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Avoiding Lawyers & Discipline

Presenters Nicole N. Schrier and Ethan Geis of Neuberger, Griggs, Sweet & Smith, LLP

Why should you listen to us? Who's more ethical - Attorneys or Engineers?

Requirements for Lawyers

- ▶ 30 hours of Continuing Legal Education every 2 years;
- ▶ 3 of those 30 hours need to be in approved course work in the area of legal ethics and professional responsibility (EPR);
- ▶ Ongoing requirement to follow all ethical rules, with disciplinary procedures in place for violations.

Requirements for Professional Engineers

- ▶ 30 hours of Professional Development every 2 years;
- ▶ 2 of those 30 hours need to be in the area of professional conduct and ethics.
- ▶ Ongoing requirement to follow all ethical rules, with disciplinary procedures in place for violations.

Two examples of unethical conduct

Attorney accused of showing up to court drunk

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(Photo: iStockphoto)

JUNEAU—A Dodge County attorney has been charged with her third drunken driving offense after allegedly showing up drunk at court.

Mary Harper, 51, of Beaver Dam, was drunk Oct. 20 while representing a client during a sentencing hearing at the Dodge County courthouse, according to the complaint. She made an initial appearance on the drunken driving charge on Oct. 22.

Bob Barrington, managing attorney for the Dodge County District Attorney's Office, said the case has been appointed to Green Lake County District Attorney Andrew Christiansen.

According to the criminal complaint, the Juneau Police Department received a call from court security officers before 1 p.m. Oct. 20. They reported that Harper had entered the building and appeared to be intoxicated, although they could not smell an odor of intoxicants. The woman appeared to have trouble walking and speaking.

Harper said she drove to the courthouse for a case and attributed her unsteady gait to the effects of prescription medications and an early injury. A Breathalyzer test showed Harper had a .170 percent blood alcohol concentration, more than twice the legal limit of intoxication, according to the complaint.

On Oct. 6, Harper was arrested for driving while intoxicated with a passenger under the age of 16. The bond conditions of that case noted that Harper was to maintain absolute sobriety, according to the criminal complaint.

Harper was released Oct. 22 on a \$5,000 signature bond, with the condition that she maintain absolute sobriety and refrain from entering any business whose primary activity involves the sale or distribution of alcohol. Harper is also prohibited from operating a motor vehicle without the court's permission.





If we want to dive deeper, what are the common concepts you should be aware of?

- Standard of Review
- Core ethical duties
- CYA

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- What's Likely to Trigger Discipline
 - Failing to abide by CLE requirements
 - Failing to disclose discipline in other states to DSPS
 - Practicing outside specialty
 - What's Likely to Trigger Litigation
 - System/plan design doesn't perform as intended or malfunctions
 - Now, opposing counsel starts digging into professional conduct responsibilities to prove liability theory (negligence ordinary and professional standard of care)

Standard of Review - Negligence

- ▶ Legal Negligence: "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do."
- ▶ Ethical Rules: Gross Negligence ... "means the performance of professional services by [a] ... professional engineer, ... which does not comply with an acceptable standard of practice that has a significant relationship to the protection of health, safety or public welfare and is performed in a manner indicating that the professional knew or should have known, but acted with indifference to or disregard of, the accepted standard of practice."

Duty to Avoid Conflicts of Interest

- ▶ Your Professional Conduct Rules don't define conflicts of interest.
- ▶ When interests are directly adverse, the conflict is clear.
- ▶ Generally, conflicts include:
 - ▶ Clash between a public and private pecuniary interest
 - ▶ Use of client information against them
 - ▶ Acceptance payment from a third party without a written agreement setting parameters
 - ▶ Settlement of ethics or negligence claims by using duress or threats
 - ▶ Significant risk that your ability to work with one party will materially limit your ability to work with another.
- ▶ Experts testimony in lawsuit
 - ▶ Inconsistent positions at trial

Duty of Competence

- ▶ "Shall use reasonable care and competence in providing professional services" Wis. Admin Code A-E § 8.06(1)
 - ▶ Not incredibly helpful
- ▶ May be disciplined for gross negligence, incompetence, or misconduct
 - ▶ Vivian case (61 Wis.2d 627 (1974))

Duty of Competence

- ▶ Taking professional education seriously
 - ▶ Lack of knowledge or ability to apply fundamental principles can be cause for discipline
 - ▶ Presumably, as the principles of the discipline advance so does the level of competence required as bare minimum
- ▶ Not working outside area of specialty
- ▶ Mental health? Substance abuse? Effects ability and fitness to discharge duty owed to clients and could cause professional discipline
 - ▶ May be an understandable reason for failure to meet duty, but not an excuse from professional discipline perspective or legal shield from lawful cause of action

Difference between Duty of Competence and Professional Duty of Care

- ▶ Competence
 - ▶ Relates to sufficient education, training, and experience providing adequate knowledge base
 - ▶ And relates to mental/physical ability to discharge professional duties
- ▶ Duty of Care
 - ▶ Despite competence and ability, professional acts or fails to act like another reasonable engineer would act
 - ▶ Ordinary negligence sufficient for legal recourse, but gross negligence required for professional discipline
 - ▶ Admin Code A-E 8.03(3)(b)
 - ▶ Ordinary negligence, particularly a pattern of negligence could equal "incompetence"

Duty to Supervise

- ▶ Obligation to adequately supervise "practice of professional engineering" in engineering firm by employees
 - ▶ What is "practice of professional engineering"? It's broad:
 - ▶ (1) Application of engineering principles and data
 - ▶ (2) In which public welfare or safeguarding life, health, and property at stake
 - ▶ Level of supervision required?
 - ▶ Admin Code takes pains to differentiate
 - ▶ Direct v. Indirect
 - ▶ Active v. Casual
 - ▶ "Supervision" = Supervision AND Control

Duty to Supervise

- ▶ Level of Supervision Required (Continued)
 - ▶ "Supervision" = Supervision and Control
 - ▶ Making decisions requiring discretion and evaluation of alternatives and professional judgment
 - ▶ Duty not ultimately concerned with competence/ability of individual doing the work – it's a matter of having review and control by licensed professional
- ▶ "Paper" the file
 - ▶ Show major design decisions being made by supervising engineer
 - ▶ Document meetings and schedule regular times for checking in
 - ▶ Trust, but verify; don't sign off until thoroughly reviewed and analyzed
- ▶ Don't "supervise" outside of your area of specialty

Examining Board v. Schuurmans (1980) (Unpublished case)

- ▶ Non-registered or licensed contractor hired by client to prepare plans for non-exempt apartment building
 - ▶ Contractor and client agree on basic design; contractor prepares sketches and plans; contractor becomes aware that building will be > 50,000 cubic ft
 - ▶ Hires licensed P.E. to sign and seal plans; P.E. conditions agreement on having some degree of supervision and control of project
 - ▶ P.E. examined plans already drafted by non-licensed contractor; indicates revisions
 - ▶ Contractor redrafts according to P.E.'s indicated revisions and P.E. signed, sealed and delivered plans to contractor.
 - ▶ P.E. has no contract with client and never inspects building site
- ▶ Examining board disciplines P.E. for aiding unauthorized practice of engineering

Schuumans (Continued)

- ▶ Trial court reverses Examining Board and appellate court affirms:
 - ▶ What did court look for?
 - ▶ P.E. had "complete engineering control"
 - ▶ i.e., revised all plans to be in accordance with sound engineering principles and did not sign and seal until plans were changed according to his direction
 - ▶ P.E. didn't have knowledge that contractor ever performed work that was unauthorized and then aided that practice
 - ▶ i.e., once contractor knew that building was not exempt, he requested help from P.E.
 - ▶ P.E. had no reason to believe otherwise
- ▶ Case is from 1980. Same result today?

Governing statute is the substantially the same

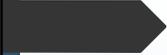
- ▶ Wis. Stat. 443.17. Seal or stamp; aiding unauthorized practice
 - ▶ No person who is registered under this chapter to practice . . . professional engineering may impress his or her seal or stamp upon documents which have not been prepared by the person or under his or her direction and control, knowingly permit his or her seal or stamp to be used by any other person or in any other manner knowingly aid or abet the unauthorized practice of . . . professional engineering

Definition of Supervision is modified (Wis. Admin A-E 8.03(5))

- "Supervision," "direct supervision," "responsible charge," and "direction and control," direct, personal, active supervision and control of the preparation of plans, drawings, documents, specifications, reports, maps, plats and charts.
 - includes:
- Selection of materials; selection or comparison of alternative designs; testing; knowledge of applicable codes and professional standards; knowledge of the technical capabilities of the personnel they rely upon to perform the professional work.
 - Does not include:
- Indirect or casual supervision; Delegation of any decision requiring professional judgment; Casual review or inspection of prepared plans; Mere assumption of responsibility for work without actual control; assuming charge, control or direct supervision of work in which professional engineer does not have technical proficiency.

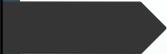
Duty of Honesty

- Your rules:
 - Accurately & truthfully represent capabilities & qualifications
 - Bring in specialists if you need to. Don't do anything you are not qualified to do
 - Accurately & truthfully represent costs & completion times
 - No fraudulent or deceptive advertising
 - No "secret" referral fees
 - Accurately & truthfully disclose your business name, structural organization, & type
- Ongoing obligation to correct an error, omission, or false assumption
 - Keep website information current and updated



CYA

- ▶ Any negligence or contract claim is reviewed based on a real-time evaluation – What did you know at the time the act or omission occurred?
 - ▶ The Problem of Hindsight
- ▶ Paper your file
 - ▶ Notes on costs
 - ▶ Notes on phone calls that defined your choices
 - ▶ Impressions
 - ▶ Limit the scope of your facts



There is a difference between making a mistake and acting unethically.

BUT

A mistake can turn into an ethical violation depending on how you handle it.

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- Nicole N. Schrier is a partner with Neuberger, Griggs, Sweet & Smith, LLP. Her practice areas focus around real estate, business law, creditor rights and estate planning. She has worked extensively in matters involving lien enforcement, foreclosure and replevin actions. She has lectured in the area of ethics and lien enforcement for the Wisconsin Association for Justice and given lien enforcement lectures to numerous organizations around Wisconsin. She is admitted in all courts within the State of Wisconsin and has appeared before the Wisconsin Supreme Court.
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