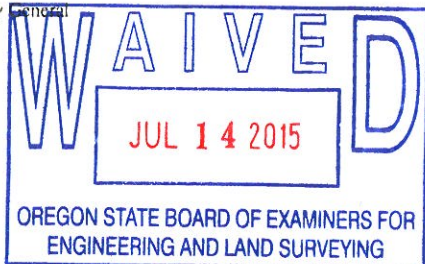


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DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

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DATE: May 11, 2015.

TO: Mari Lopez, Administrator

FROM: Katharine M. Lozano, Senior Assistant Attorney General  
Business Activities Section

SUBJECT: Negligence, Gross Negligence, Incompetence Update  
DOJ File No. 917001 GB0202-14

QUESTION

You have requested an update to our September 8, 2005 advice (attached), defining "negligence," "gross negligence" and "incompetence" as they are used in ORS 672.200(2).

SHORT ANSWER

Previously, we primarily provided the dictionary definitions of these words, augmented with some case law definition, distinguished between "gross" and "repeated" negligence, and provided discussion of *Voelz v. Bd. of Engineering Examiners*, 30 Or App 889, 568 P2d 700(1977)(*Voelz I*) and *Hambleton v. Board of Engineering Examiners*, 40 Or App 9, 594 P2d 416 (1979). We would now, however, update our advice to note that although dictionary definitions do provide a general understanding of the terms, because these terms are also legal terms of art not otherwise defined by the Board in rule, Oregon case law -- particularly Oregon professional licensing case law -- provides some additional and more precise guidance in the areas of negligence and incompetence. We have no updates to provide on the term, "gross negligence."<sup>1</sup>

<sup>1</sup> Gross negligence, described as conduct of such magnitude as to indicate a willful indifference to prescribed standards and practices, legal duties, probable consequences of an act, or the rights of others, still appears to be the most appropriate explanation of the term within the context of professional licensing.

## ANALYSIS

ORS 672.200(2) provides:

The State Board of Examiners for Engineering and Land Surveying may suspend, revoke or refuse to issue, restore or renew a certificate or permit, or may reprimand an individual enrolled as an intern or holding a certificate or permit \* \* \* For gross negligence, negligence or incompetence in the practice of engineering, land surveying or photogrammetric mapping;

As noted above, we have no updates to provide to our previous advice with respect to the term, "gross negligence"; we therefore re-examine only negligence and incompetence.

Negligence and incompetence are well-defined legal terms. As our courts have noted, rather than looking to the "plain and ordinary" meaning of words that are also legal terms, "(i)n analyzing the text and context of a statute, we apply the well-defined legal meanings of legal terms." *Coffey v. Board of Geologist Examiners* 348 Or 494, 509, 235 P3d 678, 687 (2010), citing *Norden v. Water Resources Dept.*, 329 Or 641, 645, 996 P2d 958 (2000). Thus, this is the analysis to which we turn below.

### Negligence

In our 2005 advice, we counseled that "negligence" in ORS 672.200(2) means, "a failure to exercise the care a prudent person usually exercises," rather than the definition found within tort law, including its various elements, citing *Cf. Pratt v. Real Estate Div.*, 76 Or App 483, 493, 709 P2d 1134 (1985). However, although the definition in tort does not typically apply in professional licensing matters, in the professional negligence context, our courts have been somewhat more specific than this basic dictionary definition of the term, recognizing that professional negligence is a failure to exercise:

\* \* \* the standard of care is that of a reasonably prudent, careful and skillful practitioner of that discipline in the community or a similar community under the same or similar circumstances." would exercise. *Creasey v. Hogan*, 292 Or. 154, 163, 637 P.2d 114 (1981) (omitted) (malpractice claim against podiatrist); *see also Getchell v. Mansfield*, 260 Or. 174, 179, 489 P.2d 953 (1971) (recognizing that a professional acts negligently by failing to follow "the reasonable practice \* \* \* in the community").

*Coffey v. Board of Geologist Examiners* 348 Or at 509-510 (Or 2010) (Emphasis added).

Therefore, when examining professional negligence in a regulatory context, (1) a reasonable degree of skill in the discipline at issue and (2) a comparison to the standards of the community (or a similar community) of the Respondent, (3) relative to the same or similar circumstances, are elements to be weighed and considered, in addition to reasonable prudence and care.

Moreover, it is important to note that our courts have observed particularly:

\* \* \* in disputes involving claims of professional negligence, parties routinely depend on expert testimony to establish the standard of reasonable care in the applicable community because, ordinarily, the factfinder otherwise would be unable to determine whether the conduct in question failed to satisfy the required standard of care. *Getchell*, 260 Or. at 179, 489 P.2d 953; *see also Spray v. Bd. of Medical Examiners*, 50 Or.App. 311, 318, 320-21, 624 P.2d 125 (1981) (implicit in the statutory standard of “inappropriate or unnecessary medical treatment” is the assumption that expert testimony may be used to “determine the standards of treatment that would be adhered to by the members of the medical community in any given case” because, for such a standard, “adoption of precise pre-decisional criteria is not feasible”). \* \* \* Consistent with the familiar legal meaning of professional negligence, the board's standard took into account any distinctive elements of the practice of professional geology in the pertinent community.

*Coffey v. Board of Geologist Examiners* 348 Or at 511-512.

We would therefore note the particular significance assigned to professional community standards by our courts.

#### Incompetence

In our 2005 advice, we provided the dictionary definition of incompetence, and cited *Hambleton v. Board of Engineering Examiners*, counseling that within the context of professional incompetence, the term means, “lack of fitness to perform the professional functions.” We then opined that a finding of incompetence “requires a review of a larger body of work.” We would now update that advice.

In terms of defining incompetence, a review of our state supreme court’s cases shows that, more precisely, professional “incompetence” is found when the respondent displays:

\* \* \* a lack of basic knowledge or preparation, or a combination of those factors. *See, e.g., In re Spies*, 316 Or. 530, 534, 852 P.2d 831 (1993) (accused found incompetent for representing a client “in a matter outside her area of expertise without acquiring adequate knowledge or skill”); *In re Odman*, 297 Or. 744, 750, 687 P.2d 153 (1984) (accused found incompetent where facts showed improper and late filings of estate documents; “accused did not know basic steps in administering and closing decedent's insolvent estate”); *In re Chambers*, 292 Or. 670, 678, 642 P.2d 286 (1982) (accused guilty of incompetent representation where record showed accused “tried the criminal case ‘by the seat of his pants’”).

*In re Conduct of Gastineau* 317 Or 545, 553-554, 857 P2d 136, 141 - 142 (1993) (Emphasis added, footnotes omitted.)

In terms of reviewing a complaint for evidence of incompetence, we would add that according to the text of ORS 672.200(2), Oregon Administrative Rules chapter 820, division 20, and our courts, incompetence need not be expressed throughout a career or other large body or

work to exist, but can be found and disciplined in a single instance. ORS 672.200(2) authorizes the Board to discipline a registrant or intern for, \* \* \*incompetence in the practice of engineering, land surveying or photogrammetric mapping.” The text of the statute does not require that the incompetence be demonstrated on multiple occasions or over any particular period of time. Further, the Board’s administrative rules provide:

(1) Registrants shall undertake assignments only when qualified by education or experience in the specific technical fields of engineering or land surveying involved.

(2) Registrants shall not affix their signatures or seals to any plans or documents dealing with subject matter in which they lack competence, nor to any such plan or document not prepared under their direction and control.

OAR 820-020-0020(1) and (2)

And

(2) Registrants may express a professional opinion on technical subjects only when that opinion is founded upon adequate knowledge of the facts and the registrant is competent in the subject matter.

OAR 820-020-0025(2)

All three of these rule sections address specific instances, i.e., specific “assignments \* \* \* plans or documents \* \* \* [or] professional opinion,” without limiting their restrictions to an overall body of work. For example, a perfectly competent agricultural engineer whose education and experience was limited to agricultural and environmental engineering could easily engage in incompetent engineering practices after taking on a single, complex nuclear engineering assignment.

Finally, as our state supreme court has explained:

\* \* \* competence or incompetence can best be measured on a case-by-case basis \* \* \* [for example] In one of the cases of alleged incompetent representation now before us, a client came to the accused seeking a rapid incorporation of a family business so that the business could, as a corporation, bid on a government contract. The client told the accused that there was a deadline in the very near future for making that bid. The accused did not review the proposed articles of incorporation that his staff prepared before the articles were submitted to the proper state official. He did not ensure that the amount of filing and other incorporation and registered agent fees that were required by law accompanied the proposed articles when they were mailed to the state official. The filing was rejected for deficiencies in both the information presented and the amount of filing fee tendered.

A violation of the competent representation rule \* \* \* was proved in this incorporation matter. *See, e.g., In re Spies, supra*, 316 Or. at 534, 852 P.2d 831 (previously stated); *In re Odman, supra*, 297 Or. at 744, 687 P.2d 153 (previously stated).

*In re Conduct of Gastineau* 317 Or at 554 (1993).

This case examined only one matter undertaken by the professional, but that professional was found guilty of incompetence nonetheless.

#### RECOMMENDATIONS

Regarding complaints or cases involving negligence, we recommend that the Board be mindful of the four components of the legal term within a professional regulatory context. In other words, the Board should ask whether the Respondent failed to meet the standard of care of a:

- reasonably prudent and careful
- reasonably skillful practitioner of that discipline
- in the community or a similar community
- under the same or similar circumstances

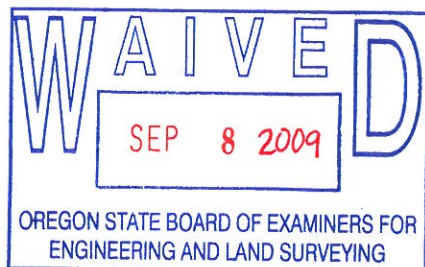
We also recommend that the Board consider utilizing testimony in negligence cases, to ensure distinctive elements of practice within the Respondent's community are included in the record.

Regarding complaints or cases involving gross negligence, we continue to recommend that the Board look for whether there was recklessness or willful disregard for the general standards of the practice or rights of others – it is a term that connotes magnitude of violation.

Regarding complaints or cases of incompetence, we recommend that the Board may proceed against a generally incompetent professional, or on a single instance of incompetence, and that it examines whether the Respondent has displayed a general lack of knowledge, preparation (which includes, as we see from the relevant case law, training, planning, and organization) or both.

Thank you for the opportunity to work with you; if you have any additional questions, concerns, or would like further or more specific analysis, please do not hesitate to contact us.





DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 8, 2005

TO: Mari Lopez, Executive Secretary  
Oregon State Board of Examiners for Engineering and Land Surveying  
  
Brian Halfman, Investigator  
Oregon State Board of Examiners for Engineering and Land Surveying

FROM: Kathleen Dahlin, Senior Assistant Attorney General  
Business Activities Section

SUBJECT: Meaning of "Negligence", "Gross Negligence" and "Incompetence" as Basis  
for Sanction  
DOJ File No. 917-001-GB0019-05

At the last Law Enforcement Committee meeting, I was asked to advise the committee regarding the meaning of the terms "negligence", "gross negligence" and "incompetence" as they are used in ORS 672.200(2).<sup>1</sup>

In interpreting statutory provisions, the courts follow the template outlined in *PGE v. Bureau of Labor & Industries*, 317 Or 606, 859 P2d 1143 (1993) to determine the legislature's intent in enacting the provision. The first level of analysis examines both the text and context of the statute. If, but only if, the legislature's intent is not clear from the text and context inquiry, the court will then consider legislative history. If, after consideration of text, context and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Id.*

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<sup>1</sup> ORS 672.200(2) provides that:

The State Board of Examiners for Engineering and Land Surveying may refuse to issue, restore or renew, or may suspend or revoke a certificate or permit, or reprimand any person enrolled as an intern or holding a certificate or permit:

\* \* \* \*

(2) For gross negligence, negligence or incompetence in the practice of engineering or land surveying;

We turn first, then, to the text of ORS 672.200(2) and specifically the terms used in that section, “negligence”, “gross negligence” and “incompetence”. Words of common usage in a statute typically should be given their plain, natural, and ordinary meaning. *SAIF Corp. v. Allen*, 320 Or 192, 881 P2d 773 (1994). Because the text of the statute relies upon the meaning of the terms, which can be discerned from their common meanings and previously decided case law, we need only reach the first step of the *PGE* analysis.

#### **A. Negligence**

Negligence is defined as “a failure to exercise the care a prudent person usually exercises.” *Webster’s Third New Int’l Dictionary* (2002 ed) at 1513. As used in ORS 672.200(2), negligence refers to this common meaning of the term, and not to the tort of negligence with its various elements. *Cf. Pratt v. Real Estate Div.*, 76 Or App 483, 493, n. 5, 709 P2d 1134 (1985) (interpreting “negligence” in ORS 696.301(29) which made negligence a basis for revocation of a real estate license).

#### **B. Gross Negligence**

Gross negligence is defined as “negligence marked by total or near total disregard for the rights of others and by total or near total indifference to the consequences of an act.” *Webster’s Third New Int’l Dictionary* (2002 ed) at 1002.

As a general rule, in the context of licensing statutes, gross negligence includes conduct that indicates indifference to legal duties, to the probable consequences of an act, or to the rights of others. *See Stacy v. Bd. of Accountancy*, 26 Or App 541, 545, 553 P2d 1074 (1976). This rule applies to land surveying. *Voelz v. Bd. of Engineering Examiners*, 30 Or App 889, 893, 568 P2d 700 (1977) (*Voelz I*).

Both *Voelz I* and *Voelz II* (*Voelz v. Bd. of Engineering Examiners*, 37 Or App 113, 586 P2d 807 (1978)) involved contentions that a licensee was grossly negligent in his survey practices.<sup>2</sup> *Voelz* had committed a number of errors in preparing surveys, several of which he admitted – failure to apply his seal, failure to sign surveys, failing on a map to show the basis of bearing, insufficient detail in surveys and survey maps, and failure to show a fence line. The Board acknowledged that such failures, in ordinary circumstances, would not constitute gross negligence. However, the number of failures, in the Board’s opinion, elevated the conduct to gross negligence. The court agreed.

However, later court cases rejected a similar approach and distinguished between negligence of such *magnitude* as to rise to the level of “gross negligence” and *multiple acts* of negligence that could be characterized as “repeated negligence.” *Britton v. Bd. of Podiatry Examiners*, 53 Or App 544, 556, 632 P2d 1273 (1981).<sup>3</sup>

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<sup>2</sup> At the time of the *Voelz I* and *Voelz II* cases, ORS 672.200(2) authorized the board to revoke a license only for gross negligence or incompetence. Negligence, as a basis for license discipline, was added later.

“Repeated negligence” requires, by definition, more than one act or omission. The various acts and omissions may be related, or entirely unrelated. Viewed together, they may bespeak an attitude of carelessness or a general level of incompetence which renders the licensee unfit to practice, but they may not, in sum, rise to the level of gross negligence. *Britton* at 554.

“Repeated negligence,” therefore, differs from “gross negligence.” In the context of land surveying, “gross negligence” is conduct of such magnitude or recurrence as to indicate a willful indifference to prescribed land surveying standards and practices. *Hambleton v. Board of Engineering Examiners*, 40 Or App 9, 12, 594 P2d 416 (1979).

The *Hambleton* court concurred with the Board’s finding that a land surveyor was grossly negligent in failing to follow procedures set forth in the BLM manual, when he had agreed (by contract) to follow those procedures. And, significantly, the court found that the surveyor’s non-compliance occurred because he either did not know, or was unwilling to follow, the BLM standards and practices.

### *C. Incompetence*

“Incompetence” means a lack of physical, intellectual or moral ability; “incompetence” means insufficiency or inadequacy. *Webster’s Third New Int’l Dictionary* (2002 ed) at 144. In the context of a professional license, such as that held by an engineer or a land surveyor, incompetence means the lack of fitness to perform the professional functions. *Hambleton* at 13. For example, failure to conduct surveys in accordance with BLM standards may be a fact that demonstrates incompetence.

### *D. Overlap*

As you can no doubt tell, there is some duplication and overlap between the three terms used in ORS 672.200(2). Most disciplinary cases that fall within ORS 672.200(2) will likely involve simple negligence. These cases occur, for example, when there is failure to follow a recognized standard generally known and followed by members of the profession. In contrast, gross negligence will usually occur only when there is disregard for the rights of others or, in general, recklessness. Incompetence requires a review of a larger body of work with an eye towards fitness to perform the work.

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<sup>3</sup> If the Board were preparing to issue a notice today on the basis of acts similar to those giving rise to the *Voelz* cases, I would advise that the notice be issued on the basis that the acts constituted negligence, not gross negligence. However, that option was not available at the time the *Voelz* cases were decided. See note 2.