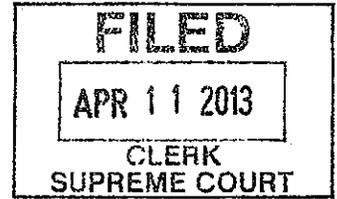


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-169-D
(2010 -CA- 000693 & 2010-CA-000730)



KENTUCKY STATE BOARD OF LICENSURE,
FOR PROFESSIONAL ENGINEERS AND
LAND SURVEYORS

APPELLANT

V. FRANKLIN CIRCUIT COURT
CIVIL ACTON NO. 09-CI-231

JOSEPH B. CURD, JR.

APPELLEE

BRIEF FOR APPELLEE

I hereby certify that on this 11th day of April, 2013, an original and ten copies of the foregoing was hand delivered to:

The Clerk of the Supreme Court of Kentucky, The Capitol, Frankfort, KY 40601

A true copy of the foregoing was mailed to: Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Franklin County Judicial Building, 669 Chamberlain Avenue, Frankfort, KY 40601; The Clerk of the Court of Appeals, 360 Democrat Drive,

and

Honorable Jonathan Doran Buckley, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, 160 Democrat Drive, Frankfort, KY 40601.

I further certify that the Record on Appeal was not withdrawn by Appellee.

A handwritten signature in black ink, appearing to read "Robert V. Bullock". The signature is written in a cursive style and is positioned above the printed name and address.

Robert V. Bullock
BULLOCK & COFFMAN, LLP
101 St. Clair Street
Frankfort, Kentucky 40601
Phone: (502) 226-6500

INTRODUCTION

The Appellant Kentucky State Board of Licensure, for Professional Engineers and Land Surveyors brought a disciplinary action against the Appellee Joseph B. Curd, Jr. for his testimony as an expert witness in a land dispute case which was tried before a Judge of the Wayne Circuit Court. The Franklin Circuit Court subsequently reversed the Board's Order imposing a six month's suspension of Mr. Curd's license as a surveyor, by finding that the statutes and regulations were unconstitutionally vague as applied. On review the Court of Appeals Affirmed in Part, Reversed in Part and Remanded.

Both Mr. Curd and the Board filed Motions for Discretionary Review and both were granted. This brief will consist of Mr. Curd's brief as Appellee in 2012-SC-000169-D. The Appellant Board is Appellee in 2012-SC-000165-D.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee, Mr. Curd, agrees with the Appellant that oral argument would be helpful to this Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

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I.

COUNTERSTATEMENT OF THE CASE

A.

NATURE OF THE CASE

This Court granted Discretionary Review in both *Joseph B. Curd, Jr. v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*, (2012-SC-165-D), and *Kentucky State Board of Licensure for Professional Engineers and Land Surveyors v. Joseph B. Curd, Jr.*, (2012-SC-169-D). Both appeals are a result of the Court of Appeals decision involving the six month suspension of Mr. Curd by the Board, (2010-CA-000693 & 2010-CA-000730), which was attached to the Appellant briefs in both cases. The following is the brief for Appellee in *Kentucky State Board of Licensure for Professional Engineers and Land Surveyors v. Joseph B. Curd, Jr.*, (2012-SC-169-D):

After a Hearing, the Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (hereinafter Board) suspended Mr. Curd's license as a Professional Land Surveyor as a result of his expert testimony given in the Wayne Circuit Court during a boundary dispute case. *Denny v. Southwood* (Wayne Circuit, Court Civil Action No. 01-CI-00201) (See Board Opinion, Tab 3). On appeal, the Franklin Circuit Court determined parts of the Board's statute and regulations were unconstitutionally vague as applied to Mr. Curd. (KRS 322.180 (2)(12); 201 KAR 18:142) (See Circuit Court Opinion, Tab 2).

The Court of Appeals determined that parts of KRS 322.180 and 201 KAR 18:142(2)(9) were unconstitutionally vague, but that 201 KAR 18:142(3) was not vague.

In this appeal, the Board has challenged that part of the Court of Appeals opinion finding part of its statutes and regulations unconstitutionally vague. The Appellant Board states in its brief that it is appealing the Court of Appeals decision that Sections (2) and (12) of KRS 322.180 and Sections 2 and 9 of 201 KAR 18:142 were unconstitutionally vague as applied to Mr. Curd. (Page 3 of Appellant Board's brief). The issue of whether 201 KAR 18:142(3) is unconstitutionally vague is a primary issue discussed in 2012-SC-165-D. (Court of Appeals Opinion, Tab 1).

B.

PERTINENT FACTS

The disciplinary action by the Board centered on the expert testimony of Mr. Curd in the Wayne Circuit Court in which he stated his opinion on the quality of the survey of Mr. James West, and in which he gave his opinion of the course and distances appearing in a deed description through use of a deed plot and a topo map. A secondary issue was whether Mr. Curd improperly represented his credentials as a Board Investigator. Mr. Curd gave his testimony by both deposition and by direct testimony in Court. (See Exhibits 1 & 2 admitted during the Hearing before the Board). Mr. Curd challenged the action of the Board claiming that the Board's statutes and regulations were unconstitutionally vague as applied to him. He also contended that the Board's decision violated the Kentucky Constitution's Separation of Powers provisions as well as the contention that the Board's findings were arbitrary and without substantial evidence to

support them.¹

On appeal to the Franklin Circuit Court, that court stated in part:

Under Kentucky law, it is the function of the Wayne Circuit Court to serve as the gatekeeper for expert testimony, and the Board should not be second-guessing the determination of the Court absent truly extraordinary circumstances. Mere disagreement over the proper technique for plotting in an *adverse possession claim* is not enough. In fact, general acceptance within the land surveying community is no longer a prerequisite for the admission of Mr. Curd's testimony, and certainly cannot provide the basis for administrative discipline.

Admittedly, expert testimony in an adversarial system is not always ideal; however, the Board is constitutionally prohibited from policing this testimony using vague and indeterminate standards. While various practitioners have advocated for review panels on expert testimony, this must be an all or nothing approach in order to comport with constitutional mandates. The Board cannot review the appropriateness of Mr. Curd's testimony while conveniently ignoring the testimony of numerous others. For that reason, this Court finds that the statutes and regulations are void-for-vagueness as applied to the Petitioner, Mr. Joseph B. Curd.

(Footnotes omitted-Franklin Circuit Court Opinion, pp. 8, 9
- See Tab 2 for the full opinion.)

The Appellant Board appealed to the Court of Appeals and Mr. Curd cross-appealed. While discussing the vagueness of the Boards regulations, the Court of Appeals stated in part:

Having so found, we believe that reversal of the circuit court's determination that 201 KAR 18:142 Section 3 was vague as applied to Curd is appropriate. We nevertheless briefly note our agreement with the court's determination that

¹ These last cited issues are primarily involved in the Appeal of *Joseph B. Curd, Jr. v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*, (2012-SC-165-D),

the remainder of the provisions at issue are indeed vague as applied to Curd's testimony below. These provisions repeatedly utilize words such as "gross negligence," "incompetence," and "misconduct," but do not elaborate in any detail as to what sorts of behavior might fall into the realm of the conduct intended to be prohibited. Likewise, although the provisions urge engineers to act in a manner which will "protect the public health, safety, and welfare," it gives no guidance as to how this is to be accomplished, or what sort of testimony would be in violation of this goal. Further, while the provisions require that, "the professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession," it is apparently left to the expert in question to ascertain, perhaps to his or her own peril, whether the testimony the expert intends to give during trial would be in violation of that provision or not. And last, though of importance, is the fact that an expert in court responds to questions and, at his discretion, may or may not go beyond answering the question to offer additional explanation of his answer. It is for the opposing counsel to ask questions on cross-examination, which further define the responses given by an expert witness.

Repeatedly, in its brief to this Court, the Board itself reaffirmed the vagueness of the regulations at issue, insofar as it was unable to point to specific conduct prohibited by the regulations, and instead merely urged that Curd, as a professional land surveyor, should have been able to "readily understand" what the regulations required through the use of his own "common sense." This court finds it a rather onerous burden to place upon expert witnesses given the lack of guidance and specificity in the statutes themselves. Indeed, this Court can readily understand how the Application of these provisions, as exemplified by the proceedings below, might have a chilling effect on expert testimony in general. Accordingly, we are in agreement with the circuit court, but for 201 KAR 18:142 Section 3, that the provisions at issue were unconstitutionally vague as applied to Curd's testimony below. * * *

(Court of Appeals Opinion, Tab 1, pp.18, 19, 20)

1.

Mr. Curd's expert testimony regarding the deed description.

The Board, in its Opinion primarily concluded that Mr. Curd violated statutes and regulations by failing to advise the court that the Southwood's boundary could not have been south of the Eadesville Highway or west of the Matthews tract. (Board's Conclusion # 27). This was one of the two ultimate decisions to be determined by the Trial Court. The other was whether there was adverse possession. There is no real dispute that the Southwood's deed description did have distance and direction calls, that would carry the property line across the Eadesville Highway. (See Appellant Board's brief, p. 4). This was pertinent to the adverse possession portion of the trial. Mr. Curd was under no obligation to volunteer an opinion that the highway's monumentation determined the boundary line. Even so, Mr. Curd, through his testimony in the Wayne Circuit Court made it clear that generally monumentation has more control than course and distance. He noted that the exception would be in the case of unwritten rights such as adverse possession. (Transcript of Mr. Curd's Wayne Circuit Court Testimony - Board's Exhibit 2, p. 31) (See also the transcript of Mr. Curd's deposition, Board Hearing Exhibit 1, p. 25).

2.

Mr. Curd's testimony regarding the work of Mr. West.

Mr. West was the expert witness for the Denny's who were adverse to the Southwood's in the Wayne Circuit Court case. During his deposition (Board Hearing, Exhibit 5, p. 5), he was asked what work did he do in the deed room prior to surveying the property in question. He replied that he didn't do any. He then went on to explain that an

attorney furnished him with the research on it, he did look up adjoining deeds and so forth, but he didn't do any title work on the deed.

Mr. Curd, during Circuit Court Deposition indicated that in his opinion Mr. West did not do adequate or any research involving a determination of boundary lines. (Board Hearing, Exhibit 1, pp. 22, 27, 41). During his Circuit Court testimony he read from the deposition and testified that he felt from reading Mr. West's deposition that Mr. West did not conduct deed research in the process of performing his survey. (Board Hearing, Exhibit 2, p. 11). When Mr. Curd began giving his opinion regarding Mr. West's testimony an objection was made. The Court ruled that the attorney for the Southwood's had a right to impeach particularly the testimony of their witnesses and noted that this was the Southwood's witness. (Board Hearing, Exhibit 2, p. 11).

3.

Mr. Curd's testimony about his employment as an investigator.

During the beginning of his testimony before the Circuit Court, Mr. Curd read from a resume' concerning his qualifications. He testified on October 2, 2003, that he was an investigator for the Board from '94 to present. (Board Hearing, Exhibit 2, p. 4). This was not completely correct. In fact, Mr. Curd's contract with the Board as an investigator had expired some three months earlier on June 30, 2003. The Hearing Officer found that Mr. Curd had never been formally notified that his contract would not be renewed, that previous contracts had been back dated to July 1st, and the Board had not retrieved Mr. Curd's badge or ID cards. (See Findings of the Board No. 51-54, p. 10). Furthermore, during the Hearing, the Board acknowledged that the issue of Curd's alleged

misrepresentation of his status as an investigator for the Board would not normally be one that would generate any significant disciplinary action. (See Tab 3, Conclusion of the Board No. 46, p. 20). Notwithstanding its own findings and conclusions, the Board found that Mr. Curd intentionally testified that he was presently an investigator in order to bolster his credibility.

II

ARGUMENT

1.

The Court of Appeals did not wrongfully fail to apply the proper standard in finding some of the statutes and regulations unconstitutional.

A.

The standard for review.

The law in determining whether a statute and presumably a regulation is unconstitutional because of vagueness or unconstitutional as applied is well settled. The test is whether a person disposed to obey the law could determine whether contemplated conduct would amount to a violation. Stated another way the statute or regulation must place someone to whom it applies on actual notice as to what conduct is prohibited; and, it must be written in a manner that does not encourage arbitrary and discriminatory enforcement. A statute or regulation can be constitutional on its face, but be applied in an unconstitutional manner. *Commonwealth v. Foley*, 798 S.W.2d 947, 951 (Ky. 1990), overruled on other grounds, *Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003). The statutes and regulations at issue in this appeal are clearly unconstitutional since a licensee

of reasonable intelligence would not be on notice that his expert opinion given in a Circuit Court might subject him or her to a suspension of license under these regulations.

B.

Section 3 of 201 KAR 18:142 was unconstitutionally vague as applied.

As noted earlier, the question of whether 201 KAR 18:142(3) is unconstitutionally vague as applied is one of the primary issues in the companion appeal of 2012-SC-165-D. Mr. Curd's arguments found there will not be repeated here. Since Appellant Board chose to mention this issue, Appellee here, Mr. Curd, will note that a licensee of a Board could not reasonably conclude that an expert opinion given in a Circuit Court Trial which was overseen by a Judge, would be second guessed by an administrative agency after the Circuit Court trial was concluded. An opinion is an opinion, and absent extraordinary circumstances, the licensee cannot be compelled directly or indirectly to conform his opinion to that of the Board's. No reasonable person could anticipate that. 201 KAR 18:142(3) is unconstitutionally vague as applied.

C.

**The Court of Appeals correctly applied the law of vagueness
in reviewing the remaining sections of the statute
and regulations in question in this appeal.**

Citing *Doe v. Staples*, 706 F. 2d 985 (C.A. Ohio, 1983), the Board appears to argue that the regulations in question do not violate Mr. Curd's First Amendment rights and that therefore a more lenient standard of analysis should apply. (Board's Appellant brief, p. 14). The Board overlooks the fact that the issue herein involves Mr. Curd's expert opinion. To require Mr. Curd to opine that James West did adequate research, when in

fact he believed he did not, would infringe on Mr. Curd's First Amendments right. Likewise, to prohibit him from answering an attorney's question relating to the course and distances found in a deed description and placed as a deed plot on a topo map, would not only put him at odds with the Circuit Court Judge and Court Rules, but would also infringe on his First Amendment Rights. The application of the statutes and regulations in question must therefore receive close scrutiny in order to pass constitutional muster. Since they fail in this regard the Court of Appeals was correct in its determination that they were unconstitutional.

The Appellant Board has listed the words "incompetence", "misconduct", and "gross negligence" and categorized them with the word "dishonesty". It then takes the position that these words have a common and ordinary meaning so that Mr. Curd should understand that his opinion on Mr. West's survey and the placement of calls and distances on a topo map could subject him to disciplinary action if the Board should differ with his opinion. (Board's Appellant brief, p. 18). The term "dishonesty" cannot be logically married with the term "opinion" in circumstances such as this. No amount of dictionary definitions can change that. An "opinion" is an opinion and not a statement of fact. Mr. Curd cannot be disciplined for giving or defending his expert opinion under the supervision of a Circuit Judge pursuant to the Rules of Civil Procedure.

D.

The Statute and Regulations in question did not have enough specificity for a licensee to determine what would subject him or her to disciplinary action.

The statute and regulations in question do not specify with reasonable certainty that

a Board licensed expert testifying in a court of law may not criticize the work, research or conclusions of an adverse party's expert. Likewise, he or she would have no way of knowing that using the "forks of a drain", a physical monument described in an early deed description, to make an opinion of the placement of the deed description calls and distances on a topo could subject him to disciplinary action. (See the Board's Conclusion No. 16, Tab 3, p.15). These are judgements for the Expert, and there is no way Mr. Curd could have anticipated that his opinion and judgment in this matter would cause him to lose his license for six months. While some latitude must be given in drafting statutes and regulations, it is clear that the Constitution will not allow vague statutes and regulations, with no pertinent criteria which cause illogical disciplinary conclusions. *Board of Trustees of the Judicial Form Retirement System, et. al. v. Attorney General*, 132 S.W.3d 770, 778 (Ky. 2003).

E.

**Mr. Curd's testimony was not dishonest,
incompetent, misconduct or the result of gross negligence.**

As noted in subsection C, above, Mr. Curd's testimony cannot be characterized as dishonest. Likewise his testimony cannot be characterized as incompetent, misconduct or the result of gross negligence. Mr. Curd is a highly respected professional land surveyor, has been licensed since 1985, and has been awarded both a Bachelors and Masters Degree. (Board testimony Vol. V, p. 2). The opinions given in the Wayne Circuit Court were, to the best of his knowledge, information and belief. Board members and staff are free to disagree with him, but they may not discipline him for dishonesty, etc., or for giving his

expert opinion which was permitted by the Judge of the Wayne Circuit Court.

F.

Deception or Fraud does not apply to Mr. Curd's testimony.

On page 21 of Appellant Board's brief, the Board once again repeats its claim that Mr. Curd was dishonest by giving his opinion. The terms "deception" and "fraud" readily apply to theft and other criminal activity. They do not apply to a well qualified expert's opinion given in a Court of Law. The Board is in error in this repeated characterization.

G.

201 KAR 18:142(2) is unconstitutional as applied.²

On page 22 of the Appellant Board's brief, the Board attempted to tie the word dishonest with the term "public health, safety, and welfare" in order to try and avoid the necessary prohibition of void for vagueness found in 201 KAR 18:142(2). It is impossible for a licensee of the Board to anticipate that giving his expert opinion in a Circuit Court could result in a license suspension for failing to protect the public health, safety and welfare. Likewise, there is no standard for measuring what is in the public health, safety and welfare. A "common sense" standard does not apply. The regulation is void for vagueness and void as applied.

² The Appellant Board notes 201 KAR 18:142 (3) in its heading, but discusses 201 KAR 18:142 (2) in this part of the body of its brief. Appellee believes this to be a clerical error.

H.

201 KAR 18:142(9) is unconstitutional as applied.

In an attempt to salvage 201 KAR 18:142(9) the appellant Board uses what it terms a “common sense standard”. In framing testimony before a Circuit Court, a common sense standard is impossible to ascertain. What is common sense to one person may be nonsense to another. Of all the Board’s statutes and regulations, 201 KAR 18:142(9) is the most clearly vague as applied to Mr. Curd. There is no rational basis for requiring a licensee to determine what would be likely to discredit or reflect unfavorably upon the dignity or honor of the surveying profession while testifying in a court of law. Once again, attempting to tie opinion testimony to dishonesty and this regulation is unjustified.

2.

It was impossible for the Court of Appeals to construe the statute and regulations in question as constitutional.

The Appellant Board cites *Posey v. Commonwealth*, 185 S.W. 3d 170 (Ky. 2006) and *Gurnee v. Lexington Fayette Urban County Government*, 6 S.W.3d 170 (Ky. App. 1999) for the proposition that there is an inference or presumption of a statute’s Constitutionality. (Appellant Board’s brief, p. 24). While that proposition may be true, it does not mean that all statutes and regulations are constitutional. Here, the statutes and regulations as applied are clearly not constitutional as applied. In fact, it is hard to fathom how any statutes or regulations could be unconstitutional if these are not.

3.

**The Court of Appeals opinion did not
conflict with a central element of the
Administrative Law System.**

The Appellant Board begins its treatise on the Administrative Law System on page 28 of its brief. Many of the items discussed are textbook style pronouncements and have little relevance to the issues at hand. The following is a response to some of the points raised:

It is difficult to write legislation that would include every conceivable situation involving a licensed professional land surveyor. Even so, legislation that disciplines licensees must be specific enough, and have enough criteria, to put a reasonable person on notice as to what conduct is acceptable and what is not. This balance requires the just and often difficult determination of the courts. In the case, *sub judice*, the balance is in favor of Mr. Curd, since giving an expert opinion in a court of law cannot be dishonest absent extraordinary circumstances.

The Appellant Board makes the point that the legislature is required to write intelligible laws that do not encourage or produce arbitrary or discriminatory results. This is black letter law and illustrates why the Court of Appeals struck down the statute and regulations in question. Once an opinion of a licensee is accepted by a court, it is an "expert opinion" and cannot be disrupted or second guessed by the action of an administrative agency. In order to discipline a licensee for his or her expert opinion, given under court supervision, there would have to be specific criteria putting the licensee on notice as to what is prohibited, and such a regulation or statute may not interfere with the

rules of justice of the courts. The regulations and statutes in question do not provide that criteria and Mr. Curd could not have anticipated that his criticism of Mr. West's survey and the placement of the deed description calls and distances through a deed plot on a topo map, would cause him to lose his license for six months. See *Craig v. Kentucky State Bd. For Elementary and Secondary Educ.*, 902 S.W.2d 264 (Ky. App. 1995).

On page 35 of its brief, the Appellant Board appears to argue that if a licensee is part of a select group with specialized understanding, the standard for constitutional vagueness is lessened. (Citing *Fleming v. U.S. Dept. Of Agriculture*, 713 F.2d 179, 184 (C.A.6, 1983)) Mr. Curd's understanding was that he could lawfully express and defend his expert opinion in a court of law without fear of being second-guessed by the Board at a later time. It should be noted that the Board is not saying that Mr. Curd could not criticize the research and survey done by Mr. West, but seems to be saying that it disagreed with his conclusions. *Fleming v. Agriculture, id.* does not apply.

On page 35 of Appellant Board's brief, the Board discusses an issue of arbitrariness and substantial evidence. While this is an issue in the corresponding appeal of *Joseph B Curd, Jr. v. Kentucky State Board of Licensure, for Professional Engineers and Land Surveyors*, (2012-SC-165-D), it does not appear to be a primary issue in this appeal which involves the Court of Appeals' finding that certain regulations and/or statutes were vague. The Appellant Board claims that if a determination of a Board is supported by substantial evidence, then the decision could not be arbitrary and the statute could not be vague as to the individual when the facts were considered. Notwithstanding Appellant Board's citations to *Kentucky Racing Commission v. Fuller*, 481 S.W.2d 298

(Ky. 1972); *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964) and *Borkowski v. Com.*, 139 S.W.3d 531 (Ky. App. 2004) which discuss substantial evidence as it relates to findings of fact, a statute or regulation can be unconstitutionally vague or vague as applied even with facts that might support such findings.

4.

**The Court of Appeals did not impermissibly
infringe on the constitutional duties of the Legislative Branch.**

The Separation of Powers issue discussed on page 38 of the Appellant Board's brief is a primary issue in the above noted companion appeal, *Joseph B Curd, Jr. v. Kentucky State Board of Licensure, for Professional Engineers and Land Surveyors*, (2012-SC-165-D). Section 27 of the Kentucky Constitution divides the powers of the government of the Commonwealth into the three distinct departments of legislative, executive and judicial. Section 28 of the Kentucky Constitution clearly states that the powers of one of those departments shall not exercise power properly belonging to either of the others unless expressly directed or permitted by the Constitution. This means that the Executive or Legislative, through an administrative agency cannot be actual judges or interfere with Judicial functions.

As explained in *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984):

Our present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the

powers and functions of the others. Thus, our constitution has a double-barrelled, positive-negative approach.
Id. at 912 (emphasis in original).

As noted in *Chambers v. Stengel*, 37 S.W.3d 741, 742 (Ky. 2001):

* * * [T]his Court has declared unconstitutional the General Assembly's attempts to legislate aspects of **legal practice, procedure**, admission or discipline.
Turner v. Kentucky Bar Ass'n, Ky., 980 S.W.2d 560 (1988)(statute allowing nonlawyers to represent workers' compensation claimants); Foster v. Overstreet, Ky., 905 S.W.2d 504 (1995)(statute providing for chief justice's review of denial of recusal motion); O'Bryan v. Hedgespeth, Ky., 892 S.W.2d 571 (1995)(statute allowing collateral source payments into evidence); Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990)(statute permitting admission of hearsay evidence of abused children); Commonwealth v. Reneer, Ky., 734 S.W.2d 794 (1987)(truth-in-sentencing statute); Gaines v. Commonwealth, Ky., 728 S.W.2d 525 (1987)(statute permitting abused children's videotaped, out-of-court, unsworn testimony); Smothers v. Lewis, Ky., 672 S.W.2d 62 (1984)(statute prohibiting court challenges to alcoholic beverage license revocation hearings during administrative appeal); Ex Parte Auditor supra (statutes regulating Kentucky Bar Ass'n admission.).

(Partially taken from footnote—emphasis added - *Drumm* later overruled.)

As stated in *Ex Parte Auditor of Public Accounts*, 609 S.W.2d 682, 688 (Ky. 1980):

The correct principle, as we view it, is that the legislative function cannot be so exercised as to interfere unreasonably with the functioning of the courts, and that any unconstitutional intrusion is *per se* unreasonable, unless it be determined by the court that it can and should be tolerated in a spirit of comity. The converse also is true, and in Lunsford v. Commonwealth, Ky., 436 S.W.2d 512 (1969), this court recognized that its own rule authorizing imprisonment for failure to execute a peace bond was an unconstitutional infringement upon the legislative prerogative. And in Raney, supra (361 S.W.2d 518 (Ky., 1962)) for the same reason, we

declined the invitation to trespass upon the exclusive right of the Senate to determine the qualifications and disqualifications of its own members. Such an inquiry is, of course, of a judicial nature, but the Constitution excludes it from the judicial process.

(Citation to *Raney* added.)

During a trial in a Circuit Court a Trial Judge is the entity that decides whether a person is an expert and whether evidence thereby entered is admissible or not. Thus if the trial court determines that evidence is credible, it cannot be second guessed by an administrative agency. To permit an administrative agency to discipline a licensee for testimony accepted by a Circuit Court, whether directly or indirectly, constitutes an unreasonable interference with the function of the judicial department and violates Sections 27 and 28 of the Kentucky Constitution. Such a state of affairs would have a chilling effect on honest opinions given by experts in a court of law. The courts rely heavily on the honest opinions of experts. It was not the Judiciary encroaching upon the Legislative as claimed by the Appellant Board. It was just the opposite, the Board, which is part of the Executive has attempted to encroach upon the Judiciary. The Court of Appeals did not violate the Separation of Powers doctrine by finding that parts of the statute and regulations of the Board were unconstitutionally vague as applied to Mr. Curd.

CONCLUSIONS

The issues involved in this, and the companion appeal, are extremely important to the administration of justice in Kentucky. If the Board's determination is allowed to stand, a licensee of a Board would censure his testimony in court in order to tailor his testimony to what he thought the licensing agency would want or require. The Court of

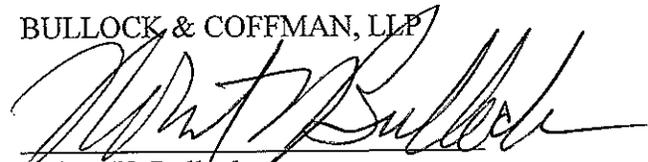
Justice might then lose the honest judgment of Experts which are an integral part of the Judicial system.

A reading of Mr. West's Deposition, Mr. Curd's Deposition and Mr. Curd's testimony at trial (Board Hearing Exhibits, 1, 2, and 5) clearly evidences that the suspension of Mr. Curd's license was not justified either factually or legally.

The statute and regulations in question for this Appeal and for the Appeal in *Joseph B. Curd, Jr. v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*, (2012-SC-165-D) are unconstitutional as applied. For the reasons stated above, that portion of the Court of Appeals Opinion which found that portions of the statute and regulations in question were unconstitutionally vague as applied, should be affirmed.

Respectfully submitted,

BULLOCK & COFFMAN, LLP



Robert V. Bullock
101 St. Clair Street
Frankfort, Kentucky 40601
Phone: (502) 226-6500
(502) 226-1101 (FAX)
Attorney for Appellant
Joseph B. Curd, Jr.

APPENDIX

1. Opinion, Commonwealth of Kentucky Court of Appeals, No. 2010-CA-000693 and No. 2010- CA-000730.
2. Opinion and Order, Franklin Civil Action No. 09-CI-231.
3. Findings of Fact, Conclusions of Law and Final Order, Commonwealth of Kentucky, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors, Administrative Action No. 07-KBELS-0056.