HOW PRACTITIONERS CAN PREVENT CONFLICTING OBLIGATIONS

By José Vera, P.Eng., MEPP

Consider this: a practitioner designs a structural frame for a site where corrosion resistance is needed and therefore specifies galvanized steel elements. Instead, the client selects plain steel components, which are less expensive but more susceptible to corrosion. The practitioner is dismayed to discover that the agreement allows the client to overrule the practitioner's material specifications and is concerned that stress corrosion cracking will lead to structural failure and consequently unsafe working conditions. On one hand, the practitioner has a statutory obligation to make reasonable provision for the safeguarding of life, health or property. On the other hand, the agreement appears to conflict with this obligation by allowing the client to overrule the practitioner's professional judgment on a matter involving safety. How should the practitioner handle this situation? Or better yet, how can practitioners avert these situations in the first place? This article provides some key insights into this and other situations where practitioners might be faced with conflicting obligations.

STATUTORY OBLIGATIONS AND CONTRACTUAL AGREEMENTS

All too often, PEO's practice advisory team receives phone calls from practitioners who have been placed in a position where complying with their statutory obligations becomes a challenge. It should not be this way, since frequently the root cause of these problems are agreements and/or scopes of services that did not take into consideration the practitioner's statutory obligations. Practitioners can help prevent these issues from occurring in the first place by communicating their statutory obligations to clients early and clearly.

Practitioners have several statutory obligations, outlined in the *Professional Engineers Act* and its regulations. These obligations need to be considered when drafting agreements and scopes of services, otherwise potential conflicts can ensue when inconsistencies are found between the practitioner's statutory obligations and their contractual ones included in agreements and scopes of services. Three common scenarios involving conflicting obligations, which are frequently reported to PEO's practice advisory team, are examined below.

REPORTING SITUATIONS THAT MAY ENDANGER SAFETY

The practitioner's obligation to correct or report a situation that may endanger safety or the welfare of the public is found in section 72(2)(c) of Regulation 941/90 under the *Professional Engineers Act*:

> For the purposes of the act and this regulation, "professional misconduct" means,…
> (c) failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public

This statutory obligation commonly referred to as the duty to report should be clearly communicated to clients. Below are some key points that both clients and engineers should consider when discussing the duty to report.

First, both clients and practitioners should know that this obligation applies to practitioners as defined as "holder of a licence, a temporary licence, a provisional licence, a limited licence or a certificate of authorization (C of A)." In plain terms, this obligation applies not only to engineers but also to engineering firms holding a C of A. Therefore, the engineering firm that enters into a contract with the client has the same duty to report that engineers do.

Second, clients and practitioners should be aware that the duty to report is covered extensively in the PEO guideline *Professional Engineering Practice*, available at www.peo.on.ca/index.php/ci_id/22127/la_id/1.htm. This guideline is a valuable resource not only for practitioners but also clients who want to learn more about the statutory obligations of engineers. Further, this guideline makes a distinction between the duty to report and whistleblowing, which only applies to extreme situations involving the duty to report.

Thirdly, it is in the interest of clients to avoid placing practitioners in a situation where in the practitioner's view the only moral option is to blow the whistle, since whistleblowing should only be a last resort. After all, clients and practitioners should be able to address safety concerns early enough to not require involvement from authorities. Consequently, agreements between clients and engineering firms should be consistent with the practitioner's duty to report, in order to prevent extreme circumstances from arising in the first place. Below are some best practices on achieving this objective:

- Clients and practitioners should agree on a clear communications protocol for reporting situations that, in the view of the practitioner, may endanger the safety or welfare of the public;
- The responsibilities of both the client and the practitioner when addressing such situations should be clearly outlined;
- Agreements and scopes of services should not only be consistent with the duty to report but should also be consistent with other statutory obligations;
- Both clients and practitioners should collaborate when drafting agreements and scopes of services; and
- Both clients and practitioners should seek the advice of their own legal counsel when drafting agreements.

Last but not least, practitioners should explain to clients that the duty to report not only benefits the public but also benefits the client by making

them aware of unsafe situations that may present a serious liability to them.

OVERRULING PROFESSIONAL ENGINEERING JUDGMENT

Practitioners have a statutory obligation to clearly present the consequences expected from a proposed deviation from their engineering work, if their professional judgment is overruled by a non-technical authority (refer to 72(2)(f) of Regulation 941/90). Recall the earlier example where a practitioner designs a structural frame and specified galvanized steel, but the client selected plain steel, which is less costly but prone to corrosion. In this situation, the practitioner must clearly present the consequences of utilizing plain steel elements, such as potential corrosion causing structural failure, among other things.

Practitioners should not be held accountable for deviations to their engineering work that they did not recommend or give the go-ahead to. Consequently, agreements and scopes of services should note the client assumes full responsibility for proposed deviations to engineering work and their consequences, should they overrule the professional judgment of the practitioner. Furthermore, it is prudent for practitioners to recommend that the client obtain a second professional engineering opinion before making any final decisions. Finally, in the event of an unresolved disagreement, practitioners can propose the client engage another practitioner to perform a technical review of the original practitioner's engineering work. In that vein, the PEO guideline *Professional Engineers Reviewing Work Prepared by Another Professional Engineer* (available at www.peo.on.ca/index.php/ci_id/22122/la_id/1.htm) is quite helpful.

Clients may prefer to rely on engineering work that has undergone a technical review. Consequently, in order to dissuade situations where the client believes it necessary to overrule the practitioner's engineering judgment, a more proactive approach would be to always include a technical review of the practitioner's engineering work in agreements and scopes of services, and thereby prevent these problematic situations from arising in the first place.

USE OF SEAL SHOULD NOT BE A CONTRACTUAL OBLIGATION

The use of the engineer's seal is a statutory obligation found in section 53 of Regulation 941/90. In very general terms, engineers have an obligation to seal professional engineering work they either prepared or thoroughly reviewed. The PEO guideline *Use of the Professional Engineer's Seal* (available at www.peo.on.ca/index.php/ci_id/22148/la_id/1.htm) covers this obligation in great detail.

Unfortunately, too frequently agreements include language where engineers are required to seal specific documents. Not only is wording of this kind completely unnecessary, since the use of the seal is already a statutory obligation, it can give rise to conflicts if engineers are not authorized to seal the specified documents, such as when they did not prepare or thoroughly review the documents. A contractual obligation to the contrary presents a serious conflict to engineers.

To avoid these potential conflicts, agreements and scopes of services should leave out any mention of the seal. Rather, agreements and scopes of services should focus on what work the practitioner is responsible for. For example, the following wording is problematic on its face: "the engineer shall seal the as-built drawings prepared by the contractor…." As-built drawings not prepared or thoroughly reviewed by the engineer cannot be sealed in the first place. On the other hand, the following wording does not conflict with the use of the seal statutory obligation: "the engineer shall perform an onsite visit for verification of existing and as-constructed conditions, and shall prepare and provide record drawings…." This avoids mention of the seal and focuses on the work that needs to be completed.

It is in the interest of practitioners to avoid being placed in a position where their contractual obligations conflict with their statutory ones. Early discussions and collaboration, clear agreements and scopes of services as well as technical reviews are all tools to avoid potentially costly and risky situations. More work documenting what has been agreed to with the client in the beginning can help prevent problems in the long run. It is far less expensive to retain legal counsel for drafting agreements than retaining them for court.

Finally, PEO's practice advisory team is available by email at practice-standards@peo.on.ca and is happy to hear from practitioners looking to prevent conflicting obligations from arising. **e**

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