

NEWSLOG

Published for Its Members by ASFE/The Best People on Earth

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New Study Says Evidence Does Not Support Claims about Mold-Induced Illnesses

Scientific evidence does not support the contention that mold causes a wide array of serious health problems. So says *Damp Indoor Spaces and Health*, the report of a new study conducted by the Institute of Medicine for the Centers for Disease Control and Prevention. (The Institute of Medicine is a private, nonprofit institution that provides health policy advice under a Congressional charter granted to the National Academy of Sciences.)

"An exhaustive review of the scientific literature made it clear to us that it can be very hard to tease apart the health effects of exposure to mold from all the other factors that may be influencing health in the typical indoor environment," said Noreen Clark,

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Survey Indicates \$50,000/\$1 Million of Construction Being Spent on Unethical Behavior

What's an unethical act? In a recent survey of owners, architects, engineers, construction managers, and contractors, FMI defined it to mean "an action that is inconsistent with agreed-upon moral conduct." In construction, that could mean behavior, such as bribery,

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FROM THE BENCH

Bad News for NC Design Professionals: Judge Allowed To Rule on Negligence without Expert Testimony

In what could be an extremely important – and dangerous – decision, an appellate court has ruled that expert witness testimony is not required to establish the standard of care, effectively holding that surveyors are required to achieve perfect results.

Honda Motors wanted to build a perfectly square addition that aligned precisely to its main plant in North Carolina, to ensure smooth travel of an overhead crane.

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Engineers Turn to Unions from Fear of Offshoring

In case you hadn't heard, Local 150 of the International Union of Operating Engineers has declared victory in Chicago. Local firms had a choice: "Cooperate" or go broke. We've heard that other engineering firms, not of the geotechnical or construction materials engineering and testing "persuasion," really don't care that much, because they won't be affected. But we've been told that that's not the case; that the goal of Local 150 is to establish a virtual project labor agreement at every Chicagoland construction site; i.e., if you don't

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Address subscription and other inquiries to:

ASFE/The Best People on Earth

8811 Colesville Road

Suite G106

Silver Spring, MD 20910

phone: 301/565-2733

fax: 301/589-2017

e-mail: info@asfe.org

Internet: www.asfe.org

THIS LOGO MEANS THAT A FIRM BELONGS TO

ASFE
The Best People on Earth

AND THAT MEANS SOMETHING TO YOU

The best people on earth are the 50,000 professionals employed by the firms that comprise ASFE, a not-for-profit trade association that helps its Member Firms profit through professionalism. ASFE develops unique programs, services, and materials to help its Member Firms delight their clients.

**Find an ASFE
Member Firm
near you at
www.asfe.org,
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ASFE Member Firms provide earth engineering and related applied science services, such as: geotechnical, environmental, and civil engineering; geology, hydrology, ecology, biology, and archeology; brownfields revitalization; infrastructure security; construction management; and construction materials engineering and testing, among others. If you're not delighted with the firms you use for these services, try one that's a member of ASFE.

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ASFE Maintains Advertising, Branding Program

Shown to the left is the advertisement ASFE is running for the balance of this fiscal year and the start of the next one. The ad will appear in:

- *Airports*,
- *Brownfield News*,
- *CE News*,
- *Commercial Investment Real Estate*,
- *Constructor* (the Associated General Contractors' magazine),
- *Engineering, Inc.* (the ACEC magazine),
- *Military Engineer*, and
- *Waste Age*.

Are you taking advantage of ASFE's efforts? If not, you could be missing a tremendous value-add of membership. ASFE is the only group we know of that advertises like this on its members' behalf, and its claims are legitimate. In fact, membership in ASFE indicates that your firm is far more likely to "try harder" than the nonmember firm.

Consider putting the ASFE logo on your letterhead, business card, and other appropriate materials, including your brochure. (Obtain an electronic version by contacting ASFE's Alpha Moore (alpha@asfe.org or 301/565-2733, ext. 225).) What about your website? Do you let people know you're a member of ASFE? Why not post the ASFE logo and allow people to click on it and then be taken to a page consisting of a PDF version of ASFE's proposal insert sheet? (Check **MS1** on p.16 for a sample copy.) And by all means, consider using the ASFE proposal insert sheet for its intended purpose, as a proposal insert designed to highlight how and why your firm is different from nonmember firms.

Are you using ASFE hard-hat stickers? What about ASFE tee shirts? Have you ordered them in bright orange for your field representatives to wear on site?

ASFE is keeping up the steady drumbeat to make itself a brand, so clients and prospective clients come to say, "We want a firm that's a member of ASFE." Identify yourself with a winner: Co-brand with ASFE!

Funding the Deductible through Universal/Variable Life Insurance

Universal life insurance, a.k.a. variable life insurance, directs a portion of your premium to a mutual fund or combination of funds you choose. Cash values can build significantly over time. You can take advantage of that cash by having your insurer loan it to you. You repay the loan over time at an interest rate you set, with the insurer typically charging about 1% or so. (When the money is used for a business purpose, the interest you pay (to yourself, usually) may be deductible.) Some firms have found it worthwhile to purchase such policies in order to fund higher deductibles on their PL and CGL insurance policies, with the savings derived from the higher deductible being used to help pay for the life insurance instrument. In that way, should a loss occur, money can be borrowed from the life insurance to provide the cash needed to cover the higher deductible. And if no loss occurs, a good chunk of change could be available for retirement or any other purpose. Have your insurance agent check it out.

UPCOMING MEETINGS

Mark your calendar!
Call ASFE (301/565-2733)
for more information.

October 21-24, 2004
ASFE Fall Meeting
Marriott Camelback Inn
Scottsdale, AZ

April 14-17, 2005
ASFE Spring (Annual) Meeting
Four Seasons Hotel
Toronto, Canada

October 20-23, 2005
ASFE Fall Meeting
Renaissance Esmeralda
Resort and Spa
Indian Wells, California



An international trade association established in 1969, ASFE develops programs, services, and materials to help geotechnical, environmental, and civil engineering firms prosper through professionalism.

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(Fugro South, Inc., Houston, TX)
713/369-5418 / jcibor@fugro.com

DIRECTORS

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(PMK Group, Inc., Cranford, NJ)
908/497-8900 / jjohnston@pmkgroup.com

David Lourie, P.E.

(Lourie Consultants, Metairie, LA)
504/887-5531 / Lcon1@aol.com

Robert C. Rabeler, P.E.

(Soil and Materials Engineers, Inc., Lansing, MI)
517/887-9181 / rabeler@lansing.soilmat.com

Richard H. Wargo, P.E.

(Schnabel Engineering, Inc., West Columbia, SC)
803/796-6240 / rwargo@schnabel-eng.com

STAFF

Phone: 301/565-2733
E-mail: info@asfe.org

EXECUTIVE VICE PRESIDENT

John P. Bachner
Ext. 223 / john@asfe.org

GENERAL COUNSEL

Pamela J. Rypkema, Esq.
Ext. 231 / pam@asfe.org

OPERATIONS DIRECTOR

Ann Reed
Ext. 222 / ann@asfe.org

ASSOCIATE OPERATIONS DIRECTOR

Eileen M. Price
Ext. 232 / eileen@asfe.org

MEMBERSHIP DIRECTOR

Zachary Fletcher
Ext. 227 / zach@asfe.org

PUBLICATIONS MANAGER

Alpha Moore
Ext. 225 / alpha@asfe.org

CONTROLLER

Phillip Pettway
Ext. 230 / phil@asfe.org

2004-2005 TRAINING SCHEDULE

Take advantage of ASFE training. Any number of firms will tell you that it's the best available. Go to the ASFE website for complete details (www.asfe.org/programs/) or contact Operations Director Ann Reed (ann@asfe.org or 301/565-2733, ext. 222). Available programs include:

- **Fundamentals of Professional Practice (FOPP)**, ASFE's classic program that's a rite of passage for those rising to the top of the profession (*MS2*).
- **Project Manager Training Program (PMTP)**, ASFE's innovative 10-course, 90-hour program that confers the Registered Project Manager (RPM) credential. The courses are available as ASFE-sponsored or –cospon-

sored events, as BackYard Seminars, or for in-house application (*MS3*).

- **BackYard Seminars (BYS)**, ASFE's cost-effective way to offer a PMTP course or one of the four additional courses available as BYS only (*MS4*).
- **Customized presentations** can also be arranged. Contact John Bachner (john@asfe.org) for details.

Here's what we had scheduled as of this writing. Contact the sponsors to see if space is available. Be sure to check the website for the latest updates.

DATE	LOCATION	CONTACT/SPONSOR	SEMINAR NAME
September 1		ASFE Eileen Price eileen@asfe.org 301/565-2733	FOPP: Fundamentals of Professional Practice
September 17-18	Union, WA	ACEC/Washington Loy Young 425/453-6655 loy@cecw.org	BYS: Professional Practice 101: Essentials of Risk Management and Profitability
November 1	Cambridge, MA	Harvard University Executive Education Seminar Program Margaret Moore de Chicojay 617/496-8728 mmoore@gsd.harvard.edu	BYS: Contract Fundamentals for Project Managers
December 3-4	Pittsburgh, PA	Pittsburgh Project Management Training Group Marlene Harbert Civil & Environmental Consultants 412/429-2324 mharbert@cecinc.com	PMTP: The Written Word: What Project Managers Need to Know
2005			
January 22	Houston, TX	TCEL Jeffrey Roberts, P.E. 713/690-8989 jcroberts@terracon.com	BYS: Field Representation: The Technician's Role on Site
January 23	Austin, TX	Geofrontiers 2005 John Wooley jwooley@fugro.com	BYS: Professional Practice 101: Essentials of Risk Management and Profitability

For inquiries or to schedule a Training Program, contact Ann Reed (301/565-2733, ext. 222; ann@asfe.org).

Engineers Turn to Unions from Fear of Offshoring ...continued from page 1

belong to a union, don't even try to come on site. "Chicken Little," ASFE has been called. After all, professional engineers would fight a union tooth and nail. Oh? What follows was excerpted from an Associated Press article by T. A. Badger, published on Wednesday, June 9. Form your own opinions about today's engineers' attitudes toward unions.

During his 15 years with The Boeing Co., Stephen Gentry never pictured himself wearing the union label. Then the computer programmer from Auburn, Wash., was laid off last summer after training his replacement, a high-tech worker in India. Now Gentry, who hasn't worked since, is among those convinced that America's white-collar workers have to band together to keep their futures from being exported to places where skilled labor comes cheap. "I don't see any other options," said Gentry, 52, who's joined a Seattle-based union trying to organize tech workers around the country....

"I got a call last week from Intel, I got a call from Microsoft, I get calls from places we never used to get calls from," said Andy Banks, organizing director for the International Federation of Professional and Technical Engineers.... "People are realizing that labor unions are the best-kept secret in America. You have no employment

rights at work unless you have a collective bargaining agreement."

..."This is a kind of lever to convince the public that labor is under pressure more than people realize it is, that it could be you tomorrow," said Alex Colvin, a labor professor at Penn State University....The number of U.S. high-tech and service jobs that have been moved overseas so far is relatively small, but a report last month said the pace is quickening. Cambridge, Mass.-based Forrester Research estimates about 830,000 such positions will be relocated to India, Russia and other low-wage nations by the end of 2005 and that 3.4 million jobs representing \$136 billion in U.S. wages will be lost by 2015....

Banks said offshoring work was a key issue that helped his union recently organize 250 engineers and architects employed by the city of San Jose, Calif. He said a drive to organize engineers will start soon in Seattle.

Marcus Courtney, who in 1997 co-founded the Washington Alliance of Technical Workers in Seattle, said the unionizing effort started slowly, but has gained momentum. WashTech's dues-paying membership has more than doubled to 450 in the past year, he said, while its newsletter subscriber list grew eightfold to 17,000.

Even Prayers Can Be Offshored

Mass intentions are special prayers – intentions – said during a Catholic mass. Typically, the intention comprises a prayer for the health of a loved one or the repose of a departed relative's soul. The prayer can also be one of thanksgiving, as for a favor received or to celebrate a birth. The nature of these prayers is such that the church receives a lot of them; so many it seems, that the demand in the U.S. exceeds the capacity of available clergy.

As it so happens, India has about 25 million Catholics and plenty of clergy, with a particularly large concentration of them in Karala, a state on India's southwestern coast. According to an article in the June 13 *New York Times*, the Ernakulam-Angamaly diocese in Cochin, a Karala port town, receives "an average of 350 Mass intentions a month from overseas." Those from the United States tend to be for requiems, and usually are accompanied by dona-

tions of \$5 to \$10. By contrast, memorial and thanksgiving prayers on behalf of "the locals" are said for 40 rupees (about 90 cents). Most of the overseas requests are routed through the Vatican, bishops, or other religious bodies, and many of them are now arriving via email. A British labor union expressed outrage over the practice and said that "the very fabric of the nation is changing. We need to have a long, hard think about what the future is going to look like." By contrast, Sebastian Adayanthrath, Ernakulam-Angamaly's auxiliary bishop, said that offshoring Mass intentions is a way for wealthy churches short on priests to support smaller churches in poorer parts of the world. And, as noted by the Rev. Paul Thelakkat, a spokesperson for the Synod of Bishops of the Syro-Malabar Church, "The prayer is heartfelt, and every prayer is treated as the same whether it is paid for in dollars, euros, or in rupees."

Coming to a Computer Near You, from ASFE

ASFE is putting the finishing touches on two new resources.

- **Risky Business Game.** ASFE demonstrated a prototype of this employee training resource at the Spring (Annual) Meeting in New York. The game makes education and training fun. Standard questions relate to contract issues, field issues, loss prevention, client relations, and technical matters, too. You can also add your own questions. You should be able to download the game from ASFE's website after
- **The Best Virtual Trade Show on Earth.** With a few clicks, you will soon be able to access a wide array of vendor and product information, plus obtain "ASFE members only" and "show special" discounts. Search by service or through a system of keywords. *The Best Virtual Trade Show on Earth* will save you money and make your purchasing decisions more efficient and informed. Make sure you check it out!

August 1st . When your employees play, everybody wins!

It hired Associated Industrial Contractors, Inc. (AIC) to construct the expansion. Plans called for the addition to have ten columns, five on each side. Footings existed for the two columns closest to the main building, but the location of the remaining eight columns needed to be determined. Under Honda's specifications, each column could not be more than one-eighth of an inch out of alignment. AIC hired Fleming Engineering, Inc. (Fleming) for the survey work.

AIC personnel reviewed the architectural plans and requirements with Johnny Register, L.C., Fleming's surveyor for the project. Because a crowded site and constant wind made conventional surveying methods risky, Mr. Register decided to use a plumb bob, with his body blocking the wind, and (with the help of an "instrument man") an electronic transit. He used nails to mark both center and offset points for each column. Mr. Register "did look back through the instrument to confirm straight lines through most of these points," he later testified. AIC checked Register's final survey with a tape measure.

Three columns were constructed without incident, but a concrete slab, which contained a "batter board" with Mr. Register's offset nail, extended into the footer of the fourth. AIC moved the batter board back, extended the string on the initial offset nail, and proceeded with construction of the columns. When it erected the first joist, AIC discovered that the southern columns, though straight, were not at a 90-degree angle to the main building. It sued Fleming for \$23,000, the cost of having to redo the skewed line of columns.

AIC and Fleming agreed that relying on center and offset points was an acceptable way to do the work.

They also agreed that one of them was responsible for the problem, with AIC naming Fleming and Fleming naming AIC. Fleming cited four reasons why AIC was at fault, and AIC denied each.

First of all, Fleming said, AIC failed to follow its recommendations. Fleming claimed that Mr. Register had recommended a second survey, which, had it been performed, would have caught the problem before it caused any grief. AIC said that Mr. Register had never made such a recommendation, and Fleming had nothing in writing to prove otherwise.

Second, Fleming said, AIC's double check of the final survey, performed with a tape measure, must have been flawed. Had it been performed properly, it should have caught the problem. But AIC countered that, if a tape measure was sufficient, why hadn't Mr. Register used one?

Third, Fleming cited AIC's removal of the batter board and recreation of the center point for the fourth column. AIC responded that batter boards are often moved and that the skew began with the first three columns.

Fourth, Fleming claimed that Mr. Register was able to confirm straight lines by flopping the transit without moving the base. But AIC referred to Mr. Register's own testimony that he did not confirm all of the points.

The trial judge, without a jury, found that Fleming was negligent because it evidently had miscalculated the location of the columns along the south wall, which proximately caused the mistake and resulting damage to AIC. Fleming appealed the decision to the North Carolina Court of Appeals on the ground that AIC's lack of expert testimony deprived the court of an appropriate

template to measure Mr. Register's actual conduct against the "ordinary skill and prudence" expected of professionals operating under similar circumstances.

A majority of the appellate bench upheld the trial court's verdict. It said that Mr. Register's description of what he had done was sufficient to describe the standard of care, but what he did could not have complied with the standard of care if the desired outcome was not attained. The court also noted that an expert is not required when the work falls within the common knowledge and experience of the trier of fact: "It is within the common knowledge of a trier of fact that a surveyor hired to pinpoint columns for a rectangular building site that must be precisely square must accurately mark column locations so as to result in two sets of parallel lines connected by four 90-degree angles. As in [*Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (per curiam), a similar case tried in another state], understanding this task 'does not involve esoteric knowledge or uncertainty that calls for the professional's judgment' nor is it 'beyond the knowledge' of the trier of fact as to whether lines or angles staked by a surveyor were straight and square.... Given that the survey at the Honda facility started from predetermined, fixed points and the sole task was to define straight lines and 90-degree angles, this is a case in which 'accuracy could ... be expected from performance done in a workmanlike manner.'"

The Court of Appeals deferred to the trial judge with respect to the analysis of facts. Competent evidence supported an inference that Fleming had plotted a straight line at the wrong angle, starting with the very first column. Although the

record showed that some facts were in dispute, that situation alone was not enough to merit a return to the fact-finding process.

The Chief Judge of the Court of Appeals filed a dissenting opinion. He said that the court had no basis to say that Mr. Register's actions established the standard of care: "While Mr. Register testified extensively as to the process *he* went through to establish and verify the locations of the support columns, his testimony was limited to the procedure that he *in fact* followed, not the procedure he was 'supposed' to follow." In other words, the judge said, the court did not establish whether or not Register met the standard of care and, absent such a finding, negligence cannot be deter-

mined. Citing another decision, the Chief Judge said, "[T]he application of the 'common knowledge' exception has been reserved for those situations where professional conduct is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of a professional." He also noted that *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, which his fellow justices relied on so heavily to rule an expert was not needed, was not an analogous case. The judge said experts were not needed because the issue was breach of contract, not negligence. (By contract, DMJM had agreed to "pinpoint" the location of certain caissons. The firm failed to do so, and the judge decided an expert was not needed to help the trier of

fact decide whether or not a firm's failure to do what it said it would do comprised a contract breach.) And as the Chief Judge also pointed out, "Even strict adherence to accepted surveying principles will, in some cases, yield inaccurate measurements.... Therefore, application of the 'common knowledge' exception must turn on something more than the ultimate result."

Of course, the dissenting opinion, as wise and as well-reasoned as it may be, is not the viewpoint that prevails. And because of that, it would seem, any North Carolina surveyor who fails to produce a perfect result is negligent *per se*. Ouch. (*Associated Industrial Contractors, Inc. v. Fleming Engineering, Inc.*, 590 S.E. 2d 866 (N.C. App. 2004))

GETTING PAID

Over the years we've given you any number of reasons why it's not wise to sue a client to obtain payment. Most of these reasons have been in the form of object lessons; e.g., *ASFE Case History No. 82* which describes how a Member Firm's efforts to enforce collection of a \$1,200 fee wound up costing it "\$84,000, not including the value of lost morale, lost opportunity, and lost sleep." Why is it that suing for payment is so often the trigger for a counterclaim? Simple: Federal Rules of Civil Procedure Rule 13 (which is also what it's called in states that mimic the Federal Rules of Civil Procedure). Rule 13 requires a defendant to assert in the same suit any claims based on the same circumstances as set forth in the lawsuit filed to collect fees. If the defendant fails to assert any reasons why it should not pay, it cannot do so in the future.

Few client representatives are familiar with Rule 13. However, when you sue a client for payment, the client will almost always engage an attorney for advice on how to proceed, and a lawyer is virtually required to inform the client of Rule 13 and explain how to use it, while encouraging the defendant to think of any legitimate grounds for cross-complaint. Of course, with that kind of prompting, something will almost always be "remembered" (or as documented in *ASFE Case History No. 82*, fabricated).

Now, lawyers, being officers of the court, generally are required to "vet" any allegations made by a client before taking them forward. However, lawyers are generally excused from investigating a counter-claim because of the short time available (typically 20 to 30 days) for responding to the initial claim, thus permitting bogus claims

to be legitimized. And as our hapless ASFE member discovered, there's precious little that can be done once that claim is filed. You try to collect a few thousand dollars (or less) that was a small fee to begin with, and well-earned, and – POW! – the next thing you know you are staring down the muzzle of a professional negligence claim. Like it or not, you have to contact your professional liability insurer, and then get frustrated, angry, and upset as things move downhill from there.

Want to avoid that trap? Then by all means read *ASFE Practice Alert No. 31*, "Improving Cash Flow through Effective Collection Procedures." Developed by ASFE's intrepid Business Practice Committee, it's available for free download at www.asfe.org, or by contacting ASFE Publications Manager Alpha Moore (alpha@asfe.org or 301/565-2733, ext. 225).

MEMBER NEWS

Haley & Aldrich (Boston, MA): **Brandon J. Fagan, L.S.P., P.G.** has joined the firm's Boston office.

QORE Property Sciences (Duluth, GA): **Darrell Setser, P.E.** has been appointed branch manager of the

Jacksonville office. **John T. Snider, P.E.** is the new manager of the West Palm Beach branch.

Schnabel Engineering (Glen Allen, VA): **Eric B. Rehwoldt, P.E.** and **Charles B. Wilson, P. E.** are new

Principals of the firm, and **Stephen R. Hahn** has been promoted to Branch Leader of the Charlotte, NC office. **Bon Lien, Ph.D., P.E.** has joined the firm, bringing 15 years of international geotechnical engineering experience.

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harassment, billing for work not done, substance abuse on the job, inappropriate sharing of proprietary information and intellectual property, unauthorized use of equipment and supplies, misreporting of costs or time, bid shopping and "reverse auctions," and change order/payment/claims games. Just how prevalent is it in the construction industry? Well, according to FMI, 84% of their survey's respondents said they had encountered unethical construction-related business dealings in the past year; 61% thought the industry is "tainted" by unethical acts.

Fortunately, or so it would seem, few if any of the respondents had themselves engaged in unethical behavior, with 91% saying they consider ethics when working with others. They noted that unethical behavior:

- erodes trust, making it that much more difficult to establish the cooperation and collaboration necessary to complete projects,
- leads to longer, more complex and restrictive contracts,
- increases regulatory pressures and activities, and
- encourages litigation.

Were survey results extrapolated to the industry as a whole, one could conclude that \$5,000 to \$50,000 of every million dollars spent on a construction project comprises

an "unaccounted for" amount related to some type of unethical transaction.

Despite respondents' high regard for ethics, only 30% had formal ethics programs (10% of these didn't enforce or publicize their programs), 24% admitted to not assessing ethics until a person was hired, and 97% would delegate ethics training to colleges and universities.

Leadership is the key solution to this problem. Leaders are not powerless and resistant to change. Leaders provide ethics training and serve as an example. They do not accept unethical behavior as "just the way construction works"; they walk away from projects that require dishonesty to make a profit and expect enough integrity from employees to do the same. They insist the firm be able to deliver what it promises. They warn collaborators of potential problems rather than waiting to exploit mistakes. At the end of the day, ethics is not a question of legalities or business strategy: It is a matter of character and integrity.

Contact Dennis Doran (919/785-9219 or ddoran@fminet.com) for survey information and Philip Warner (pwarner@fminet.com) for a copy of the report.

Baystate Is Peer Reviewed. What about Your Firm?

ASFE's organizational **Peer Review** is regarded as the most innovative program of its kind; in fact, the most innovative association-developed program of the last 125+ years! When you undergo a **Peer Review**, a knowledgeable team of professionals evaluates your firm in conjunction with a **scope of service you select**, using records review, client evaluations, and employee evaluations and interviews to identify your firm's strengths and weakness. As a consequence of the report, you can focus your energies on making your operation as good as it can possibly be, thus lowering your exposure to liability, HR problems, turnover, and so forth, while improving client loyalty and profitability.

What's your excuse for not undergoing **Peer Review**? Could it be, "We're too busy to get better"? How about, "Liability claims keep us on our toes"? And there's always, "Turnover helps us develop new ideas and viewpoints."

C'mon, folks, **JUST DO IT!** The ASFE Member Firm that took that advice most recently is

Baystate Environmental Consultants, Inc.
(East Longmeadow, MA).

The firm's CEO is James E. "Jim" Walsh, Ph.D., P.E. Want to know if he's happy about the experience? Ask him at 413/525-3822 or jwalsh@b-e-c.com. Or ask the CEO of any other firm that's been Peer Reviewed; they're all listed in the *ASFE Directory*.

If you have questions, we have resources available at www.asfe.org. You can also speak with ASFE Executive VP John Bachner (301/565-2733, ext. 223 or john@asfe.org). John's firm (Bachner Communications) was ASFE Peer Reviewed, too!

NEW MEMBERS

We are delighted to say “howdy” to our two newest **Member Firms**. They are:

Foppe Technical Group, Inc.
(11415 Century Boulevard,
Cincinnati, OH 45246; **tel** 513-671-
8144; **fax** 513-671-8150) is a
turnkey site development engineer-

ing firm that provides design-build
support for architects, developers,
and municipalities. The firm's
Principal is **Lawrence E. Foppe,**
P.E. (larryf@foppe.com).

Kim Engineering, Inc. (7824
Beechcraft Avenue, Gaithersburg,
MD 20879; **tel** 301-987-8188;

fax 301-987-8144) provides con-
sulting geotechnical engineering
services to local clients and their
design and construction teams in
the Washington metropolitan area.
The firm's Principal is **M. Sunny**
Kim, P.E. (kimeng@erols.com).

GRAPE PRESS

If you like red wine, you owe it to yourself (and others whom you might invite to join you) to start a wine seller of at least 100 bottles. Why? Simple. Few good red wines are ready to drink upon release, and even those that are will usually improve with bottle age. As a consequence, when you have a cellar, you can buy a case of this or that, drink some now, and put some away for drinking in a year or two, or more. In that way, you can enjoy the \$70 taste of a \$15 bottle several years after you first brought it home. The alternative is to pay \$70 for the bottle (assuming you can even find it), or to drink inferior wines or inferior (way too young) versions of really good wines. (This concept is behind our guidance to never order young vintages of really expensive wines in restaurants. Restaurants offer them to people who want to celebrate by buying a really great wine, but all they are buying is a really great label; the wine is so young, typically, that a bottle selling for one-tenth the price will taste better. Of course, no one will complain, but a lot of people will shake their head later and say, “I don't understand wines. I tasted a really expensive bottle and, as far as I was concerned, it wasn't much better than Thunderbird.”)

When it comes to deciding what to collect, you have to figure out what you like. That lets you have a lot of fun (typically by hosting or

engaging in wine tasting parties with friends), as you open wines from all over the world. As we've tried to make clear, great red wines are now available from the U.S., France, Australia, New Zealand, Chile, Argentina, Spain, Italy, and elsewhere. With a cellar, you can have great variety (*vive la difference!*) along with the ability to match wine and food. (Also, when you have a wine cellar, visitors always know what you want as a gift!)

Also consider the quality of wine you want in your cellar. Is there any doubt? High quality. But do not confuse high-quality wine with high-quality labels. Price is almost never an indicator of a wine's quality. The July 31 edition of *Wine Spectator* makes that clear. As an example, *Flora Springs Cabernet Sauvignon Napa Valley Rutherford Hillside Reserve 2001*, the highly rated company's flagship bottle, sells for about \$100; it's rated at 88 points. The almost-as-good *Flora Springs Cabernet Sauvignon Napa Valley Out-of-Sight Vineyard 2001*, for “just” \$85 a bottle, is also rated 88 points. The winery's low-end offering – *Flora Springs Cabernet Sauvignon Napa Valley 2001* – sells for \$30 a bottle, and it's rated 89 points! So, do you want the label or the wine? If you want the wine, you'd get the low-end bottle for \$30. Alternatively, you can get an inferior wine with a better label for \$70 more.

But wait! An 89-point wine is no great shakes, no matter what it sells for. Which is why if you like really good California cab, you'd do what we did (also following guidance in *Wine Spectator*): We located *Simi Cabernet Sauvignon 2001*, which was rated up to 95 points in a barrel tasting. (We found it at Costco for under \$15/bottle.)

In other words, if you are going to stock your cellar, do it smart: Read the reviews of people who have good palates. And, as far as we're concerned, as good a “read” as *Wine Spectator* may be, it cannot hold a candle to *Wine Advocate* and the reviews of Robert Parker. In fact, by following his guidance, you should be able to assemble a first-class cellar for probably an average \$15 per bottle or less, and we're talking no wine rated less than 90 points, and a lot of them rated 92, 93, and 94. True: He also discusses wines that sell for \$100, \$200, and more, but, as he points out so often, you do not need to spend nearly that much to have great wine that will just get better with age. And Parker tells you how long it will age, when it will peak, etc., all with frightening accuracy (in our experience). So, to really enjoy your wine, start your cellar now. It's fun, and tastes good, too!
Details: wineadvocate@erobertparker.com

Uninsured for Your Promise to Defend

"Hold harmless, indemnify, and defend" is an expression that engineers, other design professionals, and environmental consultants frequently encounter in contracts presented by their clients. While such indemnities often cause a number of concerns, the potential problems created by the promise to "defend" often are overlooked.

Consider one example where a contract contains such an indemnity provision. A claim arises with several allegations, one of which faults your rendering of professional services. You deny any mistake and claim that the services met or exceeded the standard of care. Your client counters that the word "defend," in its commonly understood meaning, obligates you to pay for its lawyer immediately, even before it's determined you are negligent.

The inclusion of "defend" in an indemnity provision transforms you into an insurer, *regardless of any actual fault on your part*. The "insurance services" provided to clients

through your contract are likely to be uninsurable.

Clients have no right to expect this service from you. The word is unnecessary for clients to recover what they are entitled to: attorney's fees and other defense costs, but only *to the extent* of your negligence. This amount is insurable under most professional liability policies, after proportionate responsibility between the parties has been established. Advancing defense costs to clients unfairly burdens you with risks beyond your control and disproportionate to your anticipated profits on the engagement. Clients should purchase their own insurance.

A full discussion of this issue is included in Terra Insurance Company's newest *Risk Management Advisory*, "Concerns Presented by the Word 'Defend' in an Indemnity Provision." The monograph is available for free download at Terra's website: www.terrarrg.org.

PROFESSIONAL SELLING

You're about to meet a representative of your dream client of a lifetime. What will you be selling that person? The answer: yourself. If the client rep takes an instant dislike to you, or thinks for any reason that you are subpar, that's the image that the client rep will impart to your organization. While the prospect may not take an immediate like to you, clearly you want to do everything in your power to convey a positive image, because, without that, you cannot sell anything.

To some extent, you are always selling, given that you create or affect your image with everything you do. A key to effective selling, then, is to develop good habits, so you do it right *all* the time. In that respect, you will from time to time speak with a prospective client's representative by telephone. We have discussed on several occasions the kind of message you should have for your own voicemail box: friendly, concise, and clear:

Hi. You've reached my voice mail. This is John. I'll be back in the

office at 3PM today. Leave me a message. You can reach me by cell phone, and I'll give you the number twice: 301/565-2733. That's 3 0 1 5 6 5 2 7 3 3. You can speak with someone else by pressing the pound key.

Do not have someone else say, "You've reached Mr. Doe's voice-mail box. He's not in...", unless you want to appear somewhat regal. Do not tell people "I'm away from my desk or on another call" because they know that. Do not leave yesterday's message in place; you create an image of someone who does not attend to detail.

Figure out the best message, write it down, and then record it.

Bear in mind that the message you leave on someone else's voicemail box also creates an image. The good habit to get into is to assume that, for every call you make, you may have to leave a message. Prepare for your call, then, by formulating answers to a series of blunt questions that you can pretend would be asked by the person

you're calling; e.g.:

Who's calling? *Hi. Ms. Jones. This is Chick Little with Graves Predictions.*

Why are you calling? *I have that information you requested about the overhead situation.*

What do you want from me? *I need to discuss it with you so we know what the next step should be. The information is somewhat alarming, so I think we should meet face-to-face. I need to know when would be a good time for you and where you'd like to meet.*

When should I call you back? *I'll be available in my office until 6:00PM tonight, at 301/565-2733. Again, that's 3 0 1 5 6 5 2 7 3 3. You can reach me on my cell phone after that, until 10:00 PM tonight, at...*

Recognize that about 95% of what you do is indistinguishable from about 95% of what your competitors do. As a consequence, little things you can do different can mean a lot. If you're better at telephone technique, that's great. You sure do not want to be inferior.

What's Enclosed ... Or Order if Not

Updated materials are now available from ASFE. If you receive a routed *Newslog* without enclosures, or if you want to order additional copies, contact ASFE Publications Manager Alpha Moore (301/565-2733, ext. 225 or alpha@asfe.org). Remember, we are here to help you.

Important Information about Your Geotechnical Engineering Report

A warning about mold exposures has been added to this popular insert sheet, urging clients to obtain professional assistance. The new language states in part, "diverse strategies can be applied during building design, construction, operation, and maintenance to prevent significant amounts of mold from growing on indoor surfaces. . . . [T]he geotechnical engineer in charge of this project is not a mold prevention consultant; **none of the services performed in connection with the geotechnical engineer's**

study were designed or conducted for the purpose of mold prevention. Proper implementation of the recommendations conveyed in this report will not of itself be sufficient to prevent mold from growing in or on the structure involved."

Important Information about This Geotechnical Engineering Proposal

We added a similar warning about mold exposures to this insert sheet.

Save Money: UPS Discount Brochure

ASFE has a partnership with UPS to save Member Firms up to 20% on shipping – take advantage of it. Delivery to hundreds of cities worldwide is possible, even overnight, and you can track your packages through the UPS website.

MEMBERS ONLY ORDER FORM

Stock your inventory of these updated insert sheets at special introductory prices. Orders postmarked by 8/31/04 will cost \$20/100 sheets and \$90/500 sheets. Thereafter, the purchase price will be \$30/100 sheets and \$125/500 sheets. Place your order today. Fax this form with your credit card number; mail a copy with your check; or just call us and then email your credit card information.

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The Dangerous Side of Summer

It's summer, and any number of firms sponsor company athletic teams, corporate picnics, and fun team-building or community-service outings. But hot temperatures put people at risk, and extreme heat can cause maladies from heat rash to heat stroke. Manage summertime risks by addressing workplace risks and others that arise.

Workplace Risks. OSHA makes your firm legally responsible for worker safety outdoors, and the Americans with Disabilities Act may obligate you to accommodate those at heightened risk.

- Identify personal factors that affect a person's level of risk, including advanced age, excessive weight, poor fitness, a medical condition (like chronic high blood pressure), and/or use of prescription or other legal drugs and supplements. Establish a policy that addresses these factors before affected employees work outdoors in the sun.
- Evaluate the environmental factors that affect the level of risk, including temperature, humidity, radiant heat (from vehicles or equipment), and air velocity. Establish a policy to appropriately determine when it is safe to work outdoors.
- Reduce personal exposure. To the extent practical, schedule outdoor work at cooler times of the day, and encourage people to wear loose, light clothing and apply suntan lotion. Make people aware about the perils of dehydration and encourage them to drink plenty of water. During the heat of the day, decrease work loads, shorten work periods, and require frequent breaks and fluid intake. A person in good physical condition may need more than a gallon of water per day when temperatures exceed 90 degrees. Suggest that employees refrain from drinking "bad" fluids like caffeinated soft drinks. Slowly acclimate employees to working in the heat, and repeat the process when an employee returns from vacation or an extended leave. Postpone outdoor work on sweltering days.
- Don't equate common sense with weakness. Encourage self-reports of dizziness or other heat-related symptoms. Prohibit supervisors from asking employees to "tough it out" until the task is done.
- Watch for problems. Supervisors should be trained to recognize heat-related symptoms and monitor workers for whom they're responsible. You might even want to consider a "buddy system" where employees work in pairs. Look for indirect, heat-related safety hazards caused by a person's decreased mental alertness or gripping ability due to sweaty palms. Distribute OSHA's free *Heat Stress* card (www.osha.gov/pls/oshaweb/owadisp.show_document). The Centers for Disease Control and Prevention offers a script for a 15-minute employee training session (www.cdc.gov/nceh/hsb/extremeheat/heatstroke.htm); consider using it.
- Evaluate the potential for heat-related risks indoors. Power outages, brown-outs or black-outs, combined with permanently-sealed windows, can compromise safety, especially for employees more susceptible to heat risks due to personal factors. Develop a contingency plan that enables employees to work from another location or from home if indoor risks materialize.
- Prepare a response plan. A person can sustain permanent

injury, and possibly die, within 30 minutes of exposure to heat. Consider developing an emergency plan that takes that fact into account. In the field, or at the picnic, promptly take a person to cool place with readily available fluids, ice packs, and cell phone or other means to call for help. Err on the side of seeking professional assistance if you are unsure of the emergency treatment necessary.

Other Risks. Does your firm's "workplace" include a softball team, community-service activities, or social events? Depending on state and federal rulings it may, and, as a consequence, workers' compensation, labor law, and negligence implications, may be involved. Find an appropriate way to focus on human health and safety.

- Even when participation in an activity is voluntary, you can still educate your employees about the risks. Whenever it may be appropriate, use disclaimers and/or signed waivers to shield your firm from liability.
- Collaborate with care. If your athletic team is part of a league, or if your community-service project occurs under the auspices of a community nonprofit organization, try to transfer the management of heat-related risks to the collaborating group (coach for the league or project manager for the nonprofit). Document the transfer of risk and consider asking for evidence of the outside group's insurance.
- Control only what your firm is responsible for contributing to the event; e.g., schedule of activities, available food and beverage, or supervision of activities. Do not voluntarily undertake activities, and therefore legal duties, that the firm would not otherwise have.

continued on page 13

- If your firm exercises control over all or part of an outdoor activity, do so with due diligence. Pay attention to when the event is scheduled and availability of “good” fluids to protect against dehydration.

Screen athletes, or require a physical exam by the person’s doctor, to ensure safe participation. Don’t make assumptions. The young intern who volunteers for the softball game might be more at risk

than you think

Details:
www.cdc.gov/niosh/hotenvt.html;
www.nata.org/newsrelease/archives/000056.html

Overtime Changes: What You Can Do Now

As reported in the last *NewsLog*, the Department of Labor (DoL) has revised its overtime rules. Congress is expected to let DoL’s rules go into effect, and that would be good news for A/E/E firms. You’ll only have a few months to comply so, starting today:

- **Conduct a self-audit.** List your employees, their job titles, job descriptions, salaries, and current FLSA classifications. Investigate the information on your list for

accuracy and ensure payment of appropriate overtime to those who are required to get it. Be proactive in reimbursing employees for any past overtime violations.

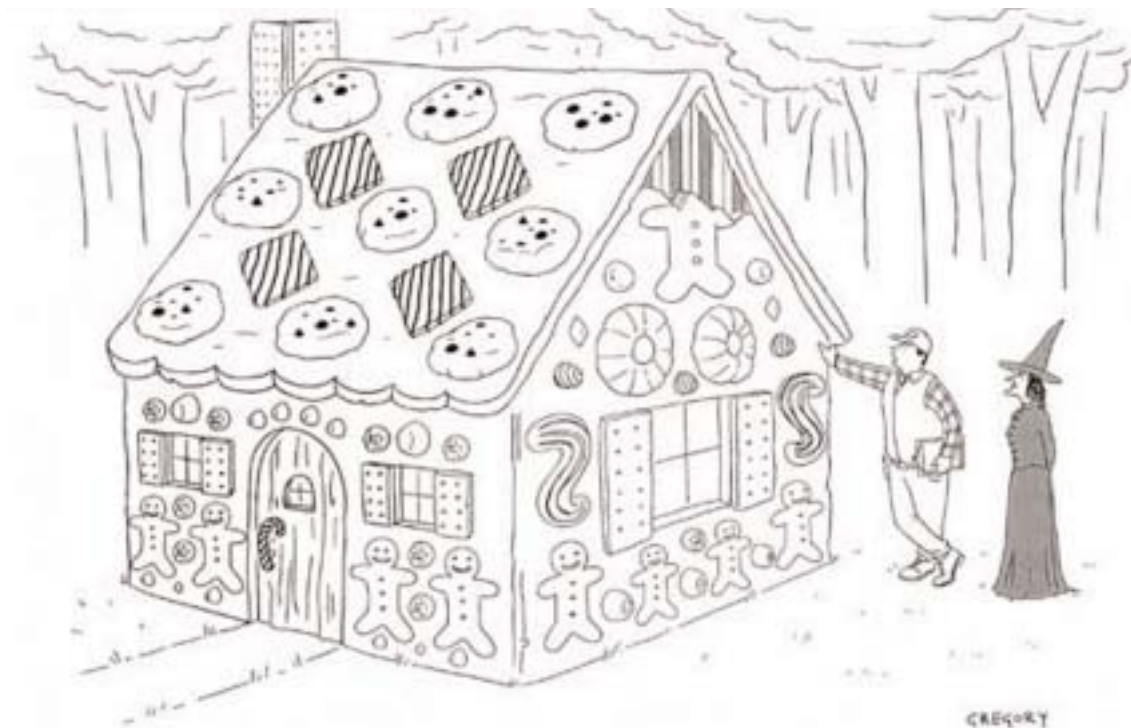
- **Review the list for changed classifications.** Identify the “learned professionals” and “highly compensated employees” on your staff who may now be exempt from overtime requirements. Consider whether to continue overtime for these employ-

ees or develop equitable ways to transition them to the new rules. Competitive pressures and the risk of losing key staff members may necessitate a slower transition than required by law.

- **Organize your records.** Make sure your records are thorough, organized, and accurate. Be prepared for implementing the changes.

Details: www.dol.gov/fairpay

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“See, that’s your problem right there—the roof is mostly sugar.”

New Study Says Evidence Does Not Support Claims about Mold-Induced Illnesses ...continued from page 1

Dean, School of Public Health, University of Michigan, Ann Arbor, who chaired the committee that conducted the study. "Even though the available evidence does not link mold or other factors associated with building moisture to all the serious health problems that some attribute to them, excessive indoor dampness is a widespread problem that warrants action at the local, state, and national levels."

Excessive dampness influences whether mold, bacteria, dust mites, and other such agents are present and thrive indoors. It may also cause chemicals and particles to be released from building materials. Many studies of health effects possibly related to indoor dampness do not distinguish the specific health effects of different biological or chemical agents.

Although the committee found sufficient evidence to conclude that mold and damp conditions are associated with asthma symptoms in asthmatics who are sensitive to mold, and to coughing, wheezing, and upper respiratory tract symptoms in otherwise healthy people, *the evidence did not meet the strict scientific standards needed to establish a clear, causal relationship.* An uncommon ailment known as hypersensitivity pneumonitis also is associated with indoor mold exposure in genetically susceptible people. Damp conditions and all they entail may be associated with the onset of asthma, as well as shortness of breath and lower respiratory illness in otherwise healthy children, although the evidence is less certain in these circumstances. Likewise, the presence of visible mold indoors may be linked to lower respiratory tract illness in children, but the evidence for that is not as strong.

The committee found very few studies that have examined whether mold or other factors associated with indoor dampness are linked to fatigue, neuropsychiatric disorders, or other health problems that some people have attributed to fungal infestations of buildings. The little evidence that is available does not support an association, but because of the dearth of well-conducted studies and reliable data, the committee could not rule out the possibility.

Studies on animals and cell cultures in labs have found toxic effects from various microbial agents, raising concerns about whether these same agents growing in buildings can cause illness in people. Molds that are capable of producing toxins do grow indoors, and toxic and inflammatory effects also can be caused by bacteria that flourish in damp conditions, the report noted.

Little information exists on the toxic potential of chemicals or particles that may be released when building materials, furniture, and other items degrade because of wetness. The committee recommended that current animal studies of short-term, high-level inhalation exposures to microbial toxins be supplemented with new research that evaluates the effects of long-term exposures at lower concentrations.

Technical information describing how to control dampness in buildings exists, but, the report says, architects, engineers, building contractors, facility managers, and maintenance staff do not always apply this knowledge. The committee recommends:

- development of better standardized methods for assessing human exposure to organisms and chemicals linked to dampness;
- studies that compare various ways to limit moisture or eliminate mold and to evaluate whether the interventions improve occupants' health and, if so, to what extent;
- development of national guidelines for preventing indoor dampness, to promote widespread adoption and to avoid the potential for conflicting advice from different quarters;
- modification of building codes and related regulations to reduce moisture problems;
- production and dissemination of training curricula on why dampness problems occur and how to prevent them;
- evaluation of the effectiveness of economic and other incentives for spurring adherence to moisture prevention practices – e.g., bonuses for facility managers who meet goals for preventing or reducing problems, or fines for failure to correct problems by a specified deadline – and implementation of those that are effective; and
- development of materials designed to educate the public about the health risks associated with indoor dampness.

Obtain a copy of *Damp Indoor Spaces and Health* from the National Academies Press (800/624-6242 or 202/334-3313), or on-line at www.nap.edu/books/0309091934/html/.

Crack Down on Pirates – Is Your Firm One?

The Recording Industry Association of America has been making headlines with its lawsuits against teenagers. The Business Software Alliance has collected millions of dollars in fines from firms that have installed unlicensed software.

Could your firm be caught in the dragnet, too? It could, if your employees:

- download “free” music onto company computers,
- illegally copy software programs or copyrighted material (like movies) from Internet bulletin boards, e-mail, news groups, or site links,
- “borrow” text from copyrighted sources,
- install the same software on multiple computers to save money, even though your license agreement permits only one, and/or
- purchase “garage-built” or used computers with preloaded software that lacks appropriate authorization or licenses.

Your employees are “agents” under the law, and that could make your company liable for the theft of intellectual property, even if management was not aware of its employees’ actions. Think your firm won’t get caught? A disgruntled employee can make it an issue, as can a manufacturer when looking at a software problem under warranty. You also never know what watchful eyes will catch the theft through general observation or by surfing the Internet. Lower your exposure to liability by taking steps such as these:

- Make all software purchases through the IT/MIS department. Require department personnel to ensure proper licensing and that the program and the selling company are legitimate. This would also apply to programs pre-loaded into computers purchased by the firm.
- Ask employees to refrain from directly copying information and programs from the Internet. Require a supervisor or IT/MIS department staff to sign off on the download. In addition to piracy, various noxious Internet viruses are a concern.
- Prohibit music downloading from the Internet using company computers. If music is allowed, instruct employees to bring their own MP3 players and ear phones.
- Educate employees about intellectual property laws through a written firm policy. Discipline those who violate policy.
- Restrict user permissions to prevent software installation by non-IT/management staff on some computers.
- Periodically monitor the programs contained on office computers and review the reference materials used during operations.
- Keep good records to prove that the company has appropriate licenses to use software programs or other intellectual property.

Airplane Work, Billing Policy

Recently, an ASFE member asked, “Do you have any comments on ASFE Member Firms’ air travel policies, that is, whether Member Firms typically require their personnel to work on flights? Our policy is that work is required when travel is conducted during business hours.”

ASFE Executive VP John Bachner responded, “Your question is an interesting one. I believe I am correct in saying that the American Bar Association has ruled on a related issue, from an ethical standpoint. It has said that travel time is billable to the client for whom the travel is required. If you choose to work for another client during the flight, that time can be charged to the other client. Assuming you subscribe to that theory, travel time is work time (or at least direct project labor, billable time) even if the employee is sleeping. Any additional billable time spent would also be billable, albeit for a different (or maybe even the same) client.

“As to requiring an employee to work while traveling, I have never inquired about others’ policies. I do know that some people get pretty fearful when flying, however, and, I suspect, much of their time is spent praying. I am copying your query to members of the Board to learn their reactions.”

One respondent noted, “I frequently travel where part of the day is business hours and part is not regular business hours. I really try to avoid billing for more than eight hours in any calendar day. It is not unusual for me to work until late afternoon, fly somewhere, and get in at 10:00 PM. I would bill the client for air fare and expenses, and maybe for a couple of hours, but not the seven hours that lapsed between leaving the office at 3:00 PM and traveling until 10:00 PM.”

Another member commented, “We don’t have a written policy on this issue. However, it is generally understood that employees who are traveling should be productive to the extent practical (praying comes first, of course). I guess it comes down to a personal motivation, in that your best employees will likely be doing it anyway without being asked or told. I can also tell you that we get a whole lot more out of our employees who have laptops when they’re out of the office, so much so that we’ve even made them available to some of our field representatives.”

What’s your policy? Do you have one? And if you do, please share it with us. Contact john@asfe.org.

YOU'VE JUST GOT TO BE KIDDING

Ah, the digital age, when not a day passes that something old doesn't give way to something new. And who could embrace that concept better than Jon Blake Cusack, a self-described engineering geek and father-to-be of a

bouncing baby boy. "I want to name my son after me," he evidently said to himself (and his wife), "but I want to do it a new way. I want to do it digitally." And he did, leaving the world to welcome not Jon Blake Cusack, Jr. or even Jon

Blake Cusack II. That's right, folks: Now in our midst is none other than Jon Blake Cusack 2.0. (We can only wonder what name 2.0 will have for dad when he grows up! We can think of a few, but they're not all that new.)

DR. ENGLISH

A news release announcing a new hire, reassignment, or promotion is one of the few types of public communications issued by engineering and environmental firms. Unfortunately, many of the announcements examined by the good doctor contain errors in grammar and style. These are some of the most common errors we see:

Failure to use proper style. A news release is supposed to read as though it were a newspaper article. Read a newspaper. You should not see an article stating, in effect, "Such & Such Associates is pleased to announce the appointment of John Doe..." Instead, the article will be written like this: "John Doe is the new director of communications at Such & Such Associates."

Failure to use designations, such as P.E. and P.G. It's not easy to earn those designations. They are something of which the professions need to be proud. Do not omit them in the

text of your announcement or in any captions.

Clarification of numbers, by using numerals and spelling; e.g., "...five (5) years of experience...." You are not preparing a contract. If the number involved begins a sentence, or if it is less than 13, spell it out. Otherwise, use numerals.

Failure to use the possessive form of years. If a person has ten years of experience, that person has ten years' (note the apostrophe after the s of years) experience.

Improper designation of degree and improper capitalization. A bachelor's degree is not a Bachelor's of Science degree nor is it a Bachelors (no apostrophe s) degree, and in neither case would degree be Degree. The proper designation is, as an example, "John Doe earned his Bachelor of Science degree from ..."; capital B and capital S, with a lower case d. Did he earn it in civil engineer-

ing? In that case you would write, "...awarded Mr. Doe a Bachelor of Science degree in Civil Engineering...", right? **Wrong!** Right would be "...awarded Mr. Doe a Bachelor of Science degree in civil engineering..." (And for you diehards who seem so infatuated with capital letters, "...a Bachelor of Science degree in CIVIL ENGINEERING..." would also be incorrect!) If you want to refer to a "bachelor's degree," note that the b of bachelor's would not be capitalized, and that bachelor's involves an apostrophe s. All this applies to master's degree "stuff."

Avoid weird capitalization. Before you issue whatever it is you want to send out, check out the capitalization. Ask yourself, "Why am I capitalizing this word?" If the answer is, "Because I think I'm supposed to, but I'm not positive," get help. (An e-mail to "Dr. English" <info@asfe.org> may get you a quick response, if the doctor is in.)

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