

BEFORE THE  
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation against: )

MARTIN JAMES O'MALLEY )  
650 East Chase Drive )  
Corona, CA 92881 )

Case No. 875-A

OAH No. 20100010956

Land Surveyor License No. L 3745 )  
Civil Engineer License No. C 27217, )

Respondent. )

**ORDER DENYING PETITION FOR RECONSIDERATION**

The Petition for Reconsideration filed by the respondent in the above-entitled matter has been read and considered by the Board for Professional Engineers, Land Surveyors, and Geologists. Good cause for the granting of the petition has not been shown; therefore, the Petition for Reconsideration is hereby denied.

The Decision issued by the Board for Professional Engineers, Land Surveyors, and Geologists shall become effective upon expiration of the Order Granting Stay of Execution of Decision on **September 12, 2011**.

IT IS SO ORDERED September 8, 2011

*Original Signed*  
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BOARD FOR PROFESSIONAL ENGINEERS,  
LAND SURVEYORS, AND GEOLOGISTS  
Department of Consumer Affairs  
State of California

BEFORE THE  
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:	)	
	)	
MARTIN JAMES O'MALLEY	)	Case No. 875-A
650 East Chase Drive	)	
Corona, CA 92881	)	OAH No. 20100010956
	)	
Land Surveyor License No. L 3745	)	
Civil Engineer License No. C 27217,	)	
	)	
Respondent.	)	
_____	)	

ORDER GRANTING STAY OF EXECUTION OF DECISION

A Decision in the above matter was issued by the Board for Professional Engineers, Land Surveyors, and Geologists on July 28, 2011, to become effective on September 2, 2011. Respondent submitted a Petition for Reconsideration pursuant to Government Code section 11521 on August 22, 2011. Pursuant to Government Code sections 11519 and 11521, the effective date of the Decision in this matter is stayed for 10 days solely for the purpose of consideration of the Petition for Reconsideration by the Board for Professional Engineers, Land Surveyors, and Geologists.

**Execution of the Decision is stayed until September 12, 2011.**

DATED: August 25, 2011

Original Signed  
\_\_\_\_\_  
NANCY A. EISSLER  
Enforcement Program Manager  
Board for Professional Engineers, Land Surveyors,  
and Geologists  
Department of Consumer Affairs  
State of California

BEFORE THE  
BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation against: )

MARTIN JAMES O'MALLEY )  
650 East Chase Drive )  
Corona, CA 92881 )

Case No. 875-A

OAH No. 20100010956

Land Surveyor License No. L 3745 )  
Civil Engineer License No. C 27217, )

Respondent. )  
\_\_\_\_\_ )

**DECISION**

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board for Professional Engineers, Land Surveyors, and Geologists as its Decision in the above-entitled matter.

This Decision shall become effective on September 2, 2011.

IT IS SO ORDERED July 28, 2011.

*Original Signed*  
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BOARD FOR PROFESSIONAL ENGINEERS,  
LAND SURVEYORS, AND GEOLOGISTS  
Department of Consumer Affairs  
State of California

BEFORE THE  
BOARD FOR PROFESSIONAL ENGINEERS AND SURVEYORS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MARTIN JAMES O'MALLEY,

Land Surveyor License No. L 3745  
Civil Engineer License No. C 27217

Respondent.

Case No. 875-A

OAH No. 2010010956

**PROPOSED DECISION**

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Diego, California on September 22, and November 22, 2010.

Rita M. Lane, Deputy Attorney General, represented David E. Brown, Executive Officer, Board for Professional Engineers and Land Surveyors.

Respondent was present and represented himself.

The matter was submitted on December 22, 2010.

**FACTUAL FINDINGS**

1. David E. Brown (Complainant) filed Accusation, Case No. 875-A, dated December 9, 2009, against Martin James O'Malley (Respondent) in his official capacity as Executive Officer of the Board for Professional Engineers and Land Surveyors (Board), Department of Consumer Affairs.

2. On December 18, 1970, the Board issued Land Surveyor License Number L 3745 to Respondent. At all times relevant herein, said license was in full force and effect and will expire on June 30, 2012, unless renewed.

On July 14, 1976, the Board issued Civil Engineer License Number C 27217 to Respondent. At all times relevant herein, said license was in full force and effect and expired on March 11, 2011, unless renewed.

3. Complainant alleged that, based on the facts of this case, in his practice of land surveying regarding the Schultz properties, Respondent was incompetent, negligent, dishonest and misrepresented facts. Respondent disputed the foregoing. In determining the facts of the case, the evidence has been evaluated.

In support of the charges, Complainant submitted documentary evidence and the testimony of: Neal Mello (Mello), the complaining witness in this proceeding and also one of the plaintiffs in litigation filed against Respondent's client; and David Lindell (Lindell), the Board's expert witness. Mello has had 10 years experience as a land surveyor. There is no evidence in the record that Mello holds or has held previously a license issued by the Board. Mello's testimony was consistent with the documentary evidence. In addition, he retained and therefore provided documents to the Board relevant to his complaint and the charges in this case. Both Mello and Lindell were credible and reliable as witnesses.

In support of his position, in addition to documentary evidence, Respondent testified, and he offered the testimony of Patricia Trydahl (Trydahl), the defendant in litigation who retained Respondent's services as a land surveyor. In response to questioning, many times, Trydahl testified that she did not recall; on occasion, her testimony was inconsistent with documentary evidence; at times, it appeared that she was evasive. As the incidents that resulted in the filing of the Accusation in this case occurred eight years or more ago, it was not clear if she was being untruthful or if her memory had faded. Given the foregoing, as the documentary evidence was drafted during the time the incidents occurred, in most instances, the documentary evidence is more reliable than Trydahl's testimony. Respondent's testimony was consistent with Trydahl's regarding their relationship and Respondent's role in the litigation with the Schultz Road property owners. In some instances, Respondent candidly admitted certain facts; in others his statements and testimony in the record were inconsistent with other evidence in the record; these inconsistent statements and testimony of Respondent were determined to be unreliable and therefore disregarded.

The foregoing has been considered in making the Findings in this case.

4. In October 1995 Mello purchased the property located at 25901 Schultz Road in Hemet, California. Several months later, he purchased the property located at 25917 Schultz Road.<sup>1</sup> The properties located at 25901, 25909, 25915 and 25917 Schultz Road are serviced by a common easement. The last of these has two additional easements, one granted from 2915 Schultz Road that permits access from the common easement to the property. There is an easement to the rear of the property known as 45457 State Highway 74 (Florida Avenue) that connects to the common easements. All of the deeds and easements

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<sup>1</sup> Mellow owned 25917 Schultz Road between 1998 and approximately 2001.

were created prior to 1972, and there is no record of survey dividing the properties. Each lot was created at different times between 1945 and 1972. There is no parcel map showing the division of the properties. The lot on the corner of Schultz Road and Florida Avenue (State Highway 74) is vacant. All other properties have residences on them and are fenced or walled, except the property at 25915 Schultz Road, which was open on the east and west sides.

In 1996 Trydahl moved into and subsequently purchased the 25915 Schultz Road property. Since the common easement is a dead end, there was a part of Trydahl's property at the end of the recorded easement that was used as a "turn-around" by the residents and the general public.

5. In July 1998 Trydahl began to erect a fence along the north side of the easement on her property, blocking the "turn-around"; Mello argued that the fence encroached on this easement. As a result, there was a dispute between Trydahl and other Schultz Road property owners. On July 20, 1999, the property owners filed a lawsuit against Trydahl to determine the location of the prescriptive easement and placement of a fence along side the easement.

Mello engaged the services of Archer Engineering, Brad Worrel (Worrel), R.C.E., to write the legal description for the easement. Worrel signed and sealed the description; it was submitted as an exhibit to the pleadings in the civil litigation.

6. During the course of the litigation, Trydahl retained Respondent to determine the placement of the fence along the north side of the easement and to advise her during the litigation.

Respondent executed a declaration, under penalty of perjury, dated October 6, 2000, that was submitted to the Court and arbitrator. In his declaration, Respondent stated that the easement was 24 feet wide and that the fence did not encroach on the access easement. Attached to his declaration was a map prepared by Respondent. He drew the easement with a uniform width of 24 feet.

7. As part of their litigation, the parties participated in mediation. During the mediation, with Respondent present, the parties settled the case. They entered into an arbitration agreement, filed with the Court, on November 8, 2000, and stated, in pertinent part:

- "1. The fence currently located on the "turn around" area shall be moved at the expense of plaintiff Mello. Plaintiff shall use a professional fence installer and the parties agree to endeavor to use the gentleman who actually installed this fence. This fence will be relocated to outside the boundaries of the turn around area as described in the license agreement.

2. The surveyor shall identify the boundary of the turn around area physically on the ground as it corresponds to the written survey of the turn around area which has been provided to the parties.
3. After the boundary of the turn around area has been identified Trydahl shall identify the new fence location between the trees and the turn around area as identified by the surveyor. A settlement agreement will be entered into in which each side agrees to dismiss the entire action with prejudice as to all parties upon signing the license agreement.
4. Each side shall bear their own costs, witness fees, expert fees and attorneys' fees and sign a standard mutual release of all claims against each other...."

Trydahl's attorney prepared the license for use of the "turn-around"; it included the legal description prepared by Worrel. The license was recorded on April 20, 2001.

8. The arbitration agreement does not state time frames by which actions must be accomplished. Between November 8, 2000 and March 1, 2003, Trydahl filed for bankruptcy, and Mello was involved in a serious accident, impairing the ability of the parties to comply with the arbitration agreement.

9. On March 1, 2003, Mello and Worrel set markers on the ground indicating the boundary for the "turn-around" as it relates to the description submitted with the pleading. In response, Trydahl sent a letter to Mello, dated March 7, 2003; she stated, in pertinent part:

"... I don't quite agree with the surveyor's interpretation of the preexisting turnaround area as he (you) marked it. What is the name and license number of the surveyor who identified the turn around area? I request that he send me a map and a legal description of the area he has identified as the turn around area. My Surveyor Mr. O Malley would like to compare the new markings with the photos and maps of the turn around area recorded on the license agreement. I will then mark where the fence will be relocated by your professional fence installer..."

10. Between March 7 and July 23 2003, there was additional correspondence between Mello and Trydahl, including two letters from Respondent.

In his April 25, 2003 letter to Trydahl, Respondent stated:

"Responding to your request I reviewed the letter from Mr. Mello regarding "markers" set to describe the turn-around that you granted to him, that is the subject of your settlement agreement with him. It is customary for a surveyor to make a map showing his work and what the stakes mean. In this case, I expect to see an informal letter sized sketch showing all the stakes, where they

are and stating the reason used to place them. I will review that map when you provide it. Until then there is no way I can evaluate marks on the ground.

Also, placing such stakes and making a map does not trigger the need for a Record of Survey map.”

By letter, dated April 26, 2003, Trydahl responded to correspondence from Mello and attached Respondent’s letter, dated April 25, 2003. Trydahl relied on the information in this letter when she responded to Mello.

In a letter, dated June 9, 2003, to Trydahl, Mello provided four options to resolve the matter, including:

“ You can provide a written explanation, from your licensed surveyor as to why he can’t find the easement line on the ground, or if he can, why the markers, as placed by my surveyor are not acceptable, including his methodology for arriving at that determination.”

In response to the June 9, 2003 correspondence, on behalf of Trydahl, Respondent sent Mello a letter, dated July 9, 2003. Among other things, Respondent stated that he was representing Trydahl, questioned whether a licensed surveyor had performed the work done on March 1, 2003 and requested “a sketch or map” showing the work performed by the licensed surveyor; in addition, Respondent stated: “At minimum the sketch must show dimensions, including bearings and distances of the lines established, the basis used to establish them, a ‘North’ arrow and bear the signature, license number and stamp of the surveyor that prepared the map.” In the same letter, Respondent stated that Mello’s statement “*There was no need for provision or need for ‘customary’ maps or surveyor’s notes, since the license clearly defines the boundary as surveyed*” was false for several reasons, and he delineated three reasons. The second reason was, “This particular boundary is not clear at all. A competently prepared sketch is particularly needed here because it is impossible to follow the legal description without a field survey.”

11. On September 5, 2003, Mello filed a complaint with the Board against Respondent. The Board’s enforcement analyst contacted Respondent by letter, dated January 4, 2004, and informed him that the complaint had been filed regarding a survey he performed, that “it is believed that you were hired by Ms. Trydahl to determine the location of the common easement and the placement of the fence along the North side of the easement; the complainant is questioning where you obtained the information you provided as the basis for your ‘map’.”

12. In his written response to the Board’s enforcement analyst, dated January 9, 2004, among other things, Respondent stated, in pertinent part:

“... I did prepare a map that did nothing more than plot the recorded documents that described the various boundaries. That map was intended for

my internal use to help me understand the case. It was not intended for any other purpose and it was not published. I am not aware of any instance where that map was used in the hearing or for any other purpose. I don't think I made any statements in testimony as to the location of any boundaries because the primary issue at the hearing was the rights of the parties rather than the location of the boundaries or easement. I did not perform a field survey nor did I prepare a map that purported to describe the easement."

13. Lindell, was retained by the Board to evaluate Respondent's land surveying work regarding the easement dispute on Schultz Road and render an opinion regarding whether he acted within the standard of care as a land surveyor. In his testimony, he described the education, training and experience that qualified him to serve as the Board's expert; in addition, he described the documents reviewed to form his opinions before drafting a report of his findings.

Lindell holds an Associates of Science degree in surveying and has been licensed by the Board as a land surveyor since September 1972. His work history began in 1962; he worked six years as a surveyor with the Los Angeles City Water and Power Company; for 30 years, he worked for the Los Angeles Department of Public Works – the last 18 years, he supervised field crews; he retired in 1999 and has continued to work part-time for the City of Los Angeles; he teaches classes at three different junior colleges.

Lindell established that he understands the definitions of incompetence and negligence. His evaluation included a review of a variety of documents, including Mello's complaint against Respondent, the arbitration agreement, maps and correspondence.

14. Complainant alleged that, based on the facts (Findings 4, 5, 6, 7, 8, 9, 10, 11 and 12) Respondent was incompetent in his practice of land surveying regarding the Schultz Road properties in that:

- He erroneously claimed that the legal description for the easement prepared by Mello's surveyor was not clear and was impossible to follow without a land survey. Also, Respondent stated that he could not tell where the boundaries were for the easement.
- Respondent misinterpreted the easement description and submitted to the court and to the arbitrator in the lawsuit a drawing that the easement was a uniform width of 24 feet when it was not.

15. In Lindell's opinion, Respondent's statement that the legal description prepared by Mello's surveyor was not clear and impossible to follow without a land survey and that he could not tell where the boundaries were constitutes incompetence; it is a simple legal description; "this is what a land surveyor does"; Lindell had no trouble following the

legal description and was able to plot it. Respondent offered insufficient relevant evidence to the contrary.

16. Lindell testified that Respondent was incompetent in his practice of land surveying when he submitted the declaration to the Court and to the arbitrator with the attached map and both his declaration and drawing inaccurately described the easement.

Both in his letter to the Board and in his testimony, Respondent stated that he prepared the map for his personal use, that he did not intend it for any other purpose; he knew that the easement was not uniform 24 feet but described it as such to make it simpler for the fact finder to understand. Considering the evidence in the record, Respondent's statements are illogical, inconsistent with other evidence and untruthful for several reasons. Respondent executed the declaration. The first page of the declaration includes the case number, the date, time and place of the arbitration as well as the name of the arbitrator. In paragraph 2 of his declaration, it states, in pertinent part:

"The attached Exhibit 'A' is a map showing the location of the properties owned by the parties to this action. These properties all take access via a non-exclusive easement for road and utility purposes. Along the boundary of the Trydahl property, fences bound the easement on each side. These fences are 24 feet apart,<sup>2</sup> the width of the easement...."

The map itself includes the letterhead of Respondent's engineering corporation and the name of the case. As a Board licensee more than 30 years, considering the formality of the documents as well as the information contained in the declaration and drawing, Respondent knew or should have known that the declaration would be used in the legal proceeding, that his drawing would be attached to his declaration and that his role in the proceeding was to elucidate the facts. His argument is without merit and therefore rejected.

17. The evidence established that Respondent was incompetent in his practice of land surveying regarding the Schultz Road properties (Findings 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16).

18. Complainant alleged that, based on the facts (Findings 4, 5, 6, 7, 8, 9, 10, 11 and 12), Respondent was negligent in his practice of land surveying regarding the Schultz Road properties in that:

- Respondent failed to confirm or deny points for the boundaries of the easement prepared by Worrel, Mello's surveyor, thereby impeding the conclusion of the arbitration agreement between the property owners;

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<sup>2</sup> Expert testimony established that Respondent did not know the distance between the fences without surveying the property.

- Respondent advised his client of ways to stall the finalizing of the arbitration agreement between the property owners.

19. According to Lindell, in litigation, the standard of care requires that the land surveyor be neutral, be truthful with and state facts to his client and the Court as well as prioritize court orders (such as the requirements in the arbitration agreement in this case); as such, Respondent was obligated to accept or reject the markings placed by Worrel and Mello within 30 days; failure to do so constituted negligence.

Respondent disagreed with Lindell's opinion (stated in the foregoing paragraph) for several reasons. He contends that the arbitration agreement was between the parties; as such, he was not obligated to accept or reject the markings; Trydahl was obligated, particularly given his role in the litigation. Respondent and Trydahl were friends; during the litigation, she represented that she retained Respondent as an expert witness; if she was paid for his service, it was minimal. He made an effort to reduce/minimize costs for her. It was Respondent's opinion that, in order to implement the terms of the arbitration agreement, Mello, not Trydahl, had an obligation to pay for the survey; according to Respondent, when Worrel prepared the legal description, it was necessary for him to perform a field survey and that Worrel had notes and prepared a sketch; if Mello had provided the requested information, he would have been able to identify the proper location for placement of the fence.

Whether paid or not, when retained by Trydahl, Respondent was obligated to act within the standard of care. He was not obligated to accept or reject the markings, Trydahl was; it is clear that Trydahl had no education, training or experience as a land surveyor and that she relied on his expertise at the time that she entered into the arbitration agreement and again between March and July 2003. The standard of care required that he accept or reject the markings for the boundary for the turn around and thereafter identify the new fence location. There is no evidence that he made an effort to obtain a sketch or map from Mello's land surveyor. Considering his concerns and the fact that this case involved litigation among the property owners about the easement and placement of the fence, the standard of care required that he perform an independent survey.

It was established that the information Respondent requested or advised Trydahl to request was unnecessary and delayed implementation of the arbitration agreement. The evidence did not establish that Respondent intended to delay fulfilling the requirements of the arbitration agreement.

20. Considering the facts (Findings 4, 5, 6, 7, 8, 9, 10, 11 and 12) and Finding 19, it was established that Respondent was negligent in his practice of land surveying regarding the Schultz Road properties in that he failed to advise his client to confirm or to deny the points for boundaries of the easement prepared by Mello's land surveyor, thereby impeding the implementation of the arbitration agreement between the property owners.

21. Complainant alleged that, based on the facts (Findings 4, 5, 6, 7, 8, 9, 10, 11 and 12), Respondent was deceitful and made misrepresentations in his practice of land surveying regarding the Schultz Road properties in that:

- Respondent would not contact Mello's surveyor to accept or reject the points for the boundaries of the easement set by Mello's surveyor in marking the easement pursuant to the arbitration agreement.
- Respondent stated that a fence did not encroach on the access easement in this case. In order to declare that a fence did not encroach on the access easement, a field survey was necessary. Respondent told the Board that he did not perform a field survey in the case. Either Respondent is being deceitful or misrepresenting facts to the Board.

22. In paragraph 5 of this report, Lindell stated, in pertinent part:

"Mr. O'Malley also appears to have violated Section 8780(a) of the Professional Land Surveyors Act. He appears to have shown deceitful misrepresentation to his client and duplicitous actions by dealing in bad faith with complainant.

He has not or will not contact the other surveyor, Mr. Worrel, for clarification or information."

These statements are unclear, and Lindell did not clarify them in his testimony. Given the foregoing, insufficient evidence was offered to establish that Respondent would not contact Mello's surveyor to accept or reject the points for the boundaries of the easement set by his surveyor in marking the easement pursuant to the arbitration agreement.

23. In his declaration submitted to the Court and to the arbitrator, Respondent stated that the fence did not encroach on the prescriptive easement. Expert testimony established that in order to determine that the fence did not encroach on the easement, a field survey was required. In his letter to the Board and in his testimony, Respondent admits that he did not perform a field survey. At minimum, he misrepresented this fact to the Court, without a valid basis for his statement. Respondent offered no credible evidence to the contrary.

24. The evidence established that, in his practice of land surveying regarding the Schultz Road properties, Respondent made misrepresentations (Findings 4, 5, 6, 7, 8, 9, 10, 11 and 12) and Finding 23.

25. In determining the appropriate discipline, the facts, violations and factors discussed in this Legal Conclusion have been considered. Respondent's efforts to assist his friend during the litigation that involved the prescriptive easement and placement of the fence on Trydahl's property were commendable but did not negate his obligation as a

licensed land surveyor. He was required to act within the standard of care. Respondent offered no evidence to establish that he understood this obligation. Respondent has held a license issued by the Board more than 30 years without prior discipline. Based on the foregoing and considering Complainant's recommendation, the following Order with probationary conditions is issued.

26. Complainant seeks recovery of the reasonable costs of investigation and enforcement in the amount of \$9,070.00 and submitted Certification of Prosecution Costs: Declaration of Rita M. Lane. Respondent made no objection.

### LEGAL CONCLUSIONS

1. Pursuant to Business and Professions Code section 8780, subdivision (b), cause exists to discipline Respondent's licenses in that he was incompetent in his practice of land surveying regarding the Schultz Road properties, by reason of Findings 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16 and 17.

2. Pursuant to Business and Professions Code section 8780, subdivision (b), cause exists to discipline Respondent's licenses in that he was negligent in his practice of land surveying regarding the Schultz Road properties, by reason of Findings 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 19 and 20.

3. Pursuant to Business and Professions Code section 8780, subdivision (a), cause exists to discipline Respondent's licenses in that he made misrepresentations in his practice of land surveying regarding the Schultz Road properties, by reason of Findings 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 23 and 24.

4. Pursuant to Business and Professions Code section 125.3, Complainant seeks to recover the costs of enforcement in the amount of \$9,070.00 (Finding 26).

In determining the reasonableness of the costs, the factors set forth in *Zuckerman v. Board of Chiropractic Examiners*, (2002) 29 Cal.4<sup>th</sup> 32, have been considered. These factors include: whether the licensee has been successful at hearing in getting the charges dismissed or reduced; the licensee's good faith belief in the merits of his position; whether the licensee has raised a colorable challenge to the proposed discipline; a determination regarding the financial ability of the licensee to pay; and whether the investigation was appropriate to the alleged misconduct.

Overall, Complainant established that Respondent's misconduct constitutes cause for discipline under all three counts. He had a good faith belief in the merits of his position but did not raise a reasonable challenge to the proposed discipline. Applying the *Zuckerman* criteria to this case, it is reasonable for the Board to recover its costs of investigation and enforcement of \$7,500.00.

Considering the foregoing, the Board's reasonable costs of enforcement are \$7,500.00.

5. Factual and legal arguments not addressed herein are determined to be unsupported by the evidence, found to be without merit and therefore rejected.

#### ORDER

Land License number L 3745 and Civil Engineer License Number 27217 issued to Respondent Martin James O'Malley is revoked. However, revocation is stayed, and Respondent is placed on probation for two years on the following conditions.

1. Respondent shall obey all laws and regulations related to the practices of professional engineering and professional land surveying.
2. Respondent shall submit such special reports required by the Board.
3. During the period of probation, if he practices exclusively outside the State of California, Respondent shall notify the Board, in writing, immediately. The period of probation shall be tolled during any time that he practices exclusively outside the State of California.
4. No later than 18 months from the effective date of this Decision, Respondent shall successfully complete and pass, with a grade of "C" or better, a college level course, approved in advance by the Board or its designee. The course shall be specifically related to the area of violation. "College-level course" shall mean a course offered by a community college or a four-year university of three semester units or equivalent. "College-level course" does not include seminars.
5. No later than 12 months from the effective date of this Decision, Respondent shall take and pass the second division examination in land surveying. The Board or its designee may select the specific examination questions such that the questions relate to the specific area of violation and may draft an examination of the same duration as that required of an applicant for licensure. Respondent shall pay the application fee described in Section 407 and shall be afforded all examination appeal rights described in 16 CCR §§ 407, 443 and 444.
6. During the period of probation, Respondent shall practice professional land surveying under the supervision of a professional land surveyor licensed in the same branch as Respondent. The Board or its designee shall approve the supervisor in advance. Such supervising professional land surveyor shall initial every stamped or sealed document in close proximity to Respondent's stamp or seal.

7. Respondent shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code Section 125.3 in the amount of \$7,500.00. Respondent shall be permitted to pay these costs in a payment plan approved by the Board, with payments to be completed no later than three (3) months prior to the end of the probation term.

If Respondent has not complied with this condition during the probationary term, and Respondent has presented sufficient documentation of his good faith efforts to comply with this condition, and, if no other conditions have been violated, the Board, in its discretion, may grant an extension of Respondent's probationary period up to one year without further hearing in order to comply with this condition. During the one-year extension, all original conditions of probation shall apply.

8. If Respondent violates the conditions of probation, after giving her notice and an opportunity to be heard, the Board may set aside the stay order and impose the stayed discipline (revocation) of Respondent's license.

During the period of probation, if a Petition to Revoke Probation and/or Accusation is filed against Respondent's license or the Attorney General's Office is requested to prepare a Petition to Revoke Probation and/or Accusation against his license, the probationary period shall be extended automatically and shall not expire until the Petition to Revoke Probation and/or Accusation is acted upon by the Board.

DATED:

May 25, 2011

Original Signed

VALLERA J. JOHNSON

Administrative Law Judge

Office of Administrative Hearings

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8  
9 **BEFORE THE**  
**BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS**  
10 **DEPARTMENT OF CONSUMER AFFAIRS**  
**STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 875-A

12 **MARTIN JAMES O'MALLEY**  
13 **650 East Chase Drive**  
14 **Corona, CA 92881**

**ACCUSATION**

15 **Land Surveyor License No. L 3745**  
16 **Civil Engineer License No. C 27217**

17 Respondent.

18 Complainant alleges:

19 **PARTIES**

20 1. David E. Brown (Complainant) brings this Accusation solely in his official capacity as  
21 the Executive Officer of the Board for Professional Engineers and Land Surveyors, Department  
22 of Consumer Affairs.

23 2. On or about December 18, 1970, the Board for Professional Engineers and Land  
24 Surveyors issued Land Surveyor License Number L 3745 to Martin James O'Malley  
25 (Respondent). The Land Surveyor License was in full force and effect at all times relevant to the  
26 charges brought herein and will expire on June 30, 2010, unless renewed.

27 3. On or about July 14, 1976, the Board for Professional Engineers and Land Surveyors  
28 issued Civil Engineer License Number C 27217 to Respondent. The Civil Engineer License was

1 in full force and effect at all times relevant to the charges brought herein and will expire on  
2 March 31, 2011, unless renewed.

3 JURISDICTION

4 4. This Accusation is brought before the Board for Professional Engineers and Land  
5 Surveyors (Board), Department of Consumer Affairs, under the authority of the following laws.  
6 All section references are to the Business and Professions Code (Code) unless otherwise  
7 indicated.

8 5. Section 118, subdivision (b), of the Code provides that the expiration, surrender or  
9 cancellation of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary  
10 action during the period within which the license may be renewed, restored, reissued or  
11 reinstated.

12 6. Section 8780 of the Code states, in pertinent part, that "[T]he board may revoke,  
13 suspend for a period not to exceed two years, or revoke the license or certificate of any licensed  
14 land surveyor or registered civil engineer, respectively, licensed under this chapter . . . , whom it  
15 finds to be guilty of:"

16 (a) Any fraud, deceit, or misrepresentation in his or her practice of land surveying.

17 (b) Any negligence or incompetence in his or her practice of land surveying.

18 . . . .

19 (d) Any violation of any provision of this chapter or of any other law relating to or  
20 involving the practice of land surveying.

21 COSTS

22 7. Section 125.3 of the Code provides, in pertinent part, that the Board may request the  
23 administrative law judge to direct a licensee found to have committed a violation or violations of  
24 the licensing act to pay a sum not to exceed the reasonable costs of the investigation and  
25 enforcement of the case.

26 SCHULTZ ROAD PROPERTIES

27 8. Respondent was hired by P.T., the owner of 25915 Schultz Road in Hemet,  
28 California, to determine the location of a common easement and to determine the placement of a

1 fence along one side of the easement in a property dispute between neighboring property owners.  
2 The properties at 25901, 25909, 25915 and 25917 Schultz Road are serviced by a common  
3 easement. The property at 25917 Schultz Road has an additional easement that was granted from  
4 25915 Schultz Road that permits access from the common easement to the property located at  
5 25917 Schultz Road.

6 9. As a result of the dispute over the easement with P.T., the property owners on Schultz  
7 Road filed a lawsuit against P.T. to determine the location of the common easement and to  
8 determine the placement of a fence along one side of the easement.

9 10. The parties went to arbitration. An arbitration agreement was reached and N.M., the  
10 property owner of 25917 Schultz Road, was required to hire a surveyor and prepare a legal  
11 description of the easement and mark on the ground the points set for what was to become a  
12 license for use by N.M. and his neighboring property owners.

13 11. Respondent, acting on behalf of P.T., requested irrelevant information and stalled  
14 the conclusion of the arbitration agreement made between the parties by failing to refuse or reject  
15 the points set by N.M.'s surveyor in marking the easement. Respondent impeded the conclusion  
16 of the arbitration agreement and advised his client of ways to stall the finalization of the  
17 agreement. Respondent claimed the legal description prepared by N.M.'s surveyor was not clear  
18 and was impossible to follow and that Respondent could not tell where the boundaries were  
19 located. Respondent prepared a drawing of the easement and submitted it to the court.  
20 Respondent's drawing misrepresented the easement description. Respondent drew the easement  
21 with a uniform width of twenty-four feet, which was incorrect. Respondent informed the Board  
22 that he did not do any field surveying on the project for P.T.

23 FIRST CAUSE FOR DISCIPLINE  
24 (Incompetence)

25 12. Respondent is subject to disciplinary action under Code section 8780(b) in that  
26 Respondent was incompetent in his practice of land surveying regarding the Schultz Road  
27 properties. The circumstances are as follows:

28 ///

1 a. Respondent erroneously claimed the legal description for the easement prepared by  
2 N.M.'s surveyor was not clear and impossible to follow without a field survey. Respondent also  
3 stated that he could not tell where the boundaries were for the easement. The supporting facts are  
4 more particularly alleged in paragraphs 8 through 11, above, and incorporated herein by  
5 reference.

6 b. Respondent misinterpreted the easement description and submitted to the court and  
7 the arbitrator in the lawsuit, a drawing that the easement was a uniform width of 24 feet, when it  
8 was not. The supporting facts are more particularly alleged in paragraphs 8 through 11, above,  
9 and incorporated herein by reference.

10 SECOND CAUSE FOR DISCIPLINE

11 (Negligence)

12 13. Respondent is subject to disciplinary action under Code section 8780(B) in that  
13 Respondent was negligent in his practice of land surveying regarding the Schultz Road properties.  
14 The circumstances are as follows:

15 a. Respondent failed to confirm or deny the survey prepared by N.M.'s surveyor,  
16 thereby impeding the conclusion of the arbitration agreement between the property owners. The  
17 supporting facts are more particularly alleged in paragraphs 8 through 11, above, and  
18 incorporated herein by reference.

19 b. Respondent advised his client, P.T., of ways to stall the finalizing of the arbitration  
20 agreement between the property owners. The supporting facts are more particularly alleged in  
21 paragraphs 8 through 11, above, and incorporated herein by reference.

22 THIRD CAUSE FOR DISCIPLINE

23 (Deceit and Misrepresentation)

24 14. Respondent is subject to disciplinary action under section 8780(a) in that Respondent  
25 was deceitful and made misrepresentations in his practice of land surveying regarding the Schultz  
26 Road properties. The circumstances are as follows:

27 a. Respondent would not contact N.M.'s surveyor to accept or reject the points for the  
28 boundaries of the easement set by N.M.'s surveyor in marking the easement pursuant to the

1 arbitration agreement. The supporting facts are more particularly alleged in paragraphs 8 through  
2 11, above, and incorporated herein by reference

3 b. Respondent stated that a fence did not encroach on the access easement in this case.  
4 In order to declare that a fence did not encroach on the access easement, a field survey would  
5 have had to have been completed. Respondent told the Board that he did not perform a field  
6 survey in this case. Either Respondent is being deceitful to the Board or misrepresenting facts to  
7 the Board. The supporting facts are more particularly alleged in paragraphs 8 through 11, above,  
8 and incorporated herein by reference.

9 PRAYER

10 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,  
11 and that following the hearing, the Board for Professional Engineers and Land Surveyors issue a  
12 decision:

13 1. Revoking or suspending Land Surveyor License Number L 3745 issued to Martin  
14 James O'Malley;

15 2. Revoking or suspending Civil Engineer License Number C 27217 issued to Martin  
16 James O'Malley;

17 3. Ordering Martin James O'Malley to pay the Board for Professional Engineers and  
18 Land Surveyors the reasonable costs of the investigation and enforcement of this case pursuant to  
19 Business and Professions Code section 125.3; and

20 4. Taking such other and further action as deemed necessary and proper.

21  
22 DATED: 12/9/09

*original signed*

23  
24 DAVID E. BROWN  
25 Executive Officer  
26 Board for Professional Engineers and Land Surveyors  
27 Department of Consumer Affairs  
28 State of California  
*Complainant*

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