

Truth in advertising: A case study

As a recent discipline case illustrates, engineers need to pay close attention to the rules for advertising in PEO's Professional Practice Guideline when promoting their firm's work.

by Alison Piper

The following is a summary of a PEO discipline case that illustrates the need for engineers to avoid claiming a greater degree of responsibility for projects, proprietary products or equipment design than is factual in advertising and other promotional materials. Handled through PEO's stipulated order process, the case involved the chair of the Discipline Committee (referred to as the chair), the complainant (referred to as Company A) and a firm holding a Certificate of Authorization with PEO (referred to as Company B). It is described without references to names or identifying features.

The case

In its complaint filed with PEO, Company A alleged that Company B issued a brochure promoting its expertise in a certain field, which included photographs of equipment Company A had designed and procured on behalf of its clients. In the complaint, Company A also stated that:

- ◆ the photographs and the associated description implied that the equipment shown was designed by Company B, when it was in fact designed by Company A;
- ◆ it had proof of detailed drawings of this equipment, but was unable to provide it to PEO due to confidentiality agreements; and
- ◆ further photographs were included in the brochure, which Company A

alleged showed equipment that it had designed for other clients.

As a result, Company A was concerned that the brochure misrepresented Company B's experience and capabilities, and that by producing it, Company B had breached PEO's Code of Ethics and was guilty of professional misconduct. The complaint identified the following sections of Regulation 941 as being relevant to the case:

- ◆ subsection 72(2)(j), from the definition of professional misconduct: "conduct or an act relevant to the practice of professional engineering that, having regard to all of the circumstances, would reasonably be regarded by the engineering profession as unprofessional."¹
- ◆ subsection 77(7)(v), from the Code of Ethics: "A practitioner shall give proper credit for engineering work, uphold the principle of adequate compensation for engineering work, provide opportunity for professional development and advancement of the practitioner's associates and subordinates, and extend the effectiveness of the profession through the interchange of engineering information and expertise."²

In a meeting, a representative of Company A told the chair that Company A:

- ◆ had developed the technology and was a worldwide expert in the field;
- ◆ had taken the photographs of equipment in question and owned the negatives;
- ◆ had designed and installed the equipment shown in the photographs, and

had used one of the photographs in its own promotional material.

The chair also met with representatives from Company B, who suggested that the focus should be on whether or not the public had been deceived. Company B's representative submitted that there was, in fact, no deception of the public, the equipment industry is small, and no one receiving the brochure in question would have been deceived as to who actually designed the equipment. He also noted that after discovering the brochure at a trade show, Company A had waited a year to lay a complaint with PEO.

Company B's representative told the chair that, before receiving the complaint, no one from Company A had contacted him or anyone else at Company B regarding Company A's concerns about the brochure. He also said that when the complaint came to Company B's attention, distribution of the brochure was discontinued immediately. The representative denied that Company B intended to suggest that it had designed the equipment depicted in the brochure, adding that the company had hoped to show through the brochure that it had the expertise to design the equipment.

After reviewing the available information and hearing from representatives of Company A and Company B, the chair found the following information to be significant:

- ◆ Company B was trying to use the photographs generically, as it is difficult to show technology graphically or by means other than photographs.
- ◆ The complaint was not filed until a year after the brochure was discovered at a trade show.

- ◆ When Company B received the complaint, it discontinued distribution of the brochure immediately.

As a result, the chair found Company B not guilty of either professional misconduct or a breach of the Code of Ethics.

However, the chair and Company B agreed that there was a basis for a finding that Company B had breached Section 11 of PEO's *Guideline to Professional Practice*, which deals with advertising. The section states: "Advertising may be considered inappropriate if it:

- ◆ claims a greater degree or extent of responsibility for a specific project or projects than is the fact;
- ◆ fails to give appropriate indications of cooperation by associated firms or individuals involved in specified projects;
- ◆ implies, by word or picture, engineering responsibility for proprietary product or equipment design;

- ◆ denigrates or belittles another professional's projects, firms or individuals;
- ◆ exaggerates claims as to the performance of the project; or

- ◆ illustrates a portion of the project for which the advertiser has no responsibility, without appropriate disclaimer, thus implying greater responsibility than is factual."³

Specifically, the chair found that, through photographs, the brochure implied engineering responsibility for a proprietary product or equipment design and illustrated portions of a project for which the advertiser had no responsibility, without an appropriate disclaimer, thus implying greater responsibility than was factual.

Company B was ordered to review all of the promotional material it was distributing, and to identify and destroy any materials that depicted projects in which the firm was not involved.

What can be learned?

The primary complaint against Company B was that the photographs implied that the equipment shown was designed by Company B, when it was designed by Company A. What can be learned from the case is that, in advertising and other promotional materials, engineering firms must avoid even the appearance of claiming responsibility for another company's projects, proprietary products or equipment design. Firms publishing photographs of another firm's work in their materials must include a disclaimer that clearly identifies who was responsible for the work. ◆

References

1. *Regulation 941, R.R.O., 1990*, subsection 72(2)(j).
2. *Ibid*, subsection 77(7)(v).
3. Professional Engineers Ontario. *Guideline to Professional Practice*, 1998, section 11.

Welcome to the jungle

With Canadian society becoming more litigious and professional engineering work under closer public scrutiny, engineers need to be aware of the extent of their professional liability.

by Dwight Hamilton

As an engineer, you're used to people asking you questions. When your brother-in-law was involved in a project to solidify the wall of a warehouse, friendly advice came naturally. But when the job was being undertaken, the wall collapsed. And then the contractor wanted to sue you. You didn't use your seal. Nobody signed a contract. No money changed hands. But if you had been taken to court, you could have been found liable.

Hard to believe? While an extreme example, it's a true story and shows there are many obscure liability issues about which professional engineers should be aware. Under an area of law called "gratuitous advice," any professional is seen to be a credible expert in a specific discipline and "this perception can lead someone to take the engineer's opinions as fact," says Bernard Ennis, P.Eng., manager, professional practice for PEO. It would likely come as an even bigger surprise to most engineers to learn that, even if they were covered by primary professional liability insurance, they still wouldn't be covered in that case.

Are you covered?

Generally, consulting engineering firms purchase professional liability insurance, and everyone in the firm is covered for the engineering work they do for the firm. In many cases, even if something does go wrong, it's unlikely that action will be taken directly against the engineer—most plaintiffs will simply take action against the company. There's no guarantee however. According to Ennis, there are situations where the engineer can be sued directly in matters relating to professional negligence in consulting. For example, in a situation in which the engineer is con-

sidered an expert in a particular area and the firm is contracted because of that expertise, the engineer may owe a special duty of care and be found personally responsible.

Many engineers employed in industry are covered by their company's liability policies. If the company makes widgets, it likely has product liability insurance in case someone is harmed using the product. But if the engineering work is visible, as in the case of an engineer designing a truss in his or her capacity as an employee for a truss manufacturer, the possibility of direct action against the engineer increases dramatically.

Engineers can also be involved in work considered too risky for any insurance company to handle—such as designing nuclear power plants. This and some other types of high risk engineering work are covered by government-run insurance schemes. Peter Needra, Canadian manager of DPIC, a major insurer of engineers in Canada, says that any engineer performing engineering work is open to claims from the public, not just consultants and staffers.

Engineers should be aware that certain obligations under the Professional Engineers Act, such as having a Certificate of Authorization (C of A) when offering or providing engineering services directly to the public, are enforceable by PEO. If an engineer is found guilty of a breach of the Act in a discipline case, no insurance program will cover either the penalties imposed or a loss of income due to a suspended licence. Specific pieces of legislation like the Regulations for Industrial Establishments' (under the Ontario Health and Safety Act) new Section 7 dealing with pre-start health and safety reviews also affect engineers, and insurance would not cover non-compliance fines under this statute. Liability insurance could cover legal costs and court-ordered damages in these cases, however.

Contracts and torts

Liabilities can be either criminal or civil, but usually engineers are involved in civil cases that deal with responsibility for damages arising from disputed contracts or torts. (A tort is a wrongful act not covered by the terms of a contract, resulting in damages that can be the basis for a judgment.) There are usually substantial financial consequences in both areas, but the statutes of limitations differ according to the type of liability that arises.

There are relatively few limitation periods prescribed for criminal liabilities, but elaborate rules exist for determining limitation periods covering civil ones. Disputes concerning contracts must usually be brought to court within six years of when the contract was breached, although, in some provinces, contracts signed under seal are categorized as "specialties" for which the limitation period extends to 20 years. In addition, a contract may define its own limitation period. For example, a product warranty, which is essentially a contract, may have a three-year guarantee beyond which all rights of claim are terminated.

Limitation periods for torts are even more convoluted, since they generally do not begin until the damage resulting from the tort can reasonably be discovered. The limitation period, which is six years in many provinces, starts only after the cause of the action arises. This means that if it takes 50 years for engineering errors or omissions to surface in a project, the plaintiff has six years after that to file a court claim, not six years after the job was finished. Although the Ontario government has drafted legislation that would set a 15-year ultimate limitation period after which no claims can be launched, "it will be some time yet before all the existing laws that create indefinite exposure to tort liability will be modernized," says Brian

Dawe of the Toronto-based law firm Paterson MacDougall.

Risks outside the office

Both self-employed engineers and those on staff may be well advised to have another type of professional liability insurance (known as supplementary or secondary) to defend against some claims that occur outside their scope of regular employment. Such insurance can cover:

- ◆ the personal professional liability of engineers working in industry;
- ◆ the giving of gratuitous advice or other actions, such as doing occasional assignments, or "moonlighting," or being named in a suit after retirement;
- ◆ engineers who act as mentors to other engineers or engineering interns, whether through a company program or on their own;
- ◆ volunteer activities; and
- ◆ claims brought against staffers of engineering consulting firms that are defunct, bankrupt or insolvent, and thus no longer carry insurance.

Except in Quebec, where all engineers must be covered, secondary professional liability insurance is not mandatory for engineers in Canada.

In Ontario, Regulation 941 of the Professional Engineers Act requires all sole practitioners, partnerships and engineering firms holding a C of A licence with PEO to either be insured against professional liability, or if they are uninsured, to disclose the fact to clients and obtain their written authority to provide services without insurance. Of PEO's (approx.) 3700 C of A holders, about 57 per cent carry professional liability insurance and less than 1 per cent or 30 carry product liability insurance. About 29 per cent of PEO's C of A holders have chosen not to carry insurance, opting instead for compulsory disclosure to clients, and about six per cent work in uninsurable fields.

Derek Holloway of Encon Group Inc., another major insurer of engineers, points out that structural and geotechnical engineers are most often subject to liability claims. For these engineers, the current level within the industry is one claim each year for every three policies in place. ◆

An insurance plan for everyone?

The Association of Professional Engineers and Geoscientists of British Columbia (APEGBC) has been working with the Canadian Council of Professional Engineers (CCPE) to come up with a national professional liability insurance plan for P.Engs. The feasibility of a national supplementary professional liability insurance program that would cover areas outside an employer's general policy is now being examined by CCPE and provincial engineering associations.

If the program were mandatory for all 157,000 licensed professional engineers across Canada, CCPE estimates coverage of up to \$100,000 could be obtained for an annual fee of about \$10 a member. If membership were voluntary and only 5000 to 10,000 engineers signed up, annual premiums could cost up to \$40.

At present, PEO has declined to participate in the proposed supplementary insurance program, because Council has not achieved consensus on whether it is the public or the engi-

neer who benefits. If the latter, the program is likely better delivered through a member-interest body like the Ontario Society of Professional Engineers.

"It's providing recourse, or an opportunity for a member of the public who might be harmed to have a call on insurance. That has to be seen as the primary purpose, and if it is, it's a regulatory issue and it's a mandatory program," says John Bremner, P.Eng., executive director and registrar of APEGBC.

Feedback obtained by CCPE indicates that, aside from PEO, the other member associations support participating in a national insurance program in principle, with some saying their participation would be contingent on the premium price.

CCPE's board is scheduled to review next steps for the insurance plan at its March 3 meeting. These include finalizing a proposal and determining the premium rate, based on estimated participation rates.

The myth of the industrial exemption

The requirements for the licensing of engineers in industry spelled out in Ontario's Professional Engineers Act are widely misunderstood—and myths abound. It's time to set the record straight.

by Margaret McCaffery

◆ Joe Blow graduated from an accredited Canadian engineering school five years ago. Since graduation, he has worked for the same Ontario company, designing a braking device that's assembled into a recreational vehicle. Is he engaging in the practice of professional engineering? Should he be a licensed engineer?

◆ Jane Doe, a graduate of an accredited Canadian engineering program, has worked in a testing laboratory since graduation three years ago. She designs a testing process for a system that produces products sold to the public. Is she engaging in the practice of professional engineering? Should she be a licensed engineer?

◆ John Smith is an engineer-in-training, working under the supervision of a licensed engineer. In his spare time, he designs tools used in his family's printing company, where there are no licensed engineers. Is he engaging in the practice of professional engineering? Should he be a licensed engineer?

The answer to the first question in each of the above scenarios is probably yes. You might therefore assume that the answer to the second question should also be yes. The correct answer is—not necessarily. Let's take Joe Blow first:

- ◆ He's designing something.
- ◆ He's applying engineering principles.
- ◆ Public safety is involved.

According to the Ontario Professional Engineers Act, that's professional engi-

neering. However, if Joe Blow works in a section headed by a professional engineer who takes engineering responsibility for the work done, Joe falls into one of the exceptions to the Act and can do the work without having to be a P.Eng.

So what about Jane Doe? She's designing a testing process for a system that manufactures products for the public, and she's applying engineering principles. Is public safety involved? Maybe, maybe not. But because she's working doing the work for her own employer in-house, she doesn't need a licence. Neither does John Smith, when he's designing tools or dies. As an engineer-in-training, he's declared his intention

to become licensed, presumably because of the scope of practice he will have, the recognition of his achievements and potential career opportunities.

These situations are all exceptions to the requirement to be licensed as a professional engineer, found in section 12 of the Act. These exceptions are commonly rolled into one, incorrectly referred to as "the industrial exemption." Myths about the exceptions abound, ranging from: "Engineers in industry don't need to be licensed," through to "There are thousands of people out there practising engineering without a licence" (with the implication being that this is against the law).

Why do the exceptions exist?

The true origins of the exceptions are probably a mixture of historical precedent, active lobbying by interest groups and concern for public health and safety.

In Ontario, the Professional Engineers Act was amended in 1937 to grant licensed P.Engs the exclusive right to practise the profession. But it has always been recognized that many individuals with technical training could do some engineering work, especially when design and safety parameters were already set, either by the nature of the project or by applicable codes or certification processes. Then, there was the obvious need to permit engineers-in-training to gain their experience. Consequently, there has always been support for enabling skilled people to do engineering work, provided that supervision, review and ultimate engineering responsibility for the work was

undertaken by a professional engineer.

There are many parallels in other professions: Certain medical acts can be delegated to a nurse if a doctor takes responsibility for them; paralegals can undertake some legal work; and only the practice of public accounting is reserved for chartered accountants.

When the Ontario government's Professional Organizations Committee was reviewing the practice of engineering in 1979, it recommended a full industrial and government exemption from licensure. This recommendation was believed to have been put forward as a response to lobbying by various interest groups. PEO opposed this recommendation vigorously, as did many individual members. The ensuing compromise resulted in the exceptions written into the Professional Engineers Act of 1984, section 12, subsection 3.

Neither of these generalizations is true—or at least, no one has yet produced evidence for either one. Eric Newton, manager of legal affairs at PEO, says the association receives very few enquiries about the professional status of people doing engineering work in industry. When investigated, the few enquiries that are received turn out to be cases where either:

- ◆ the work being done cannot be classified as professional engineering, or
- ◆ it *is* professional engineering, but it's being carried out under one of the exceptions.

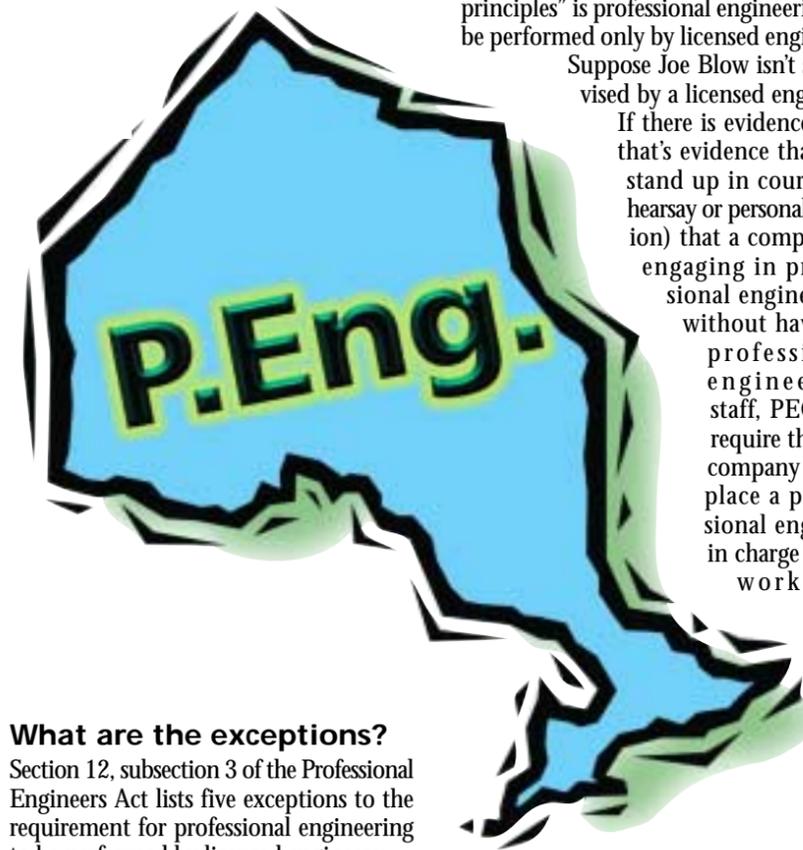
e. when the act is specifically exempted in the regulations.

There are no classes of individuals prescribed by the regulations under clause (d), and no specific acts that are exempt under clause (e), so the exceptions are currently applied only under clauses (a) to (c).

The way the Act is written, determining what constitutes professional engineering is open to interpretation. The Act specifies that "any act of designing, composing, evaluating, advising, reporting, directing or supervising wherein the safeguarding of life, health, property or the public welfare is concerned and that requires the application of engineering principles" is professional engineering, to be performed only by licensed engineers.

Suppose Joe Blow isn't supervised by a licensed engineer?

If there is evidence (and that's evidence that will stand up in court, not hearsay or personal opinion) that a company is engaging in professional engineering without having a professional engineer on staff, PEO can require that the company either place a professional engineer in charge of the work that



What are the exceptions?

Section 12, subsection 3 of the Professional Engineers Act lists five exceptions to the requirement for professional engineering to be performed by licensed engineers:

- a. when the act relates to production machinery or a production process in manufacturing in one's employer's facilities;
- b. when a professional engineer assumes responsibility for the act;
- c. when the act involves designing tools and dies;
- d. when the act is performed by a member of a class of persons specifically exempted in the regulations; or

constitutes professional engineering, or outsource either the work or the responsibility for the work to a properly licensed engineering company.

Myths and misunderstandings

Determining who should practise what is laborious at best. It's therefore not surprising that engineers tend to generalize the exceptions into a full-blown exemption from the requirement for licensure for

The value of licensure in industry

All of the employers interviewed for this article said that the P.Eng. licence is viewed as highly desirable for anyone having contact with clients, or leading divisions where the work is complex—even if it isn't professional engineering. In focus groups PEO held in 1997, when a proposed new licensure model was being tested, engineer after engineer, both management and front line, attested to the power of the P.Eng.:

- ◆ "When we hire professional engineers, we don't have to check their qualifications as much."
- ◆ "The benefit of having professional engineers involved is the judgment they bring. They are expected to know about things beyond numbers—the ethical and social aspects of decisions."
- ◆ "When my company needed to buy a very expensive part, I asked to deal with a P.Eng. If I don't know the product, I want a P.Eng. behind it. CSA and UL look at you differently when you have a P.Eng.-designed product."
- ◆ "I work with very dangerous processes. When I got my licence, the ethics test was a real shock to me. There was some really heavy stuff in there that I didn't take seriously until then. The danger in industrial plants will become worse as we move into automation. Will the line shut down when it should? It's important to have professional engineers there [to ensure public safety]."
- ◆ "We do a lot of work with people in the United States. There, the P.Eng. definitely adds respect and credibility."

engineers working in industry. Ken McMartin, P.Eng., who chairs PEO's Committee on Enforcement, believes that professional engineers themselves are the worst propagators of the myth that a total industrial exemption exists. "You hear people say things like: 'Consultants have to be licensed, engineers in industry don't.'

There is a widespread belief that employers also misinterpret the exceptions; however, the only cases presented to PEO for examination did not involve professional engineering work."

Roger Barker, P.Eng., PEO's registrar and CEO, believes that the misunderstanding of the so-called industrial exemption is rooted in the definition of *professional* engineering. "Many people with engineering degrees *are* practising engineering, but may not need a licence." He cites his own experience as typical: In his previous position in product development with a major petroleum company, he probably didn't need a licence, but he saw himself as a professional engineer and actively sought the recognition of the P.Eng. licence.

PEO President Peter DeVita, P.Eng., believes that the solution to the confusion is to seek legislative clarity. "The only

situations where there is no confusion are those where demand-side legislation specifies that a P.Eng. is required." He wants to see PEO pursuing this type of legislation in situations where the public can be adversely affected by the confusion.

So does industry encourage hiring of licensed engineers? Most employers contacted for this article were clear about the need for the P. Eng. designation in areas where public health and safety were concerned. Other areas are more difficult to define.

Tony Marr, senior management compensation and benefits officer with Ontario Power Generation Inc., notes that all project engineers at the organization are licensed, but the CAD/CAM area is "very blurry—there's no hard line any more." The process of defining whether jobs need to be filled by licensed engineers begins "when management decides where they want the signoff authority to be." The line manager then sends a job specification to the centralized recruitment division. The net effect, he says, is that "the higher up you go, the more predominant licensure is." Another trend is to contract out anything to do with design and construction—the areas where demand-side legislation makes it very clear what work must be done by a professional engineer.

As the practice of engineering changes, the blurry areas will no doubt increase, as they have in other professions. Does the management consultant supervising the writing and installation of customized accounting software have to be a CA? As is often the case in the business world, this decision will be heavily influenced by clients' comfort levels. When the P.Eng. designation is seen as an assurance of standards, its value is appreciated. When it is seen as a higher price-tag for some misunderstood letters behind one's name, the response becomes: "Who needs it?"

In the coming year, PEO will be examining the need for a communications program to increase stakeholder awareness about its enforcement program, which includes investigating instances of professional engineering being performed by non-engineers. One of the prime tasks will be to create clear messages about what constitutes professional engineering. Readers with comments or examples should send them to the managing editor of *Engineering Dimensions*. There's obviously a story that needs to be told. ♦

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What do other jurisdictions do?

There are exceptions to the requirement that professional engineering be performed by licensed engineers in every professional engineering act across Canada. (See Figure 1 for a summary of some common exceptions.) However, none refers specifically to the production of products, as Ontario's Professional Engineers Act does.

Several provinces have very general clauses that include industry. For example, Newfoundland's Act includes an exception for people designing production equipment. Quebec has an exception for those designing or supervising industrial work or equipment in industry, if the work does not affect public or employee safety. Saskatchewan has an exception for people designing, constructing or installing appliances, works or plants worth less than \$30,000.

In the U.S., all states except Mississippi have a full industrial exemption. Those who provide engineering services to their employers, related to the design and manufacture of the company's product, need not be licensed. The employer is deemed to have assumed the liability in the case of harm to the public.