UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER REGARDING SANCTIONS: April 20, 2017

CBCA 2953, 2954, 2955, 3596, 4175, 4377, 5006

SUFFOLK CONSTRUCTION COMPANY, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James R. Newland, Jr., and Anthony J. LaPlaca of Seyfarth Shaw LLP, Washington, DC, counsel for Appellant.

John K. Villa and Charles Davant IV of Williams & Connolly LLP, Washington, DC, counsel for James R. Newland, Jr., and Seyfarth Shaw LLP.

Barry E. Cohen and Peter J. Eyre of Crowell & Moring LLP, Washington, DC, counsel for Suffolk Construction Company, Inc.

Christopher Weld, Jr., and Melinda Thompson of Todd & Weld LLP, Boston, MA, counsel for Nadine Ebersole, Murray Smith, and Glen Stevens.

James F. H. Scott and Justin S. Hawkins, Office of General Counsel, General Services Administration, Washington, DC; and Nancy E. O'Connell and Meaghan Q. LeClerc, Office of Regional Counsel, General Services Administration, Boston, MA, counsel for Respondent.

Before the Full Board.[1]

Opinion for the Board by Board Judge **SOMERS**. Board Judge **ZISCHKAU** concurs in part. Board Judge **VERGILIO,** with whom Board Judge **LESTER** joins in full, dissents. Board Judges **SHERIDAN** and **CHADWICK** join in the dissent as to all but the first paragraph.

ORDER

These cases involve a construction dispute between Suffolk Construction Company, Inc. (Suffolk) and the General Services Administration (GSA) presenting numerous claims. Background on these claims may be found in our August 26, 2016, decision denying GSA's motion to dismiss one of the appeals. *See Suffolk Construction Co. v. General Services Administration*, CBCA 4377, 16-1 BCA ¶ 36,476.

Pending before the Board is GSA's motion for sanctions, arising from the removal of contract drawings from GSA counsel's table in the Board's courtroom on Thursday, February 2, 2017, and Suffolk's representatives' subsequent actions.[2] The actions giving rise to GSA's motion are new to this Board and raise issues of first impression. A majority of the judges found the matter to be of exceptional importance and opted under Board Rule 28 (48 CFR 6101.28 (2016)) for resolution by the full Board.[3] The Board notified the parties of this action by order dated March 9, 2017.

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[1] Judge Allan H. Goodman is serving as the mediator in these cases and has abstained from this decision. Judge Harold D. Lester, Jr., has abstained from the portion of the decision in which the Board considers sanctions against the law firm of Seyfarth Shaw LLP.

[2] Anthony J. LaPlaca, a Seyfarth Shaw associate and co-counsel for appellant, was not present at the time of the removal of the drawings and has not been implicated in any of the actions at issue here.

[3] Pursuant to Board Rule 1(e), the presiding judge is responsible for processing the case, including scheduling and conducting proceedings and hearings. All other matters, except for those before the full Board under Rule 28, are decided for the Board by a majority of the panel.

Background

In 2006, GSA awarded Suffolk a contract to renovate the John W. McCormack United States Post Office and Courthouse in Boston, Massachusetts. Suffolk completed the renovation in 2010. Suffolk submitted various claims to the contracting officer, who issued final decisions denying the majority of the claims. Suffolk appealed those decisions to the Board. These consolidated appeals, involving multiple claims, were filed with the Board over a period of approximately four years.[4] In total, Suffolk seeks approximately $25,000,000. GSA has asserted a counterclaim.

Suffolk's lead counsel is James R. Newland, Jr., a partner in the firm of Seyfarth Shaw LLP.[5] GSA's lead counsel is James F. H. Scott. The complex litigation resulted in lengthy discovery and multiple revisions to the dates set forth in the Board's scheduling orders. A revised scheduling order dated November 14, 2016, set forth November 30, 2016, as the due date for the parties to submit a joint appeal file.[6] Meanwhile, throughout this time period, the parties also attempted to settle the appeals through mediation.

The Board convened the hearing on the merits on December 20, 2016, at the John Joseph Moakley United States Courthouse in Boston, Massachusetts. The parties anticipated the hearing would take approximately six weeks.

The parties had agreed that the appeal file would be available to the parties and the Board at the hearing in electronic format, on a portable hard drive. At a status conference on November 23, 2016, GSA advised the presiding judge that it had completed uploading its appeal file exhibits, but reserved the right to further supplement the appeal file. However,

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[4] Suffolk filed the first three appeals in September 2012, followed by another appeal in 2013, and two others in 2014. The United States Court of Federal Claims transferred the final appeal to the Board in 2015.

[5] Mr. Newland is also a licensed architect. He earned his J.D. in 1998 and has almost twenty years of experience as a licensed attorney.

[6] Under the Board's rules, the documentary record in appeals is primarily assembled through the parties' submission of appeal files as prescribed under CBCA Rule 4. In this case, after the filing and consolidation of the first three appeals, the parties received approval to submit the Rule 4 file (to be compiled by GSA) and the supplemental Rule 4 file (to be compiled by appellant) on computer disks. The supplementation of the Rule 4 file in these appeals has been an organic, ongoing process.

the Board was not informed that the electronic appeal file did not include a complete set of the original solicitation drawings.

These documents had yet to be uploaded to the electronic appeal file when the Board reconvened the hearing on Monday, January 30, 2017, for four scheduled days of testimony in the Board's courtroom 3 in Washington, D.C. Neither party objected to the potentially incomplete nature of the electronic files. After the end of the first day of the hearing, the Board gave the parties permission to leave their documents overnight in the courtroom and provided the parties access to nearby conference rooms. Counsel for GSA used conference room A, and counsel for Suffolk used conference room B.

At some point, GSA brought four large, bound rolls of interlineated (also called conformed or posted) contract drawings into courtroom 3. Because this particular set of drawings had not yet been added to the electronic appeal file, counsel, the presiding judge, and witnesses used these documents in their paper form during the hearing.[7]

On February 2, 2017, the Board adjourned the hearing at 2:32 p.m., upon the completion of the direct examination of Suffolk's witness, Murray Smith. The parties left the courtroom and entered their respective conference rooms. GSA left the bound drawings and binders containing the contract specifications in the courtroom. GSA counsel planned to begin cross-examining Mr. Smith when the hearing reconvened on February 7 at the E. Barrett Prettyman United States Courthouse in Washington, D.C., to which the hearing was to be relocated while the Board's courtrooms were undergoing renovations.

The Board's security camera footage shows that at 2:58 p.m., Mr. Newland, Mr. Smith, Nadine Ebersole (then employed by Suffolk as a paralegal)[8], and Glen Stevens (an expert witness for Suffolk) walked out of their conference room carrying trial materials. As they walked past the door to courtroom 3, they stopped. Mr. Newland motioned the others to follow him into the courtroom, which they did. Once in the courtroom, Mr. Newland removed the interlineated contract drawings from GSA counsel's table.[9] At 2:59 p.m., the

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[7] The Board has yet to officially enter these drawings into the record.

[8] Ms. Ebersole earned a juris doctor degree in 2016 and was admitted to the Massachusetts bar on November 17, 2016. She left her paralegal position at Suffolk on February 10, 2017, and began work as a first-year associate at a law firm on February 21, 2017.

[9] On February 9, 2017, during a hearing convened to investigate the matter of (continued...)

four emerged from the courtroom with the drawings. Ms. Ebersole carried two rolls of drawings and Mr. Smith carried the remainder. They walked down the corridor toward the exit. Conference room A is visible from the corridor through a wall of windows. GSA representatives were in conference room A at the time Suffolk's team left the courtroom with the drawings. In declarations submitted to the Board, Mr. Newland and others say that they thought that GSA had left the materials behind in the courtroom, and Mr. Newland stated that he decided to help GSA by transporting the drawings from the courtroom to the Prettyman Courthouse for their use the following Tuesday, when the hearing was scheduled to resume.[10] The four, however, did not take all of the material in the courtroom. They left behind GSA's copy of the contract specifications, as well as a series of demonstrative drawings on a large sketch pad that had been designated and identified as hearing exhibits.

The four walked past conference room A, where GSA representatives remained, past the office of the Clerk of the Board, past the Board's security staff, into the elevator lobby, and departed, carrying the drawings and other trial materials. Mr. Newland did not inform GSA representatives, or anyone else, that he had removed the drawings from GSA's counsel's table, the courtroom, or the building. Mr. Newland placed the drawings into the trunk of his car, drove his witnesses to the D.C. offices of Seyfarth Shaw LLP, and then proceeded eventually to his home,[11] which is some distance south of Washington, D.C.

Shortly after 3:00 p.m., GSA's Mr. Scott left conference room A, went into the courtroom, and discovered that the interlineated contract drawings were missing. Mr. Scott contacted the Clerk of the Board and other Board personnel and expressed concern that the documents had been removed without his knowledge. At 3:10, he called Mr. Newland to ask him about the drawings. Mr. Scott left a voicemail message:

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[9](...continued)
the removal of the documents from the courtroom, Mr. Newland stated that he removed the drawings from the courtroom. Transcript at 1218, 1228.

[10] The Board has deemed it unnecessary to probe the declarations, given the limited participation of the individuals in the proceedings and the statements by Mr. Newland that he gave instructions to remove the drawings from the courtroom.

[11] At the February 9, 2017, hearing, Mr. Newland stated that he drove home after taking Mr. Smith and Mr. Stevens to his office. Transcript at 1227. In its February 24, 2017, submission, counsel for Mr. Newland and Seyfarth Shaw LLP state that Mr. Newland drove to a swim meet in Manassas, Virginia. Seyfarth Shaw LLP's and James R. Newland, Jr.'s Submission dated February 24, 2017, at 20-21.

> Hi Jim. It's Jim Scott calling. I hope everything is, uh, going, fine. We are missing the set of drawings that was on our counsel table. The specifications are still there. But the drawings aren't there now. And I was just wondering if maybe you had taken them with you thinking that they were yours. Perhaps they are in your possession. If they are in your possession, though, please let me know. We'll figure out some way to get everything back together and otherwise have a good afternoon.

Mr. Scott left a phone number for Mr. Newland to call.

Then, at 3:15 p.m., Mr. Scott followed up with an e-mail message:

> Jim, Justin [Hawkins, Mr. Scott's co-counsel] and I packed up GSA's materials, and while the specifications were on our counsel table, GSA's set of drawings was not. Perhaps did you take this set with you? If so, I'd like to make arrangements to get them returned for my use tomorrow.

At 3:31 p.m., Mr. Newland replied in an e-mail message that "[w]e thought we would bring ½ the documents to take to prettyman. Will get them to you tomorrow. Let me know where you will be."

Also at 3:31 p.m., Mr. Scott called Mr. Newland, in search of the documents (apparently having not yet read Mr. Newland's e-mail message). Mr. Newland acknowledged that he had the drawings and said he took them to assist in relocating them to the courthouse. Mr. Newland stated that he was on the highway, on his way home, and would return the drawings to Mr. Scott the following morning.

At 8:11 p.m., Mr. Scott sent Mr. Newland the following e-mail message:

> As discussed, please return the drawings to me at GSA headquarters, address below, as soon as possible tomorrow – I will likely be at the office by 7:30. If I am not available to meet your courier, please include contact information for my office's administrative assistant . . . my phone should be used for contact as well.

Mr. Newland at some point decided to "send [the drawings] out and have them scanned while we had them because we had a four day break for trial." Transcript at 1233. At 6:50 a.m., on Friday, February 3, 2017, a third-party vendor picked up the drawings from Mr. Newland's house to scan them. Half an hour later, Mr. Newland advised Mr. Scott by e-mail:

Dear Jim,

This is confirmed. As soon as the vendor is done scanning them for the Rule 4 file I have asked him to drop them off at your office. I also asked them to expedite it. I will be out of pocket in meetings for the rest of the day, but will check in to make sure they're on track.

Mr. Scott responded by e-mail at 9:50 a.m.:

This is troubling. I now have the unpleasant situation where Suffolk knew the drawings were GSA's and removed them without our consent. . . . We must have the drawings back in our possession by noon today. If necessary, I will visit your vendor to pick them up. This is all very unnecessary and a needless distraction – should Suffolk require copies of any drawings in GSA's possession, GSA would have been willing to prepare scans as earlier discussed. Self help was not an option. For now, return the drawings by noon or inform me where I can obtain them by noon.

At 10:17 a.m., Mr. Newland responded, in part:

We are having the documents scanned over a Friday during a break in trial. They will be returned today as soon as that work is completed. We did this because GSA simply failed to provide the drawings weeks ago. As you know, for the last three weeks Anthony [LaPlaca] and I have emailed requesting GSA introduce the complete drawings into the Rule 4 file, which despite assurances, never happened. . . . The vendor will return the documents as soon as they are completed. In the meantime please mind your tone. I have copied Nancy [O'Connell, regional counsel for GSA] so that she is fully aware of the nonsense you are dispensing – this type of attitude does nothing to bring the parties closer to settlement.

Mr. Scott wrote, at 10:51 a.m., in pertinent part:

The biggest problem here is process. In the past few months, GSA has scanned the drawings, and indeed last weekend I initiated the process of having them added to the Rule 4 file. We actually discussed sharing them with Suffolk for incorporation into the Rule 4 file. Rather than coordinating an exchange of existing electronic files, you removed files from our counsel table without informing us – we literally did not know where they were until we received your confirmation that Suffolk removed our drawings. . . . Your

> selected method of achieving a task, no matter how important, was inelegant . . . . For now, the drawings are GSA's and GSA has a right to their immediate return as discussed – as necessary, GSA will coordinate sharing the electronic copies we already have. Please advise of their precise whereabouts.

At 11:01 a.m., Mr. Newland wrote:

> To be very clear, no one from GSA has ever discussed with us or told us that GSA was scanning the documents; in fact I am certain you have not done so. . . . That is why we took the initiative because GSA has never done so. . . . Again, I simply cannot fathom why GSA should have ANY internal heartburn here. First, these are the very same documents GSA placed in the public domain years ago (2005 and 2006) and which have been provided to literally hundreds of people during the construction period.[12] Second, we are doing GSA's job in having them scanned in order to move this thing along. I fail to understand where you are coming from but as I stated in prior exchanges, the documents will be delivered to you when the work is done.

After asking Mr. Scott whether the documents had been returned to GSA, Ms. O'Connell wrote to Mr. Newland at 4:04 p.m., stating, in part:

> Your actions in taking the plans and then handing them over to a third party for copying (something even you declined initially to disclose) is outrageous. If GSA has not received the the [sic] plans and any/all copies you made of them within the hour it will be necessary to engage [the presiding judge] in resolving this.

At 4:42 p.m., the vendor delivered the original drawings (some now unbound) to GSA headquarters. After e-mail exchanges among Mr. Newland, Mr. Scott, and Ms. O'Connell relating to the drawings, at 6:39 p.m., Mr. Newland sent an e-mail message to the presiding judge, with a copy to Mr. Scott:

> I am sorry to bother you on a Friday evening but here is a matter we will need to take up with you on Monday via telephone conference. . . . In a nutshell,

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12 This assertion is contrary to the record. This set of interlineated documents contained annotations made during performance such that it is impossible that this version was available in 2005 or 2006. Nothing suggests that the entire set of any version of the documents was available to the public.

> weeks ago, we asked GSA to supplement the Rule 4 file to include the complete electronic copy of the contract drawings because the drawings GSA gave us (pretrial) contained about 1/10 of the actual contract drawings. GSA confirmed it would do so. It however did not do so.
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> At the close of the hearing on Thursday evening we sent the hard copy plans used during the hearings to be scanned scanned [sic] into PDF form by our litigation consulting vendor for use in the Rule 4 file. All of them were returned to the GSA this afternoon.

This message fails to indicate that the materials were removed from GSA counsel's table and the Board's premises without the consent of GSA, that they were scanned and copied without coordination with GSA, or that Mr. Newland failed to return the documents to GSA immediately when so requested.

On Monday, February 6, 2017, the Board (with all three panel members participating) held a conference call to discuss the situation. GSA requested that appellant's counsel be sanctioned for taking the contract documents and having them scanned without GSA's permission. The Board invited GSA to put such a request into a written motion so that Suffolk could respond to it.

On February 7, the presiding judge reconvened the merits hearing at the new location and counsel completed the cross and re-direct examinations of Mr. Smith. The Board then suspended the merits hearing and scheduled a special hearing for February 9 on the issue of the removal of the interlineated contract drawings from the courtroom after the February 2 adjournment.

At the February 9 hearing, the Board received a binder of exhibits from GSA counsel and heard from both Mr. Scott and Mr. Newland regarding the events of February 2 and 3. At that time, Mr. Newland confirmed that he removed the drawings from counsel's table without asking or informing GSA. Mr. Newland also confirmed that he sent the original drawings to the vendor without obtaining GSA's permission.

The Board issued an order on February 10 setting forth procedures for written submissions from the parties. The schedule for submissions was later modified, with initial responses due on February 24, 2017, and replies due on March 3, 2017. The Board has received submissions from the parties and interested non-parties.

Discussion

GSA moves to disqualify Mr. Newland and Seyfarth Shaw LLP as counsel for Suffolk and urges that we exclude the fact testimony of Mr. Smith and expert testimony by Mr. Stevens, and bar Suffolk from using any drawing in the interlineated drawings as an exhibit. GSA suggests that dismissal of the appeals is also appropriate. Suffolk and the interested non-parties (including Mr. Newland and Seyfarth Shaw) contend that (a) Mr. Newland's removal of the contract drawings from counsel's table on February 2, his subsequent actions to have the documents scanned by an outside vendor, and his refusal immediately to return the documents until scanning had been completed did not constitute misconduct, and (b) no sanctions should be imposed upon Mr. Newland, his firm, Suffolk, or any of the other participants.

I.

The Board as a judicial tribunal possesses the power to sanction parties for unacceptable behavior. *Brasfield & Gorrie, LLC v. Department of Veterans Affairs*, CBCA 3300, et al., 14-1 BCA ¶ 35,806, at 175,117. Although the Board cannot issue monetary sanctions, *see id*. (citing *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821, at 167,406 (citing other board decisions which came to the same conclusion)); *A&B Limited Partnership v. General Services Administration*, GSBCA 15208, et al., 05-1 BCA ¶ 32,832, at 162,445 (2004), we have other inherent powers consistent with our authority under the Contract Disputes Act, 41 U.S.C. § 7105 (2012). Significantly, the Board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims. *Id*. § 7105(e)(2). We have essentially the same powers as that court to administer justice and to protect the integrity of our proceedings. *See id.* § 7105(f) ("A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board."); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 881-82 (1991) (holding that the Tax Court's special trial judges, whose "duties, salary, and means of appointment for that office are specified by statute," exercise significant discretion when they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders"); *In re Bailey*, 182 F.3d 860, 864 n.4 (Fed. Cir. 1999) (holding that non-Article III tribunals possess inherent authority on twin necessities: "the need to control proceedings before such court and the need to protect the exercise of judicial authority in connection with those proceedings"); *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135 (2004). In particular, "regulation of attorney behavior is an inherent power of

any court of law and falls within the discretion" of a judicial tribunal. *Bailey*, 182 F.3d at 864.

II.

Board Rule 33(a) sets forth the standards of behavior expected of all persons appearing before the Board. It provides:

> All parties and their representatives, attorneys, and any expert/consultant retained by them or their attorneys, must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and persons. As to an attorney, the standards include the rules of professional conduct and ethics of the jurisdictions in which that attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings. The Board will also look to voluntary professional guidelines in evaluating an individual's conduct.

Rule 33(c) provides procedures for the Board to use to determine whether sanctions are warranted in a matter. It states in relevant part:

> When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions.

Rule 33(e) states, in pertinent part:

> [T]he Board may discipline individual party representatives, attorneys, and experts/consultants for a violation of any Board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

Finally, Rule 28(a) states that full Board consideration may be ordered when the matter to be referred is one of exceptional importance. Rule 28(b) provides that "[a] majority of the judges may initiate full Board consideration of a matter at any time while the case is before the Board . . . . The parties will be informed promptly, through an order, of the matter

to be considered by the full Board." By order dated March 9, 2017, the Board advised the parties that a majority of the judges deemed the possible imposition of sanctions in this matter to be of exceptional importance and merited consideration by the full Board.

III.

Mr. Newland admits to removing GSA's interlineated contract drawings from opposing counsel's table, without permission and without notice. He admits that he took the drawings off the Board's premises, placed them in his car, and drove them to his home. Disregarding GSA counsel's request that he return the documents immediately, Mr. Newland elected to have them scanned and copied by a third party, delaying their return until late the following afternoon. As with the removal, the reproduction occurred without GSA's consent. This conduct is troubling, to say the least.

As much as we are troubled by Mr. Newland's removal of GSA's drawings from the courtroom, we are equally, if not more, troubled by Mr. Newland's changing and irreconcilable explanations for his actions. As noted above, on February 2, in response to Mr. Scott's e-mail message sent to him immediately after Mr. Scott discovered the drawings were missing, Mr. Newland initially said that "we thought we would bring ½ the documents to prettyman." This first explanation appears to be what Mr. Newland conveyed to his trial team.[13] In the sworn declarations submitted by Mr. Smith, Mr. Stevens, and Ms. Ebersole, all stated that they understood that Mr. Newland would be acting as the custodian of the documents for the purpose of transporting the drawings to the new hearing location for the next day of hearings.

On Friday, in his February 3 e-mail message to the presiding judge, however, Mr. Newland stated that he sent the drawings to a third party vendor for scanning on Thursday evening. Later, Mr. Newland claimed that the drawings were sent to be scanned and copied on Friday, early morning. Mr. Newland did not inform GSA counsel that he planned to have the drawings scanned and copied, nor does it appear that he told Mr. Smith, Mr. Stevens, or Ms. Ebersole about this plan. Mr. Newland further neglected to advise the presiding judge

[13] At the time that Mr. Newland coordinated the removal of the drawings, counsel for GSA and several witnesses were still in the GSA conference room. If Mr. Newland genuinely believed that these documents had been left behind, it would have been very easy for him to stop by GSA's conference room to ask GSA's representatives, or, alternatively, to stop by the Clerk of the Board to inform the Board that documents appeared to have been left behind.

that he had taken possession of the drawings and decided to hand them over to a third party for scanning without attempting to coordinate any of this with GSA.

At no time has Mr. Newland acknowledged his misconduct in removing the drawings from opposing counsel's table without permission. During the conference call before the panel on February 6, as well as during the February 9 hearing, Mr. Newland admitted removing the documents (we "literally carried out what we were able to carry"), seemingly unaware that his actions were problematic.[14] In response to GSA's allegations concerning the nature of the materials, Mr. Newland suggested that, in the absence of a protective order, he could freely remove any documents from the courtroom. Mr. Newland has elected to focus on GSA's failure to add these drawings to the electronic appeal file. However, as Mr. Newland also acknowledges, during the course of the hearing, he never informed the presiding judge of GSA's failure to produce the interlineated contract drawings. Instead, Mr. Newland took matters into his own hands. Mr. Newland's decision to appropriate the drawings from opposing counsel's table is inexcusable and violates the standards of professional conduct. Mr. Newland's attempt to shift the focus away from his conduct and to blame GSA is problematic.

IV.

Mr. Newland and Seyfarth Shaw put forth three declarations from self-described experts opining in support of the argument that Mr. Newland acted reasonably and ethically

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[14] The concurring decision suggests that Mr. Newland apologized for his conduct at the February 9 hearing. Mr. Newland, in fact, stated as follows:

> I'm sorry that the board is in this position. I know it's not something that's dealt with every day. It's certainly not something that I've been involved in, nor other members of my firm, to my knowledge, and I apologize for that. And I apologize if there was any consternation on GSA's part. At times this has been a very difficult and challenging litigation. It's a large case. There have been some issues we've – and it gives rise to frustration. But there was never, and there has been no intent ever to harm GSA or do anything other than get the drawings. . . .

Transcript at 1232. The concurrence's characterization of Mr. Newland's statements as an apology for his own conduct is charitable, to say the least.

in taking possession of the drawings.[15] Receiving expert testimony is appropriate when it "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Such testimony should not be admitted on issues of law. *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003); *Murfam Farms, LLC ex rel. Murphy v. United States*, No. 06-245T, et al., 2008 WL 4725468, at *2 n.1 (Fed. Cl. Sept. 19, 2008) ("The principle that expert testimony on pure issues of law is unhelpful to the finder of fact is universal among the circuits." (citing cases)).

We do not find it necessary to receive assistance from purported experts to understand the facts in this case or to enforce our own hearing procedures. We are not required to decide whether Mr. Newland (or anyone else) violated an ethical rule of a state bar. Even if we were, we doubt that "[e]xpert testimony concerning the fact of an ethical violation [would be] appropriate, any more than expert testimony is appropriate concerning the violation of a municipal building code" or any other legal rule. *Fishman v. Brooks*, 487 N.E.2d 1377, 1381 (Mass. 1986); *see also Nutrition 21 v. United States*, 930 F.2d 867, 871 n.2 (Fed. Cir. 1991) ("An expert's opinion on the ultimate legal conclusion is neither required nor indeed 'evidence' at all."); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir. 1977) (witness expertise "is hardly a qualification" to offer legal conclusions "when there is a knowledgeable [person] in a robe whose exclusive province it is to [state] the law"). For these reasons, we afford the three opinion declarations no weight.

The Board's power to protect its proceedings in the course of discharging its traditional responsibilities is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962)). Mr. Newland's actions have, at a minimum, seriously interfered with the administration of justice and impeded the orderly and expeditious disposition of this appeal. *See, e.g.*, *Speckman v. Minnesota Mining & Manufacturing Co.*, 7 F. Supp. 2d 1030, 1032-33 (D. Neb. 1997) (finding that counsel's improper removal of defendant's documents from defendant's plant after a deposition "undermines public confidence in our justice system" and "represents a blatant affront to the

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[15] These purported experts are retired Judge Christine O.C. Miller, who served on the United States Court of Federal Claims; John S. Pachter, a government contracts lawyer; and Milton C. Regan, Jr., a professor at Georgetown University Law Center. At least two of these experts received compensation for their time (Judge Miller received $300 per hour, and Mr. Pachter received $650 per hour). We note that these individuals' understanding of the facts appears to be based on an incomplete and biased exposition by the attorneys for Mr. Newland and Seyfarth Shaw LLP.

notion of fairness, dignity, and orderly dispute resolution"). Mr. Newland's decision to remove drawings from opposing counsel's table and transport them out of the courtroom and the building without permission, his failure to promptly return the documents in the same condition as removed, and his shifting justifications for his actions cause us to conclude that some sanction is warranted.[16]

V.

In turning to the sanction that is appropriate here, we find that Mr. Newland's action in removing materials from his opposing counsel's hearing room table – without that counsel's knowledge or consent – constitutes misconduct under our rules, in violation of Mr. Newland's duties to the Board, to the public, to the legal system, and to the legal profession. Further, we find that Mr. Newland's actions were intentional, and we find his current protestations that his original intent was only to be helpful by transporting documents to the Prettyman Courthouse to be beyond belief. Although he asserts that it "never occurred to [him] that GSA might object" to his removal of the drawings because "[m]oving [them] to the Prettyman Courthouse was necessary to ensure that the witness could continue referring to them in his ongoing testimony," Seyfarth Shaw LLP's and James R. Newland, Jr.'s Submission dated February 24, 2017, at 2, the record before us makes quite clear that, rather than coordinating this purported plan with GSA, Mr. Newland simply helped himself to the documents that he wanted.

The harm caused by Mr. Newland's actions is to the ability of the forum to control proceedings before it and to protect the exercise of judicial authority in connection with those proceedings. For example, in the normal course, attorneys are advised by the Board that it is safe to leave documents in the courtroom unattended. Mr. Newland's actions, which include the deliberate taking of the drawings from GSA counsel's table and refusal to return them immediately when asked to do so, amount to a deliberate and inexcusable taking of trial

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[16] The concurring opinion suggests, consistent with Mr. Newland's assertions, that GSA's alleged failure promptly to produce a digitized version of the drawings contributed to Suffolk's counsel's decision to remove the drawings in question. The facts as we understand them do not support such an inference. Presumably, multiple versions of these construction drawings, some possessed by appellant, and others by GSA, exist. When GSA brought the bound version of the interlineated contract drawings to the hearing, counsel agreed to use the drawings to question witnesses, with the understanding that GSA would have the drawings digitized to be uploaded to drives that would ultimately serve as the documentary record for decision. The organic, ongoing nature of the compilation of the appeal file is consistent with this interpretation.

materials from opposing counsel and shatter the expectation that documents may be safely left in the Board's courtrooms. We cannot countenance this behavior.

Nevertheless, we are unable to find any actionable injury to GSA from Mr. Newland's actions. Other than GSA's loss in confidence in its ability to trust in Mr. Newland's respect for the boundaries that attorneys typically expect to be observed by opposing counsel during active litigation, GSA has not identified any substantial prejudice and we find none.

GSA suggests a number of sanctions, including outright dismissal of the appeal, disqualification of Mr. Newland's law firm as counsel for Suffolk, exclusion of Mr. Smith's and Mr. Stevens' testimony, and prevention of appellant from using any drawings which are among those improperly removed. We do not believe that those sanctions are appropriate. As it impacts this proceeding, the error of other Suffolk representatives was merely in following the misguided direction of the firm's lead lawyer in these appeals. Neither these representatives nor Mr. Newland's law firm appeared to have taken part in his decisions. The drawings had been referenced in testimony to which no objection had been made, and the removal of them did not significantly prejudice GSA.

The conduct that has impeded the administration of justice is Mr. Newland's alone. We find Mr. Newland's conduct in removing the documents to be egregious as it violated the expectation of the parties in a hearing that their work product and trial materials are secure and, thereby, undermined the Board's ability to control the process and proceedings in these appeals. We hereby issue a public reprimand for his behavior.

ZISCHKAU, Board Judge, concurring in part.

I concur with the Board's decision to deny the sanctions requested by GSA, but I believe that Mr. Newland's removal of the contract drawings from the courtroom was an aberration from the cooperative approach characterizing his conduct throughout the course of this litigation. To put the matter in context, I discuss some additional background.

As the presiding judge of the panel assigned to these consolidated appeals, I have dealt with counsel for Suffolk and GSA since 2012, when the first of these appeals was filed. During the past four years, and beginning in December 2012, I have held telephone status conferences on a regular basis with counsel for the parties as they engaged in discovery and prepared for a hearing on the merits. Counsel have been zealous advocates for their clients, yet counsel have worked cooperatively with each other and have been reasonable in their dealings with the Board during these proceedings.

It has been clear throughout this litigation that the contract between GSA and Suffolk – including the contract's terms and conditions, the contract specifications, and the contract drawings – contains documents which are crucial to the resolution of the parties' disputes.

Prior to opening statements on December 20, 2016, the parties had agreed (and the Board had confirmed the agreement) that the appeal file would be cooperatively assembled and stored in electronic format, with each party and the Board having an external/portable hard drive of the appeal file exhibits. The parties also agreed that they would arrange the electronic repository of the appeal file exhibits so that an exhibit could be easily projected on a screen in a courtroom.

Suffolk made available an ftp site that permitted Suffolk and GSA to upload documents to the electronic appeal file repository. It was understood by the presiding judge and counsel that a complete copy of the contract, including the terms and conditions, contract drawings, specifications, and modifications, was to be part of the appeal file and was to be added to the electronic appeal file repository. Extensions were granted to the deadline for completing the electronic appeal file repository to allow GSA more time to upload its appeal file exhibits. By December 20, 2016, when the hearing began in Boston with counsel presenting their opening statements (followed by a site visit to the building at issue), GSA had uploaded only a partial set of the original solicitation drawings. The interlineated contract drawings set, the most up-to-date and accurate version of the contract drawings, had not been uploaded or provided to Suffolk.

With the first Suffolk witness scheduled to begin testifying on January 30, 2017, GSA's Mr. Scott, in an e-mail message to Mr. Newland on January 27, 2017, indicated that he wanted Mr. Newland's consent to supplement the appeal file with additional contract drawings or have those drawings treated as "permissible hearing exhibits" in order to permit the appeals to be heard "with the benefit of all contract drawings." Mr. Newland responded that he agreed that all contract drawings should be included as a supplement, preferably in electronic format.

During the week of January 30, GSA brought to the hearing only one set of the interlineated contract drawings. GSA provided no copy to Suffolk counsel or the Board, nor was an electronic file provided. Having not yet added this set of contract drawings to the electronic appeal file repository ahead of time, GSA brought the paper set of the drawings to the hearing so that the witnesses could refer to them during their testimony.

During the direct examination of the second hearing witness, Mr. Murray Smith, on February 1 and 2, the contract drawings brought by GSA were used repeatedly by Mr. Smith at the witness table when testifying. When the witness had the contract drawing rolls at the

witness table, the presiding judge would be looking at the same drawings, and sometimes one or both parties' counsel would be at the witness box observing the witness as he pointed to or discussed aspects of the drawings as part of his testimony. The interlineated drawings on several occasions were reviewed by Mr. Smith in the Suffolk-assigned conference room during breaks in his direct examination. The presiding judge expected that, in relatively short order, copies of this set of drawings would be made and that images of the drawings would be uploaded to the electronic appeal file repository, as the parties had previously agreed would be done.

On February 2, upon the completion of the direct examination of Mr. Smith, the Board adjourned the hearing at the request of the parties' counsel, and the hearing was scheduled to reconvene on Tuesday, February 7 at the Prettyman Courthouse. Mr. Smith was to be cross-examined by GSA counsel beginning on February 7. At the time of adjournment, neither party's counsel raised with the Board the issues of transporting the hearing exhibits to the courthouse for the resumption of the hearing five days later, or the making of copies and electronic images of the drawings.

Where, as here, there was only a single paper version of the interlineated contract drawings exhibit, and this exhibit would be needed for ongoing testimony during the hearing, the parties' counsel were obligated *to cooperate in sharing the exhibit* at least until copies or electronic images could be made. Whether or not weariness or frustration from these days of hearing affected the clear thinking of Mr. Newland, I do not condone his removal of the documents from the hearing room on February 2, without first cooperatively seeking agreement from GSA counsel. At the conclusion of the hearing on February 2, I would have expected GSA and Suffolk counsel to discuss and agree on how to transport the drawings to the new courtroom location, how to make copies of the drawings and have them scanned during the four-day break, and how the parties could fairly share in using those drawings for their own trial preparation during that break period. Since GSA brought the drawings to the hearing, and was supposed to have already added the drawings to the electronic repository, I would have expected GSA to be responsible for the prompt scanning and copying of these drawings. In any event, I would have expected counsel to raise immediately with me any problem they were having reaching an agreement.

Mr. Newland recognizes that he should not have left the Board with the drawings without notifying anyone. His decision to have the drawings scanned early Friday (February 3) morning might have been a reasonable approach to allow both parties to share the drawings, but here again Mr. Newland failed to cooperatively seek agreement from GSA's Mr. Scott before sending the drawings to be scanned. If the parties had contacted me Friday morning and sought direction, I would have permitted the scanning and copying so that both parties could have use of the contract drawings. Appellant had a right to have a

copy of the drawings exhibit to use for those intervening days, just as GSA had a right to have the exhibit for its use. I agree with the majority that GSA was not prejudiced. GSA had this set of drawings at all times prior to the hearing but had failed to make copies and upload images of this set of drawings to the electronic appeal file repository. On February 3, through the e-mail exchanges, and despite the unfortunate rhetoric from the parties' counsel, GSA counsel reasonably tried to accommodate Mr. Newland's fair access to the drawings by setting a deadline for return of the drawings, first at noon and later at 5 p.m. If the drawings had been returned by noon, this matter might not have drawn the attention of the Board.

In contrast to how lead counsel handled the contract drawings, co-counsel for each party cooperatively approached me on February 6, asking guidance on how to have the easel pad sketches transported from the Board's courtroom to the Prettyman Courthouse, and that was accomplished without any dispute.

Mr. Newland's conduct was an aberration in the way he has conducted himself during the past four years. At the February 9 hearing, he apologized for his conduct. As the presiding judge, this isolated event does not change my belief in Mr. Newland's honesty, trustworthiness, and fitness to practice before the Board. I have no doubt that he will fulfill his duties as counsel for the appellant, cooperate with GSA counsel, and support the Board's role in the fair administration of justice for the remainder of these proceedings. I believe the circumstances call for an admonishment from the bench, rather than a public reprimand.

VERGILIO, Board Judge, with whom Board Judge **LESTER** joins in full, and Board Judges **SHERIDAN** and **CHADWICK** join as to all but the first paragraph, dissenting.

I dissented from the vote to bring this matter of proposed sanctions initially to the full Board. The panel is entrusted with resolving such issues in the first instance. Rule 33(c). I saw no reason to elevate this matter, although it is neither routine nor pleasant.

With the matter before the full Board, I disagree with the ultimate conclusion to issue a simple public reprimand to Mr. Newland. Original documents were removed from agency counsel's table without the consent of agency counsel. Those documents were the property of the agency. The intentional removal is unacceptable and contrary to notions of the proper and ethical practice of law. That taking of the documents merits barring Mr. Newland, who acknowledges initiating the removal, from further participation in these appeals. For me, that is the crux of the sanction proceeding.

Mr. Newland's subsequent actions and explanations do not benefit his position. It is only fortuitous that agency counsel did not have notes or privileged material attached to or stuck between pages–something that seemingly was not known when the individuals departed the Board's premises with the materials. Removing the documents only to take to the courthouse would have deprived agency counsel from reviewing the documents in preparation for the cross-examination which was to commence in the new hearing space. Not promptly returning the documents also meant that Mr. Newland was depriving GSA counsel of their own documents. Having the documents scanned and copied, also without the consent of GSA counsel, further delayed the return of the material contrary to counsel's express requests for an earlier return. Mr. Newland had used the documents during his direct examination of a Suffolk witness, without expressing on the record any surprise that the documents existed or immediate need for an electronic or paper copy. Mr. Newland utilized an improper method to obtain the documents.

I concur with the decision to reject the declarations of Judge Christine O.C. Miller, retired; John S. Pachter, Esquire, of Smith Pachter McWhorter PLC; and Professor Milton C. Regan, Jr., Esquire, of Georgetown University, as improper for expert opinions; expert declarations are not needed to sort out these facts and are not proper as to legal issues regarding Board proceedings. However, it is troubling that each of these declarations condones the actions of Mr. Newland, while creating and relying upon the fiction that the matter at issue is the simple transportation of documents. That is a basic misperception. These original documents were removed from agency counsel's table; we need not here analyze if the removal of the same documents from the judge's bench would result in any different views by the Board and these declarants. These original documents were not the property of Mr. Newland or the contractor. Contractor's counsel had no right to remove the drawings, much less retain and have them reproduced, without first obtaining the approval of the agency or the Board. Even if practice before the Board is less formal than practice before a court, none of the declarants stated that it is appropriate intentionally to depart a facility with property belonging to another when consent is lacking for the removal. Not one of the declarants stated that, placed in the same position, she or he would have removed the documents from the table of opposing counsel.