

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE BOARD OF REGISTRATION FOR ARCHITECTS,
ENGINEERS, AND LAND SURVEYORS**

In the Matter of
Clifford E. Baker

OAH No. 08-0025-AEL
Agency No. 0104-001

DECISION

I. Introduction

The Division of Corporations, Business and Professional Licensing alleged that Clifford Baker failed to conform to professional standards for a registered land surveyor when performing a survey in a boundary dispute matter ultimately resolved through an arbitration at which Mr. Baker testified. The division asserted that Mr. Baker's conduct constituted gross negligence, incompetence, or misconduct in the practice of land surveying and, as such, warranted disciplinary action by the board. Mr. Baker countered that he conformed to the applicable standards because his methods were an accepted approach and, in any event, that he should be immune from disciplinary action under the doctrine of witness immunity.

The division met its burden of proving misconduct, but not gross negligence or incompetence, on the part of Mr. Baker. The evidence established a single instance of misconduct: Mr. Baker's failure to include all relevant and pertinent information known to him in his report on the boundary dispute, as required by 12 A A C 36.210(a)(4). Mr. Baker is not immune from disciplinary action for the misconduct. That he prepared the report in connection with a survey about which he testified at the arbitration does not relieve Mr. Baker of the obligation to comply with standards of professional conduct.

Under the particular circumstances of Mr. Baker's case, disciplinary sanctions should be imposed, but the nature and seriousness of his violation does not warrant severe penalties such as revocation or suspension under the board's guidelines, and remedial education, peer review and supervision are not called for in this case. Instead, appropriate sanctions consist of a reprimand and a civil fine.

II. Facts

Clifford Baker is an Alaska registered professional land surveyor.¹ He has more than 25 years of experience as a surveyor in Alaska.² After working first for a federal agency and the

¹ March 26, 2008 Affidavit of Respondent Clifford E. Baker (Baker aff.) at ¶ 3.

² May 6, 2008 Testimony of Clifford E. Baker (Baker Testimony) (stating that he began surveying in the late 1970s); Resume of Cliff E. Baker (Baker Ex. 30) (showing experience in Alaska dating to 1982 and before).

military, and then with small private firms, Mr. Baker opened his own survey firm in 1985 and has been self-employed ever since.³ He has performed boundary surveys, including retracement surveys.⁴ He has been active in several professional associations, including ASPLS (Alaska Society of Professional Land Surveyors), has drafted questions for the Alaska surveyor licensing examination, has taught survey classes, and has taken many continuing education courses, including courses on boundary law.⁵ As recently as three months before the hearing, Mr. Baker attended a boundary law course at an ASPLS meeting.⁶

A. THE BOUNDARY DISPUTE

Mr. Baker was hired in late 2001 to perform a third-opinion survey in a boundary dispute matter between the owners of Lots 12 and 13 in a subdivision on Larsen Bay, in Kodiak.⁷ The boundary dispute arose several months earlier, when the Lot 13 owner discovered that his neighbor was building a lodge on what the Lot 13 owner believed to be part of Lot 13.⁸ The two lots are next to each other, between a road right of way (ROW) and the shoreline of Larsen Bay, with Lot 13 to the west of Lot 12.⁹ The Lot 13 owner hired a surveyor (Bergee), who prepared a survey showing the Lot 12-13 boundary line to be east of a lodge built by the Lot 12 owner, thereby supporting the Lot 13 owner's view that the lodge encroached on his property.¹⁰ Bergee set two new monuments demarking the Lot 12-13 boundary line as depicted in his survey.¹¹ The

³ Baker Testimony.

⁴ Baker Testimony. A retracement survey is performed to retrace the boundaries of a parcel of land, using monuments or other reference points, when an existing record indicates that corners have been established and monumented, and someone needs to know where the corners and related boundaries are located. May 6, 2008 Testimony of Terry P. Irwin (Irwin Testimony).

⁵ Baker Testimony (describing professional and continuing education activities, and role on committee to draft exam questions in early 1990s with ongoing review of questions in recent years); *also* Resume of Clifford E. Baker (Baker Ex. 30) (listing specifics of some memberships and activities).

Among his profession associations and activities, Mr. Baker has served as a member of the Alaska Board of Registration for Architects, Engineers and Land Surveyors since 2004. Baker Ex. 30. During a prehearing conference, Mr. Baker was notified that he would not be able to participate in the board's consideration of this case and he acknowledged that he understood that. February 6, 2008 Recording of Prehearing Conference.

⁶ Baker Testimony (describing course taken at February 2008 meeting).

⁷ Baker Testimony (indicating that he was first contacted by the Lot 13 owner and the owner's attorney in late October or early November of 2001).

⁸ Undated Letter (receive stamped October 7, 2002) from Michael Carlson to the Board at p. 1 (explaining that Carlson, who had purchased Lot 13 in November 2000, discovered "last summer" (likely the summer of 2001, from context and based on dates of surveys) a lodge being build on what he believed to be part of his property).

⁹ See Tarrant Survey (Division Ex. 8); Baker Survey (Division Ex. 11; Baker Ex. 19); Irwin Drawing (Division Ex. 24). A copy of the Irwin drawing, which provides a general orientation of the boundary lines and improvements as depicted in the three surveys, is attached as Appendix B.

¹⁰ Bergee Survey (Division Ex. 6).

¹¹ *Id.* (showing aluminum caps "set this survey"); *accord* Baker Testimony (describing his observation of monuments set by Bergee).

Lot 12 owner hired a surveyor (Tarrant), who prepared a survey showing the Lot 12-13 boundary line to be west of where Bergee placed it, and west of the lodge, supporting the Lot 12 owner's view that he built the lodge on his own property.¹²

Mr. Baker testified that when he was hired by the Lot 13 owner to provide the third-opinion survey, he told the owner and the owner's attorney that he approaches such tasks objectively, with as open a mind as possible, limits his contacts with other parties to avoid being swayed by them, and would provide his frank opinion even if the answer is one the client does not like. He did not contact the Lot 12 owner or that owner's surveyor, Tarrant, but he did obtain documents concerning the Lot 12 owner's position, including a statement about that owner's observation of a monument to the west of where Bergee placed the boundary line, and Tarrant's survey and field notes.¹³ Mr. Baker testified that Bergee contacted him to provide information and that, when this occurred, he (Baker) tried to give Bergee the impression that he did not want to be swayed by Bergee's views.

At the end of November 2001, Mr. Baker went to Larsen Bay to perform a field investigation for his survey.¹⁴ He found the monuments set by Bergee and two Bureau of Land Management (BLM) monuments found by Tarrant, but he could not find a third B L M monument Tarrant had found.¹⁵ The B L M monument along the ROW (534 on the Tarrant survey), which marks the south corners of Lots 11 and 12, and is shown as a circle with a cross through it on the Baker survey, was in good condition and Mr. Baker found it to be credible.¹⁶

Another B L M monument along the ROW found by both Tarrant and Baker, and used by Tarrant to locate the south corners of Lots 12 and 13 (530 on the Tarrant survey), was disturbed. Mr. Baker testified that it was "gravely disturbed" in that he found it out of the ground, lying horizontally, under more than two feet of water and ice in the ditch, and thus he did not find it credible, even though it was generally in the area depicted on the Tarrant survey. He added that it

¹² Tarrant Survey (Division Ex. 8) (showing Bergee monuments at 505 and 215.91, east of the Lot 12-13 boundary line as depicted by Tarrant, beginning at ROW monument at 530, and showing structures to be within Lot 12).

¹³ Baker Testimony.

¹⁴ Baker Testimony.

¹⁵ Baker Testimony; *also* Baker Survey (Division Ex. 11; Baker Ex. 19).

¹⁶ Baker Testimony. Mr. Baker testified that he found this monument to be credible despite thinking that Tarrant might have repositioned it. He thought this because the "T" on the cap pointed toward the ROW (to the south) when the normal practice is to set the monument so that the "T" points north. *Id.*

also was out of position three to five feet from the ROW and beyond the point at which a hypothesized 100-foot blunder by the B L M surveyor would have placed it.¹⁷

Mr. Baker testified that though he could not find a third B L M monument found by Tarrant (507 on the Tarrant survey), which Tarrant used to locate the north corners of Lots 11 and 12, he believes this may have been due to recent construction work destroying the monument and he accepts that Tarrant found the monument, and that it was in good condition because Tarrant's field notes say so.

Mr. Baker also testified that his field investigation extended to examining monuments in other parts of the subdivision and attempting to walk in the footsteps of the original B L M surveyor. He concluded that the B L M surveyor was conscientious and probably would not have made a blunder of the type that would have led the Lot 12-13 boundary line monuments to be set 100 feet or more from where the plat indicated they should have been set. He explained that this conclusion, along with the "gravely disturbed" condition of the ROW monument on which Tarrant relied to establish the Lot 12-13 corner, was a factor in his decision to use a method that disregarded the monuments Tarrant used.

Mr. Baker explained that because he was hired to look at the disputed Lot 12-13 property line and nothing more, he was not called upon to survey the Lot 11-12 line or other boundary lines in the subdivision. Instead, he used the other subdivision monuments and extrinsic information he could find to determine where, in his opinion, the Lot 12-13 line is located. He testified that he found a Department of Transportation (DOT) monument (for harbor work) about 25 to 30 feet west of where he understood the Lot 12 owner to have reported seeing a monument presumably associated with the northwest corner of his lot. Because none of the surveyors were able to find a monument where the Lot 12 owner indicated he had seen one and the owner might have been confused by the DOT monument farther to the west, Mr. Baker did not accept the

¹⁷ Mr. Baker's field investigation and records review led him to conclude that the original B L M surveyor likely would not have made precisely a 100-foot blunder, but his own past experience and that of other surveyors who testified indicated that large blunders by surveyors laying out subdivisions are not unheard of. *Compare* Baker Testimony (discussing apparent diligence by B L M surveyor evidenced by other parts of the survey tracking the plat but acknowledging that he had seen large errors by B L M surveyors in the past) *with* May 5, 2008 Testimony of Robert L. Tarrant (Tarrant Testimony) (discussing apparent 100-foot blunder by original surveyor and describing past experience in Talkeetna when B L M surveyor made a 132-foot error) and Irwin Testimony (stating that he has found B L M meanders to be in error many times and that B L M can be off by hundreds of feet, probably due to failure to spend enough time studying mean high tides).

owner's reported sighting as reliable evidence and disregarded Tarrant's conclusion as to where the northwest corner lay.¹⁸

Mr. Baker determined where, in his opinion, the north (shoreline) corners lay based on the angle point, which he used to deduce where the meander corner would have been located by the original B L M surveyor.¹⁹ For the south (ROW) corners of the Lot 12-13 line, Mr. Baker used proportioning (sometimes referred to as apportioning or proration) to determine where, in his opinion, that corner lay.²⁰ Proportioning uses mathematics to distribute the differences between what is measured and what is shown on a drawing in a manner that is fair to the parties on both sides of the property line.²¹ It is a method of last resort that should be used only when the monuments cannot be found and the search for other evidence of where the corners were set is exhausted.²²

Mr. Baker's opinion yielded a boundary line essentially in the same location as Bergee's. Mr. Baker's testimony concerning his field investigation and conclusions was credible, and it was not directly contradicted by other evidence in the record. More likely than not, therefore, the Baker survey document reflects the Lot 12-13 boundary line that Mr. Baker, in his professional judgment, believed to be the correct line when the ROW monument found by Tarrant and the Lot 12 owner's unconfirmed observation of a monument in the northwest area of his lot are disregarded.

During his field investigation, Mr. Baker took many photographs, including photographs of the monuments he found and the brush lines, and he downloaded them into a laptop computer that (along with the camera) was destroyed in a house fire before he prepared his survey and report documents.²³ He still had his field notes and sketches, and was able to prepare the survey

¹⁸ Baker Testimony. The physical location of the northwest corner of Lot 12/northeast corner of Lot 13 is over the rocky bluff at the mean high tide line. *Id.* The original B L M surveyor did not place a monument there because of the likelihood it would be destroyed by waves. Baker Ex. 6; Tarrant Testimony (indicating that the notation in the B L M survey notes (Baker Ex. 6) that the point for the No. 10 corner was not monumented "due to liability of destruction by wave action..." relates to the meander corner at the boundary of Lots 12 and 13).

¹⁹ Baker Testimony. Mr. Baker explained that the prominent angle point identifies the meander and that the meander corner could have been a few feet left or right of where Bergee placed a monument but he (Baker) accepted Bergee's location.

²⁰ Baker Testimony (acknowledging that Mr. Baker used proportioning for the ROW corner, but not for the shoreline corner, thereby essentially prorating the blunder between all properties on the block).

²¹ May 5, 2008 Testimony of Patrick Kalen (Kalen Testimony).

²² *Id.*; accord Irwin Testimony (describing "proration" as a method of last resort which is not used if monuments are found); Excerpt from 1973 Manual of Surveying Instructions (Division Ex. 18 at 9) (discussing restoration of lost corners and the role of "proportionate measurement" in restoring corners after exhausting evidence going to where the corners were originally set).

²³ Baker Testimony.

document, which he did not file in the public land records.²⁴ He also prepared a two-page report to his client in which he acknowledged using what he characterized as "the standard practice of proportion" to calculate the comers of Lot 13 along the R O W .²⁵ The report concludes that the Lot 12-13 property line established by Bergee is essentially correct.²⁶ The report describes Mr. Baker's approach and includes some, but not all, of his reasoning for using that approach. In particular, it does not explain why he disregarded the monuments Tarrant found or that he knew of but disregarded the Lot 12 owner's observation of a monument in the northwest area of the lot, and it does not discuss whether he interviewed property owners or otherwise took investigative steps in response to the apparent encroachment of the lodge.

The Lot 12 and 13 owners proceeded to arbitration to resolve the boundary dispute. Mr. Baker, Bergee and Tarrant all testified as witnesses in the arbitration hearing, as did a fourth surveyor, Sam Best, who had reviewed the others' work but did not survey the property himself.²⁷ The arbitrator "conclude[d] that Tarrant's line is correct."²⁸ The superior court entered judgment in favor of the Lot 12 owner, adopting the arbitrator's determination that "the Lot 12/13 boundary line is located as described by the Tarrant survey"²⁹

B. THE COMPLAINT AND INVESTIGATION

About six months after the arbitration hearing, Tarrant filed a complaint with the division, asserting "that Cliff Baker set new comers between Lots 11 and 12" but acknowledging that this was based on what Tarrant had been told and that he (Tarrant) had not seen the alleged new comers.³⁰ An investigation was conducted.³¹

²⁴ Baker Testimony (emphasizing that Baker did not file his survey document in the public land records or set any monuments of his own); *accord* Baker aff. at ¶ 8.

²⁵ February 12, 2002 Fax of Letter from Baker to Carlson (Baker Ex. 8). A copy of the letter-report is attached to this decision as Appendix C.

²⁶ *Id.* at 2 (explaining that a witness corner established by Bergee's firm, Horizon Land Surveying, "is within hundredths of a foot of the property line"); *compare* Baker Testimony (indicating that though Bergee and Baker used different approaches, they reached similar results and thus Baker accepted the comers established by Bergee because Bergee had set monuments that were close to where Baker deduced the original corners should have been set).

²⁷ May 28, 2002 Arbitration Decision and Order at 3-4 & n. 4 (Division Ex. 4 at 14-15) (discussing testimony of Baker, Bergee, Tarrant and Best, and explaining that Best did not actually survey the property); August 24, 2005 Affidavit of Gordon Samuel "Sam" Best (Best aff.) at ¶¶ 2 & 5-10; May 7, 2008 Testimony of Gordon Samuel Best (Best Testimony) (describing his role as expert witness in the arbitration).

²⁸ May 28, 2002 Arbitration Decision and Order at 5 (Division Ex. 4 at 16).

²⁹ May 1, 2003 Judgment at 1 (Division Ex. 4 at 1).

³⁰ November 16, 2002 Complaint (Baker Ex. 7).

³¹ Baker aff. at ¶¶ 11 & 13-15 (describing some aspects of the investigation); May 5, 2008 Testimony of John R. Clark (Clark Testimony) (describing his investigation); Clark's Investigative Notes for April 1, 2004-October 25, 2007 (Baker Ex. 1).

Mr. Baker cooperated with the division's investigator by responding to questions orally, and then reducing his responses to letter form when he learned that the investigator's interview recording failed.³² In the letter, he articulated several reasons for his opinion, including why he disagreed with Tarrant's conclusions and did not believe that the B L M surveyor had made a large blunder.³³ He arranged for Best to provide an affidavit containing Best's opinion about the performance of the surveyors involved in the Lot 12-13 boundary dispute."³⁴ Mr. Baker also requested that a professional society undertake its own ethics review of the complaint.³⁵

The division hired an independent surveyor, Terry Irwin, to assist with the investigation. Among other things, Irwin reviewed the Baker, Bergee and Tarrant surveys, as well as the arbitration decision, and made a site visit to Larsen Bay, and ultimately concluded that Mr. Baker's approach was reasonable up to the point at which he became aware of the apparent encroachment.³⁶ At that point, in Irwin's opinion, Mr. Baker should have performed a more thorough investigation of the evidence of occupation before resorting to proportioning.³⁷

During his site visit, Irwin was not able to examine the monument where the Lot 12-13 line intersects the ROW because it was underwater.³⁸ He found a piece of slightly bent rebar lying on the ground which he believed relates to the meander corner for the Lot 11-12 boundary line (i.e., one line to the east of the disputed line) but was not able "to see where and how it was located."³⁹ He concluded that

³² Baker Testimony; Clark Testimony; April 10, 2004 Letter from Baker to Clark (Baker Ex. 4).

³³ April 10, 2004 Letter from Baker to Clark (Baker Ex. 4).

³⁴ Best aff. at ¶ 8 (offering the opinion that none of the surveyors with opposing interpretations of where the boundary line lay was "unreasonable or inherently incorrect, inaccurate, below minimum professional standards nor unethical nor fraudulent") (Exhibit K to Baker's March 24, 2008 Memorandum in Opposition to Division's Motion for Partial Summary Judgment and in Support of Respondent's Cross-motion for Summary Judgment).

³⁵ May 7, 2008 Testimony of Joseph C. Burch (Burch Testimony) (discussing Alaska Society of Professional Land Surveyors ethics review and process by which the society created an *ad hoc* committee to review the complaint against Baker).

The particulars of the society's review and any conclusions it reached are immaterial to this decision because the board, not the society, determines whether a registrant has complied with the applicable statutory and regulatory standards.

³⁶ Irwin Testimony.

³⁷ *Id.* (explaining that it is inappropriate to "ignore structures and things people have built" and that "there's not much written that tells you that proration is a good option without the caveat that you be sure [that using] it doesn't affect ownership rights"); accord October 20, 2004 Letter from Irwin to Clark at 3 (Division Ex. 14 at 3) (stating that Irwin can see how a surveyor could set the corners where Bergee did but only if the surveyor first interviewed the owner of apparent encroachments and the owner could not come up with a reasonable explanation for why the buildings were built where they are).

³⁸ October 20, 2004 Letter from Irwin to Clark at 2 (Division Ex. 14 at 2) (explaining that he could not recover the southwest corner of Lot 12 because it was underwater).

³⁹ *Id.*

[t]he monuments found in the field define the boundaries of the lots even though they do not conform exactly to the recorded plat[, t]he corners found are credible[, and the] monuments cannot be ignored, especially when a structure has been constructed, that by testimony was positioned by reference to these same monuments.⁴⁰

Irwin concluded that Mr. Baker did not take seriously enough the professional standards calling for consideration of extrinsic evidence and evidence of occupation when conducting a field investigation, and speculated that Mr. Baker might not have had adequate education on boundary law.⁴¹

C. THE DISCIPLINARY ACTION

Several months after Irwin completed his work, the division's investigator wrote to Mr. Baker, informing him that the investigation had been completed, concluding that a disciplinary action could be brought against Mr. Baker for incompetence, and proposing to settle the matter through a memorandum of agreement (MOA).⁴² The proposed MOA called for Mr. Baker to admit to certain acts and accept several disciplinary sanctions.⁴³ Mr. Baker declined and this disciplinary action followed.

This action was commenced by accusation in December 2007.⁴⁴ The division and Mr. Baker both moved for summary adjudication but on different grounds. The motions were denied and the matter proceeded to hearing. Evidence was taken over a period of four days in May 2008. All exhibits (hearing exhibits and those filed with the parties' motions) were admitted into evidence, subject to the understanding that the aerial photographs marked Baker Exhibit Nos. 34-38 were accepted for general reference only and, without foundation or authentication, would be given little or no weight.

III. Discussion

The Board of Registration for Architects, Engineers and Land Surveyors is authorized to take a variety of disciplinary actions against registered land surveyors who fail to conform to

⁴⁰ *Id.*; accord Irwin Testimony (stating that "monuments are the best evidence of the boundary").

⁴¹ October 20, 2004 Letter from Irwin to Clark at 1 & 3-4 (Division Ex. 14 at 1 & 3-4).

⁴² August 3, 2005 Letter from Clark to Baker (Exhibit J to Baker's March 24, 2008 Memorandum in Opposition to Division's Motion for Partial Summary Judgment and in Support of Respondent's Cross-motion for Summary Judgment at 1).

⁴³ The proposed MOA, the terms of which will be discussed in Part III.C below, can be found at pages 2-8 of Exhibit J to Baker's March 24, 2008 Memorandum in Opposition to Division's Motion for Partial Summary Judgment and in Support of Respondent's Cross-motion for Summary Judgment.

⁴⁴ See generally December 17, 2007 Accusation (Board No. 0104-04-001).

applicable standards of professional conduct.⁴⁵ The division alleged that Mr. Baker's conduct in performing the boundary dispute survey constitutes gross negligence, incompetence, or misconduct for which discipline can be imposed under AS 08.48.111 and AS 08.01.075. Before reaching the question of what, if any, discipline should be imposed against Mr. Baker, therefore, it is necessary to determine whether the division has established that his conduct, in fact and as a matter of law, amounts to gross negligence, incompetence or misconduct.⁴⁶

First, however, Mr. Baker's assertion of witness immunity as a complete defense to the disciplinary action will be addressed.

A. WITNESS IMMUNITY DOES NOT BAR DISCIPLINARY ACTION.

Mr. Baker testified at the arbitration hearing as an expert witness on behalf of the landowner who hired him to perform the survey. This, he argues, gives rise to witness immunity and precludes the board from taking disciplinary action against him. By motion, Mr. Baker asked that the accusation be dismissed. That motion was denied in an interim ruling by the administrative law judge. The board's decision on the issue follows.

1. Court-developed Witness Immunity

In Alaska, witness immunity for experts evolved from judicial immunity. First, the courts applied quasi-judicial immunity to people performing an extension of the judicial function, including expert witnesses appointed by the courts.⁴⁷ Like judicial immunity, the quasi-judicial immunity for those performing an extension of the neutral function is absolute, not qualified.⁴⁸ Absolute immunity precludes civil liability even for malicious or corrupt acts.⁴⁹ Part of the

⁴⁵ AS 08.01.010(3) (making AS title 8, chapter 1 applicable to the Architects, Engineers and Land Surveyors board); AS 08.01.075(a) (listing eight disciplinary actions that may be taken singly or in combination by a board under title 8, chapter 1); AS 08.48.111 (empowering the board to suspend, refuse to renew, or revoke a registrant's certificate, or to reprimand the registrant on several grounds). *Also* 12 A A C 36.320 (setting out disciplinary guidelines the board follows when a registrant fails to conform).

⁴⁶ The division bears the burden of proving its allegations by a preponderance of the evidence. AS 44.62.460(e)(1). The preponderance of evidence standard requires the party with the burden to prove that it is more likely than not that the facts alleged occurred. *See Safeway, Inc., v. Mackey*, 965 P.2d 22, 28-29 (Alaska 1998).

⁴⁷ *See Lythgoe v. Guinn*, 884 P.2d 1085, 1087-1093 (Alaska 1994) (affirming superior court's application of quasi-judicial immunity to a psychologist appointed by a court to act as custody investigator and dismissal of suit alleging negligence, misrepresentation, failure to conform to minimum professional standards, and breach of fiduciary duty); *also compare Karen L. v. State*, 953 P.2d 871, 878-879 (Alaska 1998) (applying absolute quasi-judicial immunity to psychiatrist not initially appointed by the court but approved by the court after selection by state agency).

⁴⁸ *Lythgoe*, 884 P.2d at 1086, 1087-1092 (explaining that judges are accorded absolute immunity, demonstrating that other jurisdictions have applied absolute quasi-judicial immunity to non-judges, and rejecting arguments that court-appointed custody investigator's immunity should be qualified rather than absolute).

⁴⁹ *Id.* at 884 P.2d at 1086 & 1091. In contrast, qualified immunity protects against liability only for good faith actions that are not malicious or corrupt. *Id.* at 1090, n. 4.

rationale for protecting persons performing an extension of the neutral's function against civil liability is that other sanctions are available to address misconduct, including reporting the court-appointed expert to the appropriate licensing board.⁵⁰

Later, the courts extended immunity to experts not appointed by the courts but rather hired by litigants.⁵¹ This form of immunity is not a direct descendent of quasi-judicial immunity because hired experts do not perform an extension of the neutral's function.⁵² Instead, this is ordinary witness immunity, which stems from a testimonial privilege.⁵³ The immunity is absolute insofar as the testimony is privileged "even if given maliciously or with knowledge of its falsity."⁵⁴ It is not limited to court testimony and has even been applied to testimony given in an arbitration deposition.⁵⁵

Like quasi-judicial immunity, witness immunity bars tort claims, but the rationale for extending the immunity is different: it is to encourage witnesses to come forward, and to be open and honest.⁵⁶ Though a hired expert has a monetary incentive to come forward and, some argue, to be an advocate rather than an objective witness, the Alaska Supreme Court found no need to provide hired experts with the deterrent of potential tort liability when "traditional safeguards against untruthful testimony" should provide sufficient deterrents.⁵⁷ Among those deterrents is the possibility that a licensed professional will be subject to discipline.⁵⁸

⁵⁰ *Id.* at 884 P.2d at 1091, quoting *Seibel v. Kemble*, 631 P.2d 173, 177 n. 8 (Haw. 1981) (explaining that though the appointed expert would not be civilly liable for alleged negligent acts, the court can ensure accountability by, among other things, reporting the "doctor's behavior to the medical boards for further action").

⁵¹ *Gilbert v. Sperbeck*, 126 P.3d 1057, 1060 (Alaska 2005) (holding that an expert who performed an independent psychological examination of an insurance claimant was immune from suit alleging fraud and misrepresentation).

⁵² *Id.* at 1059 (contrasting hired expert's role from that of appointed/court approved experts in *Lythgoe* and *Karen L.*, *supra*, explaining that the former "did not serve in a role analogous to an 'arm of the court'" (citing *Karen L.*, *supra*)).

⁵³ *Id.*

⁵⁴ *Id.* (citing *Nizinski v. Currington*, 517 P.2d 754, 756 (Alaska 1974)).

⁵⁵ *Gilbert*, 126 P.3d at 1060 (applying witness immunity to expert's insurance arbitration deposition testimony).

⁵⁶ *Id.* at 1059.

⁵⁷ *Id.* at 1060. *Gilbert* argued that paid witnesses should not be immune from suit because extending immunity to them does not further "the truth-encouraging purposes of witness immunity. The court disagreed, citing the traditional safeguards of "the oath or affirmation, the perils of cross-examination, and the threat of perjury prosecution 'or other sanctions,' as sufficient deterrents." *Id.*

⁵⁸ *Id.* at 1060 & n. 20 (listing the possibility of professional discipline as one of the deterrents against untruthful testimony by the psychologist hired by one party to the insurance arbitration and noting the Alaska Statutes title 8 authority of the licensing board to impose disciplinary sanctions).

In short, witness immunity precludes civil suits, particularly tort suits alleging defamation and slander of title, because the testimonial privilege on which the immunity is based is absolute.⁵⁹ Immunity from civil suit, however, is not immunity from disciplinary action.

The Alaska case law on witness immunity does not support a conclusion that Mr. Baker is immune from disciplinary action because he acted as a witness in the boundary dispute arbitration. To the contrary, the case law suggests that the possibility of professional discipline as a sanction is one of the reasons the Alaska Supreme Court was willing to extend witness immunity to hired experts. This is an administrative adjudication, not a civil suit. Witness immunity, as developed by the courts, therefore, does not bar the board from hearing the disciplinary action or imposing disciplinary sanctions.

2. Separation of Powers

The constitutional separation of powers doctrine does not dictate that the division's disciplinary action should be dismissed by the board. Mr. Baker's argument to that effect rests on the notion that an administrative adjudication would be an encroachment on the judicial system's separate power to adopt court rules and otherwise govern the conduct of judicial proceedings.⁶⁰ It assumes that the division is seeking to have the board impose "rules regarding witness testimony in judicial proceedings."⁶¹ A disciplinary action before the board, however, is not an encroachment on judicial branch power; it is an exercise of the separate executive branch power to enforce the laws, and it preserves for the courts the judicial branch power to adjudicate the disciplinary matter to finality, after a final executive branch agency decision has been made by the board.

"The separation of powers doctrine limits the authority of each branch [of government] to interfere in the powers that have been delegated to the other branches."⁶² The executive branch, not the judicial branch, has the power to discipline Alaska's registered land surveyors. "The executive power of the State is vested in the governor."⁶³ In carrying out the duty to faithfully execute the laws, the governor may initiate an "appropriate court action or proceeding" to

⁵⁹ *Lawson v. Helmer*, 11 P.3d 724, 726-727 (Alaska 2003).

⁶⁰ *Id.* at 32-33.

⁶¹ *Id.* at 33.

⁶² *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 35 (Alaska 2007) (stating the same in the context of reasoning that creation of the Alaska Workers' Compensation Appeals Commission as an executive branch quasi-judicial agency did not violate the separation of powers doctrine).

⁶³ Alaska Const, art. III, § 1.

enforce compliance with legislative mandates.⁶⁴ The judicial branch has no analogous power and thus could not itself initiate a disciplinary action against a registered land surveyor for alleged violation of the standards of professional conduct.⁶⁵

The executive branch is not limited to enforcing compliance with professional standards by initiating a court action. The constitution "explicitly envisions legislatively created quasi-judicial agencies within the executive branch."⁶⁶ Boards and commissions that serve in regulatory and quasi-judicial roles are appointed by the governor, subject to legislative confirmation.⁶⁷ The judicial branch plays no role in the appointment process and its review of such a board's licensing or disciplinary actions occurs only after a final executive branch decision is made, in which case the courts have jurisdiction to consider an administrative appeal under AS 22.10.020(d) or, if a petition for review is filed, under AS 44.62.305.

By statute, the state's registered land surveyors are subject to the regulatory and quasi-judicial power of the Board of Registration for Architects, Engineers, and Land Surveyors.⁶⁸ That board adjudicates the division's accusation in this matter pursuant to AS 08.01.075 and AS 44.62.330(a)(3). Thus, even if court-developed witness immunity purported to bar administrative adjudications in addition to civil suits (which it does not), the separation of powers doctrine just as likely would require the court-developed testimonial privilege that creates witness immunity to yield to the executive branch power to discipline licensees.

Accordingly, it would be imprudent to dismiss the accusation simply because a court might be persuaded that the judicial branch has the separate power to curtail an executive branch agency's exercise of its disciplinary power so that regulated professionals will feel comfortable serving as expert witnesses. If he is aggrieved by the result in this disciplinary action, Mr. Baker is free to raise the witness immunity issue, including the separation of powers argument, on appeal to the superior court. The interim order denying Mr. Baker's motion for summary adjudication is affirmed.

⁶⁴ *Id.* at § 16.

⁶⁵ *See generally* Alaska Const. Art. IV; AS title 22.

⁶⁶ *Alaska Public Interest Research Group*, 167 P.3d at 35.

⁶⁷ Alaska Const, art. III, §§ 22 & 26.

⁶⁸ *See* AS 08.48.011 (creating board and providing for the governor to appoint the members); AS 08.48.101 (authorizing the board to adopt regulations); AS 08.48.111 (empowering the board to impose disciplinary sanctions); AS 08.48.121 (allowing the board to bring an action in court to seek an injunction).

B. FAILURE TO CONFORM TO PROFESSIONAL STANDARDS

"[G]ross negligence, incompetence, or misconduct in the practice of ... land surveying" is one of the groups of conduct for which the board can impose disciplinary sanctions.⁶⁹ The others are "fraud or deceit in obtaining a certificate" and "a violation of [AS 08.48], a regulation adopted under [AS 08.48], or the code of ethics or professional conduct adopted by the board."⁷⁰ The division's accusation alleges that Mr. Baker's conduct amounted to gross negligence, incompetence or misconduct, and "is grounds for discipline pursuant to 12 A A C 36.310"⁷¹ The accusation does not explicitly allege that Mr. Baker's conduct fell into one of the other groups of conduct for which disciplinary sanctions can be imposed under AS 08.48.111, but the allegation that grounds exist for "discipline pursuant to 12 A A C 36.310" effectively adds the "violation" ground to the gross negligence, incompetence and misconduct grounds.⁷² That regulation makes violation of a provision in AS 08.48 or 12 A A C 36 grounds for discipline under the general disciplinary powers in AS 08.01.075.

The 12 A A C 36 regulations contain the code of professional conduct for land surveying.⁷³ They also provide that a registrant's failure to perform "responsibilities according to AS 08.48 and [12 A A C 36]" constitutes "misconduct."⁷⁴ Thus, even if the accusation had not invoked 12 A A C 36.310, the scope of the board's decision appropriately would include whether Mr. Baker's work on the boundary dispute showed gross negligence, incompetence or that he otherwise failed to comply with the AS 08.48 statutes or 12 A A C 36 regulations-i.e., was "misconduct."

Under the disciplinary guidelines definitions, "gross negligence" and "misconduct" share a common core, whereas "incompetence" is distinct. "Incompetence" connotes a broader failure than a single mistake. It is defined as "lacking the ability, knowledge, skills, or professional judgment to discharge the professional duties of a registrant as required by law[.]"⁷⁵

⁶⁹ AS 08.48.111.

⁷⁰ *Id.*

⁷¹ December 17, 2007 Accusation at ¶ 14 (alleging that Mr. "Baker's conduct as described above [in the earlier paragraphs of the accusation] violates AS 08.48.111(2) which [allows the board to discipline] a registrant who is found guilty of gross negligence, incompetence, or misconduct in the practice of land surveying").

⁷² "[F]raud or deceit in obtaining a certificate" is not at issue in this matter. The evidence presented at the hearing was limited to Mr. Baker's conduct in the boundary dispute matter, as was the accusation.

⁷³ See 12 A A C 36.200—12 A A C 36.245.

⁷⁴ 12 A A C 36.330(4). Such a failure subjects the registrant to discipline for misconduct unless it rises to the level of gross negligence, in which case the registrant can be disciplined for gross negligence.

⁷⁵ 12 A A C 36.330(3).

In contrast, both "gross negligence" and "misconduct" can be evidenced by a single mistake by someone not generally lacking ability, knowledge, skills or professional judgment. They share the common core of a registrant's failure to perform according to AS 08.48 or 12 A A C 36.⁷⁶ A single mistake could constitute a failure to perform according to, or even violate, a provision in AS 08.48 or the 12 A A C 36 regulations without rising to the level of incompetence.⁷⁷

Accordingly, consideration of whether Mr. Baker failed to conform to professional standards follows two tracks. The first asks whether his conduct was contrary to requirements in AS 08.48 or 12 A A C 36 such that it was "misconduct," and if so whether it rose to the level of "gross negligence." The second asks whether his conduct shows "incompetence."

1. Mr. Baker's conduct was misconduct but not gross negligence.

Despite the common core of a registrant's failure to perform according to AS 08.48 and 12 A A C 36 shared by the definitions for "gross negligence" and "misconduct," they serve two separate purposes. The definition of "misconduct" functions like a catch-all for failures to perform according to AS 08.48 and 12 A A C 36 when the failures do not "constitute gross negligence."⁷⁸ The definition of "gross negligence" carves out a more dangerous kind of misconduct—one that puts at risk life, health, safety or property and is intentional or reckless.⁷⁹ Read together, in context with the disciplinary guidelines, these definitions serve to distinguish misconduct that warrants a serious sanction, such as revocation, from misconduct that warrants a lesser sanction, such as a short suspension or a fine or a reprimand.⁸⁰ Before that distinction matters in Mr. Baker's case, at a minimum, the division must prove that he failed to perform his duties or responsibilities according to AS 08.48 or 12 A A C 36.

⁷⁶ 12 A A C 36.330(2) (defining "gross negligence" and using the phrase "failure to perform the registrant's *duties and responsibilities* according to AS 08.48 *or* this chapter ..."); 12 A A C 36.330(4) (defining "misconduct" and using the phrase "failure to perform the registrant's *responsibilities* according to AS 08.48 *and* this chapter). (Emphasis added.)

⁷⁷ For example, a registrant might violate the 12 A A C 36.220 conflict of interest provisions by thoughtlessly accepting a gratuity from someone other than the client, or violate the site adaptation provisions of 12 A A C 36.195 by forgetting to obtain written permission from the person who sealed the original design, and thereby commit an act of "misconduct," without necessarily displaying such a lack of knowledge or judgment as to be considered incompetent.

⁷⁸ 12 A A C 36.330(4).

⁷⁹ 12 A A C 36.330(2).

⁸⁰ Compare 12 A A C 36.320(b) (providing for revocation of a certificate of registration in cases of gross negligence) *with* 12 A A C 36.320(f) (providing for suspension of up to one year for cases of misconduct that causes no harm).

Statutory duties and responsibilities. AS 08.48 creates relatively few duties or responsibilities that govern how an individual land surveyor performs survey work. The statutes contain duties and responsibilities about use of seals and forbid the practice of land surveying by a person not properly registered to practice,⁸¹ but none of the statutes purports to set out a particular standard of care with which a surveyor must perform survey work.⁸² Apart from the broad requirement implicit in AS 08.48.111 that a surveyor must perform competently, without committing acts of gross negligence or misconduct, the statutes leave the question of what professional standards apply, and most of the specifics about what kind of conduct is mandated or prohibited, to the board and its regulations.

Regulatory duties and responsibilities. Unlike the statutes, the 12 A A C 36 regulations create many duties and responsibilities. By regulation, the board has adopted standards of professional conduct and has given meaning to the phrase "gross negligence, incompetence, or misconduct in the practice of ... land surveying..." In 12 A A C 36.210(a), the board adopted ten broad professional conduct requirements and made them applicable to all registrants (engineers and architects, as well as land surveyors). Their purpose is "to establish and maintain a high standard of integrity, skill, and practice in the professions of architecture, engineering, land surveying, and landscape architecture, and to safeguard the life, health, property, and welfare of the public[.]"⁸³ They cover a wide range of subjects, including protection of safety, health, property and welfare; use of professional judgment; truthfulness; and cooperation in the board's efforts to police the profession.⁸⁴

Though several requirements could come into play with respect to a particular survey job, none is specific to survey work and none directs specifically how a surveyor must go about performing the field work and investigation, or preparing survey documents. Nevertheless, two requirements are pertinent to the allegations against Mr. Baker:

1. a registrant "must at all times recognize that [his or her] primary obligation is to protect the safety, health, property, and welfare of the public in the performance of his or her professional duties" (12 A A C 36.210(a)(1)); and

⁸¹ AS 08.48.221; AS 08.48.281.

⁸² AS 08.48 broadly prescribes general qualifications to become and remain registered (article 2) and penalties for practice by unregistered individuals and entities (article 3), and it exempts certain workers from compliance with the chapter and provides some basic definitions, such as for "practice of land surveying" (article 4; AS 08.43.341(13)), but it leaves most of the particulars for the board to prescribe by regulation.

⁸³ 12 A A C 36.200(a).

⁸⁴ 12 A A C 36.210(a)(1), (2), (4) & (6).

2. a registrant "shall be completely truthful in all professional reports, statements, or testimony, and shall include in them all relevant and pertinent information known to the registrant..." (12 A A C 36.210(a)(4)).⁸⁵

A separate regulation governing use of seals also come into play for the primary obligation duty in 1 above. That regulation, in effect, authorizes a surveyor to seal a survey only if it is "safe for public health, property, and welfare in conformity with accepted ... land surveying ... standards in Alaska[.]"⁸⁶

- i. Protection of safety, health, property and welfare.*

The division asserts that Mr. Baker failed to conform to the professional standard for protection of property essentially because he did not follow the field investigation steps for a survey in a professional society manual and resorted to proportioning when the boundary line between Lots 12 and 13 could have been (and ultimately was) established using Tarrant's corners. A surveyor's failure to follow required procedures or his unnecessary use of a method of last resort to establish boundaries could show that the surveyor does not recognize the obligation to protect property, if property is put at risk by the survey prepared. Sealing a survey so prepared would be improper as well. Two questions result: (1) did Mr. Baker's preparation of a survey establishing a different boundary than Tarrant's put property at risk and (2) did Mr. Baker fail to conform to the applicable professional standards in the manner in which he performed his investigation and in his use of proportioning.

On the first question, Mr. Baker takes the position that no property was put at risk by his work because the Lot 12-13 owners were already engaged in a boundary dispute and his survey was not recorded in the public land records.⁸⁷ His position implies that different standards apply

⁸⁵ A third regulatory provision—the disclosure requirement of 12 A A C 36.245—initially was at issue in this case. In briefing on the summary adjudication motions, Mr. Baker argued that the accusation should be dismissed in its entirety because he complied with the section 245 disclosure requirement when serving as an expert witness in the arbitration. For the reasons set out in the April 25, 2008 Order Denying Summary Adjudication at pp. 6-7 (incorporated in this decision by reference), compliance with the disclosure requirement does not immunize Mr. Baker from disciplinary sanctions for the survey work he performed in connection with that boundary dispute, if that work failed in some other way to conform to the applicable standards of professional practice. The division has consistently asserted that the survey work, not Mr. Baker's testimony as an expert in the arbitration, is the basis for this action. It reiterated that assertion as recently as the closing argument at the end of the hearing. Accordingly, it is unnecessary to discuss the 12 A A C 36.245 disclosure requirement in greater detail in this decision.

⁸⁶ 12 A A C 36.185(a)(2).

⁸⁷ Baker aff. at ¶ 8, which states:

With regard to my work in the Maschmedt/Carlson dispute: I did not file a survey in the public land records; did not remove any existing monuments; and, did not place any additional monuments on the land. In fact, my work had no effect on anyone or anything except the two parties to a legal dispute who agreed by contract to resolve the boundary dispute by arbitration.

to preparation of surveys meant to resolve existing boundary disputes and surveys that are not recorded than apply to other surveys. The testimony, including Mr. Baker's, supports the opposite conclusion: the minimum standards are the same for any retracement survey, irrespective of whether a boundary dispute exists or the survey will be recorded.

Though the standards are not different, the risk of harm could vary with the uses made of a survey. For instance, the risk of clouding title is greater if the surveyor or his client records the survey, and the degree of harm caused by a survey that creates a new boundary dispute might be greater than one that simply takes a position on how an existing dispute should be resolved. That does not mean an unrecorded, third-opinion survey such as Mr. Baker prepared and sealed poses no risk. Such a survey could tip the balance in a survey dispute, though Mr. Baker's did not affect the outcome in the Lot 12-13 dispute.⁸⁸ Had the Lot 12 owner capitulated based on the Baker survey reaching the same result as Bergee's, or had the arbitrator relied on the Baker survey in the face of contrary legal principals and rejected Tarrant's corners, the Lot 12 owner could have been forced to remove the improvements Mr. Baker opined were encroachments. That would be true whether or not the survey was recorded or relied on by anybody other than the two disputing landowners.

Mr. Baker's preparation of a survey establishing a different boundary than Tarrant's, therefore, did put at risk property of the Lot 12 owner. Preparing and sealing such a survey would be indicative of a failure to recognize that his primary obligation when performing his professional duties includes protection of property, unless Mr. Baker's survey work conformed to the applicable professional standards notwithstanding the fact Tarrant's Lot 12-13 boundary was found by the arbitrator to be correct under principles of boundary law.

The professional standards applicable to a retracement survey or governing when a new survey can be performed instead are not set out in statute or regulation. Initially, the division sought to establish the standards by reference to a professional society manual that sets out steps for the field investigation leading up to preparation of a survey.⁸⁹ Those steps are as follows:

My work did not place anyone's property in jeopardy because the dispute between Mr. Carslon [sic] and Mr. Maschmedt already existed, based upon the Bergee and Tarrant surveys.

⁸⁸ The arbitrator's decision briefly discusses Mr. Baker's work in the context of describing the disagreement among the four surveyors, but the rationale for adopting Tarrant's survey appears uninfluenced by Baker's work or testimony, except insofar the arbitrator mentioned Baker's testimony about past experience with "B L M surveys with monuments off as much as 200 or 300 feet." May 29, 2002 Arbitration Decision and Order at 3-7 (Division's Ex. 4 at 14-18).

⁸⁹ March 10, 2008 Motion for Partial Summary Judgment at 9-10.

1. Search for, locate, and identify monuments and other physical evidence affecting record boundary location or lines of occupation.
2. Where relevant, consider extrinsic (e.g. parol) evidence of the position of obliterated corners, and obtain affidavits.
3. Where relevant, locate and describe evidence of occupation.
4. Make necessary measurements, taking into account positional accuracy that must be achieved for the class of property being surveyed (Item 5).
5. Make sufficient check measurements to discover blunders and verify or validate other measurements.
6. Record all information and data collected in an appropriate, understandable form.¹⁹⁰¹

The manual containing these proposed model standards has not been adopted by reference in the 12 A A C 36 regulations. When a manual has not been so adopted, it does not establish a binding rule of law, even if the manual is commonly relied on by the entity with regulatory authority over the subject matter.⁹¹ Standing alone, therefore, the unadopted manual does not establish what Mr. Baker needed to do to conform to accepted land surveying standards.

Testimony at the hearing illustrated that these steps generally are followed in both original and retracement surveys but not that each and every one of the steps must be followed for every survey. Indeed, steps 2 and 3 themselves acknowledge that they may not be relevant in every survey. The witnesses, including Mr. Baker, were in general agreement that a surveyor performing a retracement survey is supposed to follow in the footsteps of the original surveyor, that undisturbed monuments establish the corners, and that proportioning is a valid method to locate boundaries when the monuments cannot be used and other evidence of where the corners were located cannot be found.

The witness testimony, however, differed as to whether the monuments Tarrant found govern, and whether proportioning is a method of last resort that should not have been used in surveying the Lot 12-13 boundary line in light of the monuments that were found. Essentially,

⁹⁰ *Id.* (citing A S C E Proposed Model Standard of Practice for Property Boundary Surveys, Technical Procedures, para. 4.3—Field Investigation and Survey).

⁹¹ *Flanigin v. State*, 946 P.2d 446, 450 (Alaska 1997) (explaining that a regulation in the guise of a policy not validly adopted as a regulation "lacks the force of law").

the dispute comes down to whether the comers established by the original B L M surveyor were lost or merely obliterated, and whether Mr. Baker may have erroneously concluded they were lost because he did not interview Tarrant or the Lot 12 owner. When a corner cannot be located readily because its monument has been destroyed, its location can be shown by competent evidence, including statements by observers familiar with the property.⁹² If a corner is lost—i.e., no competent evidence exists showing its original location—a new survey, using the courses and distances in the original surveyor's field notes, can be used to reestablish the corner where it should have been set.⁹³ If the location of an original monument can be ascertained by evidence, the corner it marks is the true corner, even if a later survey shows it should have been located elsewhere, and the boundary line must be established by reference to the true corner, without regard to where the corner should have been placed.⁹⁴

Mr. Baker treated the Lot 12-13 boundary line corners as lost and performed a new survey, resorting to proportioning for the ROW corner to make the lots consistent with the B L M plat for the subdivision, because he did not find all of the monuments Tarrant found and disregarded the ones he did find. He disregarded the monuments because of their condition. His field notes say almost nothing about the condition of or other concerns about monuments. The sketch at page 57 of his field notebook indicates that he could not find a monument in one location on Lot 12, that he found a flag stake but no monument at a location on Lot 13, and that numbers on one of the caps for a monument he did find were illegible.⁹⁵ Nothing in the field notes suggests that found monuments were in poor condition, apart for the legibility problem.

Mr. Baker's survey document depicts a B L M monument along the road right of way that corresponds to a B L M monument Tarrant determined marks the south end of the Lot 11-12 boundary line.⁹⁶ Mr. Baker's report, in the form of a letter to the Lot 13 owner, recounts his success in finding several B L M monuments in the subdivision and "four monuments set by

⁹² *Sellman v. Schaaf*, 26 Ohio App.2d 35,47-48,269 N.E.2d 60, 69 (1971) (discussing distinction between lost and obliterated corners in the context of using testimonial evidence of the surveyor and interested parties' who were in a position to observe the location of stakes); *also* Irwin Testimony (distinguishing between lost and obliterated corners in opinion on appropriate solution for this survey based on disturbance of monuments).

⁹³ *Sellman*, 26 Ohio App.2d at 46-48, 269 N.E.2d at 68-69; *Titus v. Chapman*, 687 N.W.2d 918, 924 (S.D. 2004) (emphasizing that "[o]nly upon obliteration of an original corner may a new survey be made from points that can be determined in accordance with the original surveyor[']s field notes").

⁹⁴ *Titus v. Chapman*, 687 N.W.2d 918, 924 (S.D. 2004); *accord* Irwin Testimony.

⁹⁵ Division Ex. 10, pp. 1 & 6; *also* Baker Ex. 5.

⁹⁶ *Compare* Baker Survey (Division Ex. 11) at monument at 230.50' *with* Tarrant Survey (Division Ex. 8) at monument at 534.

[Bergee] establishing the property boundary of Lot 13 ..." and states the following about problems with the condition of others:

The integrity of two additional monuments has been compromised and have been relocated out of position. The witness corner between Lots 11 & 12 Block 16 is ± 35 ft. northeast of the true position and the property corner between Lots 11 & 12 Block 16 along the right-of-way for First Street is ± 114 ft. west of its [sic] true position... In addition to the monuments located by field survey we did find an original monument for the property corner between Lots 12 & 13 Block 16. However this monument was out of the ground under water more than 100 ft. out of position. We were unable to determine a location for this monument and did not survey its position.¹⁹⁷¹

His report does not mention the Tarrant survey or explain which, if any, of the out-of-position monuments correspond to those Tarrant found.

The Baker report also does not cover several of the other reasons he later communicated to the division's investigator or through his hearing testimony for performing a new survey using proportioning.⁹⁸ In short, his report does not explain why he found it appropriate to prepare a new survey using proportioning, rather than a retracement survey incorporating the monuments that were found.

Quite likely, Mr. Baker's survey reflects where the Lot 12-13 boundary line should have been set by the B L M surveyor if that surveyor had made no major errors in laying out the subdivision as contemplated by the plat. Mr. Baker took great care to reconstruct what the B L M surveyor should have done and that effort led him to doubt that the B L M surveyor would have placed the corners where Tarrant found some of the monuments. The division showed through the testimony of Irwin and Tarrant that the better approach would have been for Mr. Baker to work with the monuments Tarrant found, so that the boundary line could be determined by reference to where the B L M surveyor placed the corners, *not* where that surveyor *should have* placed them. In short, the division proved that more likely than not, Mr. Baker made a mistake by resorting to proportioning without investigating the credibility of the corners located by Tarrant as fully as other surveyors would have under the circumstances.

⁹⁷ Undated, unsigned letter from Baker to Carlson (Division Ex. 9) at 1; also February 12, 2002 fax of signed letter (Baker Ex. 8) at 1.

⁹⁸ See *infra* discussion of requirement for complete reporting at section III.B.1.ii (describing several ways in which the report fell short of revealing Mr. Baker's reasoning).

The division's proof, however, stopped short of showing that Mr. Baker has failed to recognize that his primary obligation as a registered land surveyor includes protection of property. The testimony of Irwin and Tarrant, and the field investigation steps outlined in the professional society manual, suggest that Mr. Baker should have inquired further before resorting to proportioning, but that evidence was not so unequivocal as to compel the conclusion that Mr. Baker's conduct failed to conform to applicable professional standards. The professional society manual's steps, such as the one calling for a surveyor to consider extrinsic evidence and obtain affidavits, are not hard and fast requirements for every survey. Irwin acknowledged this, and he and Tarrant acknowledged that surveyors have to use their own judgment.⁹⁹ Mr. Baker's testimony showed that, based on his field investigation and his review of Tarrant's documents, he concluded that he should not rely on the corners located by Tarrant because the monuments were too disturbed. Nothing in the evidence presented suggests that his conclusion was motivated by a desire to cause his client to gain property belonging to the neighboring landowner or was otherwise anything less than a good faith opinion that the monuments were too disturbed to be reliable.

In sum, though Mr. Baker's survey showing a different boundary than was ultimately established as legally correct put the Lot 12 owner's property at some risk, the division did not meet its burden of proving that the risk arose from failure to recognize the primary obligation to protect property found in 12 A A C 36.210(a)(1). The arbitrator found Tarrant's Lot 12-13 boundary to be correct under principles of boundary law. Other surveyors would have relied (or did rely) on the monuments Tarrant found, or would have inquired further before resorting to proportioning. Nevertheless, the testimony showed Alaska registered surveyors differ in their judgments as to whether monuments such as the ones found by Tarrant should be considered credible when damaged and disturbed. Exercising judgment about the credibility of monuments does not demonstrate that the surveyor fails to recognize the obligation to protect property. Accordingly, Mr. Baker's decision to prepare a survey using proportioning and essentially to set the Lot 12-13 boundary where he deduced the B L M surveyor should have placed it, even if at odds with the decision of other surveyors, is not a violation of 12 A A C 36.210(a)(1). Thus, that decision is not "misconduct" for purposes of imposing disciplinary sanctions.

⁹⁹ Irwin Testimony; Tarrant Testimony (answering "yes" to a question about whether a surveyor has to use his or her own judgment about how to proceed when monuments have been disturbed).

The same, however, cannot be said of Mr. Baker's documentation of the basis for his decision.

ii. Truthful and complete reporting.

Under the code of professional conduct, Mr. Baker was required to be completely truthful in the report he prepared for the Lot 13 owner and to include in it "all relevant and pertinent information known to [him]."¹⁰⁰ The two-page letter report falls short of this requirement, in part, because it does not cover several of the reasons he later communicated to the division's investigator or through his hearing testimony for performing a new survey using proportioning. For example, it does not explain how his decision was influenced by

1. his disbelief that the original B L M surveyor would make a 100-foot error, placing monuments 100 feet or more out of position;
2. existence of structures built by the Lot 12 owner, which he concluded encroach on Lot 13 without interviewing the owner or Tarrant;
3. finding a DOT monument 25-30 feet west of where he understood the Lot 12 owner to have reported seeing a monument—i.e., what role, if any, this played in his consideration and disregarding of the owner's statement;
4. evidence of on-going utility work and other possible causes for monuments to be disturbed;
5. his conclusion, based on the meander corner and topography of the bluff, that the original B L M surveyor would have noticed the 100-foot blunder by stumbling over the rocky bluff if the surveyor had in fact set the monument for the north corners in line with the one found at the right of way.

Mr. Baker's report does not explain why he found it appropriate to prepare a new survey using proportioning to establish the ROW coners, rather than a retracement survey incorporating the monuments that were found.

Also, the report is somewhat misleading in its discussion of proportioning. When explaining how he "calculated the position of the property corners for Lot 13[,]" Mr. Baker discussed proportioning. First, he characterized it as a "standard practice."¹⁰¹ Then, he explained

¹⁰⁰ See 12 A A C 36.210(a)(4) (establishing the professional conduct rule for registrants' "professional reports, statement, or testimony").

¹⁰¹ Undated, unsigned letter from Baker to Carlson (Division Ex. 9) at 2; also February 12, 2002 fax of signed letter (Baker Ex. 8) at 2.

that "[p]roportionment allows for any discrepancies found between the field survey and record data to be spread equally among all properties."¹⁰² He did not acknowledge that proportioning is a method of last resort, or that spreading discrepancies equally among all properties is not something to be done lightly, especially when occupation of the property would be disturbed.

Finally, the report fails to discuss the improvements constructed by the Lot 12 owner Mr. Baker concluded are encroachments on Lot 13. The only reference to them is in the second to last paragraph, which states in full:

The property line shown on the sketch is based on using the angle point in the record meander as the controlling point for the property line and shows the amount of encroachment the newly constructed structures and boat launch are within Lot 13.^[103]

The report says nothing about when the "newly constructed structures" were built, or by whom they were built, or whether Mr. Baker inquired into their history and, if not, why he thought such inquiry unnecessary. The report treats the structures and boat launch as if already judged to be encroachments on Mr. Baker's client's land. This creates an appearance that the report, and the underlying survey, drove toward a desired conclusion rather than an objective opinion.

Intentional or not, the report's selective presentation of information known to Mr. Baker had the effect of omitting some "relevant and pertinent information." He knew of the boundary dispute and the Bergee and Tarrant surveys, and that his survey was meant to be a third opinion that could influence the outcome of the boundary dispute. He knew that Bergee and Tarrant had reached different conclusions about the Lot 12-13 boundary line. That two conflicting surveys already existed increased the body of information "relevant and pertinent" to Mr. Baker's task. He acknowledged as much in his testimony about why he chose not to confer with Tarrant, and not to seek out the information Bergee provided; he wanted to come at the matter from a fresh perspective, uninfluenced by the views of others. Yet his report, even taken in context with his survey document and field notes, did not include all of the information known to him that was relevant and pertinent to formation of his opinion on the boundary line's location, and to another's understanding (his client's, the arbitrator's or someone else's) of the bases for his conclusions.

¹⁰² *Id.*

¹⁰³ *Id.*

The standard of conduct required Mr. Baker to include in his report *all* relevant and pertinent information known to him. In the context of this specific survey, for which he was hired knowing of the boundary dispute and the two competing surveys, that means he was required to include more information (more was "relevant and pertinent") than he did. In this respect, therefore, his conduct fell below the standard in 12 A A C 36.210(a)(4).

For this instance of misconduct—incomplete reporting—to rise to the level of "gross negligence," the evidence would have to show that, more likely than not, Mr. Baker intentionally or recklessly failed to perform his reporting responsibilities according to 12 A A C 36.210(a)(4). Mr. Baker acknowledges, with the benefit of hindsight, that he should have included more information in his report and he attributes the failure to do so, in part, to the disruption of the house fire.¹⁰⁴ This suggests that the incomplete reporting was due to lack of foresight and perhaps a degree of carelessness, compounded by an event beyond Mr. Baker's control. Recklessness is not indicated.

For Mr. Baker's incomplete reporting to be found intentional, an inference would have to be drawn that he made a conscious decision to leave out information he understood to be relevant and pertinent—perhaps motivated by a desire to advocate for a particular result, to mislead or deceive his client or the arbitrator, or to hide some sort of mistake. Such an inference cannot fairly be drawn from the appearance created by the report that Mr. Baker had prejudged the Lot 12 owner's improvements to be encroachments. It is equally likely that this appearance of prejudgment and lack of objectivity was the result of hasty or careless writing in the aftermath of the house fire in which Mr. Baker lost the site visit photos.

The division, therefore, did not show more likely than not that Mr. Baker's incomplete reporting was "gross negligence." Accordingly, for purposes of determining what sanction to impose, it will be treated as "misconduct" unless incompetence is shown.

2. Mr. Baker's conduct does not show incompetence.

"Incompetence" is not limited to conduct that fails to conform to AS 08.48 or 12 A A C 36 requirements. If a law not contained in those statutes or regulations prescribes steps a registrant must following and the registrant fails to follow them, and that failure displays a lack of ability, knowledge, skill or professional judgment, incompetence may be shown irrespective of whether the failure would also be gross negligence or misconduct. Whether alleged incompetence stems

¹⁰⁴ Baker Testimony (stating "I will admit that my report probably could have been more detailed" and going on to explain the impact the house fire had on his work).

from failure to comply with the requirements of AS 08.48 or 12 A A C 36, or some other law, for the board to impose disciplinary sanctions based on incompetence, the division must also prove lack of ability, knowledge, skills, or professional judgment.

Mr. Baker's conduct in performing the survey for the boundary dispute arbitration does not show incompetence because the evidence fails to establish that he lacks ability, knowledge, or skills as a land surveyor, and his misjudgment in this one boundary dispute matter does not show a general lack of professional judgment. Mr. Baker's testimony, survey document and field notes, taken in light of the testimony of Irwin, show that his field work was thorough and that he had sufficient ability, knowledge and skills to perform the survey. His decisions not to interview the Lot 12 owner or Tarrant and not to include the level of detail in his report that hindsight shows would have been prudent to include were misjudgments but do not show that Mr. Baker lacks professional judgment.

Mr. Baker made a conscious choice not to interview Tarrant and the Lot 12 owner, and even tried to avoid talking with Bergee, so that he could approach the survey objectively. He used the Tarrant documents and the unsolicited information from Bergee. He knew the Lot 12 owner had reported seeing a monument in the northwest corner area, and he considered that report but dismissed it because he thought the owner may have been confused by the DOT monument. Other surveyors likely would have decided to stick closer to the usual approach of interviewing people who might have observational knowledge about monument locations.¹⁰⁵ The evidence presented did not make a compelling showing that a decision to do otherwise under the specific circumstances of this boundary dispute shows a lack of professional judgment.

Mr. Baker's decision not to include in his report the more detailed reasons he was able to articulate in communications with the division's investigator and at the hearing for disregarding the disturbed monuments on which Tarrant relied and preparing a new survey using proportioning appears to have been more happenstance than conscious choice. He testified that the house fire in which he lost photos and other materials from his field visit disrupted his work on the report. He acknowledged, with the benefit of hindsight, that perhaps he should have included more information in the report. At the hearing he was well able to articulate reasons for

¹⁰⁵ Tarrant Testimony (stating that it is normal to contact prior surveyors if there is a problem with the monuments); Irwin Testimony (discussing role of extrinsic evidence, including interviews with landowners and others, and concluding that Baker's approach may have been reasonable up to the point of discovering apparent encroachments, at which point it became important to talk to the people living there and ask about unrecorded surveys and other information that might explain why improvements were built where they are).

not relying on two of the monuments Tarrant found or on the corners Tarrant identified using the monuments. Tarrant himself testified that surveyors must use their own judgment when monuments are disturbed.¹⁰⁶ Mr. Baker's field notes and report provide some explanation for his conclusions about monuments and comers.¹⁰⁷ Though the arbitrator ultimately decided that Tarrant's comers defined the boundary between Lots 12 and 13, Mr. Baker had cause to question those comers and likely would not have resorted to proportioning if the monuments were undisturbed or if he thought it plausible that the original surveyor could have made a 100 foot error on this lot line when other monuments in the subdivision were largely consistent with the plat.¹⁰⁸

Certainly, Mr. Baker might have acquired a little more potentially useful information if he had interviewed the Lot 12 owner and Tarrant, especially if Tarrant could have provided more particulars about the location and condition of the monuments than could be gleaned from his field notes.¹⁰⁹ The lack of this information does not translate into a lack of knowledge necessary to carry out Mr. Baker's professional responsibilities generally, even though he could, and perhaps should, have been more thorough about the interview aspect of information gathering for this particular boundary dispute.

In sum, Mr. Baker had the ability, knowledge and skill to support his opinion that proportioning was an appropriate way to delineate the boundary between Lots 12 and 13 under the circumstances. He simply did not include that support in his report. This single instance of misjudgment about what information to include in the report does not show that he lacks professional judgment. The division, therefore, has not met its burden of proving that Mr. Baker's conduct shows incompetence for purposes of imposing disciplinary sanctions.

¹⁰⁶ May 5, 2008 Tarrant Testimony (responding to a question about whether surveyors have to apply their own judgment when monuments are disturbed with the answer, "yeah, that's what it's all about").

¹⁰⁷ Baker's Field Notes (Division's Ex. 10, p. 1) (noting "could not locate any monument" and "fnd flag stke but no monument"). Undated, unsigned letter from Baker to Carlson (Division Ex. 9) at 1; *also* February 12, 2002 fax of signed letter (Baker Ex. 8) at 1 (discussing out-of-position monuments, including one out of the ground and under water).

¹⁰⁸ Baker Testimony (indicating that Mr. Baker understands that proportioning is not a method to be used when boundaries can be determined from credible monuments).

¹⁰⁹ Tarrant's field notes describe the condition of each monument, including whether it was out of the ground, lying horizontal, buried to a particular depth, or in "good condition." *See* Tarrant's Field Notes (Division's Ex. 7, pp. 4-7).

C. DISCIPLINE WARRANTED

When gross negligence, incompetence, or misconduct in the practice of land surveying is shown, "[t]he board may suspend, refuse to renew, or revoke the certificate of or reprimand a registrant"¹¹⁰ In addition, the board's general disciplinary powers include imposing fines and conditions.¹¹¹ By regulation, the board has established disciplinary guidelines, the purpose of which is "[t]o ensure that the board's disciplinary policies are known and are administered consistently and fairly[.]"¹¹² The guidelines reserve the strongest sanctions—revocation and suspension for up to three years, followed by probation—for the most serious violations: gross negligence, fraud and deceit, and incompetence that causes harm.¹¹³

For misconduct, the guidelines permit the board, in its discretion, to impose a strong sanction—suspension of up to two years—if the misconduct caused undue harm.¹¹⁴ If the misconduct caused no undue harm, suspension of the registrant's certificate may not exceed one year.¹¹⁵ A period of probation ordinarily would not follow either suspension.¹¹⁶ The guidelines also provide that "[t]he board will, in its discretion, issue a public reprimand in connection with a disciplinary action taken under AS 08.48 and [12 A A C 36]." ¹¹⁷ The guidelines permit the board to impose "greater or lesser penalties ... depending on the circumstances of a particular case."¹¹⁸ The general statutory penalties that may be imposed for violation of AS 08.48 or a regulation in

¹¹⁰ AS 08.48.111.

¹¹¹ See AS 08.01.075(a), which authorizes boards to take the following disciplinary actions, singly or in combination:

- (1) permanently revoke a license;
- (2) suspend a license for a specified period;
- (3) censure or reprimand a licensee;
- (4) impose limitations or conditions on the professional practice of a licensee;
- (5) require a licensee to submit to peer review;
- (6) impose requirements for remedial professional education to correct deficiencies in the education, training, and skills of the licensee;
- (7) impose probation requiring a licensee to report regularly to the board on matters related to the grounds for probation;
- (8) impose a civil fine not to exceed \$5000.

Under AS 08.01.010(3), this board possesses these general disciplinary powers. The board exercises those powers if, after a hearing, a registrant "is found to have violated a provision of AS 08.48 or [12 A A C 36]." 12 A A C 36.310.

¹¹² 12 A A C 36.300.

¹¹³ See 12 A A C 36.320(c)&(d).

¹¹⁴ 12 A A C 36.320(e)(2).

¹¹⁵ 12 A A C 36.320(f).

¹¹⁶ Compare 12 A A C 36.320(e)(2) & (f) (speaking, respectively, of two- and one-year maximum periods of suspension but no mention of follow on probation) with 12 A A C 36.320(d) (explicitly providing for probation to follow suspension for some types of incompetence).

¹¹⁷ 12 A A C 36.320(b).

¹¹⁸ 12 A A C 36.320(a).

12 A A C 36 broaden the range of possible sanctions to include a civil fine of up to \$5,000, remedial education, peer review, and conditions on the certificate of registration.¹¹⁹

The division met its burden of proof only as to the allegation of "misconduct," and only in the form of a violation of 12 A A C 36.210(a)(4)'s requirement that Mr. Baker include "all relevant and pertinent information known to [him]" in his report on the Lot 12-13 boundary dispute. In closing argument at the hearing, the division advocated for a combination of sanctions at least equal to what it had offered Mr. Baker in the M O A he rejected. The M O A proposed a combination of remedial education, conditions on his certificate, peer review and a reprimand.¹²⁰ The M O A, as proposed, called for Mr. Baker to admit to incompetence, an allegation ultimately not proven, and to accept a reprimand based on his "setting and recording of monumentsf,]" fact assertions ultimately disproved.¹²¹ Because Mr. Baker's misconduct does not rise to the level of seriousness initially alleged, the sanctions proposed in the M O A are not a good starting point for the board's determination.

Instead, the disciplinary guidelines provide the best starting point. Under the guidelines, the board has the discretion to suspend Mr. Baker's certificate of registration for up to one year, even if no undue harm resulted from his incomplete report. The board has the discretion to impose a shorter suspension period or no suspension at all, and if the circumstances warrant could even impose a longer suspension. The board's discretion with regard to imposing statutorily authorized sanctions such as a fine or a requirement to complete remedial education is similar.¹²² The sanctions imposed must be consistent with those the board has imposed in similar cases unless departures are explained.¹²³ A board's choice of disciplinary sanctions typically will

¹¹⁹ AS 08.01.075(a)(4)-(6) & (8).

¹²⁰ Proposed M O A at Terms and Conditions A - D (Baker Ex. 15).

¹²¹ *Id.* at Terms and Conditions D. At the hearing, Mr. Baker testified that he did not set any monuments and did not record his survey in the public land records. Insofar as the M O A 's use of the word "recording" may not have been intended to evoke recording in the public land records, but rather may have meant to criticize some other record making act (e.g., noting, reporting, showing on his unrecorded survey Bergee's monuments), the criticism is misplaced. For the reasons discussed in Part III.B.2.ii, Mr. Baker's report and other survey-related documents were required to include the relevant and pertinent information about monuments he found, including the ones Bergee set.

¹²² Use of the word "may" in AS 08.01.075(a)'s authorization to boards to impose disciplinary sanctions makes imposition discretionary.

¹²³ AS 08.01.075(f) (requiring boards to seek consistency in application of sanctions and to explain significant departures from prior decisions involving similar facts); *also* 12 A A C 36.300 (explaining that one purpose of the guidelines is to ensure that disciplinary policies are administered consistently).

be upheld if reasonable and explained with reference to evidence in the record, as long as the sanctions are not viewed as unwarranted and unnecessary punishment.¹²⁴

Review of the board's past decisions in adjudicated disciplinary matters reveals no cases with similar facts. To give effect to the board's intent to administer its disciplinary policies both consistently and fairly, it is prudent to set sanctions having a possible range (e.g., period of suspension, fine amount) at an appropriate level to address the seriousness of Mr. Baker's violation while leaving room for more or less serious violations by other registrants to be sanctioned more or less severely. It is also prudent to take into account the particular circumstances of Mr. Baker's case in deciding whether other sanctions, such as remedial education or conditions on his certificate of registration are in order. The following facts are pertinent:

- Mr. Baker violated only one provision of the code of professional conduct and did so only in the single instance of preparing a report on the Lot 12-13 boundary dispute;
- Mr. Baker acknowledged at the hearing that he should have been more thorough in his report, showing that he has learned a valuable lesson from this experience about how to better conform to the code of professional conduct requirements;
- Mr. Baker's lack of thoroughness in the report may have been due, at least in part, to the disruption of the house fire;
- Mr. Baker's failure to include all of the relevant and pertinent information known to him in his report created an appearance that he was attempting to provide support for a particular result rather than an objective evaluation of the facts bearing upon the location of the boundary line, but his testimony indicated otherwise—that he made a special effort to remain objective;
- Mr. Baker's failure to include all of the relevant and pertinent information known to him in his report might have adversely affected the Lot 12 owner's property

¹²⁴ *Wendte v. Alaska Board of Real Estate Appraisers*, 70 P.3d 1089, 1094-1096 (Alaska 2003) (explaining that a licensing board "must exercise its discretion reasonably" and upholding a board's exercise of its discretion to impose sanctions because the decision was based on relevant and current information contained in the record and cited in the decision); *Ness v. Alaska State Board of Dental Examiners*, Decision and Order in 3AN-06-8587CI at pp. 6-8 (reversing as unwarranted and unnecessary punishment a four-month suspension imposed by dental board for one episode of malpractice in the dentist's 17-year career but leaving other sanctions in tact).

interest, but the arbitrator did not rely on the Baker survey and thus the property interest was not affected;

- Mr. Baker's field investigation was very thorough, except insofar as he did not interview the Lot 12 owner (or others) about the evidence of occupation and did not interview Tarrant about the monuments Tarrant found;
- Mr. Baker took the complaint against him seriously, cooperating with the division in its investigation, and even going so far as to seek an ethics review from a specially constituted ASPLS committee;¹²⁵
- Mr. Baker has taken continuing education courses that cover boundary law and regularly takes other courses, is active in professional associations, and has served as a question drafter for the Alaska surveyor's exam;
- Mr. Baker operates his own land surveying business, without the benefit of colleagues who could provide in-house supervision or peer review;
- Mr. Baker has been working as a professional land surveyor in Alaska for more than 25 years with no indication of disciplinary complaints or concerns prior to the Lot 12-13 boundary dispute.

Mr. Baker has learned from his mistake that the code of professional conduct requires more careful and complete reporting in circumstances such as he encountered in the Lot 12-13 boundary dispute. He has previously studied boundary law and engages in activities meant to keep his professional education current. Requiring remedial education, therefore, is not an appropriate sanction under the particular circumstances of this case.

Placing a condition on Mr. Baker's certificate of registration requiring him to work under supervision or subject to peer review could create a hardship on his ability to run his sole proprietor business. Though such a condition might have been appropriate had the evidence established violations other than incomplete reporting, for that single violation (from which Mr. Baker has learned of the need to better document his conclusions and reasoning), a condition that might have the effect of putting Mr. Baker out of business, or at a competitive disadvantage relative to others, could be viewed as an unwarranted and unnecessary punishment, out of

¹²⁵ That Mr. Baker sought an ethics opinion demonstrates that he took the complaint seriously, but the committee's conclusion is given no weight in this decision because the board, not a professional society such as ASPLS, is responsible for determining whether Mr. Baker conformed to the code of professional conduct provisions in 12 A A C 36 and other applicable requirements of law for purposes of this disciplinary action.

proportion to the violation. For the same reason, imposing a period of suspension of any length would be disproportionate to the single violation proven.

Accordingly, the most appropriate sanction for the violation by Mr. Baker, considering the particular circumstances of this case, is a combination of a reprimand and a civil fine. The fine should be set at 20 percent of the \$5,000 maximum, to allow room for imposition of larger fines for more serious violations and smaller fines for less serious violations in other cases and thereby ensure consistency and fairness. Payment of a portion of the fine amount can be suspended, with payment of the suspended portion required only if Mr. Baker commits another violation of 12 A A C 36 or AS 08.48 during a specified period.

IV. Conclusion

Mr. Baker is not immune from disciplinary action. Irrespective of whether witness immunity might protect him from civil suit for the testimony he gave at the arbitration, it does not prohibit the board from considering disciplinary action against him in an executive branch adjudication based on allegations of gross negligence, incompetence or misconduct arising from the survey work he performed.

The division met its burden of proof as to the allegation of misconduct but not as to gross negligence or incompetence. Mr. Baker's misconduct took the form of failure to satisfy the requirement of 12 A A C 36.210(a)(4) to include in his report all relevant and pertinent information known to him. Under the particular circumstances of this case, the appropriate sanction for this violation is a combination of a reprimand and a civil fine.

The Board of Registration for Architects, Engineers and Land Surveyors, therefore, orders the following:

1. A civil fine in the amount of \$1,000 is hereby imposed on Clifford E. Baker. Mr. Baker shall pay \$500 no later than 60 days after the board adopts this decision. Payment of the remaining \$500 shall be suspended for a period of two years from the date the board adopts this decision. If Mr. Baker commits no other violations of AS 08.48 or 12 A A C 36 before the end of that two-year period, his obligation to pay the remaining \$500 is extinguished. If Mr. Baker does commit a violation of AS 08.48 or 12 A A C 36 before the end of the two-year period, the remaining \$500 fine amount becomes due and payable immediately upon a final determination by the board that Mr. Baker has committed the violation.

2. A reprimand substantially in the form and having the content of Appendix A hereto (as amended by the board) shall be placed in Clifford E. Baker's license file for Alaska Professional Land Surveyor License 5152 upon adoption of this decision by the board.
DATED this 19th day of September, 2008.

By: Terry L. Thurbon
Chief Administrative Law Judge

Non-Adoption Options

1. The undersigned, on behalf of the Alaska Board of Registration for Architects, Engineers and Land Surveyors and in accordance with AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) and that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2008.

By: _____

Signature

Name

Title

2. The undersigned, on behalf of the Alaska Board of Registration for Architects, Engineers and Land Surveyors and in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

The content of the letter of reprimand is changed in Appendix A, as amended, to delete the last sentence of the first paragraph and to delete the second paragraph.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of November, 2008.

By: Boyd S. Brownfield
Chair AELS

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE BOARD OF REGISTRATION FOR ARCHITECTS,
ENGINEERS, AND LAND SURVEYORS**

In the Matter of
Clifford E. Baker

OAH No. 08-0025-AEL
Agency No. 0104-001

Appendix A

REPRIMAND

The Alaska Board of Registration for Architects, Engineers and Land Surveyors hereby reprimands you, Clifford E. Baker, for failing to meet your obligation as a professional land surveyor registered in Alaska to include in all professional reports, statements, or testimony all relevant and pertinent information known to you, as required by 12 A A C 36.210(a)(4). Your failure to include certain relevant and pertinent information in the report for the boundary dispute matter that gave rise to the above-referenced disciplinary action might have harmed the property interest of a member of the public but for the fact that your survey ultimately was not determinative of the outcome in the arbitration that resolved the boundary dispute.

PERATROVICH, NOTTINGHAM & DRAGE, INC

1506 W. 36th Avenue
 ANCHORAGE, ALASKA 99503
 (907) 561-1011
 FAX (907) 563-4220

JOB.

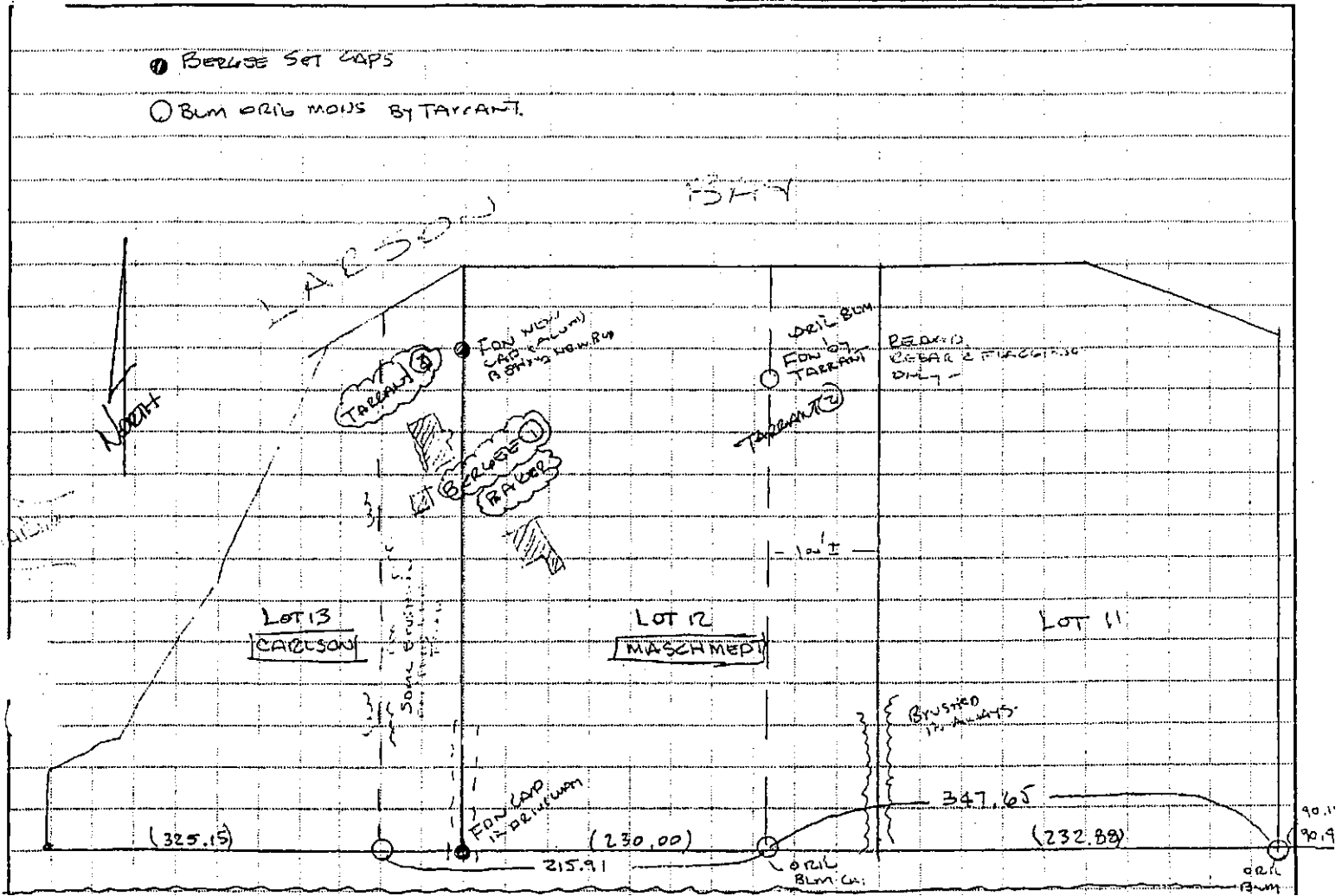
SHEET NO. _____ OF _____

CALCULATED BY TPI DATE 10/15/07

CHECKED BY _____ DATE _____

SCALE _____

- REUSE SET CAPS
- BLM ORIG MONS BY TARRANT





Integrity Surveys

SURVEYORS • PLANNERS
605 SWIRES DRIVE XENAI, ALASKA 99601
(907) 283-9047 PHONE
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Mike Carlson
Larsen Bay Lodge
P. O. Box 92
Larsen Bay, Alaska 99624

Re; Lot 13 Block 16, Townsite of Larsen Bay
U. S. Survey No. 4872

I have completed a field survey and Investigation of the above referenced property and have attached a sketch, which is a result of my analysis of the field data obtained.

We found numerous original Bureau of Land Management (*BLM*) monumentation along First Street, one along "J" Street, one witness corner located for the northeast lot line of Lot 10 Block 16 and two property corners along the back property line of Block 19. In addition to the BLM monuments, we also found four monuments set by Horizon Land Surveying establishing the property boundary of Lot 13 Block 16.

The attached sketch shows the found positions of all the monuments located during the field survey with the exception of the corners found along the back property line of Block 19: these two property corners appear to have been disturbed by utility installation.

The integrity of two additional monuments has been compromised and have been relocated out of position. The witness corner for Lot 10 Block 16 is ± 35 ft northeast of the true position and the property corner between Lots 11 & 12 Block 16 along the right-of-way for First Street is ± 114 ft. west of its true position. An old cut line through the brush along the property line between Lots 11 & 12 was discovered and through field survey determined to be in the correct location (see attached sketch). In addition to the monuments located by field survey we did find an original monument for the property corner between Lots 12 & 13 Block 16. However this monument was out of the ground under water more than 100 A. out of position. We were unable to determine a location for this monument and did not survey its position.

Based on the remaining BLM monuments we were able to determine the centerline location of First Street. Using this centerline in front of Lots 11, 12 & 13 Block 16 as the basis of bearing we established the record meander for Larsen Bay from the original BLM field notes. During our field survey we as-built the location of the top of the low bluff determining this to be the approximate meander line at the time of this field survey. Even with the erosion that has occurred since the original meander we were able to see that the current meander definitely follows the original.

Appendix C

DEFENDANT

EXHIBIT NO. Baker 8

ADMITTED •

OAH No. 08-0025 AEL

(Case Number)

Through the standard practice of proportion we calculated the position of the property corners for Lot 13 Block J 6 along First Street and found the position established by Horizon Land Surveying to within a few hundredths of a Foot and very acceptable as the true position. Proportionment allows for any discrepancies found between the field survey and record data to be spread equally among all properties. Two methods could be used to re-establish the property line between Lots 12 & 13. From the record B L M plat it is evident that all side property lines are perpendicular to the right-of-way; it is also evident from the B L M field notes that a prominent angle point in the meander is the property corner between the lots and the original witness corner was set on this property line. Based on a perpendicular property line the witness corner established by Horizon Land Surveying is within hundredths of a foot of the property line. Using the record angle point of the meander for Larsen Bay as the designated property corner the established witness corner is ± 0.5 ft east of the property line. However, under different circumstances I would accept the position of the witness corner established.

The property line shown on the sketch is based on using the angle point in the record meander as the controlling point for the property line and shows the amount of encroachment the newly constructed structures and boat launch arc within Lot 13.

Integrity Surveys appreciates this opportunity to be of service. Should you have any questions, please feel free to call me.

Sincerely
Integrity Surveys

Cliff Baker, RLS