5-10-2018

Erickson v. Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors Appellant's Reply Brief Dckt. 45205

IN THE SUPREME COURT OF THE STATE OF IDAHO

APPEAL OF SUBSTITUTED JUDICIAL REVIEW OPINION

SUPREME COURT No. 45205

CHAD R. ERICKSON,
RESPONDENT - APPELLANT
v.
THE IDAHO BOARD OF LICENSURE OF PROFESSIONAL ENGINEERS AND PROFESSIONAL LAND SURVEYORS,
COMPLAINANT - RESPONDENT

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the 2nd Judicial District for Idaho County.

Honorable Gregory FitzMurice presiding, District Judge

Docket Idaho Co. Case No. CV-16-45061

Appeal from the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors, Chairman George Murgel presiding.

Board Docket No. FY 11.11.

Chad R. Erickson, pro se
2165 Woodland Road
Kamiah, Idaho 83536
RESPONDENT – APPELLANT

Michael Kane
4355 West Emerald Street, Suite 190
Boise, Idaho, 83701-2865 for Respondent.
COMPLAINANT - RESPONDENT

I lead this reply with a summary of the issues, with a showing of where the issue was argued at each stage. This summary is made without comment. To explain this method, and give a metaphor useful for later, I give a story from my childhood.

> In the Spring of 1953 Dad sold the family potato farm near Rexburg Idaho and bought a 320 acre ranch in the Bitterroot Valley. Part of the income plan was to sell horse rides into the adjacent National Forest. What with the oldest chasing girls and the second chasing footballs, I was often the head wrangler for these gigs. Dad would hang up the phone and tell me to go round up the horses. By the time I jogged the ½ mile, Shep would have the horses on their feet and then it was Katy-bar-the-door. Not that it took much coaxing, the horses were as eager for a run as was Shep. Off they would go with manes and tails flying, kicking, bucking, farting, with clods of dirt and thunder flying off of 300 hooves, making a bee-line for the corral, where they knew there would be oats waiting. At least for the first to get there.
>
> If I arrived at the corral before the expecting mares, the colts, the old, and the lame, I could shut the coral gate to them. The next task would be to cut out the green-broke. By the time the dudes arrived there would be a selection of 30 well trained mounts before them and they would make their pick. (Okay, so some of the horses were still a little green-broke.)
>
> Just so, I don't expect the Court to ride all 30 of the issues listed here, but most will take you to the Mountain and back. Chad R. Erickson

In the Respondents' Brief, the Board appears to have brought their own remuda and are riding on a different trail. Whose appeal is this anyway? While it is fashionable to ignore the Appellant's Brief when writing the Respondent's brief, Erickson wonders if he is to tend to his own herd or must he tend to the competitor's herd as well? Erickson is faced with the dilemma of strengthening his own Brief on points that were challenged, or defending against a new appeal that was not timely filed. We can see in the following Summary of Issues that the Board appears to have waived some 17 issues and has brought up 4 issues not raised in the Appellant's Appeal.

SUMMARY OF ISSUES RAISED IN APPELLANT'S BRIEF, WITH REFERENCES:

SERVING AS TABLE OF CONTENTS – Arranged According To Appellant's Brief

Note:
Ex denotes Exhibits
Tr denotes Transcript
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( ) denotes (Page/Line of Record)
[ ] denotes [P./L. of Appellant's Brief]
< > denotes <P./L. Respondent's Brief>
{ } denotes {P./L. This Reply Brief}
◆ lacks specific response.

II. "B" FIVE THRESHOLD ISSUES.

1. Attorney for Indigent? A Threshold, Public Interest and Fundamental Constitutional Exception. (AR P.117/L.9-10) [P.6#1] <P.10#2> {P.13#1}

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C., F. & H. Erickson falsely accused neighbors, Count 1 Paragraph 5, Count 2 Para. 9.a and Count 4 Paragraph 24.a. Tr P.123/L.1-10; P.202-205 (CR P.571-574) [P.17-18] <P.5/L.17 - P.6/L5> {P.17/L.20 – P.19/L.7}

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Williams v. IDAHO STATE BD. OF REAL ESTATE, 337 P. 3d 655, 663, 664 - Idaho: Supreme Court 2014: *"Due process is implicated in this case because the discipline imposed by the Board revoked William's appraiser license, and this revocation deprives him of his chosen livelihood...Due process issues are generally questions of law, and this Court exercises free review over questions of law...the phrase expresses the requirement of 'fundamental fairness'...An allegation of a biased decision maker implicates procedural due process, which is reviewed de novo."*

3. Violations of time limits, a jurisdiction argument. (AR P.38-47; P.51; P.270#8) (CR P.560#4; P.563/Plea) [P.38#3] <P.10/L.3-12> {P.31#3}

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19. Deliberate Decision not to Acquire Knowledge of Falsity of the charges. Improved Argument. Ex 21.1 P.1/L.3-10; (AR P.61; 73-74; 112/L.19-20) (CR P.556#13) [P.56#19] <◆> {}

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B. Did the District Court err in finding that all was lawful? (AR P247#3; P265#1) (CR P.118/L.1-11) [P.56#20; P.57#2] <◆> {}

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ISSUES RAISED IN RESPONDENTS' BRIEF BUT NOT IN APPELLANT'S BRIEF.

1. *"Failure to correct an error without additional compensation."* <P.6/L.17 – P.7/L.2; P.32/Item c> {P.42/L.18 – P.43/L.5}

ISSUES RAISED IN RESPONDENTS' BRIEF FOR FIRST TIME.

1. *"Erickson raises additional issues before this appellate body: constitutionality of the administrative agency process and procedure, the prohibition from creating a political body from an administrative agency are readily noted. Respondents request that all issues that were not raised before be dismissed".* <P.35/Item C> {P.43/L.7 – P.45/L.5}

2. *"The failure of the Board to appeal the district court's determination to require reconsideration of the imposed disciplinary measure should not be considered an admission that abuse of discretion occurred."* <P.35 "D"> {P.45/L.7-13}

3. *"One basis for the remand is an offer of settlement made by Complainant. However, as clearly set forth in the office of Attorney General, Rules of Administrative Procedure (this is not allowed)".* (parenthetical added) <P.36/L.10-16> {P.45/L.14-19}

4. "*The Board believes there is a clear basis to impose the discipline it entered."* <P.36/L18-19> {P.45/L.21-27}

5. *"Respondents request to reframe and restate...(t)hat the issue of the presiding Board revoking Erickson's license has been remanded and is not presently before this Court."* (CR P.657/Claim #32) [ ] <P.8 "D"> {P.46/L.1-8}

PRECEDENT

Pines v. BRD. OF MED., 351 P. 3d 1203, 1210, 1215, 158 Idaho 745 - Idaho: Sup. Court, 2015 {P.26/L.16; P.28/L.20}

Singleton v. Wulff, 428 U.S. 106, 121, U.S. Supreme Court (1976) {P.43/L.15}

State v. Perry, 245 P. 3d 961,974 - Idaho: Supreme Court 2010 {P.44/L.3; P.45/L.1}

Swinney v. General Motors Corp. 46F.3d 512, 517-518 (6th Cir. 1995) {P.44/L.10}

Ungar v. Sarafite, Judge 376 US 575, 84 S. Ct. 841, 11 L. Ed. 2d 921- Supreme Court, 1964 {}

Universal Title Ins. Co. v. U.S., 942 F.2d 1311, 1314 (8th Cir. 1991) {P.18/L.12; P.45/L.2}

Williams v. Idaho State Bd. Of Real Estate, 337 P. 3d 655, 663-666 - Idaho: Supreme Court 2014 {P.4/L.28-34; P.48/L.6}

TREATISE

2009 BLM Manual of Survey Instructions §5-29{P.24/L.18-19}; §10-33{P.17/L.1-2}

Considering New Issues on Appeal; the General Rule and the 'Gorilla Rule', by Robert J. Martineau, 40 Vand. L. Review 1023 (1987) {P.43/L.17-18}

Elusive Exceptions to Waiver & Forfeiture Bars by J. Bradley O'Connnell, {P.44/L.12}

http://www.amerisurv.com/content/view/10942/153/ {P.29/L.10}

Pushing Aside the General Rule in Order to Raise New Issues on Appeal, by Rhett R. Dennerline, Indiana Law Journal Vol.64/Issue 4, Article 7/P.1001/#3 {P.44/L.20-21}

History and Danger of Administrative Law, by Phillip Hamburger, Columbia Law School, Sept. 2014, Vol. 43, Number 9 {P.16/L.11-13; P.30/L.2-6}

STATUES AND RULES

IDAPA 04.11.01.700	{P.38/L.22}
IDAPA 10.01.02.005.02	{P.18/L.20; P.41/L.1; P.39/L.14}
IDAPA 10.01.02.011.01	{P.31/L.15; P.31/L.20}
I.A.R. 35(g) Orientation Maps	{}
I.C. 54-1215	{P.14/L.13-18}
I.C. 54-1220	{P.31/L.19}
I.C. 55-1604	{P.19/L.12}
I.R.E. 103(d)	{P.44/L.19}
I.R.E. 403	{P.19/L.5-6}
I.R.E. 601(a)	{P.40/L.17}
I.R.E. 803(3)	{P.36/L.21; P.38/L.24}
I.R.E. 803(20)	{P.19/L.1; P.22/L.22}
I.R.C.P. 11.3(d)	{P.38/L.21}
I.R.C.P. 59(a)(1)(D)	{P.38/L.21}

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GENERAL THOUGHTS

Up front, let us be reminded that the District Court found that the Board's Order lacked reason and professional judgment (CR P.764/L.15-16), that His Honor referred to this as an abuse of discretion (CR P.762/L.22-24) and the Board, by not appealing this finding, forfeited any consideration of innocence in the matter. Erickson argues that the District Court was in error to "sustain all findings as having substantial evidence based upon standard of care" when in the next breath the Court found that the Board had shown abuse of discretion, lack of reason and lack of professional judgment. In any case, such a finding allows this Court to move the appellate review from "substantial evidence" to "abuse of discretion", allowing a more thorough review. Once the merits have been collected and are in the saddle bags, there are plenty of procedural "horses" in the corral, with such names as "Questions of Law", "Constitutional Issues", "Appellate Court Discretion", "Judicial Economy", "Public Interest" and "Justice Requires it", that can be ridden the rest of the way. Obviously the above abuse of discretion, lack of reason and professional judgment were prejudicial and harmful, unjustly leading to the Board's Order revoking Erickson's survey license.

DE NOVO REVIEW: While it is a "General Rule" to consider a failure of the Complainant to object at examination as a bar against bringing issues up for the first time on appeal, an error at the beginning of the Hearing left Appellant without this burden. TR P.40/L9-20:

> Mr. Erickson: *"I would object on one point here. Why are we going to the west 1/4 corner of Section 25? Its irrelevant."*

Mr. Naylor: *"Yeah, and I would ask that Mr. Erickson be instructed, that he can make objections at the end of an answer, or beginning of a question. But to interrupt the witness is disruptive. And plus, he can't ask questions in the middle of examination."*
Mr. Murgel: *"So what you are wanting to know, you will be able to ask under cross-examination. So you will, basically, make a note of it to yourself, and wait your turn."*

Mr. Erickson objected, then Mr. Naylor ignored the objection and sassed Erickson. Mr. Murgel should have instructed Mr. Naylor to wait for the objection to be resolved before sassing. Instead, Mr. Murgel ignored the objection and upheld the sassing. In instructing Erickson to save his comments for later, it seemed to Erickson that Murgel was addressing the objection. If this wasn't the case, why didn't the Board's Counsel, Mr. Kane, correct this egregious error?

At the Hearing, Erickson's take on Murgel's instruction was that Erickson was not to make timely objections, and to do so would risk sanctions. This instruction was very similar to the one given at Deposition page 9, lines 1-14:

Naylor *"(If)I ask you a question about a conversation you had with an attorney, that's attorney/client privilege. Everything else you reserve the objections for later...And if I have to...I will seek for the Board to sanction you."*

Thus the defendant did not have a meaningful opportunity to object at trial, or deposition. See In re Sheena K., 153 P. 3d 282, - Cal: Supreme Court 2007, page 726 fn. 7; and
Cooper v. Superior Court, 55 Cal. 2d 291, 298 - Cal: Supreme Court (1961): *"...the judge is without power to foreclose that opportunity (to object)."*

The subject of the objection, the West ¼ corner of Section 25, came to occupy a considerable amount of time, a motion for continuance and was a significant basis for discipline (AR P.238/L.17 – P.239/L.4). The irony is that, after Erickson once again explained the

irrelevancy of the West ¼ corner at [P.51/Item c], the Board, in it's Respondent's Brief, waived the subject entirely. Oh, the time and confusion that could have been saved.

RESPONDENTS' ARGUMENTS & REBUTTALS THERETO,
Arranged according to Appellant's Brief.

II. "B" FIVE THRESHOLD ISSUES:

1. Attorney for Indigent? A Threshold, Public Interest and Fundamental Constitutional Exception. (AR P.117/L.9-10) [P.6#1] <P.10#2>

Board's Response: <P.10#2> *Erickson does not have an established constitutional right to counsel before the administrative agency.*

Appellant's Reply: Erickson acknowledges at [P.6/L3-16] that this is a threshold issue, having little more than the due process clause of the 5 and 14th Amendments to justify it. Just the same, the reasoning of In re Alaska Network on Domestic Violence, 264 P. 3d 835, 838 has compelling parallels to this case. Erickson pro se has been steam rolled by an agency with not one, but two law firms aggressively prosecuting him. Erickson has lost property, the liberty to practice the profession of his choice and his press credentials.

A study of the history of administrative agencies reveals that it was anticipated that attorneys would not be allowed at administrative hearings, for obvious reasons. About 1997 Erickson remembers attending a Board disciplinary hearing, as a witness, and if memory serves him right, there were no attorneys present. Now we are at the point where the State pays for an attorney for the prosecution only. It seems we have turned the idea of Administrative Hearings

inside out. See dissent of Bistline in Kolp v. Bd. of Trustees of Butte Cty.Joint, 629 P.2d 1153. 1161-1166 - Idaho: Supreme Court (1981). Now, if the defendant shows up without an attorney, it is taken as an admission of guilt and the hearing proceeds like a cowboy spurring a bronc.

III. ISSUES AT DISTRICT COURT

A. Signing & sealing reports, Count 1. Paragraph 4. Tr P.195/L.6 – P.196/L.24 (CR P.559-563) [P.15] <P.6/L.12-16; P.19/Item 1>.

Board's Response: <P.6/L.12-16; P.19/Item 1> "*Elle testified that Hearing Exhibit 3.2 violated Idaho law because it was not signed, sealed nor dated, nor did it contain the word..."preliminary"*.

Appellant's Reply: I.C. 54-1215(3)(b) reads in part, *"The seal, signature and date shall be placed on all final specifications, land surveys, reports, plats, drawings, plans, design information and calculations, whenever presented to a client. Any such* (final?) *document presented to a client...that is not final…"* (parenthetical added).

1. Many surveyors, and Erickson is one of them, have the understanding that the double "final" was intended to limit I.C. 54-1215(3)(b) only to documents giving professional opinions or determinations. To include every communication issuing from our office is a ridiculous interpretation and makes a jurisdiction argument of "void for vagueness". Jurisdictional arguments are never waived, see Fundamental Constitutional rights, Jurisdiction.

2. As an improvement upon a sufficiency argument, the following is based upon the same factual grounds used by the Board. No new evidence is needed to support the claim that when the Board failed to produce the client's copy of Ex 3.2, they failed to produce sufficient evidence to

show a violation of I.D. Code 54-1215. People v. Rodriguez 18 Cal Rptr. 3D 550, 555 (2004): *"Generally issues of sufficiency of the evidence are never waived.'"*

With the evidence available in the record, it is shown with certainty that Ex 3.2 came from Erickson's digital files, not from the former client. For comparison, a Client's copy of a similar document can be seen at Ex 1.3, while a copy of the same document, but from Erickson's digital file, can be seen at Ex 5a(1). Notice the greater clarity of Erickson's copy and the heroics that he had to go through to have a digital copy with the signature and seal. Due to his limited software capability at the time, copies from Erickson's digital files of that time period may or may not have the signature and/or seal that was on the Client's copy. The evidence on this point is that Ex 3.2, on which this charge is based, came from Erickson, not Walker. A violation of I.D. Code 54-1215 must be based upon the copy given to the client. Thus the charge lacks sufficient evidence; actually it lacks any evidence.

Board's Response: <P.20/L.12: *"...no evidence was presented to rebut Elle's testimony that Erickson had a long term client relationship with Mrs. Walker."*

Appellant's Reply: Actually, in the following, the Board admits that Walker was not Erickson's client at the time Ex 3.2 was issued: The Finding of Fact speaks specifically to this charge at AR P.232/L.15-16. Also, Ex 17e.1/P.1/L.17, 21 and Ex. 17d.1/L.1-15 show that the client relationship ended months prior to the issuing of Ex 3.2, thus the Board lacked jurisdiction to apply an I.D. Code 54-1215 charge in this case.

B &H Grangeville Highway District (G.H.D.) property and overstating Walker acreage. Cnt. 1, Para. 5 and Cnt. 4, Para. 24.b, Failure to note. Tr P.198-201 (CR P.564-570) [P.16] <P.5/L.12-16; P.29 "b">

Board's Response: <P.5/L.12-16; P.29/Item b.> *"...the standard of care would require that at least the outline of the G.H.D. property should be shown (and area given)* <P.30/L.22-24>*."*

Appellant's Reply: This accusation occupied three pages of Respondent's Brief, but not a word in those three pages gave reference to a law requiring such delineation. The end result of such unjustified vilification can only be another pony ride to Appellate Court for another reversal of a conviction for an act that was not illegal. The Board's action smacks of the "Star Chamber" of the 1400-1600's where the King's delegates made up the law as they went along. (History and Danger of Administrative Law, by Phillip Hamburger, Columbia Law School, Sept. 2014, Vol. 43, Number 9,).

There are many reasons for composing a Record of Survey, and not all of them include delineating property ownership. In the title block of Ex 1.2, Erickson wrote that the purpose of his survey was: *"A dependent re-survey of the exterior and subdivision of Section 24…"*

A homonym like "subdivision" has multiple meanings, and the true meaning depends on how the word is used. A call for Section 24 is a call for the U.S. Rectangular Survey system, see CR P. 653. While the G.H.D. property is a "subdivision", as in a subdivision of land, its metes and bounds description shows that it is a "nonrectangular subdivision". In contrast, being the SE1/4 SE1/4, the Zumwalt property is a U.S. Rectangular System subdivision and so is shown on Erickson's survey.

In the 2009 BLM Manual of Survey Instructions the term “nonrectangular” appears 30 times and is defined at §10-33:

> *"Nonrectangular surveys, sometimes referred to as metes-and bounds surveys, are required to define the boundaries of irregular areas of land that are not conformable to legal subdivisions."*

An experienced Land Boundary Surveyor knows these sophistications instinctively, and that is another reason why a relatively inexperienced, part-time Engineer (TR P37/L8-17), like Mr. Elle, should not be used to establish the standard of care for Land Boundary Surveyors, especially one who woefully lacks an aptitude for discernment or candor [P.54-55]. It is revealing at Tr. P.125/L.11-17 that Mr. Elli gave a good explanation of rectangularity to the Board but at Cross at Tr. P.198-201 the concept escaped him. See page 40 below for a motion of Declaration of Incompetence against Elle.

All recent surveys from this community have treated the G.H.D. property in the same manner as Erickson, and herein lies the true “community standard of care” spoken of in Laurino v. Board of Professional Discipline. The Board is in error, and in fact lacks jurisdiction, to discipline Erickson for not showing the G.H.D. property, and this because there is no law requiring it. In respect to the G.H.D. property, Erickson’s Ex 1.2 does conform to the community’s Standard of Care (see Laurino v. Bd). (CR P. 653)

“C, F & H” Erickson falsely accused neighbors, Count 1 Paragraph 5, Count 2 Para. 9.a and Count 4 Paragraph 24.a. Tr P.123/L.1-10; P.202-205 (CR P.571-574) [P.17-18] <P.5/L.17 - P.6/L5>

Board’s Response: <P.5/L.17 - P.6/L5> *"(Erickson falsely) stated that adjoining neighbors encroached upon the Walker property by building fences."*

Appellant's Reply: This paraphrase is not accurate. The original Ex 1.3/P.11/L.15-19 reads:

> *"Never-the-less, the Edwards monuments were an invitation for neighbors to encroach upon the Walker's property from the South, West and North. At the West boundary of the NW1/4 of Section 24 the neighbors have accepted that invitation by building fences upon the Edwards lines...At no other location have the neighbors taken advantage of the situation."*

Erickson did interview Mrs. Bradertscher, twice, and she then never mentioned who built the fence, but it was obvious during the visits that her house and lawn occupied right up to the fence, 100'± into Section 24. The Bradertschers are not abused babes in the woods in this matter. The Bradertschers are still apparently trespassing on the Walker property, fence or no fence.

As an improved argument not requiring additional evidence, (Universal Title Ins. Co. v. U.S., 942 F.2d 1311, 1314 (8th Cir. 1991), Erickson argues that everyone is missing the point here, the fence is small potatoes in this garden. Forget the fence, as Mr. Elle concedes, the Badertscher's house is also on Walker's property (Tr P.123/L.2-10), and all five surveyors subsequent to Erickson agree to this [P.54/L.30-34]. Are the Badertschers going to claim that the Walkers built the Badertschers' house also? It is too bad that the Badertschers were enticed to put their improvements on the Walker's property, whatever the improvements are, and it is obvious that someone damaged someone, but Erickson is just the messenger. The true Standard of Care [IDAPA 10.01.02.005.02; Tr P121/L1-5 and Laurino v. Bd.] shows that Erickson's message is correct. Badertscher is trying to kill the messenger, and the Board is trying to make hay.

Ex 1.4, the Badertscher letter upon which this complaint is based, was issued one year after the controversy became known to the Badertschers. Hearsay evidence from a member of a

land boundary dispute is not acceptable evidence if it issues AFTER the controversy began, I.R.E.803(20). Without the Badertscher's letter, no proof was offered that the Walkers built the fence.

Besides, Walker is one of the neighbors, so even if the Walkers built the fence, it was still built by a neighbor.

This particular charge has been a huge waste of time. Erickson asks for an I.R.E. Rule 403 Exclusion, which Erickson attempted to make at Tr P.50/L.12-21, and asks that this charge be reversed. This particular charge is pettifoggery.

"D" Failure to File Corner Records, Count 1 Paragraph 7.a, 7.b and 7.c.
Tr P.58-60 (CR P.575-578) [P.19-21] <P.20#2>

Board's Response: <P.20#2 Failure to File Corner Records> *"Elle testified in response to direct questions that Hearing Exhibit 1.2 violated (I.C. 55-1604)."*

Appellant's Reply: (CR P.580/11-16) It was presented at the hearing at Tr. P.304/L.3-P.305/L.3 that there were typographical errors on this charge. The Complaint was never modified to correct these errors. Erickson asks that this Corner Record finding be reversed for error.

The charge is rebutted on its merits at [P.19#D] and CR P.580#2.

E. Failure to evidence prior Corner Records, Count 1 Paragraph 8.a.
Tr P.224 – P.225/L.4 (CR P.579-581) [P.19-20] <P.21/L.11 – P.22/L.3>

Board's Response: <P.21/L.11 - 22/L.3> *"The relevant agency record is devoid of (incorporation by reference) defenses. The Court is required to look at the agency record as it existed on June 22, 2016"*

Appellant's Reply: Is *"The Court is required"* the solyent green upon which Administrative Agencies feed? What happened to "Court discretion"? Why did the District Court obey the "imperative command" (CR P.728/L.14-15)?

But we digress. See Tr P.223/L.24 – P.225/L.4 where "incorporation by reference" is extensively discussed during cross examination. Because incorporation by reference is allowed by law, see [P.21/L.16-24], Erickson's Record of Survey did show the required prior existing Corner Record recorder's number upon the face of the plat, though it was done so by incorporation. By Mr. Elle's own testimony, this is allowed, see Tr P.153/L9-15.

At <P.21/L.23> Mr. Kane, while discussing incorporation by reference, gave an example of the universal practice and acceptability of incorporating by evidence.

The extent of incorporation by reference is a matter of law, so says Advanced Disply v. Kent State Univ. 212 F.3d 1272, 1283 (line 5) 54 USPQ.2d 1673, 680 (Fed. Cir. 2000)

His Honor, found at CR P.759/L.18-19 that all prior existing corner record numbers have been incorporated into Ex 1.2. Now, the Board is challenging that finding, that's fine, but where is the appeal or cross appeal? This a hijack of Erickson's appeal by the Board who is turning it into its own untimely challenge of His Honor's findings.

GENERAL THOUGHTS ON THE SW CORNER:

The SW Corner Of Section 24, The Central Issue Of The Case:

It appears to be the nature of court presentations to mingle a subject with other subjects throughout the document, and it is especially so with the Respondents' Brief as it addresses the central issue of the case, the SW corner of Section 24. In order to maintain some sort of

continuance with the Board's newly "rephrased and restated" case, Erickson will address the central issue as it appeared in Appellant's Brief with cross references <...> to the Respondents' Brief. In order to set perspective, Erickson pauses for a moment to make some critical observations on the subject, all of which are part of the record as so stated and which the Board is in agreement with.

1. The SW corner of Section 24 has been in dispute since the early 1900's. See (CR P.645#8) Even Mr. Elle has acknowledged that there is no record of anyone using the Carl Edwards position before 1977. [Tr P279/L18-25]

2. Mr. Elle has acknowledged that just because a surveyor says their stone is the original GLO stone, does not make it so, Tr P.268/L.21-24. There are in fact two stones, separated by about 280', at which various surveyors claim each to be the original SW corner stone of Section 24. [Tr. P. 268/L.3-24]

3. Mr. Elle and Mr. Kane have acknowledged at <P.28/L.11-12>

> *"Regarding the standard of care of a professional land surveyor, it is possible for surveyors to have different opinions and not violate the standard Tr. 278-279"*

4. In 1977-78 Mr. Carl Edwards performed a survey and resolution of the SW corner of Section 24. In this, Mr. Edwards wrote a legal description which radically differed (272') from the 1915 School deeds as they referenced the SW corner. [Ex 52 v. Erickson Appeal Exhibit "J"]

5. In 2010 Mr. Erickson surveyed and made a resolution of the SW corner of Sec. 24 allowing for the 272' reference. [Ex. 1.2]

6. While Mr. Edwards' position closely matches the GLO distance running north (5290.6' v. 5280') [Ex 1.2 v. Ex 3.5], Mr. Erickson's position closely matches the GLO bearing running east (N.89°49'E. vs. GLO S.89°55'E).

7. It is acknowledged by all parties that the SW corner of Section 24 is in litigation. Any statements about that corner remain unsubstantiated until that trial concludes.

Board's Response: *"In Section 24, several* (5) *of Carl Edwards' corners are in the wrong position. (Tr.273 – Tr.274) Although the expert did not think this corner was one of them". (Tr.117)*

Appellant's Reply: Kane and Elle will get some long odds on that horse.

"G" "The Central Issue". Rejection of "original" stone at the SW corner Sec. 24. Count 2 Paragraphs 9.c and 10.a. Tr P.230-268 (AR P.271#11) (CR P. 583-593; P.669-670; P.671-676) [P.7-9, 22-29] <P.23 "a" >

Board's Response: [ ] <P.23/Item a>: *Failure to adequately research and re-trace an established corner monument*.

Appellant's Reply: At trail, during cross, Erickson established that he did speak to Mrs. Hoiland, but found that her testimony did not fit the property exception to hearsay (I.R.E. 803(20)) and this because her "post-controversy" testimony would give Mrs. Hoiland a strip of land 100± feet wide that she does not now possess. Therefore her testimony was self-serving and not admissible, Tr P275/L22-3. The same can be said of Mrs. Badertscher's testimony, it is self-serving and thus not admissible.

Board's Response: <P.24/L1-3> *"Regarding Hearing Exhibit 1.2, Complaint's expert testified that Erickson's placement of the SW corner of Section 24 violated the standard of care for a professional surveyor licensed in the State of Idaho."*

Appellant's Reply: Other recorded surveys performed in the community[P.53-55] are dispositive against Mr. Elle's standard of care claims against Erickson and Wellington. The other recorded statement by surveyors are Ex 1.2, Ex 3.7, Ex 13.2, R.O.S. #S-3341 [ATTACHMENT "J"] and R.O.S. #S-3355 [ATTACHMENT "K"]). Again, *"Regarding the standard of care of a professional land surveyor, it is possible for surveyors to have different opinions and not violate the standard. (Tr.278 – Tr.279)"* <P.28/L.11-12>

Board's Response: <P.25/L.11-12> *"Erickson disregards the 1897 GLO Survey."*

Appellant's Reply: The following are instances in the record of Erickson giving due regard to the 1897 survey:

A. The 1897 bearings and distances appear seven times on Erickson's 2010 Record of Survey (Ex 1.2), at all the appropriate places.

B. Survey Report Ex 1.3 devotes pages 1-5, 8 and 10 (seven of its 11 pages) to the 1897 survey.

Just because Erickson correctly observed that Mr. Shannon, the 1897 GLO surveyor, lacked knowledge and experience when compared to other GLO surveyors, doesn't mean Erickson disregarded Mr. Shannon's work. Quite the contrary, the above shows that Erickson gave him due regard, and then some.

Is Erickson to be convicted by the Board's flights of fancy? And do these flights indicate unreasonableness and bias?

Board's Response: Tr P.118/11 – P.119/L.3 <P.25/L.18-21> *"As a result of Erickson's new survey results and recording of his survey, not only was the Walker property affected, but the properties in Sections 23, 24, 25 and 26 were affected."*

Appellant's Reply: Contrary to Respondent's Brief, properties are not adversely affected when section corners are restored to their original position. Respondent's argument is specious. See Tr P.118/11 – P.119/L.3

Board's Response: <P.27/L13-15> *"By failing to honor the original monument, Erickson impacted the welfare in the community by leaving neighboring land owners uncertain as to their actual property boundaries."*

Appellant's Reply: Erickson's response in this case is the same as in all his cases, he has only one client, and it is always the same client, the "Original Corner". Costumers may hire him, they may pay him money, they may even demand a certain outcome for the survey, but the client, the point of loyalty, is always the Original Corner. That is what our oath to protect the welfare of the public means. We don't protect the public by putting out fires, arresting murderer's, or practicing law. Licensed Land Boundary Surveyors protect the Public (and their customers) by finding the original corner. The BLM 2009 Manual of Survey Instructions explains it well when it states at §5-29 *"Under fundamental law, the corners of the original survey are unchangeable."*

The challenge is to find where that 1873 original corner is, and we solve that challenge by following the record and evidence through the permutations of 145 years. An experienced surveyor will not, must not, blindly accept a stone with notches that are too fresh, with lead-in grooves that might have been made by an agricultural disc (Ex "P"), and that is 260'± out of position to the General Land Office topography calls. In this case Erickson analyzed the Exterior

of Section 24 and found that Mr. Edwards made five errors averaging 125', which analysis was the purpose of Ex 1.2. Mr. Edwards reliability was so low in this Section 24 that his work could not be taken for granted.

Two other discoveries were made that forced the rejection of the Carl Edwards stone as the original position for the SW corner of Section 24:

1. An indisputable 1909 County Survey Stone was found marking a West 1/16th corner on the south line of Section 24. With this discovery we now have an uninterrupted chain of evidence stretching back to 1897 and 1873. Do you hear what I'm telling you? The South line of Section 24 has never, never been lost, period, and that line is unequivocally 270'± south of the Carl Edwards stone. How can the Edwards stone be the SW corner of Section 24 when it is not on the original, verified south line of Section 24? Remember, Mr. Elle acknowledged that there is no record of the Carl Edwards stone predating 1977, Tr P279/L18-25.

2. In 2011 a means was discovered to enhance a 1946 aerial photo. That enhanced photo (Ex 21.2 & Erickson Appeal Exhibit "K") unequivocally shows the position of the Stony Point School House and the field fences on the west and north sides of the school property. That, coupled with the 1915 School deed, gives us a solid position for the SW corner of Section 24, and that position falls on, or very, very near, the recovered south line of Section 24.

Beyond a reasonable doubt (the certainty is that high) the world and the neighbors, if their attorneys will leave them alone, now know where the SW corner of Section 24 is. It is at the location of the Erickson/Wellington monument as projected 272' south from the SW corner of the

School property. Everything else is speculation, commentary, amateurism, and Engineers wishing that they were Surveyors.

All of the foregoing is part of the record below.

Board's Response: (CR P.655/#20) [ ] <P.26/L2-3> *"Elle further testified that (random audit notes and special instructions) would have been beneficial for Erickson to review…"*

Appellant's Reply: G.L.O. Random Audits, Special Instructions and Examinations of Surveys are insertions into this case, they do not appear in the Complaint and the Complaint was never amended. This was argued at CR P.655/Claim #26.

> Pearl v. BPD of Idaho State BD of Medicine, 44 P. 3d 1162, 1170 - Idaho: Supreme Court 2002: *"The Board based its decision in part on Dr. Pearl's administration of valium and monitoring of Dilantin levels. These violations were not contained in the County One. Therefore, the Board violated Dr. Pearl's due process rights by considering this evidence."*
>
> Pines v. IDAHO STATE BOARD OF MEDICINE, 351 P. 3d 1203, 1210, 158 Idaho 745 - Idaho: Supreme Court, 2015: *" C. The Court in (Pearl, 137 Idaho 1114-115, 117, 44 P.3d 1162) made similar holdings, reversing the Board's conclusion that a physician violated the local standard where the Board relied in part on facts not alleged in the complaint."*

Besides, ancillary records such as Examination Surveys, Special Instructions, etc. are not considered part of the Public Record and thus are in not incorporated by reference into the face of the survey and patent.

Board's Response: <P.26/L.11-14> *The USFS 1920 position supports Carl Edward's stone.*

Appellant's Reply: C'mon man, Carl Edward's stone is at the SW school property corner while the USFS position is 104' to the east at the SE corner (see CR P.667-668). Mr. Elle impeaches himself.

Board's Response: <P.28/Last paragraph> *"Why this information (wet drum scanned aerial photo) was not contained in his 2010 survey work has not been answered."*

Appellant's Reply: It was answered. See Ex 17.e.1 /P.1/L16, where it was stated that the high-definition aerial photo was obtained in "early 2011", a year after the 2010 survey was completed.

IV. "I" FIRST AMENDMENT VIOLATIONS – EVIDENCE OF BIAS

1. First Amendment Violation - Bias:
Tr P.399-402, (AR P.43/L.8-10; P.52/Last paragraph; P.54#7; P.155-157) (CR P.542#1; P.744#5) [P.9/L.6-13; P.29-35; P.42#7; P.55/L.4; P.56#19; P.57#4] <P.12#4>

Board's Response: <P.12/Item 4> *Erickson's right to a fair tribunal was not violated.* <P.14/L.10-12> *"Erickson can neither establish actual bias of the remaining Board members who presided after Mr. Bennett rescued himself nor a probability that the actual decision maker would unfairly decide any issue."*

Appellant's Reply: The Board gave its own rebuttal to this at <P.12/Item 4> :

> *"To rebut an administrative board's presumption of honesty, a plaintiff must demonstrate that the tribunal was actually biased, or that there was an impermissible appearance of bias."*

Erickson has establish in the Courts below probability of bias and actual bias as follows:

A. Glenn Bennett was removed from the Board in response to Erickson's Affidavit of Prejudice. (Tr P.26/L.16 – P.28/L.13)

B. Glenn Bennett wasn't the only Board officer participating in the e-mail exchange that was the main thrust of the Affidavit of Board's Prejudice, there were four others; the Executive Director (Keith Simila) who instigated the e-mail series, the Assistant Executive Director, the Investigator (John Russell) and the Chairman-cum-Expert Witness (Elle).

None of these resisted Keith Simila's conspiracy or Glenn Bennett's sneak attack (AR P.171/L.10).

C. All five belong to the same Board, where they mingled and worked the sneak attack for 9 months, subjecting each member to group-think, cyclic reasoning and narcissism. Then the Chairman rescued himself (Tr P.26/L.6; P.33/L.21) to become the Investigator/Expert Witness. Actually, other than the statement in the Transcript at Tr P.34/L20-25, the recusal of Mr. Elle is not documented in the record.

D. There were also over-zealous statements in the Board's Complaint, as evidenced by the approximately 40 charges and sub-charges that have since been dropped. Also see Transcript P.193-238 ending with, *"You are not going to answer any of my questions, are you?"*; P.395-396; P.400-401, P.411 - 414 and C.O.L. AR P.241-243.

E. In his original Order at CR P.723/L.22-23, His Honor, FitzMurice, found

"..that the Board did not reach its decision to suspend Erickson's license through an exercise of reason and that the tribunal was not fair and impartial."

It was only after an authoritative command from the Board's Counsel (CR P.728/L.10-15), that His Honor removed the finding of bias (CR P764/L10-13). Ironically, or perhaps subliminally, His Honor left in place the law and reasoning upon which he had found bias.

> Pines v. BRD. OF MED., 351 P. 3d 1203, 1215, 158 Idaho 745 - Idaho: Supreme Court, 2015: *"F. In conducting its proceedings on remand, the Board must be mindful that 'due process entitles a person to an impartial tribunal. The language employed in the Board Findings is of concern in this regard...a tribunal does not give the impression of impartiality when it employs heated rhetoric and denunciations. Rather than playing*

to an audience, the job of the impartial tribunal is to deal with the facts and issues at hand in a professional manner.'"

F. In his Amended Order at CR P762/L.24 and at CR P.764 /L.15-16 His Honor found abuse of discretion by the remaining Board, and stated that the remaining Board had not used reason or professional judgment.

G. Bias is shown in the e-mails of November 19th, 2014 (ar p.170-174), See the following:

METAPHOR OF THE FIVE DEMOCRATS

"You don't see something until you have the right metaphor to let you perceive it", so says American Physicist Thomas S. Kuhn: http://www.amerisurv.com/content/view/10942/153/.

Once upon a time there were five Democrat officials standing on a sidewalk watching a Republican rival jaywalk right in front of them. The Executive Director of the group said, *"Why don't you guys all think of a way that we can gob-smack him"*. The second said, *"watch me sucker-punch him"*. Pow! *"That's for being a hog!"* Biff! *"That's for not being hugged enough as a child"*! *"Now, lets set a trap for him at trial, but don't tell anyone or we will tip our hand."*

As the Democrats sauntered away, laughing and carrying on, the Republican lay in the gutter, but as he lay there he spied a surveillance camera across the street, aimed his way.

Eighteen months later the Republican was brought before a Court for the complete removal of his civil rights, based on the charge of violating the standard of care just because they said so. As the Republican entered the Courtroom he noticed the gob-smack instigator was the Prosecutor and the sucker-puncher was an Adjudicator sitting behind the bench, smiling and laughing with five other justices. In fact, all five Democrats were in the room; an adjudicator, the Investigator, the Prosecutor, the Deputy Prosecutor and the Prosecution's Expert Witness.

The Republican submitted an Affidavit of Prejudice (AR P.155-P.185), complete with a video (AR P.170-P.173, annotated at CR P827-829) from the surveillance camera showing 1. the conspiracy, 2. that the others watched while not lifting a hand to stop the sucker-puncher, and 3. did not chide him afterwards.

The Republican asked that, for prejudice, the entire panel dismiss the entire panel. Guess what happened?

Well, in a real Court, those five, and their smiling compatriots, should not have survived as officials of the Court, let alone be allowed on the jury. Phillip Hambuger, in his History and Danger, P.6/Last Paragraph, summed up the wickedness of Administrative agencies this way:

> *"Administrative adjudication evades almost all of the procedural rights guaranteed under the Constitution (and) thus becomes an open avenue for evasion of the Bill of Rights."*

Erickson explained it this way:

> Tr P.33/L.14-P.34/l2: *"...I come into this room, and I have a bundle of rights. And it doesn't matter what your rules say. I have a bundle of rights. And one of them is due process. And one of those rights is that those who sit in judgment of me, will not be a party to (accusing or testifying against) me. To have a member of the Board, sitting in testimony against me, shows (that) the Board is prejudiced. And that is a violation of my rights under the (Fifth and) Fourteenth Amendment."* (parenthetical added)

Mr. Erickson believes that he has established actual bias of the remaining Board members who presided after Mr. Bennett rescued himself and a probability that the actual decision maker did unfairly decide issues due to obvious bias. Erickson did not receive a fair trial before a fair tribunal.[P.29-P.35]

Erickson admits that he has been remiss in one aspect. He was, and is, so incensed over the Board's attack upon Freedom of the Press, that he sometimes forgot, in his Appellant's Brief, to specifically address the Board's bias. Erickson prays this Court to view his arguments about the U.S. 1st Amendment and Idaho's Constitution, Article 1, Section 9 and 10, to also be a presentation of the Board's bias.

IV. "J" DUE PROCESS ISSUES

3. Violations of time limits, a jurisdiction argument. (AR P.38-47; P.51; P.270#8) (CR P.560#4; P.563/Plea) [P.38#3] <P.10/L.3-12>

Board's Response: <P.9#1> *Idaho Code §54-1220(2) did not prohibit Complainant from filing against Erickson in 2015.* Time Limits – there are none.

Appellant's Reply: Making the claim that the Board is not limited by §54-1220(2), is like adding formaldehyde to store-bought bread, it increases the self life of the commodity while posioning the body politic. In this case the shelf life of Ex 1.1 was stretched from the statutory limit of 2 years to 4.5 years (from date of Ex 1.4 to date of Ex 1.1).

At Respondent's Brief <P.9/L.15-21> the letters from Bradertscher and Walker were referred to as "complaints" which would allow the use of the extendable deadline of IDAPA 10.01.02.011.01, yet the Board had previously correctly determined that the letters were "Requests For Inquiry" (R.F.I.), not complaints. See Ex 45 P.1/L4-6.; AR P.1A/L.3-6, AR P.224/Item B; CR P.650/Claim #17 and the Board's Index of Exhibits AR P.147/L.6-7.

The nomenclature is critical to determining violations of time limits <P.10/L.3-12>. The required content of the *"sworn charge*" of I.C.54-1220(2) is further defined and restricted at IDAPA 10.01.02.011.01: *"...written affidavit...shall be sworn to or affirmed under penalty of perjury, signed and in which the alleged rule and statute violations shall be clearly set forth…"* Of course it would be rare indeed for a citizen's letter to give the required "rule and statute", thus the invention of the term Request For Inquiry (R.F.I.) to which most of these citizen letters are regulated. A "R.F.I." does not qualify for the term "charge", "affidavit" or "complaint" as used in 54-1220(2) or 10.01.02.011.01 and there is no provision for accepting nor extending an R.F.I. as a

complaint. However, there is a 10.01.02.011.01 limit of time to when an R.F.I. can be converted into a “charge”, “affidavit” or “complaint” and that is two years after the date of discovery. The issues of this case were fully known to the Board in the year 2011 (see CR P.561#4 for a fuller development of the time line) and the first affidavit/complaint in this case is Ex 1.1, which is dated October 28, 2015, four years after the issues were known to both the citizen and the Board. Though the prosecution wrote the October 28, 2015 Affidavit/Complaint, the expired two year time limit means the Board lacked jurisdiction to accept it.

Errors in excess of jurisdiction may be heard on appeal without objection below (In re Harris (1993) 5 Cal. 4Th 813).

Except for Marvin Erickson v. Idaho Bd. of Registration, 203 P. 3d 1251, 1252-1253 - Idaho: Supreme Court 2009, Erickson has been unable to locate precedent on the application of these time specific Idaho statutes, and Marvin is not on point.

12. Is a formal discovery request required to effect discovery? (AR P.277#6) (CR P.278/L.4-6) [P.46#12] <P.15#5>

Board’s Response: <P.17/L.7-18> *"Erickson did not seek to compel Complainant to produce this* (request for discovery) *information; the presiding Board did not have an opportunity to decide whether such information was discoverable."* (parenthetical added)

Appellant’s Reply: Quite the opposite is true. At the Hearing the presiding Board did have numerous copies of the requests for discovery, its just that they ignored them.

1. Hearing Ex 26g.1 (Investigation Report);
2. Affidavit of Prejudice (AR P.158/L.14-18);
3. Exhibit G of that Affidavit at AR P.184;

4. Exhibit H of that Affidavit at AR P.185;
5. Erickson Hearing Ex. Z-12. (All communications)
6. [Attachment D]

There has been no argument below that a party must be compelled before requests for discovery is effective, nor law given. After three years of total silence on the part of the Board on the issue of "failure to discover", suddenly the Board announced in the Respondent's Brief, at P.17/L.10-12: *"Erickson has waived his right to complain that Complainant was required to provide him discovery when he did not request the Board to compel discovery."* No statute or precedent was given, just a fiat announcement that no discovery is required unless compelled. Now there is a horse with short legs.

The discretionary issue at discussion here is not one of inherit right so much as one of fair practice. In this case the Board requested discovery on August 12, 2015 using an informal request outside of an establish discovery period, later threatening action because they had mistakenly believed that the August 12th letter had not been conformed with. The Board requested, and did receive, Erickson's work products, all of which had been prepared in anticipation of judicial proceedings. (When you are a Land Boundary Surveyor, all of your work is prepared in anticipation of judicial proceedings.)

When Erickson similarly returned the request he was met with cold stone silence for nearly three years, despite numerous reminders, which is a fine manifestation of being arbitrary, capricious and another abuse of discretion. And when the denial response did arrive from the Board <P.15#5>, it was accompanied with a protestation that the subject requested was work

product prepared in anticipation of judicial proceedings. All of the foregoing paragraph is substantiated by the several pages of Ex 28.

Kolp v. Bd. of Trustees of Butte Cty.Joint, 629 P.2d 1153. 1165 - Idaho: Supreme Court (1981) Bistline dessent: *"Analogously, the shield from meaningful judicial review provided by the label "discretionary" is often inappropriate, and could well lead to far greater abuses than any feared abuses from judicial overstepping. Judicial review is a necessary adjunct to local decision-making: without it, local decisions, no matter how erroneous, will go unchallenged. While the initial decision must rest in the discretion of the local bodies, the courts must stand ready to protect the rights of those suffering from arbitrary decisions."*

In failing to obtain discovery, Erickson was damaged and prejudiced because he was unable to demonstrate a higher level of bias and Freedom of the Press violations, which, reflective of AR P.170-P.173, were undoubtedly hidden in the Board's files. Thus the State and U.S. rights to freedom of the press are implicated here. [P.46#12 &P.51#16]

13. Medical crisis - continuing Hearing without defendant. (AR P. 186-192) (CR P.278/L.7-13) [P.47#13] <P.1/L.7-19; P.17#6>

Board's Response:<P.17/Item 6> *Erickson's voluntary departure prior to the end of the administrative hearing did not constitute a known request for accommodation by the Board.*

Board's Response: <P. 18/L.6-8> *"There is no indication that Erickson suffered from a medical condition which required the Board to accommodate his medical issues."*

Appellant's Reply: Well, at AR P.218/L.9 Chairman George Murgel said that *"Respondent then claimed that he was not healthy enough to proceed."* As the Board's fiduciary agent, Opposing Counsel is in error when he contradicts his client, see Idaho Rules of Professional Conduct, Rule 1.13, Commentary [3]. Mr. Murgel was probably speaking to arguments made off the record at Tr

P.391/L.6. In as much as the Board ruled upon the issue, it is not inappropriate for this Court to do so likewise.

In ignoring Erickson's "I need a break" and the following Motion for Continuance (AR P.186-192), which contained an affidavit of medical symptoms, the Board committed error when it violated IRE 803(3). Also see

Ungar v. Sarafite, Judge 376 US 575, 84 S. Ct. 841, 11 L. Ed. 2d 921- Supreme Court, 1964
"The judge who accused the witness of malingering was not a medical expert and his conclusion that the witness was faking, though admissible as evidence, would not be conclusive. This crucial fact was one that the judge should not be left to decide on the basis that he saw the witness and therefore could be depended upon to determine that he was not ill…"

Because a defendant is Constitutionally entitled to a viable opportunity to present his defense before a fair tribunal, and Erickson was prevented from doing so, the Constitutionality claim allows the taking of new evidence. Erickson asks for judicial notice of the Corrected Notice Of, And Affidavit Of Medical Condition And Motion For Judicial Notice that was made available to this Court on January 16th, 2018.

Also, Erickson presents the February 16th, 2018, Patient Letter that Hope Goodman DNP, FNP-C issued, and asks for judicial notice:

February 16, 2018

Chad Erickson
2165 Woodland Road
Kamiah ID 835365205

To whom it May Concern:
The above mentioned is currently under my care. This patient was recently diagnosed with a pulmonary embolism. In reviewing the patient's health history, symptoms,

physical exam and the diagnostic CT that confirmed the presence of the pulmonary embolism it is apparent that this pulmonary embolism is chronic and has been present for quite some time. Pulmonary embolisms can go undetected for years but can continue to cause patient's significant symptoms. It is apparent that this patient's pulmonary embolism has been present for years without detection. This patient will continue to require treatment for his pulmonary embolism for the rest of his life due to the chronic nature of his conditions.

Please contact my office with any questions you may have.

Sincerely - signed – Hope Goodman, NP, Banner Health

The Hope Goodman medical affidavit is Attachment "I" of the Appellant's Brief.

Board's Response: At <P.18/L.9> the Board states:

"Respondents agree that a 3 day hearing is physically taxing regardless of age."

Then at <P.19/L.1-2> after pushing an old man around and throwing him to the dogs, state:

"His later Motion for Continuance gave no evidence that his departure was the result of a medical condition which required accommodation."

Appellant's Reply: A study of the said Motion for Continuance at AR P.186-192 reveals a seven page affidavit predominately dedicated to Erickson's health issues. I.R.E. 803(3) establishes that, as an exception to the Hearsay rule, a person's statement of medical condition and symptoms is acceptable and admissible evidence.

16. Unjustified denials of continuance. (AR P.79-82; P.96-98; P.186-192) (CR P.544#4) [P.51#16] <P.11#3; P.17#6>

Board's Response: <P.11/Item 3> *Erickson's prehearing requests for continuance were within the discretion of the presiding Board.*

Appellant's Reply: That doesn't mean the Board can do anything they want.

Kolp v. Bd. of Trustees of Butte Cty.Joint, 629 P.2d 1153. 1164 - Idaho: Supreme Court (1981) Bistline dessent: *"...in 1840...(the) choice was between de novo review and no review. The Court did not know what we know now - that interference by courts to the extent of interpreting statutes for the purpose of keeping administrative officers within their lawful authority is not productive of mischief but can be a cardinal feature of a highly successful system of dividing functions between administrative officers and reviewing courts. Today we know that we do not have to choose between de novo review and no review."*

Board's Response: <P.11/Last paragraph> *"Respondents concede that a letter was sent to Erickson requiring a timely response".*

Appellant's Reply: The said request for a timely response caused Erickson to lose 26 days from date of receipt to date of submittal of response, and this was just at an impending deadline for motions for the Preliminary Hearing.

At the Respondent's Brief, the Board claims that they "quickly" <P.11/L.18-20> relieved Erickson from the timely response requirement. Here are the time lines and pertinent references:

March 8, 2016: Board sends request for response to the Scott inquiry. (CR P.987)

March 9, 2016: Erickson eletronically requests a time extention and objects to the pending schedule (AR P.79-82).

March 11, 2016: Board sets schedule without change (AR P.83-85).

March 17, 2016: Board denies extension and tables response (AR P.101-103).

March 23, 2016: Board denies reconsideration and tables response (AR P.111-113).

March 28, 2016: Erickson submits response to Allan Scott letter. (CR P.953-972)

From the first request for response to the tabling was 8 or 15 days, depending on how you look at it. This is not "quick" when the affected deadline is at four days. In contrast, two days after

Erickson's (electronically filed) motion for continuance was received, the Board "quickly" filed the unaltered Scheduling order. Now that's "quick". Be the tabling at 15 days or 8 days, by then Erickson had missed the deadline for submittal of motions for the Preliminary Hearing. In the same document (AR P.112/L.4-22) that the Board denied the requested extension, they acknowledged the delay they had caused and furnished the justification for the extension by illegally canceling the Preliminary Hearing because Erickson hadn't made any motions.

This dogpiling of the unfounded Allan Scott complaint during a deadline is similar to other canine activities that, like dominos, caused Erickson to be unprepared at the Hearing.

In denying justified motions for continuance, the Board abused its discretion and affected due process.

> Lambert v. Northwestern Nat. Ins. Co., 769 P. 2d 1152, 1156 - Idaho: Court of Appeals 1989: *"...denial of a reasonable continuance...(was a) prejudicial error."*

(Does the Idaho Bar entertain disciplinary procedures against a Lawyer every time a citizen files a complaint because they are losing at court?)

Board's Response: <P.34/L20-23> *"After his wholly voluntary absence on the third scheduled day of the hearing, the presiding Board members had to rely upon the record presented to reach a decision."*

Appellant's Reply: No, what the Board HAD to do was choose one of the following: 1. Stay the action (I.R.C.P. 11.3(d)), 2. Declare a mistrial (I.R.C.P. 59(a)(1)(D)), 3. Re-open the hearing, or 4. Issue a notice of pending default (IDAPA 04.11.01.700). With the presence of acceptable evidence of a medical crisis, there was no justification in this instance in continuing the hearing without Erickson's presence, diagnosis or no diagnosis (I.R.E. 803(3)). Also see Item #13 above.

Wholly? The Board greatly contributed to Erickson's medical crisis by: A. Allowing insufficient time between the effect of their Shortening of Time Motion (AR P.283-284) to the first day of the Board's Hearing; B. Selecting, intentionally or not, the only week of the year when there are no hotel rooms available in Boise. [P.10, P.47#13]

17. Standard of Care. (AR P.8#10) (CR P.551#7; P.566#4) [P.53#17] <P.22/Last paragraph>

Board's Response: <P.22/Last paragraph> The Board presents that John Elle is just the man to *"establish the community's generally accepted standard of care"*.

Appellant's Reply: (CR P.654#25 – P.655/L1-14) For the "community" requirement of the Standard of Care see Laurino v. Bd. of Prof'l Discipline of Idaho State Bd. of Med., 137 Idaho 596, 602, 51 P.3d 410, 416 (2002), IDAPA 10.01.02.005.02 and Tr P121/L1-5. [P.53#17; P.54#18]

C'mon man! John Elle is a self-acknowledged part-time engineer (TR P37/L8-18) who can't tell the difference between a survey for a boundary dispute and an as-built survey or site plan (Tr. P.179/L.24 - P.180/L.18), rectangularity and metes and bounds, and whose practice in S.E. Idaho is separated from Grangeville by 435 miles of road, 200 miles of vacant, rugged, 9,000 foot tall mountains and a bigger social barrier.

18. Credibility of Expert Witness. Tr P.33/L.14 (AR P.544#2) (CR P.550#6; P.539/Last paragraph) [P.54-55] <P.4/L.12-17; P.23/L.1-8>

Board's Response: <P.23/L.6> *"Erickson did not object to Elle's qualifications or his ability to provide an expert opinion as to the standard of care...*". (CR P.647#13)

Appellant's Reply: This is a spurious argument. See #17 above. After Erickson introduced his Affidavit of Board's Prejudice at the Hearing on the first morning, June 20th, 2016, and the Board recessed to discuss it, everyone was fully informed of Erickson's objection to Mr. Elle, and several others. See AR P.157/L.12-17. Also, at Tr P.33/L14 we read: Erickson *"And I object to this witness."*

Erickson herewith petitions the Court to take note of the following instances in the record of Mr. Elle's lack of candor as a dissembling witness at the Hearing:

Notches on stone: Tr P.237/L.12-P.238/L.21

Rectangularity: Tr. P.125/L.11-17 vs. Tr P311/L5 – P.312/L9; Tr P.198/L.3 - 199/L.25

How many lines between four points? Tr P.287/L.10-23; Tr P.291/L.1-6

Incorporation by reference: TR P.153/L.9-15; P.224/L.2-9 vs. P.225/L.20-25

Original Stone because he said it was. P265/L.25-P.266/L.9 vs. Tr P.268/L.21-24; Tr P294/L8-17

Ownership at south ¼ S24. Tr P.63/L.22-P.64/L.4 vs. Tr P171/L4-22; Tr P.275/L.22-P.276/L.3.

Badertscher's Fence: Tr 123/L.2-10; P.203/L.8-15 vs. P.218/L.2-16; P.274/L.5-12.

Did Erickson say Walker owns the 605.740 Acres? Tr P.48/L.1-5, "Yes" vs. Tr P201/L8-13, "No."

Considering the preceding, Erickson hereby moves this Court, pursuant to I.R.E. 601(a), to hold John Elle to be incompetent as a witness, Expert or otherwise.

Considering the incredulity and misbehavior of the Expert Witness, see CR P.648#15 & 16, Erickson moves this Court to reverse and remand.

IDAPA 10.01.02.005.02 does not allow a one source opinion, such as one "Expert Witness", to establish the community's standard of care, neither does Laurino.

> Peckham v. Idaho State Bd. of Dentistry, 303 P. 3d 205, 211 - Idaho: Supreme Court 2013. *"And, while the Board may use its expertise to reach factual findings based on evidence in the record, that expertise cannot serve as a substitute for necessary evidence."*

Myriad are the instances in the District Court ruling of His Honor's reliance upon the following cyclic reasoning:

> 1. Mr. Elle declares that, by his experience and knowledge, without making the necessary local comparisons, that Erickson has violated the Standard of Care.
>
> 2. Mr. Elle declares that, based upon his testimony, there is substantial evidence that Erickson violated the Standard of Care. <P.34/L.1-15>
>
> 2. In its Order, the Board agrees that because Mr. Elle says that Mr. Erickson has violated the Standard of Care, therefor there is substantial evidence of violation of various statutes.
>
> 3. His Honor finds that, because the Board said there was substantial evidence, therefore there is substantial evidence (CR P.761/L.25-30). Thus His Honor upholds all six of the charges, including the four that he had discredited in his "Review of Board's Findings".

In this echo chamber Erickson lost his license and press credentials. And this because one part-time surveyor, who had previously participated in name-calling, two years of collusion to "show the world what Erickson is made of", states that Erickson violated a statute which has no requirement except that comparisons be made. This is particularly egregious in that comparables were readily available at the Idaho County Recorder's Office in the form of Record Of Surveys #S-3204 (Ex 13.2), #S-3138, #S3303 [ATTACHMENT "L"], #S-3341-3 [ATTACHMENT "J"], #S3355 [ATTACHMENT "K"], #S-3390.

IV. "K" MISC. FINDINGS AT DISTRICT COURT AND APPEALS THEREOF.

A. Did the District Court err in finding substantial evidence?[P.57#1]<P.19-34>{P.42/L.6-9}

Board's Response: <P.19/L.12-13; P.20/L.15-18; P.22/L.4-6; P.29/L.3-5; P.32/L.1; P.34/L.1-17.> *"Substantial evidence supports..."*

Appellant's Reply: See #18 immediately above.

C. Did the District Court Err in finding that Erickson violated the Standard of Care?[P.57/L.8-10] <P.22/Last paragraph>

Board's Response: <P.19/L.12-13; P.20/L.15-18; P.22/L.4-6; P.29/L.3-5; P.32/L.1; P.34/L.1-17.> *"Substantial evidence supports a violation of the Standard of Care"*

Appellant's Reply: See #18 immediately above.

ISSUES RAISED IN RESPONDENTS' BRIEF BUT NOT IN APPELLANT'S BRIEF.

1. Board's Response: *"Failure to correct an error without additional compensation."* <P.6/L.17 – P.7/L.2; P.32/Item c>

Appellant's Reply: Here is another Star Chamber conviction for that which is not illegal. No law was provided to support the accusation and no warning has been given anywhere that such can result in loss of license. The Board is in error and in fact lacks jurisdiction to discipline Erickson for not correcting his survey without payment, and this because there is no law requiring it.

However, the point is mute, because Erickson has always corrected errors whenever and wherever one is found in his surveys, all three times. In this case the point is moot because Erickson's first position was confirmed on Record of Survey #S-3138, dated April 8th, 2013.

Erickson's determination then reverted back to his first monument. This reversion can be seen at Ex 17c.1/P.6/First paragraph; Ex 17d.1/L.15-28; Ex 17e.1/Entirety; and Ex. 26g.1/L22-28. At <P.33/L.8> the Board states: *"Elle did note that he understood that Erickson had reversed his position later."* By ignoring the Board's claim of failure to correct a monument, His Honor rejected this issue, and there being no appeal, this point is now settled.

ISSUES RAISED IN RESPONDENTS' BRIEF FOR FIRST TIME.

1. Board's Response: *"Erickson raises additional issues before this appellate body: constitutionality of the administrative agency process and procedure, the prohibition from creating a political body from an administrative agency are readily noted. Respondents request that all issues that were not raised before be dismissed".* <P.35/Item C>

Appellant's Reply: Generally, Appellate Courts have ruled that waiver arguments must be specifically argued.

At Singleton v. Wulff, 428 U.S. 106, 121, in 1976 the U.S. Supreme court found that the prohibition of bringing an issue up for the first time on appeal is not a general rule at all, leaving waiver to the discretion of the Court. Also see Robert J. Martineau, Considering New Issues on Appeal; the General Rule and the 'Gorilla Rule', 40 Vand. L. Review 1023 (1987)

The waiver issues are partially answered at <P.35/L.12-17>: *"The Court shall affirm an agency decision unless the Court finds the agency's findings, inferences, conclusions, or decisions were: '(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.'"* In

the latter we see that the Court is not a rubber stamp for the Board. While some of Erickson's claims are based on errors below, most of Erickson's claims herein are due process claims which may be raised for the first time on appeal (State v. Perry, 245 P. 3d 961,976 - Idaho: Supreme Court 2010). This is especially appropriate since Erickson was not given a viable opportunity to object or present his defense. At {P.11/L.16 – P.13/L.3} we see that Erickson was instructed by the Chairman not to object, leaving him without the burden of waiver.

At CR P.762/L.24 and CR P.764/L.15-16 the honorable FitzMaurice found that the Board had abused discretion, allowing a closer review of the merits by this Court.

Other issues which may be raised for the first at appeal are

A. Fundamental Constitutional rights, Jurisdiction (Swinney v. General Motors Corp. 46F.3d 512, 517-518 (6th Cir. 1995); Edelman v. Jordan, 415 US 651, 677-75 (1974); Elusive Exceptions to Waiver & Forfeiture Bars, by J. Bradley O'Connnell, page 10, http://www.fdap.org/downloads/seminar-criminal/seminar_1_04_waiver_materials.pdf

B. Pure questions of law, ibid

C. Sufficiency of Evidence, ibid.; People v. Rodriguez 122 Cal. App.4th 121, 129 (2004)

D. Jurisdiction, ibid.

E. Futility, ibid.

F. Lack of Opportunity to object, ibid.

G. Substantial Rights: I.R.E.103(d)

H. Public Interest (Pushing Aside the General Rule in Order to Raise New Issues on Appeal, by Rhett R. Dennerline, Indiana Law Journal Vol.64/Issue 4, Article 7/P.1001#3),

I. Bias of trial judge, State v. Perry, 245 P. 3d 961,974 - Idaho: Supreme Court 2010,

J. Improved argument not requiring additional evidence, (Universal Title Ins. Co. v. U.S., 942 F.2d 1311, 1314 (8th Cir. 1991)

K. Miscarriage of Justice (Batiansila v. Advanced Cardiovascular Systems, 952 F 2d 893, 896 (5th Cir. 1992)

2. Board's Response: *"The failure of the Board to appeal the district court's determination to require reconsideration of the imposed disciplinary measure should not be considered an admission that abuse of discretion occurred."* <P.35 "D">

Appellant's Reply: What should it be considered? The District Court found abuse of discretion for lack of reason and professional judgment and without a timely appeal, that abuse is now a settle fact.

3. Board's Response: *"One basis for the remand is an offer of settlement made by Complainant. However, as clearly set forth in the office of Attorney General, Rules of Administrative Procedure (this is not allowed)".* (parenthetical added) <P.36/L.10-16>

Appellant's Reply: Might the Court be reminded that it was the Board who put the offer of settlement into the record, and that the record is now settled.

4. Board's Response: "*The Board believes there is a clear basis to impose the discipline it entered."* <P.36/L18-19>

Appellant's Reply: Here the Board broadcasts loud and clear that they think that they are not guilty of abuse of discretion, lack of reason and professional judgment (CR P.764/L.15-16; CR P.762/L.24), and when they get the case back they will go for the ultimate, the revocation of license.

5. Board's Response: *"Respondents request to reframe and restate...(t)hat the issue of the presiding Board revoking Erickson's license has been remanded and is not presently before this Court."* (CR P.657/Claim #32) [ ] <P.8 "D">

Appellant's Reply: Apparently the Board believes that the remand was not appealed. In answer, the remand is what prompted the appeal.

In fact, at the Oral Argument of March 27, 2017, Tr P.256/L.25 – P.257/L3, the Board is quite rebellious to the idea that the penalty phase can be remanded.

V. CONCLUSION:

In September 2014 The Idaho Board of Professional Engineers and Professional Land Surveyors were lobbying new legislation that would redefine "surveying" and remove the land boundary experience from licensure. Erickson opposed this effort, lobbying Congressmen and publishing an exposé article in the American Surveyor Magazine.

Erickson contends that within days of the article appearing electronically, five officers of the Board conspired to bring retribution upon Erickson and to silence his dissent. This can been seen in the Chain of e-mails. Mere days after that, the full Board reversed a preliminary finding of a Request For Inquiry, that had been in favor of Erickson. The R.F.I. was already 3.5 years old, 1.5 years past the deadline for filing an Affidavit/Complaint, but the Board reversed its preliminary decision and signed paperwork to illegally extend the R.F.I. and all this within one week of the Article appearing. Coincidence?!

Erickson pro se has been steam rolled by an agency with not one, but two law firms aggressively prosecuting him. The agency has shown bias, collusion between the prosecution

and the adjudication, conspiracy to hide evidence, and obstruct discover. After nearly two years of leading the Board in these antics, the Chairman, a part-time Engineer throughout his career, recused himself from adjudication (a fact missing from the record) and took a seat with the Prosecutors, thereafter acting as the Expert Witness. During the hearing the Expert Witness lacked candor to the degree of prevarication, certainly to the extent of dissembling. As a consequence, Erickson has lost property, his liberty to practice the profession of his choice and most importantly, when he lost his Press Credentials, he lost his voice.

Obviously the Board cannot be relied upon to fairly find justice or impose fair discipline. In such a state it would appear that judicial economy would allow this Court to decide the issues, using evidence and arguments as necessary.

Erickson admits that he has been remiss in one aspect. He was, and is, so incensed over the Board's attack upon Freedom of the Press, that he sometimes forgot in his Appellant's Brief to address the Board's bias. Erickson prays this Court to view his arguments about the U.S. 1st Amendment and Idaho's Constitution, Article 1, Section 9 and 10, to also be a presentation of the Board's bias.

VI. PRAYER FOR RELIEF

Erickson prays this court to reverse and render for lack of substantial evidence. Due to cylic reasoning echoing between substantial evidence and an erroneous interpretation of the standard of care, the Board has convinced itself that all they have to do is make up a rule, declare that it is the Standard of Care and by their testimony they have substantial evidence. *"I wish*

nothing but good; therefore, everyone who does not agree with me is a traitor and a scoundrel.", so said King George III as quoted in Saratoga: Turning Point of America's Revolutionary War, by Richard Ketcham, page 65.

Erickson prays that this Court will reverse and render because the trial was unfair before an unfair tribunal.

If this Court finds it necessary to remand, may it please the Court to observe the caution of Williams v. Idaho State Bd. Of Real Estate, 337 P. 3d 655, 665, 666 - Idaho: Supreme Court 2014:

> *"(Board Member) Janoush did not participate in the formal deliberation and decision-making for the Final Order, but it seems he remained involved with the process for quite some time before eventually recusing himself...Were it not for the fact that the Hearing Officer performed the hearing in a professional and impartial manner, Williams' concerns may have had some justification."*

Also see Haw v. Idaho State BD. of Medicine, 137 P.3d 438, 443 - Idaho: Supreme Court 2006.

And finally we ask the court to take judicial notice, that, like a pack train strung out on a trail, Erickson v. The Board is just the lead mule. In the courts below there is a string of following riders, all addressing the SW corner of Section 24, T30N, R3E, and all dependent upon one another. In Erickson's case it is difficult to conceive how a ruling upon the "central issue" (the SW corner of Section 24) can justly be made until Walker v. Hoiland determines that corner (Tr P.219/L.1-7).

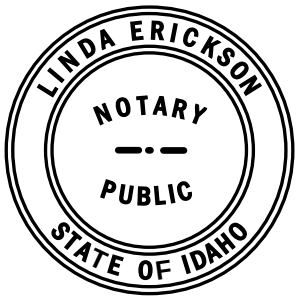
VERIFICATION

State of Idaho)
ss.)
County of Idaho)

Chad R. Erickson, being sworn, deposes and says under penalty of perjury: That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of his knowledge and belief

Chad R Erickson
Signature of Appellant

Subscribed and Sworn to before me this 10th, day of May, 2018.



Linda Erickson
NOTARY PUBLIC
Residing in Woodland Idaho
My Commission Expires May 25th, 2023

CERTIFICATE OF SERVICE

The undersigned, a resident of Idaho County in the State of Idaho, hereby certifies that on the 10th day of May, 2018, he caused a true and correct copy of the foregoing document to be served upon the following as indicated:

Idaho Supreme Court
Court of Appeals
PO Box 83720
Boise, ID 83720-0101

__X__ US Mail
____ Facsimile
____ Hand Delivery
__X__ Email: sctbriefs@idcourts.net

Michael J. Kane
Michael Kane & Associates, PLLC
4355 West Emerald Street, Suite 190
Boise, ID 83706

__X__ US Mail
____ Facsimile
____ Hand Delivery
__X__ Email: mkane@ktlaw.net

Mr. Keith Simila, P.E.
Executive Director
Idaho Board of Licensure of Professional
Engineers and Professional Land Surveyors
1510 E. Watertower Street, Suite 110
Meridian, ID 83642

__X__ US Mail
____ Facsimile
____ Hand Delivery
__X__ Email: keith.simila@ipels.idaho.gov

Chad R Erickson
Chad R. Erickson