

**State of Nevada Board of Professional Engineers and Land Surveyors
Minutes of the Legislative Committee Meeting October 23, 2018
Held 10:00 am in the Ed and Mary Alice Pine Board Room, Suite 130,
1755 East Plumb Lane, Reno, Nevada 89502**

Committee Chairman Michael Kidd, PLS, called the meeting to order at 10:00 am, in the Ed and Mary Alice Pine Board Room, Suite 130, 1755 East Plumb Lane, Reno, Nevada 89502. Committee members present were; Patty Mamola, PE, Executive Director; joining via teleconference were Karen Purcell, PE; and Brent Wright, PE/SE. Angelo Spata, PE, joined the meeting via teleconference at 10:16am. Also present were Board Chairman Robert LaRiviere, PLS; Susan Fischer, Lobbyist; Murray Blaney, Compliance Officer; and Louisa Kern, Administrative Assistant. Christopher MacKenzie, Board Counsel, joined via teleconference.

1. Call to order

2. Public Comment Period

There was no public comment.

3. Approval of July 31, 2018, Legislative Committee meeting minutes

Mr Kidd asked if there were any questions or comments related to the July 31, 2018 committee meeting minutes. There were none.

LGC 18-2 A motion was made by Ms Mamola, seconded by Mr Wright, to approve the meeting minutes. The motion passed unanimously (Mr Spata was not present for this vote).

4. Discuss potential changes to Nevada Administrative Code Chapter 625 as proposed by Legislative Council Bureau (Discussion Only)

a. Draft changes to contract requirements to add errors and omissions insurance disclosure – NAC 625.545

Ms Mamola stated that because of a tie vote at the September 13, 2018 Adoption Hearing, the board chairman asked that NAC 625.545 be brought back to the Legislative Committee to explore revisions of the language that can be presented at the November 8, 2018 board meeting. Ms Mamola continued to say that today's meeting is to discuss the committee's thoughts and suggestions on how best to move forward and to consider the concerns raised at the Adoption Hearing. She said the minutes of the Adoption Hearing are included in the committee packet.

Ms Mamola said that she reached out to every state PE & PLS board in the country to see if they have an insurance disclosure inclusion in their regulations. She heard back from 15 boards and received sample language from one, the Florida Land Surveyors Board. That example is in the committee packet. Ms Mamola said she also included language used by the Nevada Chiropractic board.

Ms Mamola said the issues raised against the proposed regulation language were to do with both parts of the proposed language, but predominantly with disclosing the limits of coverage. She said the committee could remove the last part of the language – which would likely be an easier path, or could start from scratch and rewrite the entire proposed language, which would require returning to square one in the regulation revision process.

Mr Wright said there was an expression of opposition during the adoption hearing that revealing liability insurance coverage would invite litigation, but he doesn't think that would be the case at all. He continued to say that in his experience with contracts, the general requirement is that insurance be carried and the limits stated. Mr Wright said with the intent of serving public interest; having a requirement about disclosing if professional liability insurance is carried, and its limits, is a very reasonable request. It would definitely be a benefit to the public.

Mr Kidd said that with specifying what is required in a contract, it is the less sophisticated client that he believed the board is trying to protect. Mr Wright agreed as did Ms Purcell.

Mr Wright said that he thought there are many unsophisticated clients of engineers that don't even think about liability insurance or assume that it is a given that professionals have it. He continued to say that in his opinion that there is a higher likelihood that the engineers that work with these clients probably do not have professional liability insurance.

Ms Mamola said there were some valid points brought up in opposition to the revision related to the intent of the language and specifically regarding the limits of coverage provided by the policy of insurance; questioning whether it is the limits of available coverage or is it the limits of the policy.

Mr MacKenzie said often language with good intentions can struggle in real life application due to interpretation of the language. He added that it relates to information known at the time the contract is executed. He stated that after the contract is executed, insurance could be cancelled or it could be changed. Just because you had insurance at the time of the contract was signed doesn't necessarily mean there will be insurance at the time a claim is made. Mr MacKenzie questioned if that does offer an improved level of protection, and added that that was the point Mr DeSart made at the Adoption Hearing. He said, as it is now, the board is asking for a disclosure at the time of contracting, and that hopefully for the consumer it will still be in place if a claim was to come along. Mr MacKenzie said he didn't know if you could cure all and provide for full public protection without making insurance mandatory; with duration specified, outlining certain amounts, and overall getting a lot more complicated.

Ms Mamola said that the proposed language says currently maintains a policy of professional liability insurance, and that we could add to the language or modify the language, saying maintains a policy of professional liability insurance and will maintain that policy for the duration of the project.

Mr MacKenzie said a point was made at the Adoption Hearing you are not always in control of how long the insurance coverage lasts. The policy could get cancelled and you would have to go and find other insurance, or you are able to maintain it to the level you stated in the contract if you have another claim – there is that potential.

Mr LaRiviere said he thought by stating that they currently maintain insurance, 99 out of 100 people are going to comply with this, and the way the language is written presently would cover it for most of the people.

Mr Wright said he agreed that there is possibility somebody could state they have insurance and then not maintain it, but that is highly unlikely. He said that as written, it does a good job of addressing that issue. Mr Wright added that in his experience with contracting he is asked for policy limits as opposed to available coverage, for the very reasons Mr DeSart pointed out at the Adoption Hearing.

Ms Purcell agreed, saying in her experience policy limits are the standard requirement.

Mr Spata joined via teleconference at 10:16am. Ms Mamola asked if Mr Spata could elaborate on his concerns with the proposed regulation change as he was among the no votes at the Adoption Hearing.

Mr Spata said that it was partly because it was first he had really seen it and there seemed, from his perspective, a degree of uncertainty as to what we were trying to accomplish with the proposed change.

Mr Kidd said that his chief concern in this discussion was how do we protect the inexperienced clients and what requirements can we put on the licensed professionals to help protect the unsophisticated public.

Mr Spata said that the unsophisticated client was one of the reasons he was hesitant on the language because right now, with the proposed language changes, engineers are having to disclose whether they have insurance or not. The unsophisticated client may not realize that insurance is not a requirement. He added, how do we make them aware of what is required.

Mr LaRiviere said it is almost like car insurance. Where everyone assumes that everyone who is driving has car insurance, but that is not necessarily the case. He added by requiring that a professional disclose whether they have insurance or not, provides the client with information and protects the public from making an uninformed decision when entering into a contract.

Ms Mamola said that the reality is that every engineer should carry it, but there is a number out there that do not. She said it is not at a point where the board should be looking at mandating insurance, but at a minimum, requiring a disclosure so the public has added information in their decision making before entering into a contract.

Mr Wright said, as mentioned at the Adoption Hearing, trying to determine at a given point in time what available limits of coverage is burdensome, but if the board somehow states an opinion that the language is to be interpreted as the policy limits, and not in the limits of coverage, that eliminates any confusion and the burden goes away.

Mr Kidd recapped previous discussion for Mr Spata, saying that the committee was talking about the first part of the language to where it would require licensees to disclose if they had coverage or not, and in the second part of the language, where there appeared to be some confusion about policy

limits or available limits. He continued saying that what Mr Wright was just discussing related to keeping the latter part of the revision language or doing away with it.

Ms Mamola said that we should identify from the committee if there is a consensus to maintain that second half of that sentence. Mr Kidd added we should also clarify its intent.

Mr MacKenzie said that an argument could be made that the limits of coverage can be construed different than the policy limits. He said he didn't know if that could still be a problem if it said policy limits because policy could be limited if there was another claim.

Mr Kidd said he believed coming out of this committee and heading to the board, we should leave it as, leave the language as "policy limits", let the board have a discussion and see where it ends up.

Mr Wright asked if the board could issue an opinion or an interpretation of this, and that the interpretation is that it is the stated limits of the policy and not necessarily the available coverage.

Ms Mamola said yes, that can be done if the opinion or interpretation is on the record at a board meeting or at a special hearing.

Mr Wright said that should resolve that issue if that is indeed the issue. He said that it should be clarified to be state the limits and not the limits of available coverage, as the available coverage, as discussed, would be very hard to know.

Mr LaRiviere commented that available coverage can be a moving target on any given day. Mr Wright agreed and said he didn't think that knowing that amount is most important; it is important, but it is typically not an issue.

Mr Kidd asked if there was further discussion on that point.

Mr Spata said he believed that direction made sense. He added that he is trying to get himself educated on the changes, and the reasons for the change, before committing to moving forward with it in the form of an affirmative vote.

Ms Mamola said that issue brought up at the Adoption Hearing is no different than what a firm deals with in all their other contracts with their clients that require or mandate professional liability insurance. She said when a client says you must have a \$1,000,000 policy of professional liability insurance and you must name them as an additional insured, you connect with your insurance provider and they produce a certificate to that effect. Ms Mamola said typically tracking the available coverage is not done by clients or firms. And, she asked what the experience of the committee members was. Brent, Bob, and Karen concurred that this too was their experience. Ms Mamola said that Greg had made the comment at the Adoption Hearing that he had experienced a client requesting the available limits of coverage on a project.

Mr Spata agreed that in his experience his firm had only been required to provide an insurance certificate for the required coverage amount. He said he was just trying to make sure we were not putting another unknown burden on smaller businesses.

Ms Mamola stated that the board would not be mandating that anyone carry insurance. We would just be requiring a disclosure as to whether professional insurance was carried and the policy limits, allowing the public to make an informed decision. She added that the public can use a professional that doesn't have insurance if they so choose.

LGC 18-3 A motion was made by Mr Kidd, seconded by Mr Wright, that the language of the proposed change to NAC 625.545 remain as written and that the board issue an opinion as to the intent of *"the limits of the coverage provided by the policy of insurance"*. The motion passed unanimously.

Ms Mamola said she would add the item to the next board meeting and include the committee discussion (minutes) in the board packet so it can be discussed by the full board (ACTION Item).

Ms Mamola asked for clarification as to what the next steps would be following discussion at the board meeting.

Mr MacKenzie said that because the full revision package has not yet been submitted back to the LCB, a hearing could be scheduled for this one section, and if approved, a complete submission could then be made to the LCB.

Ms Mamola said the process would require the 30 day notice period and would likely require a special board meeting (Public Adoption Hearing), which could be held via teleconference, if we wanted to move forward prior to the end of the year.

Mr Kidd said he would not present at the next board meeting and asked that another board member report on the committee's discussion and decision. Ms Purcell volunteered to present on Mr Kidd's behalf.

b. Draft Consider other possible changes to NAC 625 including repealing and replacing with updated regulations

Ms Mamola said that staff had begun a list of items to be considered for change, but in reviewing what we have in NAC currently, it really seems like it has been cobbled together over the years – putting it nicely. She continued saying that I know it would be a lot of work, but that she would like the committee to entertain the possibility of completely repealing the NAC 625 regulations and replacing them.

Mr Kidd asked if that meant completely repealing all of NAC 625.

Ms Mamola replied that she is not saying it has to be done via a full repeal, but in the initial review, there are quite a number of items the need to be closely looked at, and if it turns out that there are substantial changes needed for revision, a full repeal and replace could be the better course of action.

Mr Kidd inquired as to what time line could be expected.

Ms Mamola said it would obviously take some work by staff and the committee members in preparation, and that draft language probably wouldn't be ready for review until after the legislative session, which would mean targeting next September or October.

Ms Mamola said that it sounds like a drastic action but that she thought once we get into the details of the language you are going to see it is a massive task, with the sheer number changes that need to be made, it might be extensive enough to consider just starting over.

Mr Kidd asked if that was an item that the committee needed to act on. Ms Mamola replied that is something that should be reported on to the full board so that all board members can have input.

Ms Mamola said that in the meantime staff would continue to identify NAC items to be considered for revision.

5. Discuss strategy and schedule for moving forward with potential changes to NRS 625 and NRS 329 (Discussion Only)

Ms Mamola reported the logistics of moving forward with the proposed changes to NRS 625 and NRS 329 were being working on by her, Mr MacKenzie and Ms Fischer, and that she would report back when they were finalized.

6. Discuss draft written response due October 30, 2018, to Governor's Finance Office on its propose recommendations as a result of phase 1 audit (Discussion Only)

Ms Mamola gave an overview of the draft response included in the committee packet. She added it had been reviewed by Mr MacKenzie who had suggested several changes that had been incorporated.

Ms Mamola continued saying that the board had agreed to defer to the committee's input and approval of the letter to be sent to the GFO. There were no additional comments and Mr Kidd gave approval on behalf of the committee for the response to be sent as written.

7. Public Comment Period (Discussion Only)

There was no public comment.

8. Adjourned

Mr Kidd adjourned the meeting at 10:37 am.

Respectfully,

Patty Mamola
Executive Director