

A Review of Ethical Enforcement Proceedings Against Competent and Qualified Persons

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Abstract

The definitions of Competent and Qualified Person as defined in Australia, Canada, and elsewhere require that such professionals be members of a recognized professional organization that has and enforces a code of professional ethics or conduct. The validity of the Competent or Qualified Person concept in the eyes of securities regulators and the general public depends on the willingness of the recognized professional associations to enforce these codes. Demonstration of willingness requires four things: (1) the organization must be made aware of allegations of potential violations in order to initiate proceedings, (2) the investigation into the alleged violations and resulting prosecution, if warranted, must have been completed, (3) in cases where violations are found, the sanctions must be viewed as meaningful, and (4) the results of these activities must be reported to the public. The number of enforcement cases involving those who would generally be recognized as mining industry professionals is small; generally mining frauds are not conducted by industry professionals. Nevertheless, a record does exist that provides a basis for judging the effectiveness of various organizations in their disciplinary efforts.

Two varieties of professional credential are recognized, those issued by peer-review professional organizations like the American Institute of Professional Geologists (AIPG) and the Australasian Institute of Mining and Metallurgy (AusIMM), and government licensing organizations. Peer-review organizations are viewed as weak by some because of (1) a perceived unwillingness to sanction members, (2) their dependence on volunteers to conduct the disciplinary proceedings, and (3) the potential liability due to lack of the statutory immunity granted government organizations. Government organizations may be subject to the same unwillingness to sanction professionals. Government organizations have statutory immunity but may be hampered by the reluctance of Attorneys General or similar government legal teams to proceed with technical cases they do not fully understand and the competition for prosecutorial resources coming from a plethora of prosecutorial opportunities. Candidates for Attorney General generally campaign on their willingness to put criminals in jail, not on their willingness to prosecute white collar crime and such mundane matters as professional incompetence or malpractice. The medical profession's legal problems come from private attorneys, not Attorneys General.

Therefore, the record of actual cases going through the system provides the best basis for judging the effectiveness of either type of professional credential, certification or license. AIPG's experience in enforcing its Code of Ethics provides a basis for evaluating the types of violations that occur and the sanctions imposed. AusIMM's experience will also be reviewed.

Introduction

The definitions of Competent and Qualified Person as defined in Australia, Canada, and elsewhere require that such professionals be members of a recognized professional organization that has and enforces a code of professional ethics or conduct. The implicit purpose of this definitional requirement is that the recognized professional organization will protect the public by taking action in appropriate cases. This paper presents an overview of the process of taking action and some case histories of actions taken. The number of cases involving violations of professional ethics or conduct codes by those who would generally be recognized as mining industry professionals is small; generally mining frauds are not conducted by industry professionals. Nevertheless, a record does exist that provides a basis for judging the effectiveness of various organizations in their disciplinary efforts.

Two varieties of professional credential are recognized, those issued by peer-review professional organizations, for example, the American Institute of Professional Geologists (AIPG) and the Australasian Institute of Mining and Metallurgy (AusIMM), and government licensing organizations such as the state and provincial licensing boards in the U.S. and Canada. Peer-review organizations are viewed as weak by some because of (1) a perceived unwillingness to sanction members, (2) their dependence on volunteers to conduct the disciplinary proceedings, and (3) the potential liability due to lack of the statutory immunity granted government organizations. Government organizations may be subject to the same

unwillingness to sanction professionals. Government organizations have statutory immunity but may be hampered by the reluctance of Attorneys General or similar government legal teams to proceed with technical cases they do not fully understand and the competition for prosecutorial resources coming from a plethora of prosecutorial opportunities. Candidates for Attorney General generally campaign on their willingness to put criminals in jail, not on their willingness to prosecute white collar crime and such mundane matters as professional incompetence or malpractice. The medical profession's legal problems come from private attorneys, not Attorneys General. Therefore, the record of actual cases going through the system provides the best basis for judging the effectiveness of either type of professional credential, certification or license. AIPG's experience in enforcing its Code of Ethics provides a basis for evaluating the types of violations that occur and the sanctions imposed. AusIMM's experience will also be reviewed.¹

Adoption of a professional ethics or conduct code by a professional organization is optional; many professional organizations choose not to adopt such codes to avoid legal liability and other, legitimate reasons (Abbott, 1999, Melrose, et al., 1999 & 2000). For those organi-

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1. Whether peer-review or governmental organizations are better at protecting the public is a matter of opinion and consequent on-going debate, for example, see Abbott, 2005.

zations that have adopted a code, the validity of the Competent or Qualified Person concept in the eyes of securities regulators and the general public depends on the willingness of the recognized professional associations to enforce these codes.

Demonstration of willingness by a professional organization to enforce its professional ethics or conduct code requires four things.

- (1) The organization must be made aware of allegations of potential violations in order to initiate proceedings.
- (2) The investigation into the alleged violations and resulting prosecution, if warranted, must have been completed.
- (3) In cases where violations are found, the sanctions must be viewed as meaningful.
- (4) The results of these activities must be reported to the public.

An organization can only act if the appropriate individuals within the organization are made aware that a potential violation of the professional ethics or conduct code has occurred. Most frequently, the appropriate individuals are the Executive Director and/or the Chairman of the Ethics Committee or Disciplinary Committee; the organization's bylaws and, hopefully, website should assist those wishing to make an allegation in identifying the appropriate individual(s).

In order for an allegation to warrant organization action, the allegation (or allegations) must be accompanied by sufficient evidence, preferably documentary, to either demonstrate the veracity of the allegations or to allow the investigating parties to readily obtain that evidence. This is not an easy requirement. The fact that a situation doesn't pass a personal "smell test," a suspicion that something improper is occurring, is not sufficient evidence that a violation has occurred. The smell test is equivalent to an initial working hypothesis, one of several possible hypotheses that can explain the situation. As with any scientific study, a particular hypothesis can only be demonstrated by collecting appropriate evidence that both supports the hypothesis and refutes other possible hypotheses.

Assuming that sufficient evidence is found to demonstrate that one or more violations of a professional ethics

or conduct code has (have) occurred, the sanction imposed should reflect the severity of the violation(s) and be viewed as meaningful by the general public, within the limits of the professional organization's ability to impose sanction. The maximum penalty that a peer-review organization can impose is expulsion. Licensing boards may be able to add a fine to a license revocation, but neither organization has the power to send an offender to jail; this requires a criminal proceeding. However, the evidence collected and the conclusions reached by the professional organization may assist a criminal prosecution. One of the case histories presented later in this paper is an example of such assistance.

Finally, the professional organization should provide a means of informing the public that it fact takes action when appropriate cases are brought to its attention. Publication of enforcement actions in the organization's newsletters or on its website are the most common means of public notification.

Review of AIPG's Disciplinary Procedures

AIPG's Disciplinary Procedures (2004) are published on AIPG's website, www.aipg.org, under "Ethics." They can be summarized as follows:

- ◆ Initial allegations against a member or applicant received by AIPG are reviewed by the Ethics Committee Chairman who can:
 - dismiss the allegation for lack of evidence or for lack of violation;
 - request that more information be provided by the person making the allegations; or
 - initiate an investigation on behalf of AIPG by appointing one or more investigators, who report the findings of the investigation to the Ethics Committee Chairman for review. Normally, the member or applicant against whom the allegations are made is informed of the investigation, the name(s) of the investigator(s), and the Disciplinary Procedures, and the member's assistance in providing relevant information is requested. The member or applicant is informed that no formal charges have been brought and that no finding of alleged violations has been made.
- ◆ If the evidence does not support a finding that a violation of AIPG's Code of

Ethics has occurred, the allegation is dismissed.

- ◆ When warranted by the evidence initially provided and additional evidence and witness statements obtained during the investigation, formal charges alleging violation of the AIPG's Code of Ethics are drafted. These formal charges and the supporting evidence and witness statements, if any, are:
 - reviewed by AIPG counsel before being formally brought by AIPG;
 - brought on behalf of AIPG by the Ethics Committee Chairman;
 - must cite the specific provisions of the AIPG Code of Ethics that have been allegedly violated and why; and
 - include the evidence supporting the formal charges. At this point, the respondent member or applicant has charges to which he or she can respond.
- ◆ Due process is critical for the protection of both AIPG and the respondent member or applicant to avoid conflicts of interest, including internal AIPG conflicts by separating the prosecutorial, jury/hearing, and appellate roles within AIPG.
 - The prosecutor is the Ethics Committee Chairman assisted by the investigator(s).
 - The hearing body, the Adjudicatory Board, is appointed by the Ethics Committee Chairman, usually from among past AIPG Presidents. However, the respondent is given the opportunity to object to the appointments to eliminate any perceived conflicts of interest.
 - The appellate body is the current AIPG Executive Committee unless individual members of the Executive Committee have a conflict of interest, in which case, they are recused.
- ◆ The sanctions available to AIPG are:
 - a private letter of reprimand,
 - termination of national or sectional office or position, if relevant and applicable,
 - suspension of membership or rejection of the application for membership, which may include specific activities to be completed prior to lifting the suspension or acceptance of the application,
 - expulsion from AIPG, and
 - informing the other professional organizations having Codes of

Ethics or Conduct and to which the respondent belongs and/or applicable licensing boards of AIPG's imposition of a disciplinary sanction.

At any point in the process prior to the Adjudicatory Board's adoption of finding of fact and conclusions regarding the alleged violation(s) of the AIPG Ethics Code, the respondent member can resign his or her membership or an applicant can withdraw the membership application, thus terminating the process with no findings of fact or conclusions regarding the alleged violations having been reached. This is the most common conclusion to proceedings in which violations appear to have occurred. Resignation or application withdrawal prior to the formal findings of fact and conclusions regarding the alleged violation(s) means that the other professional organizations with Codes of Ethics or Conduct to which the respondent belongs and/or applicable licensing boards cannot cite the AIPG's actions as grounds for their own disciplinary actions.

Each year, the Ethics Committee Chairman prepares a summary of the disciplinary proceedings occurring during the previous year that is published on AIPG's website under "Ethics." The summary generically describes the character of the allegations and what actions were taken (i.e., dismissal; formal charges; resignation; sanctions imposed, if any; etc.).

Review of AIPG's and AusIMM's Experiences in Enforcing their Codes of Ethics

The cumulative annual summary of AIPG's disciplinary actions provides a basis for evaluating AIPG's enforcement activity from 1995 through 2004. During this 10-year period, AIPG:

- ◆ received 16 allegations of misconduct;
- ◆ took action in 7 cases:
 - 2 ended in member resignations;
 - 1 application was withdrawn; and
 - 4 letters of private admonition were issued.
- ◆ 7 cases were dismissed for lack of violation or insufficient evidence provided to determine whether action was warranted;

- ◆ 1 case was dismissed following legal review due to evidentiary problems; and
- ◆ 1 case was "not proved" (a Scots judgment) although the evidence acquired suggested questionable activity probably occurred.

Don Larkin, the AusIMM CEO presented a talk, "Enforcing and Revising Ethics and Complaints Requirements in the AusIMM," to "Professions Australia Ethics in Action Workshop," Wednesday 24 March 2004, that provided similar information for AusIMM for 1995 through 2004.² The AusIMM data are:

- ◆ 41 allegations were received;
- ◆ action was taken in 17 cases (warnings to suspensions);
 - 9 cases involved breaches of the VALMIN Code (for the valuation of mining properties for the Australian stock exchanges);
 - 5 cases involved questions of qualifications; and
 - 3 cases involved unprofessional behaviour;
 - 5 cases were dismissed as commercial disputes, others were determined to have no case to answer (no violation), or provided insufficient evidence to proceed; and
- ◆ 3 cases were dismissed; for example, there may have been a breach of the JORC Code (mineral reserve and mineral resource classification) but were not breaches of the AusIMM Code of Ethics or intent could not be proven.

Combining the AIPG and AusIMM data, the following conclusions can be reached.

- ◆ The number of allegations received is quite small, around ½% of the average annual membership of each organization during the period (AIPG around 3,000 members, AusIMM around 7,500 members).
- ◆ Over half the allegations received are dismissed due to lack of sufficient evidence to support the allegation or the evidence supported a finding of no violation.
- ◆ Suspicions—"smell test" failures—are not sufficient evidence to support an allegation. Specific, preferably documentary, evidence of misconduct is needed.

- ◆ Disinclination to report possible violations—the "Don't be a snitch" rule we learned in kindergarten—may result in potential violations not being reported. It is hard to assess the impact of this desire not to become involved with the bother of reporting something even though failure to report violations when one knows about them is a violation of most professional ethics codes.

These conclusions support the general impression I have gained over my career, which includes 21 years of investigating natural resource frauds for the U.S. Securities & Exchange Commission, that most professionals in the mining business practice ethically, particularly those who join organizations like AIPG and AusIMM. However, there are the occasional exceptions. It has also been my experience that when a professional ethics or conduct code is violated in a significant way, a number of provisions of the code are violated and the nature of the violations is clear to objective reviewers, as illustrated by the following case histories.

Case Histories

The following case histories illustrate some of the types of ethics code violations that have been determined. In considering violations of a code of professional ethics or conduct, one must keep in mind that not all violations are of equal severity or involve similar levels of actual or potential harm to the public. The first three case histories illustrate this point.

Failure to have a required license: from time to time an AIPG member has been found by a state licensing board to have violated that state's licensing provisions by living in or practicing in a state that requires a Professional Geologist's license (or its equivalent) without having that license. Where the resulting state action involves only the failure to have the license and does not include any allegations of unprofessional or unethical practice, AIPG's practice has been to issue a letter of private reprimand reminding the respondent of the Ethics Code provision that members should comply with all applicable laws and regulations. Because no actual harm to the public has been alleged, the applicable sanction should not be great. Repeated

2. I obtained a copy of Larkin's PowerPoint™ presentation off the web, but it is no longer available. Those wishing a copy can get one by writing me at dmageol@msn.com. Larkin informed me that his data was valid through the end of 2004 although his presentation was made in March 2004.

offenses of this type could warrant more severe sanction.

Disputes involving interpretations: a couple of AIPG cases have involved disputed interpretations between two or more professionals, and in one case, included allegations that one party called into question the professionalism of the other and vice versa. Disputes over interpretations, when each is based on acceptable data, do not constitute an ethics violation. However, calling the other party's professionalism into question can be a violation of AIPG's Code of Ethics.

Failure to pay trade bills: an AIPG member complained that another AIPG member had failed to pay subcontractors' bills and that the member in question had reputation for failing to pay trade bills. Contracting for work without the intention of paying for it is dishonest and therefore clearly unethical. Billing disputes and/or late payments unfortunately are not uncommon and the circumstances of individual cases vary widely. As a result, establishing the intent to not pay, which is an ethical violation, is quite difficult. In this case, the complaining member was unable to provide sufficient support for his allegations that the member complained about routinely failed to pay his trade bills, and, therefore, no formal action was taken.

The AusIMM enforcement summary cited above also noted that some commercial-type disputes had resulted in allegations that AusIMM's Ethics Code had been violated. Like AIPG, AusIMM is not a forum for resolving most commercial disputes.

Falsified time sheets on a job led to criminal conviction and expulsion from AIPG: an AIPG member was convicted of overcharging a client by more than \$100,000 through submission of false time sheets. Expulsion from AIPG was based on Standards 1.1 and 2.2.

False statements about gold reserves: an AIPG member was president of two small mining companies that had sold investments in gold to investors from a number of states in violation of state securities laws. Thirteen states issued Cease & Desist Orders against the member and the companies. The AIPG complaint alleged that the member's geologic reports contained unwarranted claims, omitted telling investors about the various state securities actions, and omitted to tell investors of the criminal

convictions of two of the member's associates. Among other representations, the member told investors that the properties contained gold reserves while at the same time telling the County Assessors in the counties in which the properties were located that there were no reserves to avoid paying ad valorem taxes to the counties. Either the reserves existed or they did not; the member could not have it both ways. The charges were presented at a hearing, which concluded that the member had violated Sections 2.1, 2.5, and 2.6 of the Code of Ethics and recommended expulsion from AIPG. Subsequent to AIPG's expulsion, the member was criminally charged and convicted in connection with these activities.

Copying a former employer's report and submitting it as new work: an AIPG associate member copied a report prepared by a former employer and submitted it as the associate member's own, new work. The associate member resigned following the filing of formal charges.

The surreptitious insertion of blank samples during a sampling program: this case history illustrates that some situations require careful ethical analysis in reaching a decision. A mining claim holder complained that BLM geologists had surreptitiously inserted blank samples into the sample group being sent to the claimant's chosen assayers. This was alleged to be dishonesty, a violation of the principal ethical provision in science (Abbott 2001, 2002, 2004). Inquiry into the matter concluded that the insertion of unidentified standards, duplicates, and blanks into a sample stream is required to verify the adequacy and accuracy of a sample program. The ethical analysis of the situation was (Gert, 1998, 2004):

- ◆ The ethical rule being allegedly violated was "do not deceive" or dishonesty.
- ◆ The harm done by the alleged violation was increased analysis costs
- ◆ The harm avoided by the alleged violation was eliminating the unknown reliability of sampling and analytical processes. The insertion of standard, duplicate, and blank samples in a sample stream is a recommended professional practice used to ensure the reliability of sampling and analytical results. Although the identity of the standards, blanks, and duplicates should be hidden, their existence need not be.

The investigation concluded that the BLM geologists had acted in a professionally acceptable manner by inserting blank samples that were not identified as such in order to determine if the analytical results were reliable. It turned out that the assay results proved that the claimant's assayers could not produce reproducible or reliable results.

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