

# Why IEEE Members Need Ethics Advice and Ethical Support When Engaged as At-Will Employees

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## Introduction

This article is intended to provide a valuable input to the TAB/SSIT Task Force, set up to look into IEEE's involvement in ethics and gaps which may exist and need to be fixed (1). In this article, I cite essays of law (2,3) written by Dr. Ronald B. Standler, *attorney in Massachusetts and consultant and Senior Member of IEEE, now retired* (4), which provide an excellent detailed basis of understanding of how most engineers are employed; mostly with little or no protections to practice ethically. His essays explain an important part of the law, under which many of IEEE Members are employed under the "at-will employment doctrine" and wrongful discharge. Under this law, an employee may be terminated/fired for any reason, just or unjust, moral or immoral, ever since the late 19<sup>th</sup> century in the USA.

The at-will law in its rawest form provides little or no protection to the employed engineer, but a new concept, the "public policy exception to the rule", is beginning to provide some areas of relief. In this article, it is shown how IEEE in the BART case (5) took advantage of this public policy exception and in doing so established a potential landmark basis for future IEEE support of ethical engineers threatened or terminated from their employment under the at-will law. This will provide to the Task Force access to the needed legal understanding to better comprehend the ethical and employment dilemma faced by IEEE Members when they are employees of and practice through an organization under the at-will law.

## **Background of the Problem and Biggest IEEE Ethics Gap**

An important fact which the Task Force should take into consideration is how vulnerable an ethical IEEE engineer is when engaged under this at-will law in the USA, and possibly in other areas of the world yet to be fully understood, when engaged as an employee without the protection of a written contract. Under this legal doctrine, an employee can be terminated for any reason, just or unjust. And because of that, IEEE employed engineers need to have access to IEEE's ethics advice and ethical support so they can get up to date information and advice to assist them in resolving their dilemma satisfactorily. IEEE Members may be employed in the USA as either "at-will" or "just-cause" employees. In "**at-will**", the employee may be terminated for any reason, being just or not just, whereas in "**just-cause**" there must be a legitimate reason, generally spelled out in a employment contract, to terminate.

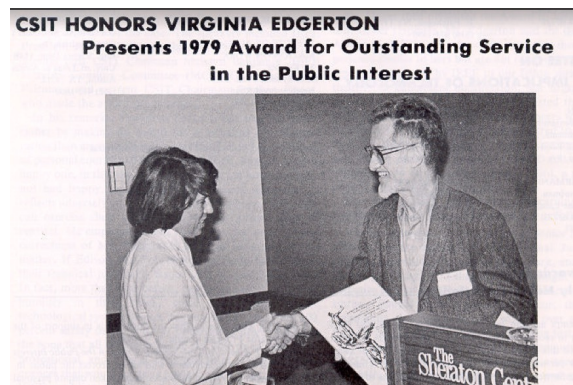
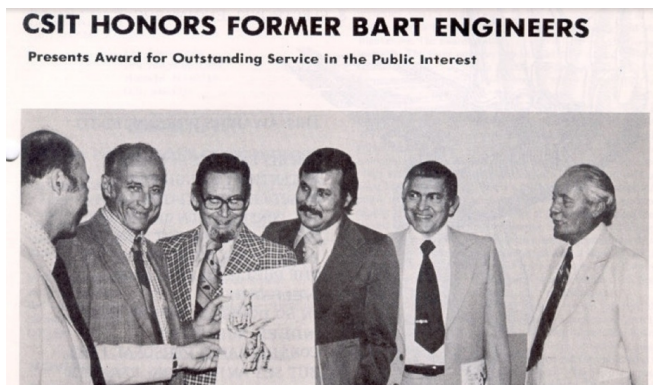
Today, and since 2000, however, they are denied both ethics advice and ethical support( 6, 7, 8) under today's restrictions in 1.3 and 1.4 of the Ethics and Member Conduct Committee's Operations Manual, (9). This dilemma is therefore seen as the main ethics gap for the Task Force to deal with. However, on a brighter light, I have shown in (10) how it was possible to achieve a positive outcome in one employee-employer ethics dispute, which I called a WIN-WIN outcome. There, ethics advice and ethical support were able to be applied internally in the place of employment under the at-will law, and an accommodation was reached with Management, which enabled achieving this outcome. Hopefully, IEEE will see fit to restore ethics advice and ethical support to provide an external source of assistance in future employee-employer disputes.

This at-will doctrine is attributed to Horace C. Wood, who in 1877 wrote in his work "Master and Servant" this doctrine as he saw the employment relationship at that time. An added view of this is that the employment may be terminated at-will by either party; either employer or employee. It seems that the USA is one of the only countries in the industrialized world with this at-will lack of

employment protection to the employee.

## **How The At-Will Employment Doctrine Can Affect Ethical IEEE Member Employees**

The above at-will explanations illustrate the law under which many IEEE Member employees work. They have no written employment contract and can be terminated at-will, for cause or no cause at all, Standler writes. We have seen this in these 3 IEEE supported cases: BART (11), Virginia Edgerton (12), and Salvador Castro (13). Each of these cases were brought to the IEEE after each had been terminated, investigated, and then later, ethical support provided. Following this, each was recognized for their service to the public and became a recipient of the IEEE/SSIT Barus Award (14).



Salvador Castro Receives SSIT's 2001 Carl Barus Award

## **An Exception to the At-Will Employment Law-the Public Policy Exception to the Rule**

In Standler's At-Will essay (2), there is discussed how an exception to

the at-will rule came about. It is called the “public policy exception” to the at-will employment rule. This was a ruling handed down by the California District Court of Appeal in 1959, referred to as *Petermann v. International Brotherhood of Teamsters*. It said that an at-will employee who is asked to commit perjury by his employer, but refuses to, cannot be terminated under the at-will law. Then later in 1980 the California Supreme Court accepted the *Petermann* reasoning, followed the same year by a landmark ruling written by the New Jersey Supreme Court. These are discussed in *Standler’s ”Professional Ethics and Wrongful Discharge”* (3). Following these 2 rulings, other states began to recognize the public policy exception to the at-will rule. In essence, Public Policy means that one cannot do lawfully what is harmful to the public, or public good and in the *IEEE BART Case Amicus Curiae* it argued that because of the public policy exception to the at-will rule, there is an implied term in the BART engineers unwritten contract, which can not be violated.

### **IEEE’s Amicus Curiae in the BART Case Was Based on This Public Policy Exception to the At-Will Rule**

In the BART case, where the IEEE in 1975 entered its landmark *Amicus Curiae* brief (15) in the case, it stated the following, citing this public policy exception to the at-will employment law:

#### **II. Summary of Argument**

This Court is expected to rule, as the trial proceeds, on questions of law, and this *amicus curiae* brief is addressed solely to those rulings.

Within that framework, we urge this Court to rule:

1. *As to Admissibility of Evidence:* That evidence of professional ethics of engineers, as outlined herein and as further developed by the parties, is relevant, material, and admissible;

2. *As to Any Motions for Judgment:* That, in consideration of any motion to dismiss or for judgment by this Court, the Court should rule that an engineer is obligated to protect the public safety, that every contract of employment of an engineer contains within it an implied term to the effect that such engineer will protect the public safety, and that a discharge of an engineer solely or in substantial part because he acted to protect the public safety is a breach of such implied term; and

3. *As to Jury Instructions:* In any charge to the jury herein, this Court should instruct the jury that if it finds, based upon the evidence, that an engineer has been discharged solely or in substantial part because of his bona fide efforts to conform to recognized ethics of his profession involving his duty to protect the public safety, then such discharge was in breach of an implied term of his contract of employment.

We base this position upon the cases, statutes and ethical codes discussed below.

#### *Professional Ethics Are Material and Relevant*

California judicially recognizes that an employee may not be arbitrarily discharged where the discharge would be inconsistent with the public good, even if his employment contract is terminable at will. In *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d (1959), it was held that an employer may not discharge an employee because the employee refuses to commit perjury. The public has too great a stake in the integrity of the judicial process to permit such a discharge.<sup>1</sup>

In *Petermann*, the District Court of Appeal for the Second District noted that the contract of employment did not provide for any fixed period of duration and that such a relationship is generally terminable at will, "for any reason whatsoever." But it also noted that such a right of discharge "may be limited by statute" or "by considerations of public policy." The Court then said at page 188:

By "public policy" is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public order. . . . [emphasis by the Court]

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The Court then noted that, because the State has a declared policy against perjury, "the civil law, too, must deny the employer his generally unlimited right to discharge a employee whose employment is for a unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury." The Court said that "the law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered." *Id.* at 188,189. The lower court having dismissed, the Court of Appeals reversed.

When questions of public safety are at stake, an engineer's code of ethics stands in the same position as the laws against perjury. If a code of ethics properly requires the protection of the public, a discharge because a employee insisted on following that code would be inconsistent with the public good. Thus compliance with such a code must be deemed an *implied term* of the employment contract.<sup>2</sup>

California statutes clearly recognize a engineer's obligation to protect the public. California Government Code, Section 835 waives the State's sovereign immunity and makes a public entity liable for conditions dangerous to the public. Section 840.2(b) of the same Code makes a public *employee* liable if he falls to take adequate measures to protect the public from such conditions. That section obviously encompasses any and all engineers engaged in public employment.

California law, then, mandates adherence to ethical and moral standards. Engineers have adopted (see Point II below) proper ethical codes to complement statutory codes. We urge this Court on the *Petermann* principle to recognize (1) that an engineer has a overriding duty to protect the public, and (2) that California law, including statutes and case law, supports the drafting of ethical codes, makes the terms of generally accepted professional ethics relevant and material in a case such as this, and effects a legally enforceable incorporation of such codes into engineering contracts of public employment, insofar as such codes are widely acknowledged to be necessary for the protection of the public.

### **The Potential Impact of the IEEE Amicus Curiae BART Case Brief Argument**

A detailed report was published about the whole BART case, titled "Divided Loyalties"(16). It discussed what happened at BART, the safety issues raised by the 3 BART engineers, their firing, the subsequent investigations, the articles published by the IEEE Spectrum magazine, Steve Unger's and the Committee on the Social Implications of Technology, CSIT, investigations and its urging via TAB for the IEEE to enter the BART case, the ExCom and Board



approval to enter, and the subsequent Amicus Curiae legal brief of IEEE, which was entered in the case in January 1975.

Contained in Divided Loyalties are these 2 significant writings. The first highlighted what IEEE's legal team viewed as the most important part of its brief:

From a legal point of view the most significant aspect of the brief is contained in its conclusion.

Based on the foregoing, we submit and we urge this court to acknowledge that an engineer has an overriding obligation to protect the public.

Specifically we urge this court:

1. to rule that evidence of professional ethics is relevant, material and admissible in this case; and
2. to rule, as to any motions for judgment or any jury instructions, that an engineer is obligated to protect the public safety, that an engineer's contract of employment includes as a matter of law, and implied term that such engineer will protect the public safety, and that a discharge of an engineer solely for unsubstantial part because he acted to protect the public safety constitutes a breach of such implied term.

and then, Steve Unger and CSIT (17) developed the view that IEEE needed to provide ethical support to its Members, by adopting the following resolution:

On March 25, 1974, CSIT held a open meeting in New York City and the following resolution was passed unanimously (with 16 affirmative votes):

Whereas in the practice of their profession, employee engineers sometimes face conflicts between what they perceive to be the public interest, health, or safety and the demands of management. They sometimes face reprisals from their employers if they act in conformity with professional ethics. A notable case in point is that of the three BART engineers, as described in the attached article.

Resolved that the Committee on Social Implications of Technology hereby request:

- a) That the IEEE establish mechanisms for providing support to engineers whose acts in conformity with ethical principles may thus have placed them in jeopardy. These procedures could include information mediation, formal investigation followed by publication of the facts, litigation, and public condemnation of unfair employer practices;
- b) That even before eventual establishment of such procedures, the IEEE intervene in the case of and in support of the three BART engineers to help establish an important precedent for the engineering profession.

Out of these, by 1978, was created the Member Conduct Committee with its dual purpose to 1. Discipline Members and 2. To Render Ethical Support. These dual purposes were implemented successfully for the next 20 years, until beginning in 1998, all ethical advice and support services were terminated by IEEE's Ex Com and Board of Directors (18). But, today, the EMCC is prohibited from rendering both ethics advice and ethical support to its Members. These restrictions are contained in 1.3 and 1.4 of the EMCC Operations Manual, shown below. My POSITION STATEMENT document (6) shows how and where these violate IEEE Governance Documents and the New York Not for Profit Corporate Law governing Directors duties to their Members.



### 1.3 Scope

**IEEE Bylaw I-305.6**

"The Ethics and Member Conduct Committee shall make recommendations for policies and/or educational programs to promote the ethical behavior of members and staff, and shall consider instituting proceedings, as defined in IEEE Bylaws I-110 and I-111, related to matters of member and officer discipline and requests for support. Neither the Ethics and Member Conduct Committee nor any of its members shall solicit or otherwise invite complaints, nor shall they provide advice to individuals."

### 1.4 Limits to Activities

**IEEE Constitution, Article 1, Section 2**

"The IEEE shall not engage in collective bargaining on such matters as salaries, wages, benefits, and working conditions, customarily dealt with by labor unions."

The Ethics & Member Conduct Committee shall not be involved in employee-employer disputes.

## Ethical Advice and Support Services Needing to be Restored

I suggest for the TAB/SSIT Task Force to take the 6 points discussed in Standler's Conclusion (2) and apply them to what IEEE Member employees face working for an employer who would willingly intimidate, threaten, punish or worse terminate an ethical engineer, when suggesting remedies to TAB, as its work progresses.

Additionally, here are my suggestions for additional considerations the Task Force may consider recommending also to TAB:

1. **Build Upon/Expand Martha Sloan's Ethics Conflict Resolution Service, ECRS, Proposal (19) Incorporating:**
  - a) **A Moderated Ethics HOT Line,**
  - b) **An Ethics Legal Support Fund,**
  - c) **Support and Amicus Curiae Legal Briefs in Employee-Employer Disputes**
  - d) **Publishing of Ethics articles in the INSTITUTE on a continuing basis**
  - e) **Ethics Outstanding Service Awards (like the SSIT Barus Award)**
  
2. **Amend the IEEE Constitution and add these into it as it gives the Members protective control, not the Board, as the Board can Amend if placed in the ByLaws**

## ***Specific Elements of the Sloan Ethics Conflict Resolution Service, the ECRS (19)***

- 1. Provide Education to the Members**
- 2. Interpret applicable IEEE Governing Documents**
- 3. Hold Face-to-Face Meetings with Those Charging or Asking for Help**
- 4. Provide a Sounding Board Function, Electronic or Hard Copy Media Assistance**
- 5. Provide a Third Party Hearing Panel of Experts or Peer Review**
- 6. Whistleblower Avoidance Advice**
- 7. Mediation or Arbitration Service**
- 8. Membership in and Assistance from the Ethics Officers Association**

### **Conclusions**

Because most IEEE Members are employed under the at-will employment doctrine, they are at risk of either being reprimanded or worse being terminated without recourse, when they raise an ethical principle with their employer and then are placed in jeopardy for doing so. A legal ray of hope, however was developed, in the Petermann ruling, where it argued that there is a Public Policy exception to the at-will rule. IEEE in the BART case used this to argue that an engineer had an implied term in its employment wherein they are legally obligated to protect the public in accordance with their Code of Ethics. Given these facts, the TAB/SSIT Task Force should develop findings leading to the restoration of the IEEE EMCC being charged with rendering full ethics advice and ethical support to Members in need.

### **SOURCE MATERIAL AND REFERENCES UTILIZED**

- 1. Elden, Walter L. “IEEE Involvement in Ethics and Gaps Needing Fixed”**  
[http://ethw.org/images/6/6c/IEEE%27s\\_Involvement\\_in\\_Ethics\\_and\\_Gaps\\_Needing\\_Fixed.docx](http://ethw.org/images/6/6c/IEEE%27s_Involvement_in_Ethics_and_Gaps_Needing_Fixed.docx)
- 2. Standler, Dr. Ronald B., “History of At-Will Employment Law in the USA”**

<http://www.rbs2.com/atwill.htm#anchor555555>

3. Standler, Dr. Ronald B., **“Professional Ethics and Wrongful Discharge”**

<http://www.rbs2.com/ethics.htm>

4. Standler, Dr. Ronald B., **“Homepage of Dr. Ronald B. Standler”**

<http://www.rbs2.com/index.htm>

5. Unger, Dr. Stephen H. **“The BART Case-Ethics and the Employed Engineer”**

<http://ewh.ieee.org/soc/ssit/Newsletter%20Archive/1972-1981/TS1-4-73.pdf>

6. Elden, Walter L. **“A Position Statement on EMCC Restrictions in Ethics Employee-Employer Disputes**

[http://ethw.org/images/d/d6/A\\_POSITION\\_STATEMENT\\_DOCUMENTING\\_ETHICAL\\_SUPPORT\\_MEANING.doc](http://ethw.org/images/d/d6/A_POSITION_STATEMENT_DOCUMENTING_ETHICAL_SUPPORT_MEANING.doc)

7. Elden, Walter L. **“An Input to the SSIT Task Force To Restore IEEE Ethics Advice and Support to its Members”**

[http://ethw.org/images/3/32/An\\_Input\\_to\\_the\\_Task\\_Force\\_Looking\\_into\\_IEEE\\_Ethics\\_and\\_Gaps\\_Therein.pdf](http://ethw.org/images/3/32/An_Input_to_the_Task_Force_Looking_into_IEEE_Ethics_and_Gaps_Therein.pdf)

8. Elden, Walter L. **“An Historical Walk Through of IEEE’s Involvement in Ethics, 1884 – 2015”**

[http://ethw.org/images/d/db/An\\_Historical\\_Walk\\_Through\\_of\\_IEEE's\\_Support\\_and\\_Non-Support\\_of\\_Ethics%2C\\_1884-2015.pdf](http://ethw.org/images/d/db/An_Historical_Walk_Through_of_IEEE's_Support_and_Non-Support_of_Ethics%2C_1884-2015.pdf)

9. IEEE, **“IEEE’s Ethics and Member Conduct Committee Operations Manual”**

[http://www.ieee.org/documents/emcc\\_opm\\_feb09.pdf](http://www.ieee.org/documents/emcc_opm_feb09.pdf)

10. Elden, W., **“How Internal Ethics Advice and Support Achieved a WIN-WIN Outcome in an Employee-Employer Dispute”**

[http://ethw.org/images/9/9a/How\\_Internal\\_Ethics\\_Advice\\_and\\_Support\\_Achieved\\_a\\_WIN\\_WIN\\_Outcome\\_in\\_an\\_Employee\\_Employer\\_Dispute.docx](http://ethw.org/images/9/9a/How_Internal_Ethics_Advice_and_Support_Achieved_a_WIN_WIN_Outcome_in_an_Employee_Employer_Dispute.docx)

11. Unger, S. **“The BART Case : Ethics and the Employed Engineer”**  
<http://ewh.ieee.org/soc/ssit/Newsletter%20Archive/1972-1981/TS1-4-73.pdf#page=6>

12. **“The Virginia Edgerton Case Involving 911 Delay Flaws, Who was fired”**  
<http://ewh.ieee.org/soc/ssit/Newsletter%20Archive/1972-1981/TS7-26-79.pdf>

13. **“The Salvador Castro Case of the Defective Infant Breathing Device”**  
<http://www.onlineethics.org/cms/23337.aspx>

14. IEEE SSIT, **“The IEEE Society on Social Implications of Technology Barus Award and Awardees”**  
<http://ieeessit.org/awards/>

15. IEEE, **“IEEE’s Amicus Curiae in the BART Case”**  
<http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=6498825>

16. Purdue University, **“Divided Loyalties-Whistle Blowing at BART”**  
<http://www.thepress.purdue.edu/titles/format/9780931682094>

17. Unger, S., **“Supporting the Ethical Engineer – The Road Ahead”**  
<http://ewh.ieee.org/soc/ssit/Newsletter%20Archive/1972-1981/TS6-23-78.pdf>

18. Unger, S., **“The Assault on IEEE Ethics Support”**  
<http://www.onlineethics.org/cms/8824.aspx>

19. Sloan, M., **“Proposed Ethics Conflict Resolution Service, the ECRS”**  
[http://ethw.org/images/9/9b/Ethics\\_Conflict\\_Resolution\\_Service\\_ECRS.docx](http://ethw.org/images/9/9b/Ethics_Conflict_Resolution_Service_ECRS.docx)

