

dlr.sd.gov/btp

sdbtp@state.sd.us

## COMPLAINT

You may use this form to file a complaint against an architect, professional engineer, land surveyor, landscape architect, petroleum release assessor or remediator, certified business entity, or an individual or business entity engaged in the unauthorized practice of a profession regulated by the Board. Your complaint will be disclosed to the person you are complaining against and to other persons who might have information about the matter. Your complaint may be disclosed to members, employees and consultants of the Board. Please type or write legibly and use additional paper if necessary.

<b>The Person Making the Complaint:</b>	<b>The Person against whom Complaint is being made:</b>
<i>Name</i>	<i>Name</i>
<i>Address</i>	<i>Address</i>
<i>City, State, Zip</i>	<i>City, State, Zip</i>
<i>Phone</i>	<i>Phone</i>

**Details to show reasonable cause why the Board should investigate and act: (Facts only; avoid opinions)**

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**Names, addresses and phone numbers** of other known parties who have direct interest or possess pertinent information in this matter whose testimony should be considered before final disposition of this complaint.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

**Attached are Exhibit A through \_\_\_ for consideration in evaluating this complaint.**

A. \_\_\_\_\_

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State of \_\_\_\_\_ )  
County of \_\_\_\_\_ ) ss.

\_\_\_\_\_, being first duly sworn upon oath,  
Name

deposes and states: That I am the person who subscribed to the foregoing Complaint; that I have read the same and know the contents thereof, and that the same is true to my own knowledge, information and belief, except as to matter therein stated upon information and belief and as to those matters, I believe them to be true.

\_\_\_\_\_  
Signature

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

(SEAL)

## **South Dakota Board of Technical Professions Complaints**

### **Complaint**

A person claiming that a holder of, or applicant for, licensure has engaged or is engaging in conduct constituting grounds for disciplinary action as they are enumerated in SDCL chapter 36-18A or chapter 20:38:20 may file with the board a written complaint, verified on oath, stating the name and address of the applicant or licensee complained against and fully detailing the conduct against which the complaint is made. Upon its receipt, the executive director shall serve by mail upon the applicant or licensee complained against and upon any other affected parties a copy of the complaint, together with a copy of chapter 20:38:20.

The applicant or licensee complained against shall answer the complaint within 20 calendar days after service of the complaint. The applicant or licensee shall serve the answer to the complaint upon the executive director of the board at the board's office. A board member or the executive director may file a complaint. The executive director may reject the complaint if it is not in proper form as detailed in this section. The person serving an answer under this section shall serve an original upon the executive director.

### **Complaint procedure**

After receipt of the answer to the complaint or after the time has expired for the applicant or licensee complained against to answer, the executive director shall submit the complaint and any answer to the board. Taking into consideration only the complaint and any answer to it, the board shall determine whether or not the complaint has merit or is frivolous and whether or not it charges conduct constituting grounds for disciplinary action.

### **Dismissal of complaint**

If, on the sole basis of the complaint and the answer to it, the board determines that the complaint is without merit or that it charges conduct not constituting grounds for disciplinary action, it shall dismiss the complaint and notify in writing the complainant, the applicant or licensee complained against, and any other affected parties, stating the reasons for the dismissal.

### **Informal proceedings**

If the board considers the complaint to be of a serious nature constituting grounds for disciplinary action and the board and the party complained against do not agree to proceed directly to a formal hearing, the board may conduct informal proceedings. If the board conducts informal proceedings, it shall consult with the party or parties affected in an effort to resolve the matter satisfactorily.

The board shall notify in writing the person making the complaint, the applicant or licensee complained against, and any other affected parties, of the result of the informal proceedings and the action taken, if any. The conduct of informal proceedings does not preclude the board from instituting formal proceedings nor does it preclude the applicant or licensee complained against from requiring that the board proceed formally.

The board may accept an assurance of voluntary compliance regarding an act or practice alleged to be a violation of this article or the provisions of SDCL 36-18A from a person complained against. The assurance shall be in writing and is subject to the approval of the board. The assurance may contain a statement that the person will not engage in such an act or practice in the future. The

assurance may include a stipulation for the voluntary payment by the alleged violator of any costs of the investigation and any amount necessary to restore to a person money or property which may have been acquired by the alleged violator by means of such an act or practice. The assurance of voluntary compliance may not be considered an admission to a violation for any purpose; however, proof of failure to comply with the assurance of voluntary compliance shall entitle the board to institute formal proceedings.

### **Formal proceedings**

If it appears to the board that formal proceedings should be instituted after a complaint has been filed and informal proceedings have been held, the board shall issue a formal board complaint and serve a notice of hearing by mail, upon the applicant or licensee complained against, the person making the complaint, and any other affected parties.

### **Contents of a board complaint**

The formal board complaint shall contain the name of the applicant or licensee complained against, a statement that a complaint charging conduct constituting grounds for discipline has been filed with the board, the date of its filing, the name and address of the person making the complaint, the details of the conduct complained against, and the date of the formal board complaint. The formal board complaint must be verified under oath and signed by a Notary Public.

### **Answer to board complaint**

The applicant or licensee shall file an answer before the hearing admitting, denying, qualifying, or explaining all facts contained in the formal board complaint. The person serving the answer under this section shall serve an original upon the executive director of the board.

### **Disqualification**

If a board member filed the complaint, that board member is disqualified from sitting at the hearing as a board member and from participating in the decision rendered by the board.

### **Final action by the board**

After hearing the evidence, the board may decide to dismiss the complaint, revoke the registration, suspend the registration, or issue a letter of reprimand to be placed in the file of the person complained against. A letter of reprimand shall state the action against which a complaint was filed with the names, dates, places, and lists of witnesses involved in the complaint. This section does not preclude the board from allowing a formal hearing to be compromised. The board may also allow an assurance of voluntary compliance.

## **Contested Cases:**

### **Petition for hearing**

In a contested case, including disciplinary proceedings, a person aggrieved by an action of the board taken without a hearing may, within 30 days following the date of the board action, petition the board for a hearing. The hearing shall be held not later than 60 days following receipt of the petition.

**Notice of hearing**

At least 20 days before the date set by the board for hearing, the board shall serve by mail upon the petitioner and other interested or affected parties a copy of the notice of hearing.

**Hearing procedure**

A person compelled to appear before the board may be represented by counsel.

**Briefs**

A party to the hearing, upon request made before the close of the hearing, may file a written brief with the board within a reasonable time fixed by the board. The board may also direct the submission of written briefs and set a reasonable time for their filing when, in its opinion, briefs are warranted by the issues involved in the proceedings.

**Decision**

The board's decision shall be made and entered and notice of the decision given in accordance with the provisions of SDCL 1-26-23 to 1-26-25, inclusive.

Continue

**POLICY AND GUIDELINES FOR INVESTIGATION OF  
REPORTS OF VIOLATIONS, COMPLAINTS,  
AND CONFIDENTIALITY DURING INVESTIGATION**

**DUTY TO INVESTIGATE.**

The South Dakota Board of Technical Professions (board) has a statutory duty to investigate and review any alleged violation of SDCL 36-18A. When the board receives a report of a violation from a registrant, the board investigates. Board counsel and the Executive Director perform the initial investigation. If further investigation is necessary a committee is appointed by the board to perform the investigation. The committee will consist of at least one board member and board counsel. The Executive Director or investigator may be part of the investigating committee. Any board member involved in the investigation is automatically disqualified from hearing and rendering a decision in the case. The separation of the board's investigative and prosecutorial functions from the adjudication (judging) is necessary to guarantee due process to any registrant charged with a violation.

**IF THE BOARD HAS A DUTY TO INVESTIGATE WHY IS THE INVESTIGATION DONE BY A COMMITTEE?**

The due process clause of the Fourteenth Amendment of the United States Constitution and the South Dakota Constitution requires that the investigation and prosecutorial duties be separate from the duties of judging and rendering a decision. The board, under statute, has both duties and the law requires that these duties be separated. This separation may be better understood in the context of a criminal charge. If an architect or engineer is investigated for criminal fraud in a bidding process, and the investigation results in charging the architect/engineer with criminal conduct, the registrant would not want the investigator/prosecutor, i.e., state's attorney, also being the individual that would sit in judgment to decide whether he was guilty. The separation of the investigation/prosecution from judging/decision making, is mandated by our system of due process. This right of due process applies to administrative boards, such as the South Dakota Board of Technical Professions. To be fair to a registrant charged with a violation of SDCL 36-18A, the board members that will judge the registrant's conduct will not be involved in the investigation. If they are, these members are recused.

**DUTY TO REPORT VIOLATIONS.**

Each registrant within the jurisdiction of this board has a duty to report violations. Failure to report a violation is a violation. All registrants have a duty to report and all are encouraged to report violations. Prosecution of a registrant for non-reporting of a violation is reserved generally for situations where the failure to report places the public at risk of harm, or when non-reporting is shielding a registrant from criminal prosecution.

**ARE REPORTING SOURCES TO THE BOARD CONFIDENTIAL?**

All reporting sources of a violation of SDCL 36-18A to the board are confidential. If the investigation shows a reasonable basis to believe a violation has been committed, the board issues a complaint and the board can proceed to prosecute the violation either formally or informally. The identity of the reporting source, whether a registrant or a third party, such as a news reporter, contractor, subcontractor, or owner, is confidential. The confidentiality of the reporting source is maintained throughout any proceedings and is only disclosed upon a court order. To date no registrant has successfully challenged the confidentiality of the reporting source. However, there are situations where confidentiality can be lost.

## **WHEN CAN CONFIDENTIALITY BE LOST?**

Confidentiality can be lost when the reporting source is a necessary witness to prosecute the violation. As a witness, the individual may be required to testify at the hearing. All witnesses and the nature of their testimony must be disclosed prior to the hearing. At hearing, under cross-examination, inquiries can be made about the source who reported the violation. When this occurs confidentiality is lost. The nature of the violation will determine whether or not the reporting source is a witness.

### **Example:**

Architect A is hired to do construction administration services. Architect B, who designed the structure, admitted to Architect A that he stamped the plans and the plans were not drawn under his direct supervision and control. Architect A reports the violation to the board and the board prosecutes. In this instance, Architect A is a witness to the admissions made by Architect B that he stamped the plans and that they were not drawn under his direct supervision and control. While Architect A's report of a violation remains confidential, when the board proceeds to a formal hearing and calls Architect A to be a witness about what Architect B told him, the attorney for Architect B can cross-examine Architect A on whether he/she reported the violation. Confidentiality is lost.

In the above example, the reporting architect is a witness and confidentiality cannot be maintained if the violation is prosecuted. On the other hand, if the reporting source is not a witness, confidentiality can be maintained.

### **Example:**

Engineer A discovers that Engineer B is performing engineering services in South Dakota and that Engineer B is not licensed with the South Dakota Board of Technical Professions. Engineer A reports the violation to the board. The board investigates and prosecutes Engineer B for performing engineering services without a license in the state of South Dakota. In this instance, Engineer A is not a necessary witness to the prosecution of the claim against Engineer B. The board records will show that Engineer B is not registered and the design drawings will show that Engineer B is the engineer on the South Dakota project. The only witnesses needed by the board will be the Executive Director that Engineer B was not licensed, and Engineer B admitting that it is his signature and stamp on the design documents.

In this example, the reporting source of the violation is not needed as a witness to prosecute the violation. In this case, the reporting individual will remain confidential and confidentiality can be maintained throughout prosecution of the violation.

In summary, the reporting source of all violations to the board is confidential and the reporting source is not disclosed to the party that is the subject of the investigation. If the reporting source is a witness and necessary at trial then confidentiality will be lost.

In some instances, even though a reported violation is confidential, as a practical matter the violator may suspect or know who the most likely reporting source would be.

### **Example:**

Architect A is hired to design a project for the owner and during the construction administration stage the architect is discharged by the owner. Under the statute the architect is obligated to report to the board and the building official his successor,

or lack thereof. Architect A reports the owner's discharge of him to the board and county officials, and the owner immediately suspects the reporting source.

While the board can maintain confidentiality, the owner knows that the architect was more than likely the reporting source. The county building official is not obligated to keep the reporting source confidential. Accordingly, in some instances, due to the nature of the violation and the close relationship of the registrant to the owner and/or other entities involved in the construction process, confidentiality can be lost.

### **CONFUSION OVER "REPORTING SOURCE" AND THE FILING OF A COMPLAINT BY A REGISTRANT.**

The mandatory obligation of a registrant to report violations of SDCL 36-18A, et seq., is easily confused with the complaint process of ARSD 20:38:24:01. Reporting sources to the board are quite commonly referred to as a "complaint." While this is true, this type of complaint must be distinguished from complaints made and filed under ARSD 20:38:24:01. Under this administrative regulation, a registrant can file a verified complaint with the board that another registrant violated SDCL 36-18A, et seq. Under this administrative procedure, a registrant is prosecuting, before the board, another registrant for a violation. This procedure is seldom used because if a registrant makes a report of a violation, the board will investigate and proceed to prosecute if there is a reasonable basis to believe there has been a violation of a rule or statute. However, if the board, after investigation, declines to prosecute a registrant has recourse and may file a verified complaint pursuant to the administrative rules. In this instance, the registrant making and filing the complaint is not confidential. Pursuant to ARSD 20:38:24:01, the registrant against whom the complaint is made is entitled to a copy of the verified complaint. Filing a verified complaint under oath by a registrant is a serious undertaking because the registrant is stating under oath that the complaint is true based upon his best information and belief. A frivolously filed complaint with the board under this administrative regulation can be a basis for disciplinary action.

Under a particular disciplinary action brought by this board, the South Dakota registrant made numerous reports of violations to the board about another engineer. The board investigated the alleged violations and determined that the issue was a reasonable dispute between professional engineers and there was no violation of SDCL 36-18A. Unsatisfied with the board's decision not to prosecute his report of a violation, the registrant continued to file numerous reports of violations with the board reiterating essentially the same allegations and complaints that the board had declined to prosecute. The registrant then filed a complaint pursuant to ARSD 20:38:24:01. In this instance, the registrant's complaint is forwarded directly to the person to whom the complaint is made for a response. There is no confidentiality.