing the case, preparing the report, meeting with the Deputy Attorney General, reviewing the case at the request of the Deputy Attorney General, and testifying at the hearing. The Board will reimburse expenses incurred, such as mailing costs, mileage, and parking. The State reimburses mileage at the established rate. Original receipts must accompany this statement of services, excluding mileage expenses.

Since the Board's investigative file is considered confidential, it is expected that you are the only person to have access to this information. Therefore, the Board is only paying you for your time.

If you have any questions regarding expenses, please contact the Enforcement Unit of the Board for clarification.

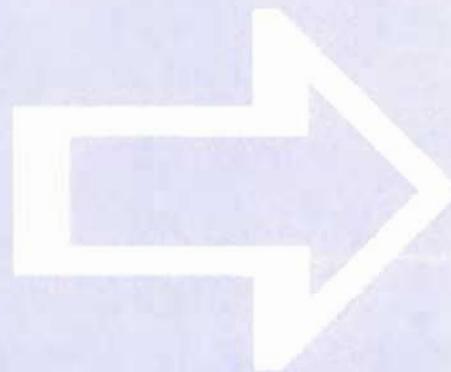
Please return this Statement of Services forms with your completed report and all documents and files provided to you by the Board. Board staff will submit the form to the Accounting Division of the Department of Consumer Affairs for processing. The Accounting Division will mail the check directly to you at the mailing address you provide on this form.

This payment process takes approximately six to eight weeks. If you have any questions regarding your payment, please contact the Enforcement Unit of the Board.

FEES CHARGED WHICH ARE NOT IN CONFORMANCE WITH THE ABOVE INFORMATION MUST BE NEGOTIATED PRIOR TO BILLING WITH THE BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS. UNAPPROVED CHARGES WILL NOT BE PAID.

TAX INFORMATION

Section 6041 of the Federal Internal Revenue Code and Section 18802 of the State Revenue and Taxation Code require the State to report consulting fees paid to individuals or partnerships. In order to report these payments as required, we must be informed of your taxpayer identification number or Social Security Number. If the fee is payable to a corporation or government unit, no reporting is required. If this is the case, please indicate "Exempt" in lieu of a taxpayer identification number or Social Security number on this form.



PAYEE DATA RECORD

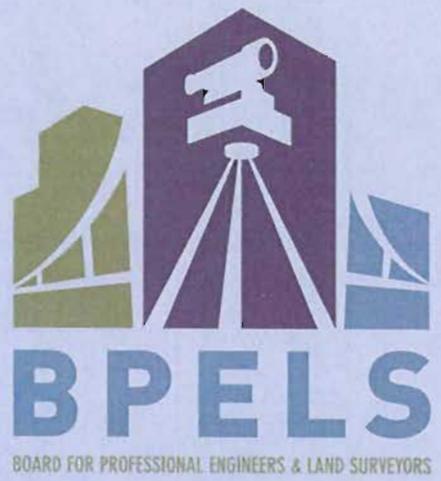
(Required when receiving payment from the State of California in lieu of IRS W-9)
 STD 204 (Rev 8-2003)

1	INSTRUCTIONS: Complete all information on this form. Sign, date, and return to the State agency (department/office) address shown at the bottom of this page. Prompt return of this fully completed form will prevent delays when processing payments. Information provided in this form will be used by State agencies to prepare Information Returns (1099). See reverse side for more information and Privacy Statement. NOTE: Governmental entities, federal, State, and local (including school districts), are not required to submit this form.																								
2	PAYEE'S LEGAL BUSINESS NAME (Type or Print) _____ <hr/> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:60%;">SOLE PROPRIETOR – ENTER NAME AS SHOWN ON SSN (Last, First, M.I.)</td> <td>E-MAIL ADDRESS</td> </tr> <tr> <td>MAILING ADDRESS</td> <td>BUSINESS ADDRESS</td> </tr> <tr> <td>CITY, STATE, ZIP CODE</td> <td>CITY, STATE, ZIP CODE</td> </tr> </table>			SOLE PROPRIETOR – ENTER NAME AS SHOWN ON SSN (Last, First, M.I.)	E-MAIL ADDRESS	MAILING ADDRESS	BUSINESS ADDRESS	CITY, STATE, ZIP CODE	CITY, STATE, ZIP CODE																
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3 PAYEE ENTITY TYPE CHECK ONE BOX ONLY	ENTER FEDERAL EMPLOYER IDENTIFICATION NUMBER (FEIN): <table border="1" style="display:inline-table; border-collapse: collapse; text-align:center;"> <tr><td> </td><td> </td><td>-</td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> </table> <input type="checkbox"/> PARTNERSHIP CORPORATION: <input type="checkbox"/> ESTATE OR TRUST <input type="checkbox"/> MEDICAL (e.g., dentistry, psychotherapy, chiropractic, etc.) <input type="checkbox"/> LEGAL (e.g., attorney services) <input type="checkbox"/> EXEMPT (nonprofit) <input type="checkbox"/> ALL OTHERS <hr/> <input type="checkbox"/> INDIVIDUAL OR SOLE PROPRIETOR <table border="1" style="display:inline-table; border-collapse: collapse; text-align:center;"> <tr><td> </td><td> </td><td> </td><td>-</td><td> </td><td> </td><td>-</td><td> </td><td> </td><td> </td><td> </td><td> </td></tr> </table> ENTER SOCIAL SECURITY NUMBER: _____ (SSN required by authority of California Revenue and Tax Code Section 18646)				-											-			-						NOTE: Payment will not be processed without an accompanying taxpayer I.D. number.
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4 PAYEE RESIDENCY STATUS	<input type="checkbox"/> California resident - Qualified to do business in California or maintains a permanent place of business in California. <input type="checkbox"/> California nonresident (see reverse side) - Payments to nonresidents for services may be subject to State income tax withholding. <input type="checkbox"/> No services performed in California. <input type="checkbox"/> Copy of Franchise Tax Board waiver of State withholding attached.																								
5	I hereby certify under penalty of perjury that the information provided on this document is true and correct. Should my residency status change, I will promptly notify the State agency below. <hr/> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td colspan="2">AUTHORIZED PAYEE REPRESENTATIVE'S NAME (Type or Print)</td> <td>TITLE</td> </tr> <tr> <td>SIGNATURE</td> <td>DATE</td> <td>TELEPHONE ()</td> </tr> </table>			AUTHORIZED PAYEE REPRESENTATIVE'S NAME (Type or Print)		TITLE	SIGNATURE	DATE	TELEPHONE ()																
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SIGNATURE	DATE	TELEPHONE ()																							
6	Please return completed form to: Department/Office: <u>Department of Consumer Affairs</u> Unit/Section: <u>Board for Professional Engineers and Land Surveyors</u> Mailing Address: <u>2535 Capitol Oaks Drive, Suite 300</u> City/State/Zip: <u>Sacramento, CA 95833</u> Telephone: (916) <u>263-2222</u> Fax: (916) <u>263-0899</u> E-mail Address: _____																								

PAYEE DATA RECORD

STD 204 (Rev 6-2003) (REVERSE)

1	<p><u>Requirement to Complete Payee Data Record, STD. 204</u></p> <p>A completed Payee Data Record, STD. 204, is required for payments to all non-governmental entities and will be kept on file at each State agency. Since each State agency with which you do business must have a separate STD. 204 on file, it is possible for a payee to receive this form from various State agencies.</p> <p>Payees who do not wish to complete the STD. 204 may elect to not do business with the State. If the payee does not complete the STD. 204 and the required payee data is not otherwise provided, payment may be reduced for federal backup withholding and nonresident State income tax withholding. Amounts reported on information Returns (1099) are in accordance with the Internal Revenue Code and the California Revenue and Taxation Code.</p>								
2	<p>Enter the payee's legal business name. Sole proprietorships must also include the owner's full name. An individual must list his/her full name. The mailing address should be the address at which the payee chooses to receive correspondence. Do not enter payment address or lock box information here.</p>								
3	<p>Check the box that corresponds to the payee business type. Check only one box. Corporations must check the box that identifies the type of corporation. The State of California requires that all parties entering into business transactions that may lead to payment(s) from the State provide their Taxpayer Identification Number (TIN). The TIN is required by the California Revenue and Taxation Code Section 18846 to facilitate tax compliance enforcement activities and the preparation of Form 1099 and other information returns as required by the Internal Revenue Code Section 6109(a).</p> <p>The TIN for individuals and sole proprietorships is the Social Security Number (SSN). Only partnerships, estates, trusts, and corporations will enter their Federal Employer Identification Number (FEIN).</p>								
4	<p><u>Are you a California resident or nonresident?</u></p> <p>A corporation will be defined as a "resident" if it has a permanent place of business in California or is qualified through the Secretary of State to do business in California.</p> <p>A partnership is considered a resident partnership if it has a permanent place of business in California. An estate is a resident if the decedent was a California resident at time of death. A trust is a resident if at least one trustee is a California resident.</p> <p>For individuals and sole proprietors, the term "resident" includes every individual who is in California for other than a temporary or transitory purpose and any individual domiciled in California who is absent for a temporary or transitory purpose. Generally, an individual who comes to California for a purpose that will extend over a long or indefinite period will be considered a resident. However, an individual who comes to perform a particular contract of short duration will be considered a nonresident.</p> <p>Payments to all nonresidents may be subject to withholding. Nonresident payees performing services in California or receiving rent, lease, or royalty payments from property (real or personal) located in California will have 7% of their total payments withheld for State income taxes. However, no withholding is required if total payments to the payee are \$1,500 or less for the calendar year.</p> <p>For information on Nonresident Withholding, contact the Franchise Tax Board at the numbers listed below:</p> <table border="0"> <tr> <td>Withholding Services and Compliance Section:</td> <td>1-888-792-4900</td> <td>E-mail address:</td> <td>wscs.gen@ftb.ca.gov</td> </tr> <tr> <td>For hearing impaired with TDD, call:</td> <td>1-800-822-6268</td> <td>Website:</td> <td>www.ftb.ca.gov</td> </tr> </table>	Withholding Services and Compliance Section:	1-888-792-4900	E-mail address:	wscs.gen@ftb.ca.gov	For hearing impaired with TDD, call:	1-800-822-6268	Website:	www.ftb.ca.gov
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For hearing impaired with TDD, call:	1-800-822-6268	Website:	www.ftb.ca.gov						
5	<p>Provide the name, title, signature, and telephone number of the individual completing this form. Provide the date the form was completed.</p>								
6	<p>This section must be completed by the State agency requesting the STD. 204.</p>								
	<p><u>Privacy Statement</u></p> <p>Section 7(b) of the Privacy Act of 1974 (Public Law 93-579) requires that any federal, State, or local governmental agency, which requests an individual to disclose their social security account number, shall inform that individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and what uses will be made of it.</p> <p>It is mandatory to furnish the information requested. Federal law requires that payment for which the requested information is not provided is subject to federal backup withholding and State law imposes noncompliance penalties of up to \$20,000.</p> <p>You have the right to access records containing your personal information, such as your SSN. To exercise that right, please contact the business services unit or the accounts payable unit of the State agency(ies) with which you transact that business.</p> <p>All questions should be referred to the requesting State agency listed on the bottom front of this form.</p>								





2535 CAPITOL OAKS DRIVE
SUITE 300
SACRAMENTO, CA 95833-2944
WWW.PELS.CA.GOV
(916) 263-2222



Department of Consumer Affairs

Board for Professional Engineers, Land Surveyors,
and Geologists

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Wanted: Expert Consultants (Formerly Technical Experts) to Review Enforcement Cases

The Board's Enforcement Unit is recruiting professional engineers and professional land surveyors who have been licensed for five or more years to serve as experts in the following disciplines and areas of expertise:

Civil Engineers with expertise in subdivision planning and development, grading and drainage of residential and small business projects, home inspections for resale and for national disaster evaluation, water intrusion issues, and septic system design. (A special need exists for *civil engineers with experience working in Northern and Central California, including the San Francisco/Oakland Bay areas.*)

Civil and/or Structural Engineers with expertise in structural design for residential houses and commercial projects.

Civil and/or Geotechnical Engineers with expertise in providing geotechnical evaluations for new construction and to mitigate soil and compaction failures.

Land Surveyors with expertise in boundary surveying, property line disputes, subdivision map processing, and title descriptions (*in all areas of the state*).

Experts review enforcement complaint investigation cases to determine if the standards of the profession are being met and/or the Board's laws and rules violated. Experts are required to provide a *written report* of their expert opinion and may be asked to testify at a hearing. Expertise in the area of engineering or land surveying which is the subject of a given complaint is essential. The majority of the Board's cases involve *residential* projects and *small* business projects. Experts must be licensed in California and must be California residents. No one who has been investigated or who is currently under investigation by the Board's Enforcement Unit may serve as an expert consultant.

Board experts are paid an hourly rate for case review, report preparation, and actual time spent testifying at administrative hearings. Travel costs associated with attending a hearing to provide expert testimony are reimbursed.

If you would like more information about being an expert consultant, you may contact the Enforcement Unit at 1-866-780-5370 or BPELS.Enforcement_Information@dca.ca.gov. If you are interested, please complete the Areas of Expertise form for Civil (including Structural and Geotechnical) Engineers and Land Surveyors or the Areas of Expertise form for Electrical and Mechanical Engineers and send it with your most current resume/curriculum vitae to the following address:

Board for Professional Engineers, Land Surveyors, and Geologists
Attention: Enforcement Unit
2535 Capitol Oaks Drive, Suite 300
Sacramento, CA 95833

AREAS OF EXPERTISE

NAME: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

PHONE: _____ LIC NO.: _____

FAX: _____ E-MAIL: _____

List of Local Jurisdictions, Cities, and Counties where you have expertise/experience:

Fields of Engineering and Surveying. Check all that apply:

Civil/Structural/Geotechnical

- _____ Airports & Airways
- _____ Bridges
- _____ Buildings
- _____ Drainage
- _____ Flood Control
- _____ Foundations
- _____ Framed & Homogeneous Structures
- _____ Grading/Site Preparation
- _____ Harbors
- _____ Highways
- _____ Inland Waterways
- _____ Irrigation
- _____ Municipal Improvements
- _____ Purification of Water
- _____ Railroads
- _____ Refuse Disposal
- _____ Roads
- _____ Sewerage
- _____ Soils Engineering
- _____ Tunnels
- _____ Water Supply
- _____ Waterpower

LAND SURVEYING

- _____ Boundary Determination
- _____ Construction Staking
- _____ Final Maps
- _____ Legal Descriptions
- _____ Photogrammetry
- _____ Tentative Maps
- _____ Water Boundaries

List Additional Areas of Expertise: _____

AREAS OF EXPERTISE

NAME: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

PHONE: _____ LIC NO.: _____

FAX: _____ E-MAIL: _____

List of local jurisdictions, cities, and counties where you have expertise/experience:

Fields of Electrical or Mechanical Engineering: Check all that apply:

ELECTRICAL

POWER _____
ELECTRONICS _____
FIRE ALARMS _____

MECHANICAL

HVAC _____
INDUSTRIAL FACILITY DESIGN _____
PIPE STRESS _____
SYSTEM CONTROLS _____
FIRE SPRINKLERS _____
PLUMBING _____
FUEL STORAGE & PIPING _____
MEDICAL GAS SYSTEM _____
SMOKE EVACUATION/CONTROL _____
HIGH PRESSURE STEAM _____
LOW PRESSURE STEAM _____
LOW TEMP. REFRIGERATION _____

LIST ADDITIONAL AREAS OF EXPERTISE:

RECOVERY OF COSTS OF INVESTIGATION AND ENFORCEMENT (Business and Professions Code section 125.3)

At its August 28-29, 2013, meeting, the Board requested that staff present information regarding recovery of costs of investigation and enforcement pursuant to Business and Professions (B&P) Code section 125.3 at a future meeting.

Section 125.3 is a general B&P Code section that applies to nearly all of the boards, bureaus, and programs (hereinafter referred to as "boards") under the Department of Consumer Affairs (DCA) [the Medical Board is specifically excluded]. This section was enacted, effective January 1, 1993, through DCA-sponsored legislation. In the preceding years, several boards had sponsored legislation to enact board-specific laws addressing cost recovery. When it became apparent that each board would be seeking to enact such laws, DCA agreed to sponsor legislation to enact a general provision that would apply to all boards, thus ensuring that the law would be consistent among all of the boards and professions.

Section 125.3 authorizes the Board to order a licensee who has been found to have committed violation(s) of the licensing laws in a formal disciplinary proceeding to pay to the Board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The law specifies that the Administrative Law Judge (ALJ) hearing the matter must include, in the Proposed Decision, a finding of the reasonable costs of the investigation and prosecution of the case. The costs that may be included are those incurred up to the date of the hearing, including any charges from the Office of the Attorney General. The law prohibits the Board from increasing the cost award from the amount specified by the ALJ. However, it does allow the Board to reduce or eliminate the amount or to remand the matter back to the ALJ to make a finding if one has not been made. The law also specifies that cost recovery may be included in a stipulated settlement.

Cost recovery laws were enacted because it was viewed as unfair that all licensees, through their renewal fees, had to bear the costs of the investigation and enforcement of licensees who had been found to have committed violations of the laws. However, there were concerns that requiring a licensee to pay all of the costs would discourage them from pursuing a defense through the hearing process and would instead encourage them to settle quickly to avoid incurring more costs.

Additionally, there has always been a question as to how the term "reasonable" should be interpreted; no guidance was given in the law to the ALJs or the Board. As such, there were widely varying findings and conclusions on reducing the costs by the ALJs for the first few years after the law went into effect. For example, one ALJ would consider that the Accusation alleged negligence in the preparation of calculations, with a list of 10 specific items within the calculations that were evidence of that negligence; if only 5 were proven at the hearing, the ALJ would find that only half of the allegations were proven and reduce the award by 50%. However, another ALJ would consider that the overall allegation of negligence was proven and would not reduce the amount since the same amount of investigation had to be done whether 5 or 10 of the specific items

were proven, while yet another ALJ would reduce the award by 10% with no further explanation as to how that factor was determined.

In August 2002, the California Supreme Court issued a ruling addressing cost recovery in *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal. 4th 32. This case involved a constitutional challenge to a regulation adopted by the Chiropractic Board that was similar to Section 125.3 [the Chiropractic Board was not under DCA; therefore, Section 125.3 did not apply; however, that board had adopted a regulation that closely mirrored Section 125.3]. Although the Supreme Court rejected the constitutional challenge, it did direct that the ALJ and the board must evaluate several factors in order to ensure that cost recovery did not deter licensees from exercising their right to an administrative hearing. Those factors are as follows:

1. The board must not assess the full costs where it would unfairly penalize the licensee who as committed some misconduct, but who has used the hearing process to obtain dismissal of some of the charges or a reduction in the severity of the penalty;
2. The board must consider a licensee's subjective good faith belief in the merits of his position and whether he has raised a colorable challenge;
3. The board must consider a licensee's ability to pay; and
4. The board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a licensee engaged in a relatively innocuous misconduct.

Subsequently, the Office of Administrative Hearings (OAH) adopted a regulation, Section 1042 of Title 1 of the California Code of Regulations (1 CCR 1042), which became operative on December 1, 2004. This regulation provides some additional guidance regarding the evidence that must be submitted as proof of the costs. It also clarified that the boards must include a request for cost recovery in the pleading (Accusation or Petition to Revoke Probation/Vacate Stay). Additionally, it made it clear that the ALJs must include both a factual finding and a legal conclusion on the request for cost recovery and must state the reasons for denying the request or for awarding less than the amount request; it also required that any award of costs be specified in the order.

In November 2011, the Court of Appeal, Second District, Division 5, issued a ruling that further addressed cost recovery in *Imports Performance et al. v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911. In this case, which specifically related to Section 125.3, the Appellate Court held that "... Section 125.3 does not require an [ALJ] to award costs on a pro rata basis taking into account the charges and issues on which the [board] did not prevail." It was noted that the ALJ in the underlying administrative case "... had not make an offset for the unproven allegations because they were part of the overall investigation and the prosecution of the case, and no distinct and separable efforts were made in connection with the unproven allegations."

With regard to this Board's cases, we request cost recovery of the amount we are charged by the independent technical expert consultant (if the case was reviewed by one), the amount we were charged by the Division of Investigation (if DOI was involved

in the investigation), and the amount we were charged by the Office of the Attorney General. We do not include staff costs in the amount we request because it would be too difficult to determine the amount of staff time to charge for several reasons. For example, there would be a question as to which individual staff members' time should be included; all cases are processed in some way by the Enforcement Technician, the Enforcement Analyst, and the Enforcement Program Manager, and many of them also involve the staff licensees and the Executive Officer. Additionally, we currently do not do time accounting on our cases, so we do not have a means to determine the exact amount of time spent on a specific case. Since we do not include staff costs, the amount of cost recovery we request is always less than the actual costs incurred by the Board for the investigation of the case. Furthermore, as mentioned previously, the costs to be recovered can only be up to the date of the hearing; therefore, they would not include the costs incurred from the Office of the Attorney General for the Deputy Attorney General to present the case at the hearing; from OAH for the cost of the ALJ to hear the matter and prepare the written Proposed Decision; or from the court reporter.

Section 125.3 specifies that all costs recovered are considered to a reimbursement for costs incurred and are deposited in the fund of the Board that is available upon appropriation by the Legislature. What this means is that any monies paid to the Board as part of cost recovery go into the Board's reserve budget (which the Legislature can take loans from); they do not go back into the spending authority line item from which they were spent.

The law also specifies that the Board cannot renew a license if the full amount has not been paid, unless a payment plan has been established. In the majority of the Board's decisions, cost recovery is included as a condition of probation, and the condition specifies a period of time in which the full amount must be paid. We allow the licensees to make payments, usually in any amount and on any schedule they choose, as long as the full amount is paid by the end of the time period.

In summary, the Board is authorized to recover the costs it expends in the investigation and enforcement of individual case from the subject as part of the formal disciplinary decision. However, there are factors that must be considered in determining the amount so as to ensure that the ability to recover costs does not cause the licensee to not exercise his right to an administrative hearing. In addition to those factors that can limit the amount ordered, the amount the Board requests is already less than the amount it expends since we do not include costs incurred from the Board staff.

Included for reference are the following documents:

Business and Professions Code section 125.3

Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32

Title 1, California Code of Regulations section 1042

Imports Performance et al. v. Department of Consumer Affairs, Bureau of Automotive Repair (2011) 201 Cal.App.4th 911

Business and Professions Code

Section 125.3

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department or before the Osteopathic Medical Board, upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

(b) In the case of a disciplined licentiate that is a corporation or partnership, the order may be made against the licensed corporate entity or licensed partnership.

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

(d) The administrative law judge shall make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested pursuant to subdivision (a). The finding of the administrative law judge with regard to costs shall not be reviewable by the board to increase the cost award. The board may reduce or eliminate the cost award, or remand to the administrative law judge if the proposed decision fails to make a finding on costs requested pursuant to subdivision (a).

(e) If an order for recovery of costs is made and timely payment is not made as directed in the board's decision, the board may enforce the order for repayment in any appropriate court. This right of enforcement shall be in addition to any other rights the board may have as to any licentiate to pay costs.

(f) In any action for recovery of costs, proof of the board's decision shall be conclusive proof of the validity of the order of payment and the terms for payment.

(g) (1) Except as provided in paragraph (2), the board shall not renew or reinstate the license of any licentiate who has failed to pay all of the costs ordered under this section.

(2) Notwithstanding paragraph (1), the board may, in its discretion, conditionally renew or reinstate for a maximum of one year the license of any licentiate who demonstrates financial hardship and who enters into a formal agreement with the board to reimburse the board within that one-year period for the unpaid costs.

(h) All costs recovered under this section shall be considered a reimbursement for costs incurred and shall be deposited in the fund of the board recovering the costs to be available upon appropriation by the Legislature.

(i) Nothing in this section shall preclude a board from including the recovery of the costs of investigation and enforcement of a case in any stipulated settlement.

(j) This section does not apply to any board if a specific statutory provision in that board's licensing act provides for recovery of costs in an administrative disciplinary proceeding.

(k) Notwithstanding the provisions of this section, the Medical Board of California shall not request nor obtain from a physician and surgeon, investigation and prosecution costs for a disciplinary proceeding against the licentiate. The board shall ensure that this subdivision is revenue neutral with regard to it and that any loss of revenue or increase in costs resulting from this subdivision is offset by an increase in the amount of the initial license fee and the biennial renewal fee, as provided in subdivision (e) of Section 2435.

{Added by Stats. 1992, Ch. 1289; Amended by Stats. 2001, Ch. 728; Stats. 2005, Ch. 674; Stats. 2006, Ch. 223}

Supreme Court of California
Robert ZUCKERMAN, Plaintiff and Appellant,
v.
STATE BOARD OF CHIROPRACTIC EXAMINERS, Defendant and Respondent.

No. S096127.

Aug. 26, 2002.

Licensed chiropractor filed petition for administrative mandate, alleging that Board of Chiropractic Examiners' findings of professional misconduct were contrary to weight of evidence and that assessment of Board's prehearing costs was unconstitutional. The Superior Court, Los Angeles County, No. BS 057809, Robert H. O'Brien, Dzintra I. Janavs, JJ., denied petition. Chiropractor appealed, and the Court of Appeal affirmed in part, reversed in part, and remanded, directing the trial court to grant chiropractor's petition insofar as it challenged the Board's order directing him to pay costs. Board petitioned for review. The Supreme Court, Kennard, J., held that the cost reimbursement regulation does not unconstitutionally impair the right of a licensee subject to discipline to obtain a hearing.

Reversed.

Werdegar, J., concurred and filed separate opinion.

Brown, J., concurred and filed separate opinion.

Chin, J., concurred.

***702 *35 **120 Ronald B. Kaplan, Chicago, IL, for Plaintiff and Appellant.

Catherine I. Hanson and Astrid G. Meghrijian, San Francisco, for California Medical Association as Amicus Curiae on behalf of Plaintiff and Appellant.

Davis, Cowell & Bowe and Andrew J. Kahn, San Francisco, for Union of American Physicians and Dentists as Amicus Curiae on behalf of Plaintiff and Appellant.

***703 Russell Jungerich, Rolling Hills, for California Academy of Attorneys for Health Care Professionals as Amicus Curiae on behalf of Plaintiff and Appellant.

Manatt, Phelps & Phillips, Ellen M. Berkowitz and Jack S. Yeh, Los Angeles, for California Chiropractic Association as Amicus Curiae on behalf of Plaintiff and Appellant.

Bill Lockyer, Attorney General, Antonio J. Merino and Zaven V. Sinanian, Deputy Attorneys General, for Defendant and Respondent.

Bill Lockyer, Attorney General, Carlos Ramirez, Assistant Attorney General, and Joseph P. Furman, Deputy Attorney General, for the Medical Board of California as Amicus Curiae on behalf of Defendant and Respondent.

*36 KENNARD, J.

Under California law, the State Board of Chiropractic Examiners (Board) may discipline any chiropractor who engages in professional misconduct. A chiropractor accused of misconduct is entitled to a hearing before an administrative law judge, whose proposed decision is reviewed by the Board. A chiropractor found to have committed misconduct may be ordered to pay the “reasonable**121 costs of investigation and prosecution of the case,” including attorney fees, that the Board incurred “up to the date of the hearing....” (Cal.Code Regs., tit. 16, § 317.5.)

Here, a disciplined chiropractor raises a facial challenge to this regulation. He claims the regulation violates the due process rights of chiropractors whom the Board seeks to discipline, by chilling their right to request a hearing to contest charges of misconduct. We disagree.

I

In October 1997, the Board’s executive director issued an “accusation” alleging that plaintiff Robert Zuckerman, a licensed chiropractor, should be disciplined because he engaged in sexual misconduct during the treatment of two female patients and incompetently treated a third patient. The accusation gave notice that the Board would seek an order directing Zuckerman to pay its costs of investigating and prosecuting the matter.

Zuckerman requested a hearing on the allegations, asserted various defenses, and challenged the constitutionality of the regulation authorizing the Board to order him to pay the costs of investigation and prosecution. A hearing was held before an administrative law judge, who found the allegations of sexual misconduct true. The transcript of the hearing is not part of the appellate record, but it appears that the Board offered no evidence on the allegation of incompetence. The administrative law judge issued a proposed decision revoking Zuckerman’s license, but staying the revocation and placing him on probation for three years, subject to various conditions, including payment of \$17,500 for the Board’s prehearing costs of investigation and prosecution. The Board voted *not* to adopt the proposed decision and notified the parties that it would decide the case itself, based on the record of the administrative hearing. After the parties submitted

written argument, the Board issued a decision finding the allegations of misconduct true and revoking Zuckerman's license, but staying the revocation and placing him on probation for five years, subject to conditions that included 60 days of actual suspension. The Board accepted the administrative law judge's recommendation that Zuckerman be ordered to pay \$17,500 for the prehearing costs of investigation and prosecution.

***704 *37 Zuckerman filed a petition for administrative mandate in the superior court, alleging that the Board's findings were contrary to the weight of the evidence and that the cost assessment was unconstitutional. The trial court denied the petition. Zuckerman appealed.

The Court of Appeal concluded that substantial evidence supported the superior court's decision upholding the Board's findings of misconduct. But it held that the Board's order that Zuckerman pay for the prehearing costs of investigation and prosecution violated his right to due process of law, and it directed the trial court to grant Zuckerman's petition insofar as it challenged the Board's order directing him to pay those costs.

We granted the Board's petition for review.

II

The Board was established by the Chiropractic Initiative Act (Act), a voter initiative enacted in 1922.^{FN1} The Board's purpose is to regulate the practice of chiropractic care in California.

FN1. The Act is an uncodified initiative measure printed, for ease of reference, as an appendix at the end of Deering's Annotated Business and Professions Code and in West's Annotated Business and Professions Code following section 1000.

Under the Act, disciplinary proceedings before the Board are governed by the California Administrative Procedures Act, which appears in section 11500 and ensuing sections of the Government Code. (Act, § 10, subd. (b).) Hearings are ordinarily held before an administrative law judge employed by the Office of Administrative Hearings. (Gov.Code, §§ 11502, 11517.) After a hearing, the administrative law judge submits a proposed decision to the Board (*id.*, § 11517, subd. (c)), which may adopt it, reduce the proposed penalty, or, as occurred in this case, reject **122 the proposed decision and decide the case itself. If the Board chooses the latter option, it may base its decision on the record of the hearing before the administrative law judge (as occurred here) or it may take new evidence. (*Ibid.*) The Board's decisions are subject to judicial review by administrative mandamus. (Code Civ. Proc., § 1094.5.)

The Act authorizes the Board to adopt "such rules and regulations as the board may deem proper and necessary for the performance of its work, the effective enforcement and

administration of [the Act], ... and the protection of the public” (Act, § 4, subd. (b)), as well as “rules of professional conduct appropriate to the establishment and maintenance of a high standard of professional service and the protection of the public” (Act, § 10, subd. (a)). Based on its rulemaking power, the Board adopted *38 title 16, section 317.5 of the California Code of Regulations (regulation 317.5), the subject of Zuckerman's constitutional challenge.

In disciplinary proceedings, the Board “may request the administrative law judge to direct [a chiropractor found to have violated the Act] to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.” (Reg.317.5, subd. (a).) These costs “shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.” (*Id.*, subd. (b).) The Board “may reduce or eliminate the cost award.” (*Id.*, subd. (c).)^{FN2}

FN2. Subdivision (f) of regulation 317.5 provides that the Board “shall not renew or reinstate any license” of a chiropractor who has failed to pay costs assessed by the Board, except that it may, on a showing of financial hardship, conditionally renew or reinstate the license if the chiropractor “demonstrates financial hardship and ... enters into a formal agreement ... to reimburse the board within that one-year period for the unpaid costs.” This provision does not apply to Zuckerman, because the Board's decision states that his probationary period will be automatically extended until the costs are paid in full. Thus, the constitutionality of this subdivision is not at issue here, and we express no views on the matter.

***705 Although regulation 317.5 applies only to the Board and not to other disciplinary bodies, similar provisions apply to proceedings before most, if not all, professional disciplinary agencies in California. For example, an almost identical provision (Bus. & Prof.Code, § 125.3) permits all disciplinary boards within the jurisdiction of the California Department of Consumer Affairs (including most professional and vocational licensing boards) to recover prehearing investigation and enforcement costs. (Recently, the Legislature amended § 125.3 to include disciplinary hearings before the Board, but this amendment (Stats.2001, ch. 728, § 1 did not become effective until after the proceedings at issue here.) Other similar provisions include Business and Professions Code sections 6086.10 (disciplined attorneys may be ordered to pay investigation and other costs), 2497.5 (disciplined podiatrists may be ordered to pay costs of investigation and prosecution), 2661.5 (disciplined physical therapists may be ordered to pay costs of investigation and prosecution), 4959 (disciplined acupuncturists may be ordered to pay costs of investigation and prosecution), and 7403, subdivision (b) (disciplined barbers and cosmetologists may be ordered to pay investigation costs).

III

[1][2] Zuckerman argues that regulation 317.5 is facially unconstitutional. He claims it violates his due process rights by discouraging chiropractors whom the Board has accused of misconduct from requesting a hearing on the charges. We evaluate the merits of a facial challenge by considering *39 “only the text of the measure itself, not its application to the particular circumstances of an individual.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) A plaintiff challenging the facial validity of a statute “cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute.” (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, 172 Cal.Rptr. 487, 624 P.2d 1215.) The precise standard governing facial challenges “has been a subject of controversy within this court.” **123(*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502, 97 Cal.Rptr.2d 334, 2 P.3d 581; see also *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 673, 117 Cal.Rptr.2d 269, 41 P.3d 87; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342–343, 66 Cal.Rptr.2d 210, 940 P.2d 797 (plur. opn. of George, C.J.); *id.* at p. 421, 66 Cal.Rptr.2d 210, 940 P.2d 797 (dis. opn. of Brown, J.); *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 345, 347, 84 Cal.Rptr.2d 425, 975 P.2d 622 (*CTA*); *id.* at pp. 358–359, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.); *Tobe v. City of Santa Ana, supra*, 9 Cal.4th at p. 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145; *Pacific Legal Foundation v. Brown, supra*, 29 Cal.3d at p. 181, 172 Cal.Rptr. 487, 624 P.2d 1215.) We need not resolve this controversy here, however, because the result would be the same under any of the tests mentioned in these cases.

[3] “The right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection” ***706(*Emslie v. State Bar* (1974) 11 Cal.3d 210, 226, 113 Cal.Rptr. 175, 520 P.2d 991), including a disciplinary hearing consistent with the requirements of due process (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1113, 255 Cal.Rptr. 390, 767 P.2d 657). At issue here is whether regulation 317.5 violates those requirements by impairing the right of a licensee subject to discipline by the Board to obtain a hearing.

The parties agree the case most closely on point is our recent decision in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622. There, a public school district dismissed a teacher for misconduct, and the dismissal was upheld by the adjudicator at an administrative hearing requested by the teacher. State law provided that the state could charge the teacher half the cost of the hearing, including the cost of the adjudicator. The teacher raised a facial challenge to the constitutionality of this provision.

This court held that the law requiring the teacher to pay half the cost of the adjudicator was facially invalid. Noting that “ ‘traditional practice provides a touchstone for constitutional analysis’ ” (*CTA, supra*, 20 Cal.4th at p. 333, 84 Cal.Rptr.2d 425, 975 P.2d 622), we pointed out

that requiring the teacher to share the cost of the adjudicator was “unique and virtually unprecedented” (*ibid.*) and conflicted *40 with “the centuries-old common law tradition” (*id.* at p. 331, 84 Cal.Rptr.2d 425, 975 P.2d 622) that the state pays judicial salaries.

In *CTA*, the state had identified the law's purpose as “discouraging ‘meritless administrative proceedings’ ” and “ ‘preventing groundless challenges to disciplinary proceedings.’ ” (*CTA, supra*, 20 Cal.4th at p. 341, 84 Cal.Rptr.2d 425, 975 P.2d 622.) But we found these descriptions misleading because the law required *every* suspended or dismissed teacher to share the cost of the adjudicator, regardless of “the teacher's subjective good faith belief in the merits of his or her position” or the “objective reasonableness” of that position (*id.* at p. 342, 84 Cal.Rptr.2d 425, 975 P.2d 622). The law, we noted, required teachers to pay even when they prevailed at the hearing but a court later overturned the decision, or when the hearing resulted in a reduction in the discipline imposed. Thus, we concluded, the law's true purpose was to discourage “hearing requests in which the teacher happens not to prevail” (*id.* at p. 341, 84 Cal.Rptr.2d 425, 975 P.2d 622), which was not a proper legislative goal.

Finally, we held in *CTA* that even if we could ignore the state's improper goal of discouraging unsuccessful hearings and instead focus on its interest in conserving public resources, to require unsuccessful teachers to pay half the cost of the adjudicator would still violate due process. In reaching this conclusion, we analyzed the law under the three-part test the United States Supreme Court, in *Mathews v. Eldridge* (1976) 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (*Mathews*), created to evaluate due process challenges to a procedural scheme. Applying this standard, we held that the state's interest in “conserving resources or discouraging hearings that happen to result in an administrative or judicial decision against a teacher” was outweighed by “the teacher's strong interest in presenting his or her side of the case and in invoking the discretion of the adjudicator [or] the public's interest in preventing erroneous or arbitrary dismissals or **124 suspensions of teachers in our public schools.” (*CTA, supra*, 20 Cal.4th at p. 357, 84 Cal.Rptr.2d 425, 975 P.2d 622.)

Zuckerman contends that, like the law we invalidated in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622, regulation 317.5 violates his right to due process.***707 As we shall explain, *CTA* is distinguishable.

The law we considered in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622, required the disciplined teacher to pay *hearing* costs, in particular the cost of the adjudicator. But, under regulation 317.5, those costs are paid entirely by the Board, and a disciplined chiropractor must only pay certain *prehearing* costs. Although laws requiring a disciplined professional to pay for an adjudicator are “virtually unprecedented” (*CTA, supra*, 20 Cal.4th at p.

333, 84 Cal.Rptr.2d 425, 975 P.2d 622), an examination of laws in California and other states reveals that laws imposing prehearing costs are not unusual.

*41 As explained earlier (see 124 Cal.Rptr.2d p. 705, 53 P.3d p. 122, *ante*), California law permits most agencies imposing discipline on licensed professionals to recover prehearing costs of investigation and prosecution. At least 30 other states and the territory of the United States Virgin Islands have similar provisions.^{FN3} Also, *42 federal law permits trial ***708 **125 courts to order persons convicted of certain federal crimes to pay the costs of investigation and prosecution, although (unlike costs imposed in a professional disciplinary proceeding) these costs may also be justified as punishment. A defendant convicted of possessing certain controlled substances “shall be fined the reasonable costs of the investigation and prosecution of the offense,” so long as the trial court finds that the defendant has the ability to pay the fine. (21 U.S.C. § 844(a).) Similarly, title 28, section 1918 of the United States Code provides: “Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution.”

FN3. States and territories that require payment of prehearing costs include Alaska (Alaska Stat. § 47.27.085 [investigation and prosecution costs recoverable in action to recover temporary assistance improperly provided]), Arkansas (Ark.Code Ann. § 4–88–113 [investigation and prosecution costs recoverable when state prevails in action for unlawful trade practices]), Connecticut (Conn. Gen.Stat., § 19a–343f [court may impose investigation and prosecution costs on defendant found liable for public nuisance]), Delaware (Del.Code Ann., tit. 6, § 7316 [Securities Commissioner may impose investigation and prosecution costs on a broker-dealer, agent, investment advisor, or investment adviser representative who engages in misconduct]), Florida (Fla. Stat. Ann. § 455.227 [professional boards and departments may assess costs, excluding attorney fees, related to investigation and prosecution for a violation of any practice act]), Georgia (Ga.Code Ann. § 26–4–28 [state pharmacy board may direct a licensee violating any drug law or rule to pay investigation and prosecution costs, not to exceed \$25,000]), Idaho (Idaho Code §§ 67–2609 [bureau of occupational licenses shall formulate rules for recovery of costs incurred in investigation and prosecution of licensees], 54–2105 [board of veterinary medicine may recover costs and attorney fees incurred in investigation and prosecution of complaints]), Indiana (Ind.Code Ann. § 23–7–8–8 [court may order violators of laws regulating professional fundraisers and solicitors to pay investigation and prosecution costs]), Iowa (Iowa Code § 535B.13 [attorney general may recover investigation and prosecution costs, including attorney fees, in actions to enforce rules governing mortgage bankers and brokers]), Kentucky (Ky. Rev. Stat. Ann. § 315.191 [board of pharmacists and pharmacies may order licensee, permit holder or certificate holder found guilty of a charge involving pharmacy or drug laws, rules or administrative

regulations to pay investigation and prosecution costs, not to exceed \$25,000]), Louisiana (La.Rev.Stat. Ann. § 37:1241 [disciplined pharmacist may be required to pay costs incurred in connection with the proceedings, including investigation and attorney fees]), Minnesota (Minn.Stat. § 325F.24 [attorney general may recover attorney fees and investigation costs from violators of laws governing building insulation]), Mississippi (Miss.Code Ann. § 73-31-21 [disciplined psychologist may be required to pay investigation and prosecution costs]), Missouri (Mo.Rev.Stat. § 407.130 [attorney general may recover investigation and prosecution costs in action to enforce Merchandising Practices Act]), Nevada (Nev.Rev.Stat. § 623.270 [disciplined architect, interior designer or residential designer may be required to pay investigation and prosecution costs]), New Hampshire (N.H. Supreme Ct. Rules, rule 37 [disciplined attorney may be required to pay investigation and enforcement costs]), New Jersey (N.J. Stat. Ann. § 17:22D-5 [insurance commissioner may require reimbursement of investigation and prosecution costs]), North Carolina (N.C. Admin.Code, tit. 21, § 66.0601 [violation of Veterinary Practice Act or Administrative Rules of the Veterinary Medical Board may be required to pay investigation and prosecution costs]), North Dakota (N.D. Cent.Code § 43-17-31.1 [disciplined physician may be required to pay investigation and prosecution costs, including attorney fees]), Ohio (Ohio Rev.Code Ann. § 4734.49 [if permanent injunction granted against a chiropractor for unlicensed practice, the court may award the party that brought the action up to \$5,000 to cover attorney fees and investigation and prosecution costs]), Oregon (Or.Rev.Stat. § 618.506 [if state prevails in action to enjoin security seal violations, defendant may be required to pay investigation, preparation, and prosecution costs]), Pennsylvania (Pa. Rules Disciplinary Enforcement, rule 208 [disciplined attorney may be required to pay investigation and prosecution costs]), South Carolina (S.C.Code Ann. §§ 40-1-170 [licensee violating applicable licensing act may be required to pay investigation and prosecution costs], 40-45-170 [disciplined physical therapist may be required to pay investigation and prosecution costs]), South Dakota (S.D. Codified Laws § 16-19-70.1 [disciplined attorney may be required to pay investigation and prosecution costs]), Tennessee (Tenn. Comp. R. & Regs. § 0260-2-.15 [disciplined chiropractor may be required to pay investigation and prosecution costs]), Texas (25 Tex. Admin. Code § 117.86 [health department may assess investigation and prosecution costs, including attorney fees]), Vermont (Vt. Stat. Ann., tit. 8, § 2548 [commissioner of banking, insurance, securities, and health care administration may assess investigation and prosecution costs, including attorney fees, against disciplined licensees providing financial services]), West Virginia (W.Va.Code § 32-4-407, subd. (a) [violation of Uniform Securities Act must pay investigation and prosecution costs, including “salaries ... paid to ... legal personnel”]), Wisconsin (Wis. Stat. § 281.98 [violation of water and sewage regulations may be required to pay investigation and prosecution costs]), and the

Virgin Islands (U.S. V.I. Terr. Ct. Rules, pt. IX, rule 303 [disciplined attorney may be required to pay investigation and prosecution costs]).

Thus, in contrast to the law at issue in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622, requiring the litigant to pay the cost of the adjudicator, laws that, like regulation 317.5, permit governmental entities to recover prehearing costs of investigation and prosecution are common in California and throughout the country.

Equally important, the *purpose* of regulation 317.5, unlike the law we invalidated in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622, is constitutionally permissible. We find nothing in the history of the Act, or in the administrative history of regulation 317.5, to suggest that regulation 317.5 was enacted to “discourage hearing requests in which the [litigant] happens not to prevail,” the purpose we held impermissible in *CTA, supra*, 20 Cal.4th at page 341, 84 Cal.Rptr.2d 425, 975 P.2d 622. Here, the Board maintains that regulation 317.5 is intended to reduce its operating costs by requiring chiropractors who engage in acts of misconduct or incompetence to pay for the prehearing costs the Board incurs in investigating and prosecuting them, up to the time of trial. By reducing these costs, the Board explains, it can better achieve its statutorily mandated purpose of protecting the public from incompetent and dishonest chiropractors. The United States Supreme Court has held that the public’s interest in “conserving scarce fiscal and administrative resources” is a legitimate goal. (*Mathews, supra*, 424 U.S. at p. 348, 96 S.Ct. 893.) Thus, regulation *43 317.5 serves “ ‘a proper legislative goal’ ” that has “ ‘a real and ***709 substantial relation to the object to be attained.’ ” (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125, 278 Cal.Rptr. 346, 805 P.2d 300.)

[4] Zuckerman contends that even if the Board’s purpose of reducing its prehearing costs of investigation and prosecution is constitutionally permissible, regulation 317.5 is an impermissible means of achieving that goal, because it violates due process by discouraging chiropractors facing allegations of misconduct from exercising their right to a hearing to contest those allegations. To resolve this issue we apply the test the high court articulated in *Mathews, supra*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, for use in considering due process challenges to procedural schemes. Three factors come into play: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” (*Mathews, supra*, 424 U.S. at p. 335, 96 S.Ct. 893.)

**126 [5] Turning to the first of these factors—the private interest affected by the official action—Zuckerman identifies the private interest at stake as the right of chiropractors to practice

their profession. This is an interest of great importance. As this court has held, the holder of a professional license “has a property interest in the right to practice his profession that cannot be taken from him without due process.” (*Conway v. State Bar*, *supra*, 47 Cal.3d at p. 1113, 255 Cal.Rptr. 390, 767 P.2d 657.) A chiropractor whose license is revoked is deprived of that property interest. Even when the Board imposes a less serious form of discipline such as a short suspension accompanied by a period of probation (as occurred here), disciplinary proceedings may tarnish the chiropractor’s “good name, reputation, honor, or integrity” (*CTA*, *supra*, 20 Cal.4th at p. 348, 84 Cal.Rptr.2d 425, 975 P.2d 622), making it difficult or impossible for the chiropractor to find work, thereby affecting a due process liberty interest. (*In re Rose* (2000) 22 Cal.4th 430, 456, 93 Cal.Rptr.2d 298, 993 P.2d 956; *CTA*, *supra*, 20 Cal.4th at p. 348, 84 Cal.Rptr.2d 425, 975 P.2d 622.)

The second factor in the due process analysis is the risk that the challenged procedures—here the cost recoupment provision in regulation 317.5—will result in an “erroneous deprivation” (*Mathews*, *supra*, 424 U.S. at p. 335, 96 S.Ct. 893) of the interest at stake, that is, the chiropractor’s right to practice his or her profession. Zuckerman argues that regulation 317.5 will, by discouraging chiropractors charged with disciplinary violations from seeking a hearing to contest the charges, lead to such erroneous deprivations.

*44 Regulation 317.5 does not discourage chiropractors from seeking a hearing insofar as it requires them to pay investigation and prosecution costs the Board incurs *before* it files formal charges, for a chiropractor who admits the charges and does not request a hearing also must pay those costs. But, as explained below, regulation 317.5’s further requirement that disciplined chiropractors must pay costs the Board incurs *after* charges are filed poses a greater risk of causing erroneous deprivations of the right to practice.

For example, a chiropractor who is *innocent* of alleged misconduct, but who has limited financial resources, might not request a hearing for fear that the Board will erroneously sustain the charge and order the chiropractor to reimburse its ***710 costs, thereby imposing an additional financial burden. Also, a chiropractor accused of several acts of misconduct, *some* of which are untrue, might decide not to contest the charges for fear of being charged for the costs of investigation and prosecution even if even *one* of the charges is found true. Moreover, in some cases the Board may seek a severe penalty such as license revocation, but mitigating evidence at a hearing would show that a milder penalty, such as a license suspension, is more appropriate. A chiropractor might decide not to request a hearing at which to present such mitigating evidence for fear of having to pay the added costs of investigation and prosecution.

These concerns are not insubstantial. But, as we shall explain, an important distinction between regulation 317.5 and the law we invalidated in *CTA* minimizes the risk that regulation

317.5 will deter chiropractors with potentially meritorious claims from requesting a disciplinary hearing. At issue in *CTA* was a *mandatory* provision that imposed hearing costs “upon all teachers who ultimately prove unsuccessful at any step in the proceedings...” (*CTA, supra*, 20 Cal.4th at p. 342, fn. 8, 84 Cal.Rptr.2d 425, 975 P.2d 622, italics added.) Regulation 317.5, by contrast, is merely *discretionary*, because the administrative law judge must determine whether the Board's costs are “reasonable,” and the Board may “reduce or eliminate” the administrative law judge's cost award. (Reg.317.5, subd. (c).)

In *CTA*, we noted the critical importance of granting disciplinary bodies the discretion not to impose costs. The dissent in that case mentioned several laws permitting disciplined professionals to be charged for the costs of investigation and prosecution, arguing that these provisions were similar to subdivision (e) of Education Code section 44944, the law at issue in *CTA*. (*CTA, supra*, 20 Cal.4th at p. 360, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.)) The **127 majority responded that those cost recoupment provisions “do not share the same serious constitutional deficiencies” as Education Code section 44944, subdivision (e), because under those provisions, “disciplined licensees *may* be *45 required to pay costs” (*CTA, supra*, 20 Cal.4th at p. 337, fn. 3, 84 Cal.Rptr.2d 425, 975 P.2d 622), but payment of costs is not *mandatory*.

[6][7][8] The Board must exercise its discretion to reduce or eliminate cost awards in a manner that will ensure that regulation 317.5 does not deter chiropractors with potentially meritorious claims or defenses from exercising their right to a hearing. Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a chiropractor who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed. The Board must consider the chiropractor's “subjective good faith belief in the merits of his or her position” (*CTA, supra*, 20 Cal.4th at p. 342, 84 Cal.Rptr.2d 425, 975 P.2d 622) and whether the chiropractor has raised a “colorable challenge” to the proposed discipline (*id.* at p. 345, 84 Cal.Rptr.2d 425, 975 P.2d 622). Furthermore, as in cost recoupment schemes in which the government seeks to recover from criminal defendants the cost of their state-provided legal representation (see *Fuller v. Oregon* (1974) 417 U.S. 40, 53 & fn. 12, 94 S.Ct. 2116, 40 L.Ed.2d 642), the Board must determine that the chiropractor will be financially able to make later payments. Finally, the Board may not assess the full costs of investigation and prosecution when it has conducted a disproportionately large investigation***711 to prove that a chiropractor engaged in relatively innocuous misconduct.^{FN4}

FN4. In her concurring opinion, Justice Brown bitterly complains that the factors we articulate here to guide the Board's discretion are “miserably inexact,” but she fails to suggest a more happily precise set of factors.

[9] A disciplined chiropractor may obtain judicial review of the Board's application of the factors discussed above by filing a petition for administrative mandate in the superior court. There, the superior court may overturn the Board's cost award if it finds, in the exercise of its independent judgment, that the Board's cost award is not supported by the weight of the evidence. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, 72 Cal.Rptr.2d 624, 952 P.2d 641.) Moreover, if the Board fails to properly exercise its discretion to limit cost assessments, its decisions may also be vulnerable to constitutional attack on the ground that, as *applied*, regulation 317.5 unconstitutionally chills the right of chiropractors to seek a hearing.

Thus regulation 317.5, by granting the Board discretion not to assess the full amount of its costs, and by subjecting the Board's cost determination to judicial review, greatly limits the likelihood that cost assessments will lead to an "erroneous deprivation" (*Mathews, supra*, 424 U.S. at p. 335, 96 S.Ct. 893) of the right of disciplined chiropractors to practice their profession.

*46 The third and final factor we consider in our due process analysis is the public interest in regulation 317.5. The Board notes that its interest is to protect the public against chiropractors who engage in misconduct, pointing out that if it cannot recoup the cost of investigating and prosecuting those who engage in such misconduct, its ability to pursue allegations of misconduct will be seriously impaired. Furthermore, as previously explained (see 124 Cal.Rptr.2d p. 705, 53 P.3d p. 122, *ante*), an almost identical provision (Bus. & Prof.Code, § 125.3) permits all disciplinary boards within the jurisdiction of the California Department of Consumer Affairs (including most professional and vocational licensing boards) to recover prehearing investigation and enforcement costs. If regulation 317.5 violated due process, Business and Professions Code section 125.3 could also be unconstitutional (unless its language could somehow be distinguished) and none of the disciplinary boards covered by section 125.3 would be able to recover their costs of investigation and prosecution. This would place a substantial burden on the state's financial resources.

**128 In *Mathews*, the United States Supreme Court discussed how financial cost (one of the chief purposes of reg. 317.5) should be weighed against an individual's interests in a fair hearing. The high court explained: "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." (*Mathews, supra*, 424 U.S. at p. 348, 96 S.Ct. 893.) To conduct that weighing process, the court stated, "[a]ll that is necessary is that the procedures be tailored ... to 'the capacities and circumstances of those who are to be heard,' [citation] to insure that they are given a meaningful opportunity to present their case."

(*Id.* at p. 349, 96 S.Ct. 893.) In evaluating what process is due, the high court gave “substantial weight” to the “good-faith judgments” of the officials charged with the administration of the procedures in question. (*Ibid.*) Here, regulation***712 317.5 gives chiropractors charged in disciplinary proceedings a “meaningful opportunity to present their case” (*Mathews, supra*, at p. 349, 96 S.Ct. 893), so long as the Board exercises its discretion to impose only those investigation and prosecution costs that will not chill their right to seek a hearing. Due process requires no more.

Thus, we hold that regulation 317.5 does not “inevitably pose a present total and fatal conflict with applicable constitutional prohibitions” (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 181, 172 Cal.Rptr. 487, 624 P.2d 1215), nor does it violate due process in “the generality or great majority of cases” (*San Remo Hotel v. City and County of San Francisco, supra*, 27 Cal.4th at 673, 117 Cal.Rptr.2d 269, 41 P.3d 87; see also *Kasler v. Lockyer, supra*, 23 Cal.4th at p. 502, 97 Cal.Rptr.2d 334, 2 P.3d 581). It is therefore not facially unconstitutional.

*47 Lending support to that conclusion are the decisions of the federal courts unanimously holding that federal laws requiring defendants in criminal cases to pay for the costs of investigation and prosecution do not violate the due process clause. (*United States v. Palmer* (11th Cir.1987) 809 F.2d 1504, 1505–1507; *United States v. Wyman* (8th Cir.1984) 724 F.2d 684, 688–689; *United States v. Chavez* (9th Cir.1980) 627 F.2d 953, 955–958; *United States v. Glover* (2d Cir.1978) 588 F.2d 876, 878–879; *United States v. American Theater Corp.* (8th Cir.1975) 526 F.2d 48, 50–51.) Some of these decisions have expressed concern that serious constitutional problems would arise if a cost recoupment law was made mandatory in every case. (See *United States v. Glover, supra*, 588 F.2d at p. 878; *United States v. American Theater Corp., supra*, 526 F.2d at p. 51; but see *United States v. Chavez, supra*, 627 F.2d at p. 957.) We share these concerns. But as we have explained, regulation 317.5, the cost recoupment law at issue here, grants the Board discretion to reduce or eliminate the costs that a disciplined chiropractor may be required to pay.

{10} In support of its holding that regulation 317.5 violates due process, the Court of Appeal pointed out that the regulation is not reciprocal, because it requires a disciplined chiropractor to pay for the state's investigation and prosecution costs (including attorney fees) if the chiropractor is unsuccessful at the disciplinary hearing, but it does not require the state to pay for the chiropractor's attorney fees if the state is unsuccessful at the hearing.^{FNS} Reciprocal rules for cost recoupment, however, are not required by due process. To require the Board to reimburse chiropractors who prevail at disciplinary hearings for their costs would impair the Board's ability to protect the public from chiropractors who injure the public through their incompetence and misconduct.

FN5. Government Code section 800 provides that the trial court may, in a civil action to review the award in an administrative proceeding, order the administrative agency to pay the plaintiff's costs if it finds that the decision in the administrative proceeding was "arbitrary or capricious," but the maximum amount the court can award is \$7,500. This section does not provide a remedy that is reciprocal to regulation 317.5 because of the \$7,500 cap and the requirement that the agency act arbitrarily or capriciously, neither of which appears in regulation 317.5.

Zuckerman also argues that the Board's enabling legislation does not authorize regulation 317.5, and that the regulation therefore exceeds the Board's jurisdiction. The Court of Appeal summarily rejected the claim, relying on ***713 *Oranen v. State Board of Chiropractic Examiners* (1999) 77 Cal.App.4th 258, 261–263, 90 Cal.Rptr.2d 287, which held that regulation 317.5 is authorized by sections 4 and 10 of the Act. We do not address this issue because it is not within the scope of our order granting the Board's petition for review.

*48 DISPOSITION

The judgment of the Court of Appeal is reversed to the extent that it held regulation 317.5 invalid. The Court of Appeal is directed to affirm the judgment of the trial court, which denied plaintiff Zuckerman's petition for administrative mandamus.

WE CONCUR: GEORGE, C.J., BAXTER and MORENO, JJ.

Concurring Opinion by WERDEGAR, J.

I agree that California Code of Regulations, title 16, section 317.5 (regulation 317.5) does not, on its face, violate the due process rights of chiropractors by chilling exercise of their hearing rights.

Under the compulsion of *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622 (*CTA*), from which I dissented, I also agree that the various restrictions imposed today on the discretion of administrative agencies to assess costs (maj. opn., *ante*, 124 Cal.Rptr.2d at pp. 710–711, 53 P.3d at pp. 126–128) are constitutionally necessary. But were it not for the authority of *CTA*, that the absence of any of the court's new restrictions would render a cost regulation facially invalid would be unclear, to say the least. Suppose, for example, that the State Board of Chiropractic Examiners were *not* required to consider, in imposing investigative costs on a disciplined chiropractor, whether the chiropractor had subjectively believed in the merits of his or her defense to the charges (maj. opn., *ante*, at p. 710, 53 P.3d at p. 127): would that render the regulation *facially* invalid? I doubt it, for in order to establish facial invalidity the plaintiff must show that the regulation will deter the exercise of hearing rights in every case, or at least in the generality of cases. (*CTA, supra*, 20 Cal.4th at p.

359, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.)) Since many chiropractors with a subjective belief in the merits of their position would presumably also have some degree of confidence that their position will prevail in the administrative hearing, that all or the great majority of such professionals would give up their hearing rights because of a possible cost assessment should they lose the hearing, were there no guarantee their subjective belief would be considered, seems doubtful. (See *id.* at pp. 359, 367–369, 84 Cal.Rptr.2d 425, 975 P.2d 622.) Nonetheless, I agree *CTA* compels this conclusion and demands adherence as a matter of stare decisis.^{FN1}

FN1. In the present case, I note, the investigative costs imposed amounted to \$17,500, whereas in *CTA* the adjudicative costs imposed were less than \$7,750. (*CTA, supra*, 20 Cal.4th at p. 332, 84 Cal.Rptr.2d 425, 975 P.2d 622.) That the *CTA* provision nevertheless would serve as the greater deterrent to a litigant, as the majority in that case held, seems problematic.

At the same time, one must note in the court's approach to constitutional adjudication a significant divergence between the present decision and *CTA*. *49 In the present case, the court accepts the agency's assertion that regulation 317.5's purpose is “to reduce its operating costs by requiring chiropractors who engage in acts of misconduct or incompetence to pay for the prehearing costs....” (Maj. opn., *ante*, 124 Cal.Rptr.2d at p. 708, 53 P.3d at p. 125.) In *CTA*, the state's asserted purpose, similarly, was “ ‘to promote accurate administrative***714 outcomes without undue taxpayer expense.’ ” (*CTA, supra*, 20 Cal.4th at p. 359, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.), quoting the state's attorney at oral argument.) But there, as I explained in dissent, “[b]ecause the statute is not limited to frivolous hearing demands, the majority rejects the state's asserted purpose out of hand and posits a different, obviously indefensible purpose: to deter all unsuccessful teacher requests, meritless or not.” (*Ibid.*) As in *CTA*, here too, under the regulation as written, costs may be imposed regardless of whether the chiropractor**130 had a potentially meritorious defense to the charges. Yet the majority here accepts the rationale they dismissed in *CTA*. I join because I think the *CTA* majority was in error and today's approach is the correct one. (See *id.* at pp. 359–360, 84 Cal.Rptr.2d 425, 975 P.2d 622.)

I CONCUR: CHIN, J. Concurring Opinion by BROWN, J.

In this case we consider a facial challenge to section 317.5 of title 16 of the California Code of Regulations (section 317.5), which authorizes the State Board of Chiropractic Examiners (Board) to require a disciplined chiropractor to reimburse the Board for the reasonable costs of investigation and enforcement. As the majority acknowledges, section 317.5 is similar to other provisions that apply to proceedings before most, if not all, professional disciplinary agencies in California. (See maj. opn., *ante*, 124 Cal.Rptr.2d at p. 705, 53 P.3d at p. 122.)

Section 317.5 and similar provisions are based on a simple premise. Incentives matter. Free or undervalued goods are overused. Thus, the creation of disincentives to discourage the overuse of public goods is both an equitable necessity and an economic imperative. Legislative bodies at all levels of government have implemented fee- and cost-shifting schemes that require litigants to decide whether their claim is worth pursuing. (See *Abdul-Akbar v. McKelvie* (3d Cir.2001) 239 F.3d 307, 318; *Flint v. Haynes* (4th Cir.1981) 651 F.2d 970, 973.) Such schemes are generally uncontroversial unless they effectively deny access to indigents (*Boddie v. Connecticut* (1971) 401 U.S. 371, 380–381, 91 S.Ct. 780, 28 L.Ed.2d 113; *Lindsey v. Normet* (1972) 405 U.S. 56, 78–79, 92 S.Ct. 862, 31 L.Ed.2d 36), or are so confiscatory, ruinous or otherwise prohibitive that they deny due process (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 363, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.) (*CTA*)).

*50 If that were still the law in California, Mr. Zuckerman would have no argument here. The question concerning the constitutionality of section 317.5 arises as a result of this court's decision in *CTA, supra*, 20 Cal.4th 327, 84 Cal.Rptr.2d 425, 975 P.2d 622, in which a majority of this court held such disincentives to be unconstitutional. Reaching that conclusion required considerable effort. Ordinarily, we evaluate the merits of a facial challenge by considering only the text of the measure itself, not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.) “ ‘To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute.... Rather, [plaintiffs] must demonstrate that the act's provisions inevitably pose a present *total and fatal* conflict with the applicable constitutional prohibitions.’ ” ***715(*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 421, 66 Cal.Rptr.2d 210, 940 P.2d 797 (dis. opn. of Brown, J.), quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180–181, 172 Cal.Rptr. 487, 624 P.2d 1215; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 60–61, 51 Cal.Rptr.2d 837, 913 P.2d 1046; *Tobe v. City of Santa Ana*, at p. 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145; *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267, 5 Cal.Rptr.2d 545, 825 P.2d 438.)

While purporting to apply that stringent standard, the majority in *CTA* sustained a facial challenge to an Education Code section that permitted the state to charge half the cost of a hearing, including the cost of the adjudicator, to a dismissed teacher who demanded the hearing, if the dismissal is ultimately upheld. This court found the provision facially invalid despite the fact that the teacher had a full hearing. The plaintiff could not show a total and fatal conflict with his right to due process because he had been deprived of nothing to which he was constitutionally entitled. He simply decided he did not wish to pay half the cost of the hearing

after his dismissal was upheld. Nevertheless, the court invalidated the statute because it created “an incentive to pursue only cost-effective strategies and tactics” **131(*CTA, supra*, 20 Cal.4th 327, 359, 84 Cal.Rptr.2d 425, 975 P.2d 622 (dis. opn. of Werdegar, J.)), and that, in the majority's view, impermissibly discouraged ultimately unsuccessful efforts. To put it another way, this court held that a litigant who defends against a threatened infringement by the state of a constitutionally protected interest is entitled, as a function of due process, to have the taxpayers foot the entire bill, even in a losing cause.

I did not agree with the *CTA* decision in 1999; I do not agree with it now. But, Mr. Zuckerman's logic in relying on it cannot be faulted. Although section 317.5 is a reimbursement statute that applies regardless of whether *51 the disciplined chiropractor requests a hearing, its provision that the disciplined chiropractor may be required to pay costs after charges are filed creates the same kind of disincentive this court rejected in *CTA*. In this case, however, the majority does not find the regulation facially invalid. I agree. The court does not stop there, however; it engrafts a raft of *CTA*-inspired “requirements” that effectively eviscerate the regulation. Having used *CTA* to turn the due process requirement upside down, the court now uses this case to turn the standard for determining facial validity inside out. Litigants challenging the facial validity of a statute will no longer be required to show that a provision is unconstitutional under any and all circumstances. Instead, the government will be required to show that no conceivable application could lead to an unconstitutional result.

Moreover, the subjective, amorphous, and miserably inexact standards the court imposes on this Board (see maj. opn., *ante*, 124 Cal.Rptr.2d at pp. 710–711, 53 P.3d at pp. 126–128), and that will presumably apply to all similar provisions, will no doubt lead to interminable litigation over the accuracy of the Board's assessment. Terms like “potentially meritorious,” “subjective good faith” and “colorable challenge,” not to mention “relatively innocuous misconduct,” are notoriously difficult concepts on which to get a firm grasp. Indeed, in *CTA*, this court rejected the argument that constitutional infirmities in Education Code section 44944, subdivision (e) should be challenged on a case-by-case basis because an assessment of the probable merit of the teacher's position would be a virtual impossibility. (*CTA, supra*, 20 Cal.4th at p. 350, 84 Cal.Rptr.2d 425, 975 P.2d 622.) We now issue an open invitation to endless litigation, which will necessarily overwhelm ***716 any benefit to be gained from section 317.5's disincentive—what's left of it.

Let us not be coy. Disincentives have a *chilling* effect. That is their purpose. However, creating economic disincentives to ration a scarce public resource like the administrative review process is not necessarily the same as impermissibly chilling the exercise of a constitutional right. (See, e.g., *Jenkins v. Anderson* (1980) 447 U.S. 231, 236, 100 S.Ct. 2124, 65 L.Ed.2d 86 [the Constitution does not forbid “ ‘every government-imposed choice ... that has the effect of

discouraging the exercise of constitutional rights' ”]; see *Corbitt v. New Jersey* (1978) 439 U.S. 212, 218, 99 S.Ct. 492, 58 L.Ed.2d 466; *In re Green* (D.C.Cir.1981) 669 F.2d 779, 786; *People v. Amor* (1974) 12 Cal.3d 20, 28, 114 Cal.Rptr. 765, 523 P.2d 1173.)

In *CTA*, a teacher whose dismissal was upheld at an administrative hearing requested by the teacher was asked to pay half the cost of the hearing. The purpose of the law was to “ ‘discourag[e] meritless administrative proceedings’ ” and “ ‘prevent[] groundless challenges to disciplinary proceedings.’ ” (*CTA, supra*, 20 Cal.4th at p. 341, 84 Cal.Rptr.2d 425, 975 P.2d 622.) To my mind, that purpose was not only *52 unobjectionable, but entirely laudable. And a statute need not operate perfectly to pass constitutional muster, particularly a facial challenge. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502, 97 Cal.Rptr.2d 334, 2 P.3d 581.) Constitutional constraints require neither a perfect nor a best available fit between a statute's goals and the means employed in that statute to further that goal. (*Abdul-Akbar v. McKelvie, supra*, 239 F.3d at p. 319.)

The state fisc is limited; the demands on it are limitless. In 1999, I was not prepared to say that providing free administrative appeals to teachers with groundless claims was more important than, for example, providing smaller classes for elementary school students or repairing aging school facilities. Today, I am not prepared to say that the **132 profligate waste of time, energy, and judicial talent pursuing the majority's ideal of the perfectly calibrated administrative response is mandated in every case by the due process clause. Due process does not mean perfect process; it means reasonable process.

Because I believe *CTA* was wrongly decided and this case just compounds the problem, I concur only in the result.

Title 1, California Code of Regulations

§ 1042. Cost Recovery

(a) An agency shall allege in its pleading any request for costs, citing the applicable cost recovery statute or regulation.

(b) Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

(2) For services provided by persons who are not agency employees, the Declaration shall be executed by the person providing the service and describe the general tasks performed, the time spent on each task and the hourly rate or other compensation for the service. In lieu of this Declaration, the agency may attach to its Declaration copies of the time and billing records submitted by the service provider.

(3) When the agency presents an estimate of actual costs incurred, its Declaration shall explain the reason actual cost information is not available.

(4) The ALJ may permit a party to present testimony relevant to the amount and reasonableness of costs.

(c) The proposed decision shall include a factual finding and legal conclusion on the request for costs and shall state the reasons for denying a request or awarding less than the amount requested. Any award of costs shall be specified in the order.

Authority cited: Section 11370.5(b), Government Code.

Reference: Sections 125.3(c), 3753.5(a), 4990.17 and 5107(b), Business and Professions Code; and Sections 11507.6 and 11520(b), Government Code.

{Operative December 1, 2004}

Court of Appeal, Second District, Division 5, California
IMPORTS PERFORMANCE et al., Petitioners and Appellants,
v.
DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF AUTOMOTIVE REPAIR,
Respondent and Respondent.

No. B228544
Nov. 10, 2011.
Certified for Partial Publication ^{FN*}

FN* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication with the exception of the Background, and Discussion, part III.

As Modified Dec. 7, 2011.
Review Denied Feb. 22, 2012.

Background: Licensees, owner and operator of an automotive service station and a mechanic who worked at station, filed petition for writ of mandate or administrative mandamus to set aside decision of Department of Consumer Affairs, Bureau of Automotive Repair, revoking smog check station license for station, revoking mechanic's individual smog check technician license, and requiring licensees to pay over \$35,000 for the Bureau's costs of investigating and prosecuting the case. The Superior Court, Los Angeles County, No. BS124752, David P. Yaffe, J., denied the petition, and licensees appealed.

Holdings: The Court of Appeal, Mosk, J., held that:

- (1) Bureau was required to apply preponderance of the evidence standard in revocation proceedings;
- (2) revocation of licenses was warranted; and
- (3) licensees could be required to pay entire amount of Bureau's costs of investigation and prosecution.

Affirmed.

**404 Kinsella Weitzman Iser Kump & Aldisert, Alan Kossoff, Santa Monica, for Petitioners and Appellants Imports Performance, Razmik Vartan, and Darryl Dean Rowe.

Kamala D. Harris, Attorney General, Gregory J. Sahute, Supervising Deputy Attorney General, Terrence M. Mason, Deputy Attorney General, for Respondent Department of Consumer Affairs, Bureau of Automotive Repair.

MOSK, J.

*914 INTRODUCTION

Razmik Vartan (Vartan), owner of and doing business as Imports Performance,^{FN1} held an automotive repair dealer registration and smog check station license for Imports Performance. Vartan also held an advanced emission specialist (smog check) technician license. Darryl Rowe (Rowe), a mechanic at Imports Performance, also held an advanced emission specialist technician license. Respondent, here and in the proceeding below, the Department of Consumer Affairs, Bureau of Automotive Repair (Bureau) conducted an undercover investigation of the smog check inspection and vehicle repair operations at Imports Performance. Following that investigation, the Bureau revoked Vartan's smog check station license probation for Imports Performance; revoked and stayed revocation of Rowe's advanced emission specialist technician license pending completion of four years' probation;^{FN2} and ordered Vartan, as owner of Imports Performance, and Rowe to pay \$35,366.40 for the Bureau's costs of investigating and prosecuting the case. Imports Performance, Vartan, and Rowe (petitioners) filed a petition for writ of mandate or administrative mandamus to set aside the Bureau's decision. The trial court denied the petition, and petitioners appeal.

FN1. "Vartan" and "Imports Performance" are generally used interchangeably.

FN2. At the time of the investigation, Vartan's smog check station license was subject to probation.

On appeal, petitioners claim that the Bureau used the wrong standard of proof in the revocation proceedings; insufficient evidence supports the Bureau's findings of smog test violations; and the Bureau levied excessive "discipline" in revoking Vartan's smog check station license, revoking and placing Rowe's advanced emission specialist technician license on probation, and ordering payment of \$35,366.40 in costs for investigation and prosecution of the case.

In the published portion of this opinion we determine that the Bureau correctly **405 used the preponderance of the evidence standard of proof and did not err in imposing discipline and costs.

BACKGROUND ^{FN**}

FN** See footnote *, *ante*.

*915 DISCUSSION

I. Standards of Review

[1] “ ‘In reviewing the trial court’s ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]’ [Citation.]” (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217, 85 Cal.Rptr.2d 660.)

[2][3] We review for abuse of discretion an administrative agency’s revocation of a license. (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 691–692, 80 Cal.Rptr.2d 317; *Williamson v. Board of Medical Quality Assurance* (1990) 217 Cal.App.3d 1343, 1347, 266 Cal.Rptr. 520 [“ ‘The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.]’ [Citation.]”].) “ ‘Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed.’ [Citations.] This rule is based on the rationale that ‘the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.’ [Citation.]” (*Hughes v. Board of Architectural Examiners, supra*, 68 Cal.App.4th at p. 692, 80 Cal.Rptr.2d 317.)

II. Standard of Proof

Petitioners contend that the Bureau improperly applied the preponderance of the evidence standard of proof in revoking and staying revocation of Rowe’s advanced emission specialist technician license and in revoking Vartan’s smog check station license probation. Petitioners argue that the proper standard of proof was clear and convincing evidence.

In their argument concerning the proper standard of proof, petitioners do not distinguish between the status of Rowe’s advanced emission specialist technician license and the status of Vartan’s smog check station license. At the relevant times, Rowe’s advanced emission specialist technician license was in good standing while Vartan’s smog check station license was on probation. Although there is no indication in the record as to the standard of proof used by the Bureau, the parties all assume that the Bureau used the preponderance of the evidence standard of proof. As discussed below, we conclude that the same preponderance of the evidence standard of proof applies to the revocation of Rowe’s license and to the revocation of Vartan’s license probation.

**916 A. Revocation of Rowe's Advanced Emission Specialist Technician License*

[4][5] “Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” (Evid. Code, § 115.) In determining the proper standard of proof to apply in administrative license revocation proceedings, courts have drawn a distinction between professional licenses such as those **406 held by doctors (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856, 185 Cal.Rptr. 601), lawyers (*Furman v. State Bar* (1938) 12 Cal.2d 212, 229, 83 P.2d 12), and real estate brokers (*Small v. Smith* (1971) 16 Cal.App.3d 450, 457, 94 Cal.Rptr. 136) on the one hand, and nonprofessional or occupational licenses such as those held by food processors (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1894, 58 Cal.Rptr.2d 571) and vehicle salespersons (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318–319, 90 Cal.Rptr.2d 277), on the other hand. In proceedings to revoke professional licenses, the decision makers apply the clear and convincing evidence standard of proof, while in proceedings to revoke nonprofessional or occupational licenses, the decision makers apply the preponderance of the evidence standard of proof.

The “sharp distinction between professional licenses, on the one hand, and ... nonprofessional licenses, on the other, supports the distinction in the standards of proof applicable in proceedings to revoke these two different types of licenses. Because a professional license represents the licensee's fulfillment of extensive educational, training and testing requirements, the licensee has an extremely strong interest in retaining the license that he or she has expended so much effort in obtaining. It makes sense to require that a higher standard of proof be met in a proceeding to revoke or suspend such a license. The same cannot be said for a licensee's interest in retaining a [nonprofessional] license.” (*San Benito Foods v. Veneman, supra*, 50 Cal.App.4th at p. 1894, 58 Cal.Rptr.2d 571.)

Although an applicant for an advanced emission specialist technician license must complete certain coursework (Cal.Code Regs., tit. 16, § 3340.28, subd. (b)(3)) and pass an examination (Cal.Code Regs., tit. 16, § 3340.29), such requirements are not similar to the “extensive educational, training and testing requirements” necessary to obtain a professional license. (*San Benito Foods v. Veneman, supra*, 50 Cal.App.4th at p. 1894, 58 Cal.Rptr.2d 571.)^{FN5} Accordingly, an advanced emission specialist technician license is a nonprofessional *917 or occupational license and proceedings to revoke such a license are governed by the preponderance of evidence standard of proof.

FN5. A “professional” is “[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency.” (Black's Law Dictionary (9th ed. 2004) 1329; see Garner, *A Dictionary of Modern Legal Usage* (2d. ed. 2001) 699 [the word profession “has been much debased of late....”])

Petitioners rely on *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 257 Cal.Rptr. 320, 770 P.2d 732 for the proposition that the Bureau should have used the clear and convincing evidence standard of proof because that standard is used in actions to revoke a contractor's license and the requirements to obtain a contractor's license are comparable to or less stringent than those to obtain a "smog license." Petitioners' reliance is misplaced. Although the Supreme Court noted that the administrative law judge "issued a proposed decision finding 'clear and convincing evidence beyond a reasonable certainty' to sustain the charges" (*id.* at p. 605, 257 Cal.Rptr. 320, 770 P.2d 732), the propriety of the administrative law judge's use of that standard of proof was not at issue in the case. Instead, the case concerned the proper interpretation of a statute under which the contractor was charged. (*Id.* at pp. 606–609, 257 Cal.Rptr. 320, 770 P.2d 732.)

Petitioners cite *Owen v. Sands* (2009) 176 Cal.App.4th 985, 98 Cal.Rptr.3d 167 for the proposition that in license disciplinary**407 proceedings two different standards of proof are applied—the preponderance of the evidence standard to citation proceedings and the clear and convincing evidence standard to suspension and revocation proceedings. Petitioners' reliance on this case is not justified. In *Owen v. Sands*, a licensed contractor challenged a citation he was issued concerning work he performed on a private residence. (*Id.* at pp. 988–989, 98 Cal.Rptr.3d 167.) The issue on appeal was whether the clear and convincing evidence standard that courts said should be applied in certain license suspension and revocation proceedings (doctor, attorney, and real estate licenses) also applied in a citation proceeding. (*Id.* at p. 989, 98 Cal.Rptr.3d 167.) The Court of Appeal held that the preponderance of the evidence standard applies in citation proceedings. (*Id.* at pp. 989–990, 98 Cal.Rptr.3d 167.) The court did not hold that the clear and convincing evidence standard applies to license suspension or revocation proceedings generally or to a proceeding to suspend or revoke a contractor's license specifically.

B. Revocation of Vartan's Smog Check Station License Probation

[6] Although the standard of proof to revoke a professional license is clear and convincing evidence, the standard of proof to revoke the *probation* of a professional license is preponderance of the evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1435, 1441, 109 Cal.Rptr.3d 826 [revocation of a dentist's license probation].) Even if a smog check station license is a professional license, an assumption we do not accept,^{FN6} a *918 proceeding to revoke the probation of such a license is subject to the preponderance of the evidence standard of proof and not the clear and convincing evidence standard of proof. (*Ibid.*)

^{FN6} Proceedings to revoke a license to operate a long term health care facility (Health & Saf.Code, § 1428, subd. (e)), to operate a substance abuse treatment facility (Health & Safe.Code, § 11834.37, subd. (b)), and to operate a child day care facility (Health &

Saf.Code, § 1596.887, subd. (b)) all are explicitly subject to the preponderance of the evidence standard of proof.

Petitioners argue that the clear and convincing evidence standard should apply to the revocation of Vartan's smog check station license because Imports Performance's liability could only have been based on Rowe's conduct and "the standard of proof for Rowe was clear and convincing evidence." Even if petitioners' vicarious liability theory is correct and the standard of proof for revoking a smog check station license is the standard of proof used for revoking Rowe's advanced emission specialist technician license, petitioners' argument fails because, as discussed above, the standard of proof for revoking Rowe's license is preponderance of the evidence.

III. Petitioners' Violations ^{FN***}

^{FN***} See footnote *, *ante*.

IV. Discipline and Costs

Petitioners contend that the revocation of Vartan's smog check station license probation, the revocation and stay of revocation of Rowe's advanced emission specialist technician license, and the order that Vartan and Rowe pay \$35,366.40 for the Bureau's costs of investigating and prosecuting the case are "unfair and clearly excessive." Because the trial court did not err in upholding the Bureau's revocation of Vartan's smog check station license probation or in revoking and staying revocation of Rowe's advanced emission specialist technician license, the Bureau order that Vartan and Rowe pay the Bureau the **408 reasonable costs of its investigation and prosecution of the case was justified.

A. Discipline

[7] Vartan contends that the revocation of his smog check station license probation was excessive because Imports Performance had been an Automobile Association of America (AAA) approved facility; a number of Imports Performance's customers testified as to the quality of his work and his honesty; he was active in his community; he had an insignificant record of *919 prior discipline with the Bureau; and there was no finding that he had engaged in dishonest, fraudulent, or deceitful acts. Rowe contends that the revocation of his advanced emission specialist technician license was excessive because a number of Imports Performance's customers testified as to the quality of his work and his honesty; he had never before been the subject of Bureau discipline; he had "an outstanding resume, impeccable reputation, and extensive experience"; and there was no finding that he had engaged in dishonest, fraudulent, or deceitful acts.

In revoking Vartan's smog check station license probation, the Bureau considered Imports Performance's current and prior violations of the Motor Vehicle Inspection Program and the fact that Vartan had been disciplined twice before for violations of smog check inspection and testing and was "currently on probation for improper acts." The Bureau also took into account the high marks Imports Performance received from AAA in customer satisfaction. The Bureau ruled that revocation of Vartan's smog check station license would ensure the protection of the public's health, safety, and welfare. (See *San Benito Foods v. Veneman*, *supra*, 50 Cal.App.4th at p. 1893, 58 Cal.Rptr.2d 571 ["The purpose of an administrative proceeding concerning the revocation or suspension of a license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners."].) Moreover, the Bureau did not revoke Vartan's automotive repair dealer registration, thus allowing him to continue to operate Imports Performance as a vehicle repair business, if not as a smog check inspection business. The Bureau's revocation of Vartan's license was not a manifest abuse of its discretion. (*Williamson v. Board of Medical Quality Assurance*, *supra*, 217 Cal.App.3d at p. 1347, 266 Cal.Rptr. 520; *Hughes v. Board of Architectural Examiners*, *supra*, 68 Cal.App.4th at pp. 691–692, 80 Cal.Rptr.2d 317.)

[8] In reaching its decision with respect to Rowe's advanced emission specialist technician license, the Bureau noted that Rowe worked on all three undercover vehicles, and the Bureau found that he committed 10 violations. The Bureau ruled, however, that because Rowe had no prior history of discipline and had extensive Automotive Service Excellence certifications, the public's health, safety, and welfare would be protected by imposing a stayed revocation of Rowe's license and four years of probation. By staying revocation of Rowe's license, the Bureau enabled Rowe to continue to perform smog check inspections, if not at Imports Performance. Having properly considered the aggravating and mitigating factors in reaching its decision, the Bureau did not manifestly abuse its discretion in disciplining Rowe's license. (*Williamson v. Board of Medical Quality Assurance*, *supra*, 217 Cal.App.3d at p. 1347, 266 Cal.Rptr. 520; *Hughes v. Board of Architectural Examiners*, *supra*, 68 Cal.App.4th at pp. 691–692, 80 Cal.Rptr.2d 317.)

*920 B. Costs

[9] Under Business and Professions Code section 125.3 (section 125.3), subdivision**409 (a),^{FN7} an entity bringing a license or probation revocation proceeding may recover the reasonable costs of its investigation and prosecution of the case. A certified copy of the actual costs is prima facie evidence of the reasonable costs of investigating and prosecuting the case. (§ 125.3, subd. (c) ^{FN8}.) The Bureau submitted a certified copy of its actual costs of investigating and prosecuting the case.^{FN9}

FN7. Section 125.3, subdivision (a) provides, in relevant part, “Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the department [of consumer affairs] ..., upon request of the entity bringing the proceeding, the administrative law judge may direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.”

FN8. Section 125.3, subdivision (c) provides, “A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the entity bringing the proceeding or its designated representative shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.”

FN9. The initial certified copy of actual costs consisted of \$7,525.90 for investigative services; \$225 for undercover vehicle preparation, documentation, and operation; and \$27,823.50 in Attorney General fees for a total of \$35,574.40. Thereafter, the Attorney General submitted a certified copy of its fees reflecting \$32,879.50 in fees.

Petitioners contend that the assessment of \$35,366.40 for the Bureau's costs of investigating and prosecuting the case is “unfair and clearly” excessive because the Bureau did not apply a pro rata reduction of costs that took into account the charges and issues on which petitioners prevailed. In support of this contention, petitioners note that the Bureau sought to revoke four licenses and prevailed only as to two licenses. In addition, as to the two licenses that the Bureau revoked, the Bureau failed to prove all of the supporting allegations. Finally, petitioners prevailed as to two issues in their initial writ petition, in which the trial court had set aside certain findings and conclusions and remanded the matter to the Bureau.

Section 125.3, subdivision (a) allows an entity bringing a license or probation revocation proceeding to recover from a license holder found to have committed a violation or violations the reasonable costs of its investigation and prosecution of the case. Section 125.3 does not require an administrative law judge to award costs on a pro rata basis taking into account the charges and issues on which the prosecuting entity did not prevail. Petitioners do not cite any authority in support of their pro rata award theory. In its Decision After Remand, the Bureau noted that not all of the allegations in the Accusation had been proven, but the administrative law judge had not made *921 an offset for the unproven allegations because they were part of the overall investigation and the prosecution of the case, and no distinct and separable efforts were made in connection with the unproven allegations. Accordingly, the Bureau did not err in ordering Vartan

and Rowe to pay the Bureau's reasonable costs of investigation and prosecution in the amount of \$35,366.40.

DISPOSITION

The judgment is affirmed. The Bureau is awarded its costs on appeal.

We concur: ARMSTRONG, Acting P.J., and KRIEGLER, J.

V. **EXAMS/LICENSING**

A. Update on October 2013 Exams

VI. APPROVAL OF DELINQUENT REINSTATEMENTS

APPROVAL OF DELINQUENT REINSTATEMENTS

Motion: Approve the following 3 and 5-year delinquent reinstatement applications.

CIVIL

MAN CHOW

Reinstate applicant's civil license once he/she takes and passes the Board's Laws and Regulations Examination.

LISA WANG

Reinstate applicant's civil license once he/she takes and passes the Board's Laws and Regulations Examination, and pays all delinquent and renewal fees.

ELECTRICAL

PHILLIP CROW

Reinstate applicant's electrical license once he/she pays all delinquent and renewal fees.

MECHANICAL

MARK LEAFSTEDT

Reinstate applicant's mechanical license once he/she pays all delinquent and renewal fees.

MATTHEW STEIN

Reinstate applicant's mechanical license once he/she takes and passes the Board's Laws and Regulations Examination, and pays all delinquent and renewal fees.

VII. **CONSIDERATION OF RULEMAKING PROPOSALS**

- A. Proposal to Amend Title 16, California Code of Regulations Sections 464 (Corner Records)
- B. Proposal to Amend Title 16, California Code of Regulations sections 416 and 3060 (Substantial Relationship Criteria)
- C. Adoption of Proposed Amendments to Title 16, California Code of Regulations sections 3061 (Criteria for Rehabilitation), and 3064 and 419 (Disciplinary Orders)
- D. Proposal to Amend Title 16, California Code of Regulations Section 3005, Add a Retired Status Fee for Geologists and Geophysicists

Amendments to Board Rule 464 (Corner Record)

Board Rule 464 describes the requirements necessary for the filing and preparation of a corner record and provides a Board approved form to be used by those authorized to practice land surveying when preparing a corner record.

For the following reasons, staff recommends that Board Rule 464 be amended to update the Board approved form in order to better meet the public and professional needs. Proposed changes include:

- a. Removal of the light blue grid lines and seal designation.
- b. Additional check boxes to clarify the need and intent of the corner record.
- c. A combined area where the surveyor can provide narrative related to the corner found identified and monument as found and set or reset.
- d. The addition of an area for an Agency Index

During the rulemaking process, amendments may be made to the language either by the Board's own motion or based on comments received during the initial 45-day public comment period. Substantive amendments would require additional noticed comment periods after the 45-day comment period.

The recommended amendments to Board Rule 464 are included in this agenda. A revised corner record form is also included. At this time, staff recommends that the Board approve these amendments and direct staff to begin the formal rulemaking process to amend these regulations.

RECOMMENDED MOTION:

Approve the proposed amendments to Board Rule 464 (Corner Record), as shown, and direct staff to begin the formal rulemaking process to amend the regulations.

464. Corner Record.

(a) The corner record required by Section 8773 of the Code for the perpetuation of monuments shall contain the following information for each corner identified therein:

- (1) The county and, if applicable, city in which the corner is located.
- (2) An identification of the township, range, base, and meridian in which the corner is located, if applicable.
- (3) Identification of the corner type (example: government corner, control corner, property corner, etc.).
- (4) Description of the physical condition of
 - (A) the monument as found and
 - (B) any monuments set or reset.
- (5) The date of the visit to the monument when the information for the corner record was obtained.
- (6) For Public Land Corners for which a corner record is required by Section 8773(a) of the Code, a sketch shall be made showing site recovery information that was used for the corner. For other kinds of corners, a drawing shall be made which shows measurements that relate the corner to other identifiable monuments.
- (7) A reference to the California Coordinate System is optional at the discretion of the preparer of the record.
- (8) The date of preparation of the corner record and, as prescribed by Section 8773.4 of the Code, the signature and title of the chief of the survey party if the corner record is prepared by a United States Government or California State agency or the signature and seal of the land surveyor or civil engineer, as defined in Section 8731 of the Code, preparing the corner record.
- (9) The date the corner record was filed and the signature of the county surveyor.
- (10) A document or filing number.
- (11) Identification of PLS Reference, if applicable.
- (12) Identification of action(s) taken relating to corner/monument condition.
- (13) An Agency Index Number, if applicable.

(b) A corner record shall be filed for each public land survey corner which is found, reset, or used as control in any survey by a land surveyor or a civil engineer. Exceptions to this rule are identified in Section 8773.4 of the Code.

(c) The corner record shall be filed within 90 days from the date a corner was found, set, reset, or used as control in any survey. The provisions for extending the time limit shall be the same as provided for a record of survey in Section 8762 of the Code.

(d) A corner record may be filed for any property corner, property controlling corner, reference monument, or accessory to a property corner, together with reference to record information. Such corner record may show one or more property corners, property controlling corners, reference monuments, or accessories to property corners on a single corner record document so long as it is legible, clear, and understandable.

(e) When conducting a survey which is a retracement of lines shown on a subdivision map, official map, or a record of survey, where no material discrepancies with these records are found and where sufficient monumentation is found to establish the precise location of property corners thereon, a corner record may be filed in lieu of a record of survey for any property corners which are set or reset or found to be of a different character than indicated by prior records. Such corner records may show one or more property corners, property controlling corners, reference monuments or accessories to property corners on a single corner record document so long as it is legible, clear, and understandable.

(f) The standard markings and standard abbreviations used by the Bureau of Land Management (formerly the General Land Office) of the United States Department of the Interior shall be used in the corner record.

(g) The corner record shall be entitled ~~filed on a form prescribed by the Board. The approved form is BORPELS-1297BPELSG-2014, hereby incorporated by reference.~~

CORNER RECORD

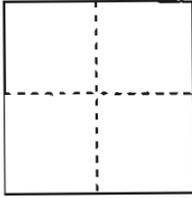
Agency Index _____

Document Number _____

City of _____

County of _____, California

Brief Legal Description _____



CORNER TYPE

Government Corner Control
 Meander Property
 Rancho Other

Date of Survey _____

COORDINATES(Optional)

N _____

E _____

Zone _____ NAD27 NAD83

NAD83 Epoch _____

Elev. _____

Vert. Datum: NGVD29 NAVD88

Meas. Units: Metric Imperial

PLS Act Ref.: 8785(d) 8773 Other _____ 8771(b)

Corner/Monument: Left as found Established Rebuilt Pre-Construction
 Found and tagged Reestablished Referenced Post-Construction

Narrative of corner identified and monument as found and set or reset:

See sheet #2 for description(s):

SURVEYOR'S STATEMENT

This Corner Record was prepared by me or under my direction in conformance with the Professional Land Surveyors' Act on _____, _____.

Signed _____ P.L.S. or R.C.E. No. _____

COUNTY SURVEYOR'S STATEMENT

This Corner Record was received _____ and examined and filed _____.

Signed _____ P.L.S. or R.C.E. No. _____

Title _____

County Surveyor's Comment _____

Document Number	Agency Index
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**Proposal to Amend Title 16, California Code of Regulations sections 416 and 3060
(Substantial Relationship Criteria)**

At its August 28-29, 2013, meeting, the Board discussed Title 16, California Code of Regulations sections 416 and 3060, which outline the “substantial relationship criteria” to be used to determine if a criminal conviction is “substantially related” to the qualifications, functions, and duties of the profession when the Board is considering denying issuance of a license or formal disciplinary action against a license based on a criminal conviction.

Following that discussion, the Board directed staff to do further research regarding what other boards, bureaus, and programs include in their regulations and to provide a recommendation to the Board regarding any amendments that should be made to these regulations to provide added clarity. Staff is in the processing of conducting this research and anticipates providing a report with recommendations at the next Board meeting.

**APPROVAL AND ADOPTION OF RULEMAKING PROPOSALS
RELATING TO
ENFORCEMENT REGULATIONS
[Title 16, California Code of Regulations Sections 3061, 3064 and 419]**

The proposed amendments to the above regulations were noticed for public comment on June 14, 2013. The 45-day period for the submittal of written comments ended on July 29, 2013. No written comments were received regarding this proposed rulemaking decision.

No public hearing was scheduled regarding this rulemaking proposal, and a public hearing was not requested during the time period in which to request a hearing.

The proposed changes to Sections 3061, 3064, and 419 are as follows:

- Section 3061-Criteria for Rehabilitation
Amend Section 3061 to match Section 418 and to update other terminology used.
- Sections 3064 and 419–Disciplinary Orders
Amend Section 3064 to match Section 419 and to update other terminology used.

The proposed changes to Section 3060 were withdrawn from the regulation package, pursuant to the direction of the Board at the August 28th-29th, 2013 Board Meeting.

The amendments will adhere to the Board’s Strategic Plan, Objective 2.10: “Review statutes and regulations to provide consistency among all of the Board’s regulated professions.”

RECOMMENDED MOTION

Adopt the proposed changes to Title 16, California Code of Regulations sections 3061, 3064 and 419 and direct staff to finalize the rulemaking file for submittal to the Department of Consumer Affairs and the Office of Administrative Law for review and approval.

**BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND
GEOLOGISTS**

Proposed Language

(1) Amend section 3061 of Article 5, Division 29, Title 16 of the California Code of Regulations to read as follows:

3061. Criteria for ~~Determining Rehabilitation or Appropriate Discipline.~~

(a) When considering the denial of ~~the registration of an application for licensure as a professional geologist, or professional geophysicist, or certification as a specialty geologist, geophysicist or specialty geophysicist, or geologist-in-training~~ under Section 480 of the Code, the Board, in evaluating the rehabilitation of the applicant and his or her present eligibility for ~~registration such a license or certification~~, will consider the following criteria:

(1) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(2) Evidence of any act(s) committed prior to or subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Code.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(4) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(5) Evidence, if any, of rehabilitation submitted by the applicant.

(6) Total criminal record.

(7) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.

(b) When considering the suspension or revocation of the ~~registration license of a professional geologist, or specialty geologist, professional geophysicist, or certification of a specialty geologist, specialty geophysicist, or geologist-in-training on the grounds that the registrant has been convicted of a crime or violation of the Geologist and Geophysicist Act, the board or administrative law judge, in evaluating the appropriate level of discipline or rehabilitation of such person and his or her present eligibility for registration will consider the following criteria under Section 490 of the Code, the Board will consider the following criteria in evaluating the rehabilitation of such person and his or her present eligibility to retain his or her license:~~

(1) Nature and severity of the act(s) or offense(s) under consideration as grounds for suspension or revocation.

~~(2) Total criminal record.~~ Evidence of any act(s) committed prior to or subsequent to the act(s) or offense(s) under consideration as grounds for suspension or revocation under Section 490 of the Code.

(3) The time that has elapsed since commission of the act(s) or offense(s) referred to in subdivision (1) or (2).

(4) ~~Whether~~ The extent to which the licensee has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the licensee.

(5) If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.

(6) Evidence, if any, of rehabilitation submitted by the licensee.

(7) ~~Actual or potential harm to the public, client, or employee.~~ Total criminal record.

~~(8) Prior disciplinary record.~~

~~(9) Number and/or variety of current violations.~~

(c) When considering a petition of reinstatement of the ~~registration certification of as a geologist-in-training, specialty geologist, or specialty geophysicist, or the license of a professional geologist; specialty geologist, or professional geophysicist or specialty geophysicist,~~ the Board shall evaluate evidence of rehabilitation submitted by the petitioner, ~~considering those criteria specified in subsection (b).~~ including but not limited to the following:

(1) Educational courses, including college-level courses, seminars, and continuing professional development courses, completed after the effective date of the Board's decision ordering revocation.

(2) Professional geological or geophysical work done under the responsible charge of a licensee in good standing or under the direction of a person legally authorized to practice.

(3) Payment of restitution to the consumer(s) by the petitioner.

(4) Actual or potential harm to the public, client(s), employer(s), and/or employee(s) caused by the action(s) that led to the revocation or that could be caused by the reinstatement of the certificate, license, or authority.

(5) The criteria specified in subsection (b)(1) through (7), as applicable.

(6) Disciplinary history, other than criminal actions, after the revocation.

(7) Recognition by the petitioner of his or her own actions and/or behavior that led to the revocation.

(8) Correction of the petitioner's actions and/or behavior that led to the revocation.

Note: Authority cited: Section 7818, Business and Professions Code. Reference: Sections 475, 480, 482, 490, and 7862, Business and Professions Code.

(2) Amend section 3064 of Article 5, Division 29 of Title 16 of the California Code of Regulations to read as follows:

3064. Disciplinary Guidelines Orders.

~~In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the board shall consider the disciplinary guidelines entitled "Disciplinary Guidelines" (initially published July 1992, republished January 1996, revised June 1998) which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board in its sole discretion determines that the facts of the particular case warrant such a deviation for example: the presence of mitigating factors; the age of the case; evidentiary problems.~~
For violations of Business and Professions Code section 7860 which result in an order issued in accordance with Chapters 4.5 and 5 of Part 1 of Division 3 of Title 2 of the Government Code against a professional geologist and/or a professional geophysicist license, the following provisions shall apply to disciplinary orders contained in decisions of the Board:

(a) The minimum disciplinary order shall be revocation. The maximum disciplinary order shall be revocation of the license.

(b) If warranted by extenuating and/or mitigating factors in the matter, the disciplinary order may be stayed by an express condition that the respondent comply with probationary conditions. The minimum time period in which the respondent shall have to comply with the conditions shall be two years. For purposes of this section, this time period shall be known as the "period of probation."

(c) All decisions containing stayed disciplinary orders as described in subdivision (b) shall include the following probationary conditions:

(1) The respondent shall obey all laws and regulations related to the practices of professional geology and geophysics.

(2) The respondent shall submit such special reports as the Board may require.

(3) The period of probation shall be tolled during the time the respondent is practicing exclusively outside the state of California. If, during the period of probation, the respondent practices exclusively outside the state of California, the respondent shall immediately notify the Board in writing.

(4) If the respondent violates the probationary conditions in any respect, the Board, after giving the respondent notice and the opportunity to be heard, may vacate the stay and reinstate the disciplinary order which was stayed. If, during the period of probation, an accusation or petition to vacate stay is filed against the respondent, or if the matter has been submitted to the Office of the Attorney General for the filing of such, the Board shall have continuing jurisdiction until all matters are final, and the period of probation shall be extended until all matters are final.

(5) Upon successful completion of all of the probationary conditions and the expiration of the period of probation, the respondent's license shall be unconditionally restored.

(d) All decisions containing stayed disciplinary orders as described in subdivision (b) may include one or more of the following probationary conditions:

(1) The respondent's license shall be suspended for a period not to exceed two years. If a suspension of the license is ordered, it shall begin on the effective date of the decision.

(2) The respondent shall successfully complete and pass a course in professional ethics, approved in advance by the Board or its designee. The probationary condition shall include a time period in which this course shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(3) Within 30 days of the effective date of the decision, the respondent shall provide the Board with evidence that he or she has provided all persons or entities with whom he or she has a contractual or employment relationship such that the relationship is in the area of practice of professional geology and/or professional geophysics in which the violation occurred with a copy of the decision and order of the Board and shall provide the Board with the name and business address of each person or entity required to be so notified. During the period of probation, the respondent may be required to provide the same notification to each new person or entity with whom he or she has a contractual or employment relationship such that the relationship is in the area of practice of professional geology and/or professional geophysics in which the violation occurred and shall report to the Board the name and address of each person or entity so notified.

(4) The respondent shall provide verifiable proof to the Board that restitution has been paid as ordered. The probationary condition shall include a time period in which the verifiable proof shall be provided to the Board which time period shall be at least 60 days less than the time period ordered for the period of probation.

(e) In addition to the conditions as may be ordered pursuant to subdivisions (c) and/or (d), the following conditions shall be included for the following specific violations:

(1) Incompetency in the practice of professional geology and/or professional geophysics:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(B) The respondent shall take and achieve the passing score for the Professional Geologist or Professional Geophysicist examination, provided that in the event the respondent holds multiple licenses, the Board shall select the examination in the area of practice of professional geology and/or professional geophysics in which the violation occurred and in the area of professional geology and/or professional geophysics in which the respondent is licensed. The Board or its designee may select the specific examination questions such that the questions relate to the specific area of violation and comprise an examination of the same duration as that required of an applicant for licensure. The respondent shall be required to pay the application and examination fees as described in Section 3005. The probationary condition shall include a time period in which the examination(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(C) During the period of probation, the respondent may practice professional geology and/or professional geophysics only under the review of a professional geologist and/or professional geophysicist licensed in the same branch as the respondent. This person or persons shall be approved in advance by the Board or its designee. Such reviewing professional geologist and/or professional geophysicist shall initial every stamped or sealed document in close proximity to the respondent's stamp or seal.

(2) Negligence in the practice of professional geology and/or professional geophysics:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(3) Violation and/or breach of contract in the practice of professional geology and/or professional geophysics:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a

time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

In addition to the disciplinary orders described in this section, all decisions shall address recovery of the Board's investigation and enforcement costs, as described in and authorized by Business and Professions Code section 125.3.

Notwithstanding this section, non-conforming terms and conditions may be included as part of the disciplinary order, including such other further or lesser action as the Board deems appropriate, in the interest of protecting the public health, safety, and welfare.

Note: Authority cited: Section 7818, Business and Professions Code; ~~and~~ Sections 11400.20 ~~and~~ ~~11400.21~~, Government Code. Reference: Sections 125.3, 494, 7860, 7861, 7863 and 7872, Business and Professions Code; ~~and~~ Sections 11400.20, 11400.21 and 11415.60, 11425.50(e), and 11519, Government Code.

**BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS AND
GEOLOGISTS**

Proposed Language

Amend subsection (e) of section 419 of Article 1, Division 5 of Title 16 of the California Code of Regulations to read as follows:

419. Disciplinary Orders.

For violations of Business and Professions Code sections 6775 and/or 8780 which result in an order issued in accordance with Chapters 4.5 and 5 of Part 1 of Division 3 of Title 2 of the Government Code against a professional engineering and/or a professional land surveying license, the following provisions shall apply to disciplinary orders contained in decisions of the Board:

* * *

(e) In addition to the conditions as may be ordered pursuant to subdivisions (c) and/or (d), the following conditions shall be included for the following specific violations:

(1) Incompetency in the practice of professional engineering and/or professional land surveying:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(B) The respondent shall take and achieve the passing score as set by the Board for the second division examination (including the seismic principles and engineering surveying examinations for civil engineers), provided that in the event the respondent holds multiple licenses, the Board shall select the examination in the area of practice of professional engineering and/or professional land surveying in which the violation occurred and in the area of professional engineering and/or professional land surveying in which the respondent is licensed. The Board or its designee may select the specific examination questions such that the questions relate to the specific area of violation and comprise an examination of the same duration as that required of an applicant for licensure. The respondent shall be required to pay the application fee as described in Section 407 and shall be afforded all examination appeal rights as described in Sections 407, 443, and 444. The probationary condition shall include a time period in which the examination(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(C) During the period of probation, the respondent may practice professional engineering and/or professional land surveying only under the ~~supervision~~ review of a professional engineer and/or professional land surveyor licensed in the same branch as the respondent. This person or persons shall be approved in advance by the Board or its designee. Such ~~supervising~~ reviewing professional engineer and/or professional land surveyor shall initial every stamped or sealed document in close proximity to the respondent's stamp or seal.

(2) Negligence in the practice of professional engineering and/or professional land surveying:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(3) Violation and/or breach of contract in the practice of professional engineering and/or professional land surveying:

(A) The respondent shall successfully complete and pass, with a grade of "C" or better, a minimum of one and a maximum of three college-level courses, approved in advance by the Board or its designee. Such courses shall be specifically related to the area of violation. For purposes of this subdivision, "college-level course" shall mean a course offered by a community college or a four-year university of three semester units or the equivalent; "college-level course" does not include seminars. The probationary condition shall include a time period in which the course(s) shall be successfully completed which time period shall be at least 60 days less than the time period ordered for the period of probation.

(4) Failure to file a record of survey and/or corner record in the practice of professional land surveying:

(A) For any records of survey and/or corner records found not to have been filed and recorded, the respondent shall file or record, as appropriate, the required record(s) with the appropriate governmental agency within 90 days of the effective date of the decision. The respondent shall provide the Board with verifiable proof that the required record(s) have been filed or recorded, as appropriate, by the governmental agency within 30 days of such filing or recordation. If an actual suspension of the respondent's license is ordered as a probationary condition, the record(s) required by this subdivision shall be the only professional land surveying work the respondent is allowed to perform during the suspension.

* * *

Note: Authority cited: Sections 6716 and 8710, Business and Professions Code; ~~and Sections 11400.20 and 11400.21~~, Government Code. Reference: Sections 125.3, ~~494, 6706.3, 6710, 6732, 6775, 6776, 8780 and 8781~~, Business and Professions Code; ~~and Sections 11400.20, 11400.21, 11415.60, 11425.50 and 11519~~, Government Code.

Recommendation and Proposal to Amend Title 16, California Code of Regulations Section 3005

Board staff recommends an amendment to Title 16, California Code of Regulations section 3005 (Geology and Geophysicist Program fees). It is recommended that section 3005 be amended to add a retired license processing fee to the regulations relating to the practices of geology and geophysics.

Staff recommends an amendment for the following reasons:

- Senate Bill 822, which will become effective on January 1, 2014, adds Business and Professions Code section 7851 and amends section 7887 of the Geologist and Geophysicists Act. Section 7851 establishes a retired license status for Professional Geologists and Geophysicists. Section 7887(j) establishes the authority to set a retired license status fee.
- Business and Professions Code section 7887(j) has been added to read: "The fee for a retired license shall be fixed at not more than 50 percent of the fee for filing an application for licensure as a geologist or a geophysicist in effect on the date of application for a retired license."
- An amendment to Title 16, California Code of Regulations section 3005 is necessary to implement the retired status for Professional Geologists and Geophysicists. The proposed fee for the retired license is \$62.50, which is the same fee that is established for Professional Engineers and Professional Land Surveyors (Title 16, California Code of Regulations section 407(f)). The same fee should be established since the same service will be performed.

RECOMMENDED MOTION:

Board staff recommends that the Board approve the above proposal and direct staff to begin the formal rulemaking process to amend Title 16, California Code of Regulations Section 3005.

Title 16. Board for Professional Engineers, Land Surveyors and Geologists

3005. Fees.

(a) All fees required by provisions of the code and rules of the board shall be transmitted by money order, bank draft or check, payable to the Department of Consumer Affairs.

(b) The following is the prescribed application fee for:

- (1) Licensure as a Professional Geologist or a Professional Geophysicist \$250.00;
- (2) Certification as a specialty geologist or specialty geophysicist \$250.00;
- (3) The temporary licensure fee as a geologist, geophysicist, specialty geologist, or specialty geophysicist \$80.00.

(c) The following is the prescribed examination fee for:

- (1) The Practice of Geology national examination \$250;
- (2) The California specific geologist examination \$150;
- (3) The Fundamentals of Geology national examination \$150;
- (4) Examination for licensure as a geophysicist \$100.00;
- (5) Examination for certification as a specialty geologist or specialty geophysicist \$100.00.

(d) The duplicate certificate fee \$6.00.

(e) The following is the prescribed renewal fee for:

- (1) Licensure as a geologist or a geophysicist \$270.00;
- (2) Certification as a specialty geologist or a specialty geophysicist \$67.50.

(f) The delinquency fee for renewal of licensure as a geologist or geophysicist or certification as a specialty geologist or specialty geophysicist is 50% of the renewal fee in effect on the last regular renewal date.

(g) When transmitted through the mail, fees required under provisions of this rule shall be deemed filed on the date shown by the post office cancellation mark appearing on the envelope containing the fee.

(h) The fee for the retired license shall be \$62.50. No renewal fee or other fee shall be charged for the retired license. As used in this subdivision, "license" includes certificate of registration or license as a professional geologist, certificate of registration as a registered certified specialty geologist, and certificate of registration as a professional geophysicist.

VIII. **ADMINISTRATION**

- A. FY 2012/13 Budget Overview
- B. Out-of-state Travel Update (Possible Action)
 - 1. Cost Analysis to Develop / Administer All National Examinations in lieu of Contracting with National Organizations

FY 2013/14 Budget Overview:

The information provided below is a summary of the Engineers and Land Surveyors Board fund and the Geologists & Geophysicists Account. The data is based on approved Governor's Budget, projected expenditures & revenue, projections to year-end, applications received and renewals processed through August 2013.

The **Engineers and Land Surveyors (PELS) Fund** as of August 31, 2013:

	FY 13/14	FY 12/13
Expenditures	\$2.3 Million	\$1.3 Million
Revenue	\$2.3 Million	\$2.4 Million
Applications	2,679	2,590
Renewals	8,273	9,092

Budget Allotment	\$9.87 Million
Projection to Year-End	\$7.98 Million
Surplus/Deficit	\$1.89 Million
Revenue (Year-End)	\$8.74 Million

Expenditures have increased versus last FY as a result of increased contract costs with Prometric, our California Specific exam developer. Overall, the Board is generating more revenue than allocated expenses and is projected to have a surplus at the end of the year. Applications have increased mainly due to EIT and LSIT continuous filing.

The **Geologist and Geophysicists (GEO) Fund** as of August 31, 2013:

	FY 13/14	FY 12/13
Expenditures	\$267 Thousand	\$205 Thousand
Revenue	\$190 Thousand	\$175 Thousand
Applications	164	75
Renewals	553	709

Budget Allotment	\$1.38 Million
Projection to Year-End	\$1.10 Million
Surplus/Deficit	\$281 Thousand
Revenue (Year-End)	\$995 Thousand

Expenditures will remain consistent with the last FY, we are still contracting with OPES for occupational analysis of our state exams. Applications are up across the Board for GIT, PG, CEG and CHG. Overall, revenue at year-end should remain consistent with historical averages.

0770 - Board for Prof. Engineers and Land Surveyors

Analysis of Fund Condition

Prepared 9/16/13

(Dollars in Thousands)

Governor's Budget 2013-14

		Governor's Budget CY	BY
	ACTUAL 2012-13	2013-14	2014-15
*\$7.0 million GF loan outstanding			
Includes FY 2012-13 year-end revenue and expenditures			
BEGINNING BALANCE	\$ 697	\$ 1,904	\$ 5,132
Prior Year Adjustment	\$ -	\$ -	\$ -
Adjusted Beginning Balance	\$ 697	\$ 1,904	\$ 5,132
REVENUES AND TRANSFERS			
Revenues:			
125600 Other regulatory fees	\$ 88	\$ 90	\$ 90
125700 Other regulatory licenses and permits	\$ 2,560	\$ 2,593	\$ 2,593
125800 Renewal fees	\$ 5,415	\$ 6,000	\$ 6,000
125900 Delinquent fees	\$ 57	\$ 55	\$ 55
141200 Sales of documents	\$ -	\$ -	\$ -
142500 Miscellaneous services to the public	\$ -	\$ -	\$ -
150300 Income from surplus money investments	\$ 8	\$ 1	\$ 1
160400 Sale of fixed assets	\$ -	\$ -	\$ -
161000 Escheat of unclaimed checks and warrants	\$ 8	\$ 8	\$ 8
161400 Miscellaneous revenues	\$ 1	\$ 2	\$ 2
Totals, Revenues	\$ 8,137	\$ 8,749	\$ 8,749
Transfers from Other Funds			
FO0001 Proposed GF Loan Repayment per item 1110-011-0770, Budget Act of 2008	\$ -	\$ 2,000	\$ -
FO0001 Proposed GF Loan Repayment per item 1110-011-0770, Budget Act of 2011	\$ -	\$ 500	\$ 500
Totals, Revenues and Transfers	\$ 8,137	\$ 11,249	\$ 9,249
Totals, Resources	\$ 8,834	\$ 13,153	\$ 14,381
EXPENDITURES			
Disbursements:			
8840 SCO (State Operations)	\$ 13	\$ -	\$ -
8880 Financial Information System for CA (State Operations)	\$ 50	\$ 43	\$ -
1110 Program Expenditures (State Operations)	\$ 6,867	\$ 7,978	\$ 8,138
Total Disbursements	\$ 6,930	\$ 8,021	\$ 8,138
FUND BALANCE			
Reserve for economic uncertainties	\$ 1,904	\$ 5,132	\$ 6,243
Months in Reserve	2.8	7.6	9.0

0205 - Geology

Analysis of Fund Condition

Prepared 9/16/2013

(Dollars in Thousands)

Governor's Budget 2013-14	Governor's		
	ACTUAL	Budget	BY
Includes FY 2012-13 year-end revenue and expenditures	2012-13	CY	2014-15
BEGINNING BALANCE	\$ 1,041	\$ 1,047	\$ 941
Prior Year Adjustment	\$ -	\$ -	\$ -
Adjusted Beginning Balance	\$ 1,041	\$ 1,047	\$ 941
REVENUES AND TRANSFERS			
Revenues:			
125600 Other regulatory fees	\$ 1	\$ 2	\$ 2
125700 Other regulatory licenses and permits	\$ 221	\$ 226	\$ 226
125800 Renewal fees	\$ 815	\$ 753	\$ 753
125900 Delinquent fees	\$ 14	\$ 14	\$ 14
141200 Sales of documents	\$ -	\$ -	\$ -
142500 Miscellaneous services to the public	\$ -	\$ -	\$ -
150300 Income from surplus money investments	\$ 4	\$ 2	\$ 2
160400 Sale of fixed assets	\$ -	\$ -	\$ -
161000 Escheat of unclaimed checks and warrants	\$ -	\$ -	\$ -
161400 Miscellaneous revenues	\$ -	\$ -	\$ -
Totals, Revenues	\$ 1,055	\$ 997	\$ 997
Totals, Revenues and Transfers	\$ 1,055	\$ 997	\$ 997
Totals, Resources	\$ 2,096	\$ 2,044	\$ 1,938
EXPENDITURES			
Disbursements:			
8840 FSCU (State Operations)	\$ 1	\$ -	\$ -
8880 Financial Information System for CA (State Operations)	\$ 7	\$ 6	\$ -
1110 Program Expenditures (State Operations)	\$ 1,041	\$ 1,097	\$ 1,119
Total Disbursements	\$ 1,049	\$ 1,103	\$ 1,119
FUND BALANCE			
Reserve for economic uncertainties	\$ 1,047	\$ 941	\$ 819
Months in Reserve	11.4	9.9	8.6

IX. TECHNICAL ADVISORY COMMITTEES (TACs)

- A. Board Assignments to TACs
- B. Appointment of TAC Members
- C. Reports from the TACs

**APPOINTMENT TO THE LAND SURVEYING
TECHNICAL ADVISORY COMMITTEE**

MOTION:

To recommend approval of Michael S. Butcher, P.L.S. to a two year re-appointment to the Professional Land Surveyor Technical Advisory Committee (PLS TAC), term to end on July 30, 2015.

BACKGROUND:

The PLS TAC member re-appointment for Mr. Butcher has been nominated by Pat Tami. Mr. Butcher has applied for and his application accepted for recommendation for appointment as a PLS TAC member. The re-appointment of Mr. Butcher will help ensure the continuance, and enhancement of the professional land surveying expertise and advice provided by the PLS TAC.

RECOMMENDATION:

The Board consider and approve Mr. Butcher to serve as a member of the PLS TAC through June 30, 2015.

X. **LIAISON REPORTS**

- A. ASBOG
- B. ABET
- C. NCEES
- D. Technical and Professional Societies

XI. **CLOSED SESSION**

A. Civil Litigation

1. Dennis William McCreary vs. Board for Professional Engineers, Land Surveyors, and Geologists, Sierra County Superior Court Case No. 7361
2. Thomas Lutge v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, Sacramento Superior Court Case No. 34-2012-80001329-CU-WM-GDS

XII. OPEN SESSION TO ANNOUNCE THE RESULTS OF CLOSED SESSION

XIII. PRESIDENT'S REPORT/BOARD MEMBER ACTIVITIES



XIV. **APPROVAL OF CONSENT ITEMS**

Approval of the Minutes of the August 28-29, 2013, Board Meeting

DRAFT MINUTES

MEETING OF THE BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

August 28 and 29, 2013
Beginning at 9:00 a.m.

Wednesday, August 28, 2013

Board Members Present: Erik Zinn, President; Kathy Jones Irish, Vice President; Diane Hamwi; Carl Josephson; Coby King; Mike Modugno; Ray Satorre; Jerry Silva; Robert Stockton; and Patrick Tami

Board Members Absent: Philip Quartararo and Hong Beom Rhee

Board Staff Present: Ric Moore (Executive Officer); Joanne Arnold (Assistant Executive Officer); Nancy Eissler (Enforcement Manager); Celina Calderone (Board Liaison); Jeff Alameida (Budget Analyst); Ray Mathe (Staff Land Surveyor & Examination Manager); Susan Christ (Staff Civil Engineer & Licensing Manager); and Gary Duke (Legal Counsel).

I. Roll Call to Establish a Quorum

The meeting was called to order by President Zinn at 9:06 a.m. Roll Call was taken, and a quorum established.

Mr. Silva arrived 9:07 a.m.

II. Public Comment

Mr. Grutman addressed the Board and read a statement he prepared into record in reference to a closed case. He expressed his concern with the investigation process and claimed the case was dormant for two years and that the expert was not qualified to perform the review due to lack of experience in private practice and failed to answer basic questions. He believes the expert selection is less than adequate and that the expert should be liable and cited in accordance with Board Rule 415 for testifying outside his area of competence and refund fees paid to him by the Board. He indicated that he won this case without legal representation because he is an expert in his field, and it was a costly process for him and the Department.

Stan Horwitz spoke as an individual Professional Engineer. He explained that California is the only state with a dual system of engineering registration with Practice Acts and Title Acts. He is recommending the Board do strategic planning and work with the Governor and agencies to pass legislation to make changes to the Engineers Act by updating and making the various registrations consistent with all other states.

Mr. Satorre arrived 9:14 a.m.

III. Executive Officer's Report

A. Legislation

1. Discussion of Legislation for 2013:

Ms. Arnold provided an update on the legislation the Board is following.

AB 186 Professions and vocations: military spouses: temporary licenses. This bill would authorize a board within DCA to issue a temporary license for 12 months to an applicant who meets certain requirements.

STATUS: Introduced 1/28/13. Last amended 6/24/13. Passed Assembly. Heard in SEN B,P&ED Committee 7/1/13 - testimony taken. Further hearing to be set – this is now a 2 year bill.

BOARD POSITION: Oppose unless amended

AB 1057 Professions and vocations: licenses: military service. This bill would require each Board within DCA to inquire in every application for licensure if the applicant is serving in, or has previously served in, the military – commencing January 1, 2015.

STATUS: Introduced 2/22/13, amended 6/3/13. Passed Assembly. To be heard on SEN floor.

BOARD POSITION: Watch

AB 1063 Surveyors and engineers. (Amends Sections 6732, 8751, 8772 of, and adds Section 8764.6 to the B&P Code) This bill would prohibit the use of certain titles using the words engineer or surveyor unless the person is appropriately licensed. Additionally it would authorize a licensed surveyor to include additional information, as specified, with a record of survey. This bill would require any monument set by a land surveyor or civil engineer to be marked as specified, and to be marked with the name of the agency and the political subdivision it serves, if set by a public agency.

Appropriations 5/24/13 – held under submission. This is a two year bill.

BOARD POSITION: Oppose unless amended

SB 152 Geologists and Geophysicists: written contracts. (Add Section 7839.2 to B&P Code) This bill would require Geologists and Geophysicists to use a written contract when contracting to provide geological or geophysical services, as specified. It will provide for consistent operations among engineers, land surveyors, geologists and geophysicists.

This bill also repeals temporary authorizations for engineers, geologists and geophysicists. This is a Board sponsored bill.
STATUS: Signed by the Governor. The Board will no longer offer temporary authorizations to engineers, geologists and geophysicists. Will require that geologists and geophysicists use written contracts.

BOARD POSITION: Support

SB 207 Department of Consumer Affairs: license information. (Amend Section 27 of B&P Code) This bill will eliminate the requirement that the Board for Professional Engineers, Land Surveyors, and Geologists disclose its licensee's address of record. This is a Board sponsored bill.

STATUS: Introduced 2/8/13. Scheduled to be heard in SEN BP&ED Committee 4/15/13 - bill pulled by author. This is a two year bill.

BOARD POSITION: Support

SB 679 Berryhill. Licensees: reporting requirements. (Amend Sections 6770, 6770.1, 6770.2, 8776, 8776.1, and 8776.2 of the B&P Code) This bill would revise the amount for a licensed engineer or Land surveyor to report a civil action judgment, settlement, arbitration award, or administrative action to the Board from "\$50,000 or more" to "more than \$50,000." It also reduces the reportable amount of any civil action judgment or binding arbitration award or administrative action of \$25,000 or greater.

STATUS: Introduced 2/22/13. Amended 6/12/13. Passed Senate. To be heard in ASM floor.

BOARD POSITION: Watch

SB 822 Committee on Business, Professions and Economic Development. Professions and vocations. (Amend Section 7887 of, and add Section 7851 to, the B&P Code) This is one of the Committee's omnibus bills. Among other things it creates a "retired registration" for geologists and geophysicists. Language provided by the Board.

STATUS: Introduced 3/20/13. Amended 6/12/13. Passed Senate. To be heard on ASM floor.

BOARD POSITION: Support

Mr. Duke inquired why AB 186 is a two-year bill. Ms. Arnold reported that the committee had concerns based on the comments, and lack of comments, from other DCA boards.

B. Strategic Plan Update

Mr. Alameida highlighted items to achieve this fiscal year. The first release of BreEZe is supposed to go into effect in mid to late September and may impact the second and third release dates. Mr. Moore reported that staff is anticipating the BreEZe implementation for the subsequent releases may be delayed about a year. Mr. Silva recommended planning items to replace BreEZe related topics in the upcoming Strategic Plan. Mr. Moore noted that staff will review the plan and suggested items may be brought to the next Board meeting.

Mr. Alameida noted that descriptions of goals were added per Mr. King's request. He reviewed the completed tasks and pointed out those tasks that are dependent upon BreEZe implementation. Mr. King suggested tracked changes from meeting to meeting. Vice President Irish asked whether there was any flexibility to contract out for technology support. Mr. Moore indicated that the Board would have to contract with someone who is familiar with the programs in the legacy system (ATS and CAS). The concern at this point is that the code is frozen for ATS and CAS, and, therefore, they cannot guarantee the same functionality will be in BreEZe. Mr. Modugno asked if we are still providing input to the BreEZe system. Mr. Moore explained that Mr. Donelson and Ms. Baker have been monitoring, testing, and attending meetings. Ms. Eissler added that once the release one boards go live, they will focus on the release two boards to have them focused on testing and, at that point, transition to communicating with the release three boards, which includes the Board. At that point, we will have the opportunity to provide them with our requirements.

Mr. Alameida continued to discuss Out of State Travel (OST). The requests were denied as they did not adhere to the budget letter and were deemed not mission critical. He indicated that he can try and resubmit the OST requests for individual trip requests. Mr. Alameida is trying to get more information about other boards' efforts from the Budget Office and added that 30 of 75 requests were approved, which is a drastic improvement from previous years. Mr. Moore added that DCA has been supportive of the requests; it is the higher level approvers who are denying the requests. Mr. Tami explained that for auditing purposes, it is mission critical both from a fiscal point of view and from reviewing what is going to be contained in the exams. He recommended that if the Board does not get approval to attend, the Board should consider pulling out of NCEES as the Board does not have the knowledge of exam content; the Board should investigate the cost of writing its own exams and the impact this change will have. Mr. Stockton inquired if it would help if the individual pays their own way to attend out of state trips. Mr. Alameida indicated that it seems less likely when someone offers their own funding. Mr. Moore explained that despite the fact that there is no cost to the state, it is about perception that someone is traveling on State business so there must be a

cost to the State. Mr. Modugno concurred with what Mr. Tami suggested regarding investigating the cost of writing replacement exams ourselves. Mr. Moore indicated that a Budget Change Proposal (BCP) would need to be done if the Board were to start writing its own exams for all disciplines. Mr. Josephson indicated that there would be a ripple effect as California licensees may not get comity with other states which means California engineers would not be able to practice in other states. A break away from NCEES would have a huge impact on the profession. Mr. Tami noted there would be a significant up front cost to develop. Mr. Zinn explained the political issues that would require marketing and advocacy. Mr. Silva believes that communication with legislators is key. Mr. Moore requested that Mr. Alameida provide a copy of the justification letter to the Board members. Mr. Silva asked to invite Agency to the Board meetings. Mr. Moore will assemble preliminary documentation for a BCP to write exams as back-up to be included with the justification and budget letter. It would be appropriate to advise the DCA Director of plans.

Mr. Moore expressed his concern for ASBOG meetings as there is always a cost associated with attending. Mr. Silva suggested including examples of what the Board could not vote on that negatively impacted the exams. Mr. Moore recommended including the effects on the practice as well.

Vice President Irish suggested an AdHoc Committee to handle the business surrounding this issue. Mr. Moore noted that the Board usually designates NCEES liaisons as they are familiar with NCEES topics.

MOTION: Mr. King and Mr. Satorre move to create an AdHoc committee to include Mr. King and Mr. Silva to explore strategies for approval of necessary travel to be approved by the Governor's office.

VOTE: 10-0, Motion carried.

C. Personnel

Mr. Moore reported the Cindy Fernandez, Enforcement Analyst, will be retiring effective August 29 after working for the Board since November of 1988. Ms. Eissler has started the hiring process for a new employee.

A new senior registrar position became effective July 1, 2013. Staff is actively working with DCA Personnel to revise the existing classification to include professional geologist and geophysicist terminology as well as revising other language to more closely reflect the Registrar's role in supporting the Board's operations.

MOTION: Mr. Satorre and Vice President Irish moved to present a certificate of commendation to Ms. Fernandez.

VOTE: 10-0, Motion carried.

D. Administrative Task Force

Mr. Moore reported that the Administrative Task Force has been in communication since the last meeting and is currently performing the review of the Board's Operating Procedures and TAC Operating Procedures. They are reviewing a draft staff evaluation pertaining to Board Rule 425 regarding the land surveyor application review process. In addition, Mr. Moore reported that, at Mr. Modugno's request, the Task Force would be reviewing a specific enforcement case due to the length of time it took to process.

E. BreEZe Status Update

Mr. Moore reported that at this time, they are anticipating that the legacy system will be down from September 12 through 16. On September 17, the Release I boards will be on BreEZe and the other boards will be up and running on the existing legacy systems. He expressed concern with the functionality of the legacy systems when it is brought back online. Mr. Moore explained that he is encouraging everyone to renew as soon as possible to avoid any issues and that information will be distributed via the Board's website, Facebook, and Twitter.

F. Discussion of Plastic ID Cards

Mr. Moore reported that several years ago the Board elected to discontinue issuance of the plastic ID cards to licensees due to costs associated with maintaining the legacy equipment and the availability of supplies necessary to produce the cards. However, licensees have expressed their preference for the plastic ID cards. He inquired with DCA to have them print approximately 5,000 ID cards per month; however, they indicated that they could not keep up with the demand. He presented two options for possible re-implementation of the ID cards to licensees.

Option 1: Provide cards to all licensees at no charge. This would occur for new licensees on a flow basis and during the first 2 year renewal cycle until all licensees are accounted for.

Option 2: Provide cards to licensees on request at a fee.

MOTION: Mr. Tami and Mr. Stockton moved to select Option 1 plastic cards to be distributed to everyone.

Public Comment – Brian Sorensen, representing PECG provided his opinion on plastic vs. paper card. He indicated that licensees prefer the plastic ID cards and that would be easier to do in-house than to contract with an outside vendor.

VOTE: 10-0, Motion carried.

IV. Enforcement

A. Enforcement Statistical Reports

1. Fiscal Year 2012/2013 Year End Report

Ms. Eissler presented the complete fiscal year report.

2. Fiscal Year 2013/2014 Report

Ms. Eissler reported that they are still working towards managing the older cases and added that the Enforcement Unit completed some of the older investigation cases in August. She added that there will be quite a few disciplinary decisions that will become effective in the next few months based on Board actions. Although they have eliminated the backlog of cases that were waiting to be referred to the Attorney General's Office, the aging will continue to show in the stats while those cases go through the process.

Mr. King suggested including statistics showing the aging of cases based on the outcome of the investigation. Mr. Tami and Mr. Silva suggested highlighting areas of progress and concern at each meeting.

B. Posting of Enforcement Actions on the Board's Website

Ms. Eissler reported that this item was included in the Strategic Plan because it was a new requirement to post decisions and, therefore, needed to get caught up. Also, there was a need to focus on posting older enforcement actions. It is an ongoing process when a disciplinary decision becomes final and effective to when it is posted on the Board's website.

V. Exams/Licensing

A. EIT/LSIT Certificate Process Discussion

Mr. Moore reported that a year ago the EIT/LSIT certification process changed to taking the national fundamentals exams prior to applying to the Board. Upon passing, the candidate can apply to the Board for certification. He noted that since California started this process, it has now become a nationwide practice that many other states' boards are turning to. However, there are inconsistencies in the Board's regulations and statutes. There are instances that the requirements for further licensure, one must hold a certification. At other times, the laws and regulations mention they must only pass the fundamentals exam. Mr. Moore requested direction from the Board for standardization of laws and procedures.

Ms. Christ indicated that most PE candidates have an EIT certification and others only have passed the FE exam. Professional license applicants require a verification of information needed for EIT/LSIT certification.

Public Comment - Roger Hanlin, PLS, representing himself as a private practitioner, commented that his firm routinely does projects for public agencies where a statement of qualifications is submitted and includes certifications as EIT and LSIT. It is a crucial piece of information in their statements of qualifications that is tied into their compensation. They have worked on levee projects where the certification as an EIT is required for inspections as they want that level of expertise on the jobsite. He encouraged the Board to maintain the certification requirement.

Mr. Tami does not want to do away with something that has value.

The recommended motion is to adopt a position requiring one of the following for all PE.PLS candidates:

1. EIT/LSIT Certification; or
2. Only successful passage of the FE/FS examination

MOTION: Mr. Stockton and Mr. Tami moved to adopt Option 1 and direct staff to evaluate current laws with Legal Counsel and, if necessary, pursue legislative/regulatory revisions to formalize the Board's position.

VOTE: 10-0, Motion carried.

Mr. Silva was not present from 1:15 p.m. to 2:34 p.m.

VI. Approval of Delinquent Reinstatements

No report given.

VIII. Consideration of Rulemaking Proposals

- A. Proposal to Amend Title 16, California Code of Regulations Sections 416 and 3060, Substantial Relationship Criteria

Ms. Eissler reported that at the last meeting, the Board inquired about taking action against a licensee if they have had a criminal conviction and the relationship between the crime of which they were convicted and the professional practice. She explained there is statutory authority to take action against a licensee to revoke or suspend their license if they have been convicted of a crime and to deny issuing a license to an applicant if they have been convicted of a crime. The statutes indicate that the crime or act is substantially related to qualifications, functions, and duties of the profession. In addition, there are also regulations for professional engineers, land surveyors, geologists, and geophysicists which further expand on the substantial relationship. In her research, Ms. Eissler discovered there are general Business and Professions Code sections that apply to all licensing boards that require the boards to adopt regulations regarding the substantial relationship criteria.

Ms. Eissler introduced the Board's Liaison Deputy Attorney General David E. Hausfeld to discuss how the Attorney General's Office interprets the sections and criminal convictions when pursuing disciplinary action against a licensee or when handling a Statement of Issues matter when the Board has denied issuing a license to someone based on their criminal convictions.

Mr. Hausfeld made a presentation in reference to the denial, suspension, or revocation of a license based upon criminal conduct. He explained the two sections under the Business and Professions Code that apply to all agencies, Sections 480 and 490; he also noted that Section 6775 applies to professional engineers, Section 8780 to professional land surveyors, and Section 7860 to professional geologists and geophysicists.

He continued by noting the protection of the public should be of utmost interest of the Board. A conviction should be related to the license holder's activities. This does not mean that the licensee must be in violation of his actions with a client. This can relate to a criminal conviction that has no bearing on his practice as an engineer if it shows harm or potential harm to the public. When there is a logical connection between the conviction and a licensee's fitness or competence to practice his profession, there does not need to be a finding of an adverse impact on the profession. The potential for adverse impact is important. The licensee's judgment indicates he has a propensity to be a danger to himself or others. They look for the link between the conduct and fitness to practice. The nature of the crime, the underlying facts, and the license involved are carefully evaluated. Substantial relationship does not mean the crime or act must have occurred during work or part of the practice.

Under Business and Professions Code 481, the Board can establish its own disciplinary criteria and some boards are more specific. Each agency has different regulations and requirements.

Mr. King inquired if there are crimes that do not rise to substantial relationship. Mr. Hausfeld explained that infractions do not count; misdemeanors are usually less than a felony. It always depends on the crime. If it is a crime that has a potential of harming the public, then disciplinary action is taken. It does not always result in revocation. It may result in probation, ethics courses, etc.

Mr. Tami commented that it is hard for licensee to know what is substantially related if it is not part of practice.

Vice President Irish explained that a license is a privilege, not a right. If convicted of a crime, one would lose that privilege.

President Zinn stated no one in the industry would want to hire someone who has been convicted and stripped of their license.

Ms. Eissler explained the reason why the Board's numbers are low is that currently there is no fingerprint requirement for the licensees. Criminal information is relayed to the Board by means of the public. Some licensees report their criminal convictions, as required by the Reporting of Legal Actions laws, but there is no way to independently determine if all licensees are reporting when required to do so.

MOTION: Mr. Tami and Mr. Stockton moved to have staff review similar language to Sections 416 and 3060 from other boards and bring recommendations to a future meeting.

VOTE: 9-0, motion carried.

B. Adoption of Proposed Amendments to Title 16, California Code of Regulations section 3060 (Substantial Relationship Criteria), 3061 (Criteria for Rehabilitation), and 3064 and 419 (Disciplinary Orders)

Ms. Eissler reported that the changes being proposed are to align the two sets of regulations together. The Board approved the proposed changes, and they were submitted for the 45-day public comment period, and there were no comments. The recommendation was for the Board to adopt this as the final language but now the Board needs to approve removing Section 3060, based on the Board's action on the prior item, and provide a 15-day notice to the public to inform them of this change.

MOTION: Mr. King and Mr. Josephson moved to remove Section 3060 from the regulatory proposal and move forward with the rulemaking process as required.

VOTE: 9-0, Motion carried.

C. Adoption of Proposed Amendments to Title 16, California Code of Regulations Sections 411, 412, 3008, and 3009 (Seal, Signature, and Address Change)

Mr. Alameida reviewed the regulations. One comment was received during the 45-day comment period; however, it was not necessary to make changes to the regulations because of it. The regulation file was provided to OAL for final review; however, the OAL attorney indicated that some minor changes needed to be made the language for clarity. The changes were noticed for a 15-day comment period; however, no comments were received. Therefore, at this time, staff is requesting that the Board adopt as final the proposed amendments and to delegate to the Executive Officer to finalize the rulemaking file.

MOTION: Mr. King and Mr. Modugno moved to adopt as the final language the proposed amendments to Sections 411, 412, 3008, and 3009.

VOTE: 9-0, Motion carried.

MOTION: Mr. King and Vice President Irish moved to delegate the authority to the Executive Officer to finalize the rulemaking file with OAL.

VOTE: 9-0, Motion carried.

- D. Adoption of Proposed Board to Title 16, California Code of Regulations sections 420.1 and 3021.1 (Applicant Fingerprinting Requirements)
Mr. Alameida reported that OAL was in final review of the package and agreed with the one comment received during the 45-day period, which the Board had rejected. As such, it was necessary to make minor modifications to the language to clarify that the term "applicant" as used in the regulatory sections has the same meaning as stated in the enabling statute, specifically Business and Professions Code Section 144, subdivision (c). The changes were noticed for a 15-day comment period; however, no comments were received. Therefore, at this time, staff is requesting that the Board adopt as final the proposed amendments and to delegate to the Executive Officer to finalize the rulemaking file.

MOTION: Mr. Josephson and Mr. King moved to adopt as final the proposed language for Sections 420.1 and 3021.1 and to delegate to the Executive Officer to finalize the rulemaking file for submittal to OAL.

VOTE: 9-0, Motion carried.

- E. Adoption of Proposed Amendments to Title 16, California Code of Regulations Sections 442 and 3035 (Examination Subversion)
Ms. Eissler reviewed the regulation and indicated that there were no comments during the 15-day period.

MOTION: Mr. King and Mr. Satorre moved to adopt as final the proposed amendments to Sections 442 and 3035 and to delegate to the Executive Officer to finalize the rulemaking file for submittal to OAL.

VOTE: 9-0, Motion carried.

IX. Administration

- A. Board Budget Presentation Options
Mr. Alameida presented three options to report the Board's Budget.

Mr. Silva return at 2:34 p.m.

Mr. Alameida believes that the fund condition should be included since it is what is provided to the Department of Finance and the Governor. As the Board reviewed the options, Mr. Silva asked Mr. Satorre if providing full details twice per year was sufficient, and Mr. Satorre agreed. Mr. Alameida indicated that Option 3 is a hybrid of a synopsis and fund condition. Mr. Silva asked to define twice per year. Mr. Moore explained that twice per year would be the first meeting of the new fiscal year and six months later. Mr. Satorre stated that a synopsis was fine but to provide a more thorough review twice per year and added that the details were not necessary at every meeting, once or twice per year is sufficient. President Zinn confirmed that anyone may request any budgetary information at any time outside a Board meeting.

After further review, it was determined that the Board preferred Option 3 and that a more detailed report would be provided twice per year as indicated.

B. FY 2012/13 Budget Overview and FY 2013/14 Introduction

Mr. Alameida provided the budget overview where he explained expenditure authority, revenue and revenue codes, appropriation and the fund. He reported on the 2013/14 fund condition and identified the PELS and GEO expenditures and revenue sources.

Mr. Moore reported that the Senate Budget and Fiscal Review Committee requested a hearing for August 29. They have indicated that they are reluctant to repay the loan. He and Mr. Alameida will be attending hearing.

X. Technical Advisory Committees (TACs)

A. Board Assignments to TACs

Mr. Moore provided an update to a correspondence request that was made in reference to maintaining communication with the State Mining and Geology Board. He stated in his letter that he wishes to attend each other's board meetings and TAC meetings on a regular basis to help further communication.

B. Appointment of TAC Members

Mr. Josephson reported that there are currently two vacancies on the Structural TAC. He recommended Mr. Alireza Asgari and Mr. Ryan Huxley be appointed to fill those vacancies.

MOTION: Mr. Josephson and Mr. Stockton moved to appoint Mr. Asgari and Mr. Huxley to the Structural TAC.

VOTE: 9-0, Motion carried. Mr. Satorre was not present for the vote.

Mr. Satorre returned to the meeting at 3:47 p.m.

D. Approval of Proposed 2013/2014 Workplans

Mr. Stockton reported that in addition to the items listed in the Civil TAC workplan, the TAC would like to review the decision by the Water Quality Control Board to do a separate certification for unlicensed individuals. It is the opinion of the TAC that these unlicensed individuals are practicing outside their area of expertise.

MOTION: Mr. Stockton and Mr. Silva move to adopt workplan with the additional item.

VOTE: 10-0, Motion carried.

C. Reports from the TACs

1. Civil TAC

Mr. Stockton reported on the Civil TAC meeting that took place on August 27 that included Neal Colwell, Jim Foley, and Adam White. Mr. Foley was appointed as Chair, and Mr. White as Vice-Chair.

a. Discussion and Possible Recommendation Regarding Request to Amend Title 16, California Code of Regulation section 424 (Experience Requirements – Professional Engineers)

The TAC reviewed PECG's request to the Board to change the experience requirements for traffic engineer applicants who are already licensed as civil engineers. The TAC voted to recommend that the Board not make changes to the requirements.

b. Discussion and Possible Recommendation Regarding Request to amend Business and Professions Code section 6731 (Civil Engineering Defined)

The TAC reviewed a request by the Air Resources Board (ARB) that the Board expand the definition of civil engineering to include work relating to air quality so that such work done by civil engineer applicants would count as qualifying work experience. The TAC was of the opinion that the work as described by ARB was not the practice of civil engineering and should not be counted as qualifying work experience for civil engineer applicants. The TAC voted to recommend to the Board that the Board not expand the definition of civil engineering to include work relating to air quality.

Public Comment – Brian Sorensen indicated that the state does not have an environmental engineering license. He inquired if the Board would support an environmental discipline considering the level of environmental work that takes place. Mr. Stockton indicated that he believes it is a good idea but it would be difficult to achieve. Mr. Moore indicated that there is only a national exam; California does not have a state exam. Mr. Tami reported that, in the past, when the Board tried to make changes to the Practice and Title Acts, it did not go well. His recommendation would be to have a professional society propose it through the Legislature.

MOTION: Mr. Stockton and Mr. Modugno moved to deny the requests to amend 16 CCR 424 and Business and Professions Code section 6731 and to direct staff to notify PEGC and ARB of the decision.

VOTE: 10-0, Motion carried.

3. Joint TAC

- a. Evaluation of Subsurface Utility Engineering (Locating) pertaining to Business and Professions Code, sections 6731, 6731.1, 7802.1, and 8726.

Mr. Moore reported the Civil Engineering, Geology and Geophysics, and Land Surveying TACs met to discuss subsurface utility locating and engineering. He noted that ASCE issued a report regarding guidelines for federal projects indicating that subsurface locating was an engineering activity that utilized geophysical methods and should be performed by professional engineers. However, since California is one of two states that license geophysicists, questions could be raised regarding whether the work should be performed by civil engineers or geophysicists in California. The TACs agreed that the current statutes and regulations for civil engineering, geophysics, and land surveying covered every aspect that was mentioned in the report. There are some activities that could be engineering, land surveying, and geophysics. It would have to be handled case by case if enforcement was necessary. They did agree that it would be beneficial to provide outreach given the number of private firms that offer subsurface utility locating. Also, they felt that it may be a good time to discuss clarifying the definition of geophysics. Mr. Tami thought it was a great opportunity to have a cross profession discussion. Mr. Stockton suggested possibly including the Structural TAC in the joint meetings.

Mr. Moore added that if they were to meet again, they would discuss digital submittals of signatures and continuing education.

President Zinn reported that the Geology & Geophysics (G&G) TAC discussed the results of the Joint TAC meeting and also considered continuing education in the future. He indicated that they were impressed by the Joint TAC meeting and felt they made constructive progress. He would like to see one of the three meetings held per year be a Joint meeting among TACs.

D. Approval of Proposed 2013/2014 Workplans (continued)

President Zinn reported that the G&G TAC suggested changing Item #7 of their workplan to read "Review licensing issues affecting other states as needed to determine if the same issues may be relevant to California." For Item #8, they removed the word "Issue" and replaced it with "Review forthcoming," and add an item #11, "Meet with other TACs to review and discuss multidisciplinary licensing issues."

MOTION: President Zinn, after handing over the gavel to Vice President Irish for this item, and Mr. King moved to approve the amendments to the workplan with the changes as described.

VOTE: 10-0, Motion carried.

Mr. Mathe reported that the Land Surveying TAC had a very productive meeting. They worked on Board Rule 464 regarding corner records. In addition, he briefed the TAC on the discussions he has had with the workgroup regarding possible changes to the experience requirements.

MOTION: Mr. Tami and Mr. Silva moved to approve the Land Surveying TAC workplan.

VOTE: 10-0, Motion carried.

Mr. Josephson reported that the Structural Engineering TAC appointed Gregg Brandow as Chair and Douglas Hohbach as Vice-Chair. The TAC listened to a proposal from SEAOC regarding SEAOC's plan to introduce legislation that would expand the type of buildings that would be required to be designed by structural engineers. They are referred to as "significant structures." Washington, Oregon, and Utah all require that significant structures be designed by structural engineers. Nevada has a trigger that buildings above a certain size must be designed by structural engineers, and Hawaii and Illinois require that all buildings be designed by structural engineers. While the TAC was favorable to SEAOC's proposal, this needs to be discussed further and possible modifications to their proposal.

During Closed Session, the TAC discussed the 16-hour SE exam. Mr. Josephson reported that the TAC suggested a review of the content and grading annually or every other year.

Mr. Josephson noted a change to #6 in the SE workplan to read "To review and audit the exam development administration and the results of the NCEES Structural Exam, to verify and evaluate whether or not the exam is adequate for the needs of California, and make recommendations to the Board."

Mr. Tami expressed concern with the exam being used as an entry level exam in many states.

Mr. Josephson explained that California, for licensure as a civil engineer, only requires two years of experience after college whereas Illinois, Utah, and Hawaii require four years of experience. Those sitting for the exam in California possibly have a year less than those in other states. The Model Law Structural Engineer is separate from the Model Law PE. The TAC is concerned whether the exam meets California's needs.

MOTION: Mr. Josephson and Mr. Satorre moved to approve the Structural TAC workplan

VOTE: 10-0, Motion carried.

XI. Liaison Reports

A. ASBOG

President Zinn reported that he was invited to attend the National Subject Matter Expert meeting as a Board member but funding was denied. He will attend but will not represent California.

B. ABET

No report given

C. NCEES

Mr. Moore reported that several members, because of their association with committees, but not representing the California Board, were able to attend the Annual Meeting in San Antonio, TX. Topics of discussion included engineering surveying. The model law definition of engineering includes engineering surveys. Proposals for revisions were denied.

Mr. Moore reported that 49 of 69 jurisdictions are moving forward with the automatic model for the fundamentals of engineering and surveying examinations.

Mr. Moore advised that the Ohio board made a motion to change the voting procedures. Currently, each board has one vote, rather than one

vote per state, so states with multiple boards have multiple votes, such as Illinois which has separate PE, SE, and LS boards, while combined boards, such as this Board, has only one vote. The proposal was to allow one vote per professions regulated by the board, which would give boards such as ours two votes. However, this motion did not pass.

Mr. Moore reported that the Board has been approached by South Korea and Japan to reach a Memorandum of Understanding to accept their applicants for licensure in California. They are not seeking to move to California; they just want licensure. He explained that Japan has an engineering license and has been administering NCEES exams for more than ten years. They have over 4,100 candidates that have passed the FE exam and 300 that have passed the PE exams. Their experience and education requirements mirror NCEES's Model Law; a degree is required and four years of experience before they can sit for the exam. They were advised that if their degree is ABET accredited, there may be a possibility to collaborate with them. If not, according to our regulations and laws, the Board can grant up to two years for a non-ABET four year degree. It appears their requirements closely match our requirements. The only hurdle is the SSN or ITIN which all applicants are required by law to provide to the Board.

Mr. Moore reported that South Korea may be problematic. They do have NCEES exams for the FE and PE but do not require them. They have 84 different levels of engineering licenses. Mr. Moore indicated that they would like to accommodate them as much as possible but may be difficult to achieve.

- D. Technical and Professional Societies
No Report Given

XVI. Other Items Not Requiring Board Action

- A. Future Board Meeting Schedule

Mr. Moore recommended that the next meeting be moved to October 16 and 17, rather than October 3 and 4 and recommended the first or second week in December in lieu of November.

After further discussion, it was determined that meetings would be rescheduled to October 10 and 11 and December 5 and 6. Despite the meetings being scheduled for two days, they may be reduced to one-day meetings.

The Board Recessed at 4:49

Thursday, August 29, 2013

Board Members Present: Erik Zinn, President; Kathy Jones Irish, Vice President; Diane Hamwi; Carl Josephson; Coby King; Mike Modugno; Ray Satorre; Jerry Silva; Robert Stockton; and Patrick Tami

Board Members Absent: Philip Quartararo and Hong Beom Rhee

Board Staff Present: Joanne Arnold (Assistant Executive Officer); Nancy Eissler (Enforcement Manager); Celina Calderone (Board Liaison); Ray Mathe (Staff Land Surveyor & Examination Manager); Michael Donelson (Staff Electrical Engineer & Administrative Manager); and Gary Duke (Legal Counsel).

I. Roll Call to Establish a Quorum

The meeting was called to order by President Zinn at 9:03 a.m. Roll Call was taken, and a quorum established.

Mr. King arrived at 9:04 a.m.

VII. Reconsideration of Decision Regarding Delinquent Reinstatement Application of Dennis Reid

Ms. Eissler summarized that Mr. Reid was licensed as a mechanical engineer and his license went delinquent due to non-payment of renewal fees. He applied for reinstatement and the Board granted that reinstatement conditioned upon his taking and passing the national 8-hour mechanical engineering examination. Mr. Reid is asking the Board to reconsider this requirement based on his work experience, which he believes demonstrates that he is technically competent to have his license reinstated without him taking the examination.

Mr. Reid addressed the Board and indicated that he presented a binder representing the work he had done since the 1990's. He reported that he took and passed the exam in 1976 and maintained his license by paying renewal fees until 1991. In 1988 he moved and sent an address change to the Board. He had not done any work that required a professional engineer license and indicated that it was not a high priority to maintain his license. He stated that he did not receive a renewal notice and did not think much about it. He was approached to do consulting and he thought it would be beneficial to ensure his license was current and discovered that it had been cancelled. He claim that his address was not changed and, therefore, he never received a renewal notice. He does not think it is appropriate to have to re-take the examination.

He stated that he founded two successful race car companies, has 14 patents and started an industry of electronic mechanical-type equipment, developed transmission products, has performed a redesign of General Motor's transmission products which now is standard in race cars and monster trucks. In addition, his company has supplied transmissions to Ford and Chrysler for production vehicles. He indicated that he has a history of continuous innovation

and engineering and feels he is more than qualified to be a Professional Engineer.

Mr. Donelson reviewed and recommended Mr. Reid's reinstatement condition upon his taking and passing the exam due to the length of time his license has been expired. He explained that the information regarding Mr. Reid's experience and the recommendation were reviewed by Mr. Silva and former Board Member Paul Wilburn before the recommendation was presented to the Board to require Mr. Reid to take and pass the exam. Mr. Donelson pointed out that in Mr. Reid's case he is working in an exempt field and is asking for his license back and that gives him the ability to practice outside exempt areas.

Mr. Reid stated that he took the exam 35 years ago, was granted a license and had the qualifications to be a professional engineer then and now has an additional 35 years of experience. Mr. Tami noted that he was impressed by his resume and wants to ensure that Mr. Reid has kept up-to-date on the Board Rules and Regulations. Mr. Reid explained that other than the periodicals that are regularly written, he has not, but he would review them before entering into any agreements to provide mechanical engineering. Mr. Tami followed up with if Mr. Reid was to enter into a contract with the public to do mechanical engineering, if he could recognize what needs to be in the contract. Mr. Reid indicated that he does not have knowledge of that but would do research. He added that meeting any regulations, standards, payment issues, all business practices would have to be reviewed to ensure that they are legal and ethical, and good engineering practices would have to be followed.

Mr. Stockton asked Mr. Reid what his motivation was to reinstate at this time. Mr. Reid indicated that he would like to stay active in engineering by doing consulting work. He wants to ensure that he is not cut out of any potential jobs by not having a P.E. license.

President Zinn pointed out that at the time Mr. Reid stopped renewing his license he was able to practice mechanical engineering for schools and hospitals. If his license was to be reissued today, would he feel qualified to do so. Mr. Reid responded by saying he did not know. He doubts he would do that as he has no interest in that area, just automobiles. Mr. Reid indicated he was somewhat familiar with the Board's Professional Code of Conduct. Mr. Duke is concerned that much has changed since Mr. Reid's license became delinquent in terms of the law. Mr. Reid is aware of business practices and business law. He works in a very competitive field where confidentiality is key.

Mr. Reid stated he plans on working with private corporations, racing manufacturing, OEM, General Motors, Ford, and Chrysler. He used to be an R&D Engineer in the 1970's and may start again.

Mr. Reid noted that if he had renewed his license, , there would not be a question as to whether he had kept current with the laws or had continued to practice in the mechanical engineering field since there are no continuing education requirements. President Zinn asked if the responsibility to renew is on the licensee or the Board. Mr. Donelson clarified that it lies with the licensees.

Vice President Irish stated that she is concerned with how cavalier Mr. Reid was in renewing his license in the past and recommends that he take it more seriously. Mr. Josephson explained that a professional engineer is required to only practice in his area of competency. He wants to reiterate that is something the Board takes very seriously. Mr. Tami has no doubt that Mr. Reid is technically competent but his concern is that Mr. Reid is not competent in the laws and rules and made up answers to try and answer them rather than explaining that he did not know. Mr. Reid believes that most licensees could not answer the questions if in his position. Mr. Tami pointed out that Mr. Reid is before the Board and is proving he cannot. Mr. Reid assured the Board that he would make sure he is knowledgeable of the laws and that he only practices in his area of expertise.

MOTION: Mr. Modugno and Mr. Satorre moved to not require Mr. Reid to re-take the exam and reinstate his license.

VOTE: 7-1-2, Motion carried; Mr. Tami opposed, and Vice President Irish and President Zinn abstained

V. Exams/Licensing (continued)

B. Update on October 2013 Exams

Mr. Mathe reported that examination notices were sent out via e-mail to 3,800 individuals, and only 30 were returned which is a significant reduction. E-mail addresses are not required to be provided by the candidates; for those who do not provide an e-mail address a letter is mailed. As of yesterday, 50% of the eligible candidates have already scheduled for the civil, geotechnical, traffic, and professional land surveyor exams. This is the second PLS exam administration this calendar year. There were 200 PLS candidates eligible for the October 2013 exam. Typically, during the October cycle there are 50 candidates that take the national PS exam. In April, there were 400 PLS candidates who applied. There appears to be an increase in candidates overall.

XIV. President's Report/Board Member Activities

Vice President Irish thanked the Board for their vote of confidence and staff for their efforts.

XV. Approval of Consent Items

A. Approval of the Minutes of the June 13, 2013, Board Meeting

MOTION: Mr. Silva and Mr. Satorre moved to approve minutes

VOTE: 9-0-1, Motion carried; Vice President Irish abstained since she was not in attendance at the June meeting.

XII. Closed Session – Personnel Matters, Examination Procedures and Results, Administrative Adjudication, and Pending Litigation (As Needed) [Pursuant to Government Code sections 11126(a) and (b), 11126(c)(1), 11126(c)(3), 11126 (e)(1), and 11126(e)(2)(B)(i)]

A. Civil Litigation

1. Dennis William McCreary vs. Board for Professional Engineers, Land Surveyors, and Geologists, Sierra County Superior Court Case No. 7361
2. Thomas Lutge v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, Sacramento Superior Court Case No. 34-2012-80001329-CU-WM-GDS

XIII. Open Session to Announce the Results of Closed Session

Mr. Duke reported that during the Closed Session the Board adopted by consent four stipulated settlements, adopted four default decisions and four proposed decisions, and made two decisions after rejection of proposed decisions. Ms. Eissler advised that the Board discussed the two lawsuits as noticed on the agenda.

XVI. Other Items Not Requiring Board Action (continued)

Ms. Eissler stated that many years ago the Board discussed changing the laws to address issues with delinquent reinstatements, such as what conditions might be placed on the reinstatement depending on the length of the delinquency period and what other conditions might be imposed. Based on the discussions at the last Board meeting and current Board meeting, the Board may want to discuss this again. President Zinn directed that staff research this issue and present options to the Board at a future meeting.

Mr. Duke noted that, during its Closed Session discussions, the Board directed staff to make presentations on the selection of independent technical experts for enforcement case review and on the cost recovery authorization provided in Business and Professions Code section 125.3 at a future meeting.

Mr. Tami indicated that he would like the Board to discuss what would need to be done to place additional requirements on licensees at the time of renewal, such as a requirement that they take and pass an open-book questionnaire covering the laws and regulations. President Zinn directed staff to begin researching this issue and present options at a future meeting.

XVII. Adjourn

Meeting adjourned at 1:17 p.m.

PUBLIC PRESENT

Ruvim Grutman
Roger Hanlin, CLSA
Joe R. Silva, AICHE
Bryan Sorensen, PECG
Stan Horwitz
Art Sutton
Bob DeWitt, ACEC
Dennis Reid

DRAFT

XV. **OTHER ITEMS NOT REQUIRING BOARD ACTION**

- A. 2014 Board Meeting Schedule

2014 Board for Professional Engineers, Land Surveyors, and Geologists

Board Meetings

January 2014

S	M	T	W	T	F	S
		1	2	3	4	
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

February 2014

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	

March 2014

S	M	T	W	T	F	S
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

April 2014

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

May 2014

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

June 2014

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

July 2014

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

August 2014

S	M	T	W	T	F	S
31					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

September 2014

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

October 2014

S	M	T	W	T	F	S
		1	2	3	4	
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

November 2014

S	M	T	W	T	F	S
30						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

December 2014

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

Holidays

1/1 New Year's
 1/20 M. L. King, Jr. Day
 2/17 President's Day
 3/31 Cesar Chavez Day
 5/26 Memorial Day
 7/4 Independence Day
 9/1 Labor Day
 11/11 Veteran's Day
 11/27-11/28 Thanksgiving Break
 12/25 Christmas

Board Meeting Dates

FEBRUARY 13-14
 APRIL 10-11
 JUNE 5-6
 JULY 31- AUGUST 1
 SEPTEMBER 25-26
 NOVEMBER 13-14

Key

BOARD MEETINGS
 HOLIDAYS
 MBA MTG
 INCEES ANNUAL MTG

XVI. ADJOURN
