Making Discipline Meaningful

By Michael Mastromatteo

When PEO disciplines its licensed practitioners, it's through an adversarial process that must be fair, transparent and above reproach. It's part of the price for the privilege of self-regulation.

It is part of any profession's understanding that the privilege of self-regulation imposes certain duties and responsibilities, not the least of which is protecting the public from misconduct and incompetence of the trusted professionals. While almost all engineers appreciate and accept that PEO, as the regulator, must spare no quarter with erring licence holders, there is a small constituency that believes discipline–and basic justice–are not always evenly applied. This is especially true for those few engineers who have been through the discipline process and who resent the penalties and embarrassment arising from their indiscretions.

Self-regulation imposes certain duties and responsibilities, not the least of which is protecting the public from misconduct and incompetence.

The necessary tension of an adversarial showdown between self-regulated licensor and its licensees was highlighted by PEO's Admissions, Complaints, Discipline and Enforcement (ACDE) task force of 1998-1999. Headed by Justice Douglas Carruthers, the task force found PEO's complaints and discipline system was operating efficiently and with a reasonable degree of fairness and transparency, but also noted a few hard truths about professional wrongdoing, discipline, penalties and deterrence.

"The proceedings before the Discipline Committee are adversarial in nature," Justice Carruthers wrote, "and for good reason. They are not gentle hearings, held as an inquiry into the truth of some matter, as some have suggested. Because Discipline Committees have powers that can destroy a man or woman's professional life, in order to ensure fairness to the member charged, a high onus exists on the professional body pursuing the complaint, which must be met before any allegation can be proven."

If the Discipline Committee (DIC) finds a practitioner guilty of professional misconduct or incompetence, the penalties it may impose under section 28 of the *Professional Engineers Act* include revoking a practitioner's licence or a holder's Certificate of Authorization (C of A); suspending a practitioner's licence or holder's C of A for up to 24 months; fining a practitioner to a maximum of $5,000; setting limits on a practitioner's professional work; imposing conditions on a practitioner for continued practice; requiring a practitioner to pass specific technical exams; directing that its findings be published in detail or in summary, with or without names (names are always required in cases of licence suspension or revocation), or taking other actions specified in the Act.

However, Carruthers also took pains to point out that the disciplinary system is not meant to set up "unnecessary barriers" between PEO and its licence holders, or that only practitioners' interests are to be protected. "The hearings must be fair for both sides," he added.

Fairness and transparency

As is noted in a training handbook for DIC members, "…disciplinary proceedings help the profession preserve public confidence in the professional engineering profession. This is achieved by giving the public access to the disciplinary process through the avenue of complaints and, in certain circumstances, by publishing the decisions of the Discipline Committee."

One of the key recommendations of the ACDE task force was to open discipline hearings to the public. This recommendation was accepted by PEO Council and PEO now publishes information about upcoming hearings, including practitioners' names and allegations, in Gazette. This new era of openness, now common in all self-regulated professions, has been disquieting for some practitioners who fear publishing these details would damage an engineer's reputation, particularly in cases where the allegations are subsequently not proven.

The routine use of Independent Legal Counsel (ILC), an attorney hired to help guide DIC members through often tricky legal waters, was another outcome of the ACDE task force review. In keeping with the ideal of having engineers judged by their professional peers, members of the DIC are not expected to have legal credentials. And while PEO provides training to committee members about basic jurisprudence, the fact that practitioners are usually represented by their own legal counsel (and are prosecuted by counsel hired by PEO) makes the role of the ILC as a source of impartial legal advice to help panelists avoid legal or procedural oversights important.

Impartial resource

The ILC and the ongoing training available to DIC members are reminders that in their role as judges, DIC members must not substitute their own practice experience for a dispassionate discernment of the facts and evidence presented during each case.

Chris Wirth, LLB, an attorney with the Toronto-based Stockwoods LLP firm, has been PEO's independent legal counsel since 2002. He recently told *Engineering Dimensions* the ILC is charged with providing impartial advice to the panel so that it might make legally correct decisions.

"I have never heard any complaint or suggestion that the ILC is aligned with the prosecution," Wirth said. "This would certainly not be the case, as our role is to provide independent legal advice that is objective and not influenced by either the prosecution or the defence to the members of the Discipline Committee. Our role is to remain neutral and to advise the committee as to the proper state of the law, and we do so fearlessly."

Further efforts to streamline what can be a lengthy process involve introduction of the use of single-member panels to adjudicate in cases where PEO and a practitioner have come to an agreement as to the facts of a case. In these instances, guilt or culpability have already been established and admitted, thereby negating the need for a normal five-member panel to hear evidence and render a decision. Single-member panels review the agreed-upon facts to confirm that professional misconduct has taken place, and ensure that the practitioner is aware of the consequences of submitting the agreed statement and admitting guilt. In most cases, a penalty, too, has been agreed between PEO and a practitioner, although the panelist has the authority (though not to be used lightly) of imposing some other penalty.

The DIC's use of single-member panels points to the rise of pre-hearing settlement discussions or "plea bargains" as a feature of PEO's discipline process (see sidebar p. 61). What appears to be little understood, even among some of the 44 members of the DIC, is that plea bargains involve licence or C of A holders who have already admitted their culpability in a matter of incompetence or professional misconduct. A plea bargain avoids the costs associated with PEO having to call witnesses, including experts, to prove a case in a full discipline hearing, and indicates, in its own way, a note of cooperation and good will between prosecution and defendant.

The discipline panel, single-member or otherwise, remains the final arbiter as to whether justice and the public interest are being served by the plea bargain.

Plea bargains involve licence or C of A holders who have already admitted their culpability in a matter of incompetence or professional misconduct.

DIC Chair David Smith, P.Eng., has long recognized the tension between a peer-review-based licensing body and those it licenses in matters involving professional misconduct, incompetence and the administration of justice. As a long-serving member of the DIC, Smith has seen an assortment of cases come forward for adjudication. Despite the experience of seeing his peers get into trouble, Smith remains committed to the ideal of discipline and penalty as a form of general and specific deterrence. "I certainly believe in the [discipline] process, especially because peer review is an important part of self-regulation," he told *Engineering Dimensions*. He also believes that service on the DIC, although often fraught with tension and occasional resentment, is a means of providing much-needed service to the wider engineering profession.

Neil Perrier, LLB, a lawyer specializing in prosecuting professionals before regulatory discipline panels, believes there is little wrong with PEO's overall administration of justice.

"It is my view that engineers as a profession enjoy a very high, and well-earned, reputation in the community for professionalism," Perrier said. "While there is no data on the subject, it would seem to me that engineers enjoy a reputation at least equal to that of doctors and likely greater than that of lawyers. Some credit in that regard must be given to PEO's discipline process in maintaining a set of standards and rules of professional conduct for its licence holders."

Among the hotly debated issues at the June 2006 meeting of the DIC was the influence of legal professionals in the discipline process. Some members of the committee were of the view that decision making is slipping away from PEO and into the hands of the prosecution and defence lawyers.

But while legal professionals appear to have some prominence in discipline matters, their realm remains entirely advisory. As ILC Chris Wirth said, "The legislature in setting up the various professional regulatory bodies in Ontario has made specific provision in law that they may seek and obtain independent legal advice to assist them in carrying out their mandate. At the end of the day, professionals are still judged by a panel of their professional peers, as it is the decision of the members of the Discipline Committee that ultimately decides a case…It is always up to the committee as to whether they are prepared to accept that advice, as they are not bound to do so if they choose not to. The decision with respect to any particular case always remains theirs."

Prosecution UPHOLDS public confidence in SELF-REGULATION

Attorney Neil Perrier, LLB, of Neil Perrier Law Professional Corporation, has acted as counsel to PEO since July 2004. In addition to being involved with some 25 discipline hearings for PEO over the last two years, he has also acted as counsel on several hundred disciplinary hearings involving doctors, lawyers, pharmacists and other regulated professions. To gain more insights into the prosecution side of discipline, *Engineering Dimensions* asked Perrier to consider the following questions.

Engineering Dimensions: In your experience with PEO and other professional regulators, do you feel that PEO's discipline system is working relatively well?

Neil Perrier: It is my view that PEO's disciplinary process does function relatively well. Disciplinary proceedings are, by their very nature, adversarial. Hence, it is not unusual for either the licence holder or the original complainant (or sometimes both) to be dissatisfied with the ultimate outcome or disposition in any particular proceeding. In my view, a discipline system is "working well" if public confidence in the profession and its ability to regulate itself is maintained or enhanced and the participants are treated fairly, even though they may not agree with the ultimate disposition of the proceeding.

Engineering Dimensions: Can you offer an opinion as to how PEO's discipline process compares to some of the other regulators you deal with (e.g. is it more aggressive/successful [in terms of the number of successful prosecutions]? takes too much time to deal with cases? etc.)

Neil Perrier: From a procedural viewpoint, most regulated professional disciplinary processes are similar. However, comparing PEO's disciplinary process to that of the College of Physicians and Surgeons of Ontario (CPSO) or the Law Society of Upper Canada (LSUC) is like comparing apples and oranges. Each profession has its own unique set of values that it seeks to protect. It is a responsibility and objective of any regulatory disciplinary process to maintain and protect its own unique standards and core values…

Each of the above regulatory bodies must take the necessary time and expense to aggressively prosecute deviations from the core values of its profession in order to maintain the collective reputation of that profession, even at the sacrifice of the fortunes of individual licence holders. Otherwise, public confidence in the profession, and its ability and privilege to regulate itself, will be quickly eroded and self-regulation jeopardized.

Engineering Dimensions: Are there any special challenges faced by you, as legal counsel to PEO, by the fact that discipline panel members are volunteers who, except for whatever training is provided by PEO itself, do not have a legal background?

Neil Perrier: In having a Discipline Committee made up of volunteers, PEO is no different than other regulated professions in Ontario. In most regulated professions, a panel of the discipline committee will include at least one individual who is not even a member of the profession (i.e. a lay person). In preparing legal submissions or arguments to present to a committee, one must be mindful of the necessity of explaining the basic legal principles that form the basis for that submission. Counsel may well take more time explaining basic legal principles and precedents than he or she would before a judge. However, it has been recognized by the courts that a committee of peers in a professional regulatory body is in the best position to understand its own profession's standards and values and decide whether other members have failed to meet those values and standards.

Engineering Dimensions: How active are you in pre-hearing activities? Do you think there is an undue emphasis on plea bargaining, or does this indicate that PEO's investigators are doing their homework and only allowing "winnable" cases to go forward?

Neil Perrier: In normal circumstances, PEO legal counsel becomes fully involved in the disciplinary process from the time of the referral of allegations by the Complaints Committee. I do not believe there is undue emphasis on plea bargaining, quite the contrary. A negotiated resolution of allegations by way of a plea and joint submission on penalty in appropriate circumstances, and on proper terms, is in the best interest of everyone involved, including the licence holder, the complainant, witnesses, PEO and the Discipline Committee.

It is my view that the investigators are doing an excellent job in gathering and analyzing the necessary information so that the appropriate committees can make informed decisions and properly dispose of matters…It is also my view that the majority of cases that are referred to the Discipline Committee have a reasonable prospect of a finding of professional misconduct or incompetence.

Engineering Dimensions: Although there is some reference to each discipline case being unique, is there a perception that once a case gets to the discipline panel, it is almost certain to result in an admission of professional misconduct or incompetence?

Neil Perrier: It would be incorrect to presume that a referred case will wind up in an admission of professional misconduct or incompetence. While the majority of cases are resolved by way of an admission of professional misconduct or incompetence, I have also been involved in a number of contested hearings where PEO has had to prove its case before a discipline panel. Further, I have also been involved in cases where, in appropriate circumstances, PEO has withdrawn allegations of professional misconduct and/or incompetence.

Engineering Dimensions: Do you have any qualms about recommending that decisions, penalties, etc., be published in Gazette with names? I'm concerned here with the idea of punishment and/or deterrence being excessive if it serves to permanently damage an engineer's reputation and livelihood.

Neil Perrier: In recent decades, the larger professional regulatory bodies in this province have moved toward more open, accountable and transparent discipline processes. Each regulatory body has done so with a view to enhancing or maintaining public confidence in the profession's ability to regulate itself and to enhance the collective reputation of the profession in the eyes of the public. Recently the CPSO and LSUC have gone as far as to administer reprimands in public. At present, PEO continues to administer reprimands in private.

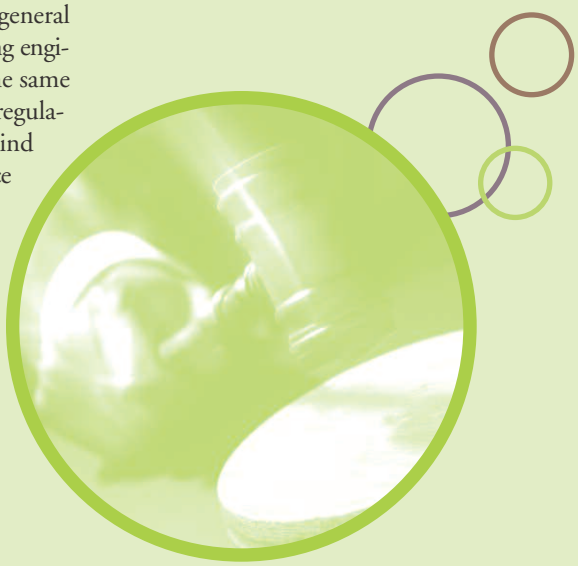
In September 1999, PEO's Admissions, Complaints, Discipline and Enforcement (ACDE) Task Force report urged that Council should recommend to the Discipline Committee that the names of all members or holders found guilty of professional misconduct be published, or to require written reasons for a decision to the contrary. In December 1999, Council adopted these recommendations of the ACDE Task Force. On June 21, 2003, Council made a recommendation that the Discipline Committee order publication with names in all disciplinary proceedings that result in findings of professional misconduct. Otherwise, the Discipline Committee was requested to provide written reasons explaining the decision not to publish.

It is not my view that publication with names is "excessive." Further, I have seen no evidence to support the theory that publication with names will result in damage, permanent or otherwise, to an engineer's reputation and livelihood. Further, it cannot be that mere embarrassment alone is a reason not to order publication. PEO's move towards more public and transparent proceedings is entirely consistent with the current and appropriate trend in professional regulatory proceedings generally.

Engineering Dimensions: In general terms, does your experience of seeing engineers get into trouble–often for the same kinds of infractions–suggest that regulators should step up efforts to remind them of the Code of Ethics, practice guidelines, etc., as a way to avoid getting into legal trouble? On the other hand, do you feel the relatively small numbers of complaints brought to PEO's attention each year might indicate that engineers, by and large, know what is expected of them as self-regulated professionals?

Neil Perrier: It is always appropriate for regulatory bodies, such as PEO, to continually inform and educate their licence holders on applicable laws, standards, codes, policies and guidelines. It is my view that the vast majority of PEO's licence holders and Certificate of Authorization holders conduct themselves professionally, competently and in a manner that is consistent with the Code of Ethics. The overwhelming majority of engineers understand, fulfill or surpass their professional obligations.

Like any other profession, however, there will always be a small minority of licence holders whose conduct will necessarily engage PEO's disciplinary process. The conduct of those individuals may raise issues of incompetence, negligence, moral turpitude or governability. Unless PEO takes action against the conduct of these licence holders in a fair, open and transparent manner, the reputation of the engineering profession as a whole and, therefore, engineers in general, will be damaged. In order for PEO to fulfill its principal statutory object of regulating the profession and to maintain the very high reputation of the profession in the eyes of the public, it is necessary not only that the appropriate disciplinary action be taken by PEO, but that the public perceives that PEO is doing so. It has been recognized by most, if not all, of the large regulatory bodies for professions that the public perception element can only be addressed if these proceedings are held in the open and the public is made aware of the proceedings through publication. Publication with names also serves as a significant general deterrence, one of the recognized objectives of penalty in professional regulatory proceedings.



Balancing OPENNESS with DEFENDANTS' RIGHTS

Gary Gibbs, LLB, an attorney with Gibbs & Associates, Toronto, has more than 15 years' experience defending engineers in the civil litigation process. Through his involvement with engineers and their insurers in civil courts, he has been drawn to represent a number of engineers facing disciplinary action by PEO. *Engineering Dimensions* recently invited Gibbs to share some of his thoughts on the entire discipline process.

Engineering Dimensions: In your experience with PEO and other regulators of professions, do you feel that PEO's discipline system is working relatively well and that it is living up to the ideals of openness, transparency and accountability?

Gary Gibbs: The discipline staff at PEO have to balance duties to PEO, the profession, and the public in exercising their function. I have had a great deal of experience with the current PEO discipline staff and they do have a greater depth of training, experience and professionalism than existed in previous years. While I often have disagreements with these regulators, they do strive to scrupulously carry out their professional roles and duties. Some of PEO's more recent steps to open up the discipline process to the public, such as making hearings public and publishing names and hearing dates on the PEO website, have been unpopular with the profession. PEO has fully embraced the principles of public openness, transparency and accountability, which now rule the day, however uncomfortable that might be to a practitioner in the spotlight. PEO has also taken strides forward in publishing Discipline Committee Rules, which allow for electronic hearings, one-person discipline panels, and pre-hearing conferences, all of which make for a more effective and economical discipline process. No doubt the discipline procedures will continue to evolve.

Engineering Dimensions: During our initial interview, you mentioned the idea of regulators of professions/discipline committees acting like a pendulum–swinging back and forth between aggressiveness to leniency. Do you think PEO might now be in an aggressive phase, and that concerns about a profession's public image might influence how regulators handle complaints against members?

Gary Gibbs: It may not be that PEO is in an aggressive phase. It may be that it is simply in step with other regulated professions in an era of public openness, transparency and accountability. Doctors' discipline proceedings are often attended by the press, with salacious details splashed across the front pages of the local newspapers. It is rare for a member of the public or press to attend at an engineer's discipline hearing, a reflection of the comparatively dry nature of the proceedings. Self-regulated professions always have to be on guard that they are not viewed as a country club to coddle their members, and PEO is likely sensitive to that issue. There is no doubt that the participants in the PEO discipline process will take into consideration how their handling of matters will be viewed by the public and, ultimately, by the politicians who could revoke self-governing status. Having said that, I have also seen PEO enter into plea bargain arrangements when they knew it would meet with disapproval from the complainant. Any perception that PEO "looks after" its own would not be supported by my frequent experience as a participant in the discipline process.

Engineering Dimensions: You seem in favour of a former PEO Complaints Review Councillor's recommendation that expert reports be made available sooner to defence counsel to help defendants prepare a full defence. Can you elaborate on your concern here? Does the lack of access to an expert report (until the hearing stage) put a practitioner at some sort of disadvantage?

Gary Gibbs: In early 2005, a former Complaints Review Councillor recommended that disclosure of expert reports be made to the complainant and the engineer at the Complaints Committee stage. This recommendation has been rejected by PEO. A practitioner facing a PEO complaint is now given a Form of Complaint that has likely gone through several drafts between the complainant and PEO staff before it is finalized. A synopsis of the allegations against the practitioner will be provided but, in my view, there is often a lack of the details required for that practitioner to give a full and adequate response. The details are often found in the expert report that is provided to the

Complaints Committee, the existence of which is usually never even disclosed to the practitioner at that stage. It is very difficult for a practitioner to make a full response to a complaint when the expert report, upon which the Complaints Committee will surely place significant weight, is not received and available for rebuttal.

Engineering Dimensions: Is there a perception that PEO only prosecutes smaller players? If so, what might be done about it, given that PEO can only act on cases that are brought to (or come to) its attention?

Gary Gibbs: The PEO discipline process is free to a complainant, unlike civil litigation wherein a complainant will incur legal fees. Some serious engineering issues, which result in significant potential damages and civil litigation, never come to the attention of the PEO discipline process. Many of the complainants to PEO have no monetary damages and/or they have limited resources, but nonetheless they have a complaint with an engineering practitioner. As a result, civil litigation is not a practical option. While I have never kept statistics, my perception is that the majority of these complaints, which often involve some personal animosity, are against so-called "smaller players" and not against larger firms.

Engineering Dimensions: Do you believe too much is made out of oversights involving use of the engineer's seal? Might there be some onus on the regulator to consider a communications campaign or educational program to make sure practitioners are fully aware of what is expected of them in these matters?

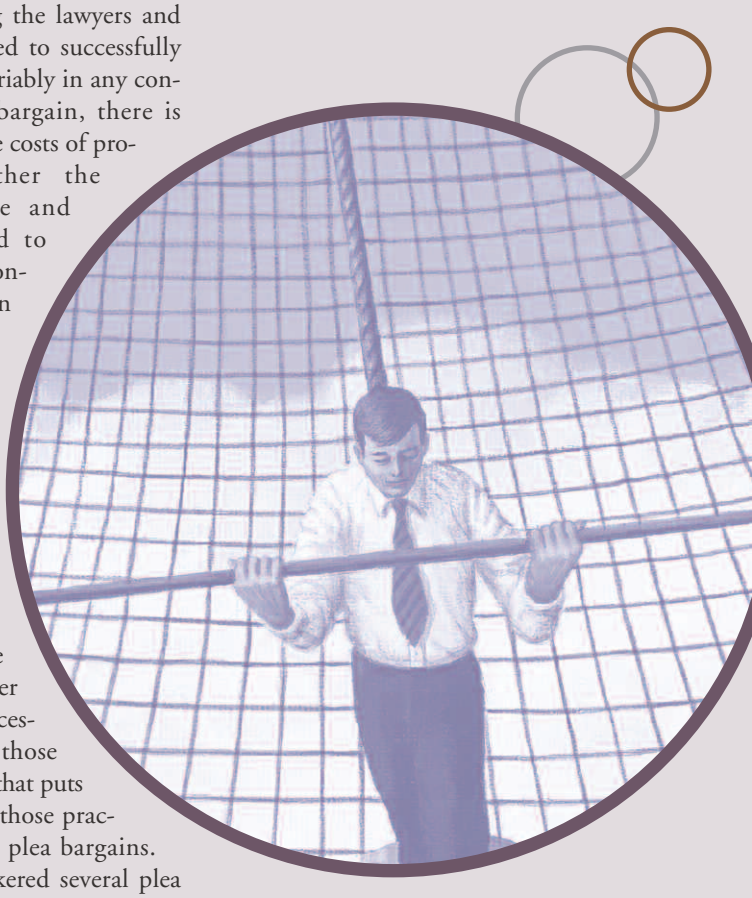
Gary Gibbs: I have been involved in a number of PEO cases where, in the course of an investigation into alleged engineering acts or omissions, it also turns out a seal was not properly applied as required. That is often a throw-in charge, but nonetheless it is one that PEO treats seriously. There was a new guideline issued in July 2005 on the *Use of the Professional Engineer's Seal*, and that is posted on PEO's website, but in my professional experience it is still an area that is not greatly understood. There is still a prevalent old school of thought that applying a seal to a drawing or report increases an engineer's exposure to liability, so there is a reluctance to use the seal in many situations. Unfortunately, that reluctance is often in direct contradiction to the requirement, in section 53 of the *Professional Engineers Act*, and as more fully set out in the guideline, to seal documents. I am of the opinion that PEO could and should do more to educate the profession on the proper and required use of a professional seal if it wants this issue to be universally understood and acted upon.

Engineering Dimensions: Although there is some reference to each discipline case being unique, is there a perception that once a case gets to the discipline panel, it is almost certain to wind up in a guilty plea? And could this, in turn, prompt some practitioners facing discipline to accept a plea bargain because it's really a form of damage control?

Gary Gibbs: If a matter proceeds through the Complaints Committee to a discipline hearing, an engineer faces a time-consuming and expensive task in retaining and advising the lawyers and experts usually required to successfully mount a defence. Invariably in any consideration of a plea bargain, there is an analysis made of the costs of proceeding, and whether the expenditure of time and resources is justified to achieve a complete exoneration, especially when there may be no guarantees in that regard. PEO has the mandate and the resources to retain whatever experts and legal representation are required to successfully prosecute its cases. There are many engineers, especially sole practitioners and smaller firms, who do not necessarily enjoy access to those types of resources, and that puts pressure and stress on those practitioners to enter into plea bargains. I have personally brokered several plea bargains where I believed the practitioner could have mounted a successful defence in a contested hearing, but the engineer believed it was not worth the risk and cost in light of a prosecution offer to a plea that could not be refused.

Engineering Dimensions: As someone who defends engineers before the discipline panel, do you have any qualms about decisions, penalties, etc., being published in Gazette with names?

Gary Gibbs: I do have a concern about a blanket direction to PEO discipline panels, which are to act independently, that they should generally order the publication of names in Gazette. I believe that publication, like all other penalty aspects, should be considered according to the individual circumstances of the situation, and of the practitioner. The publication of a practitioner's name in Gazette may have marginal to no consequences for some practitioners, but huge financial and personal implications for other practitioners, such as those who practise in smaller communities.



Other REGULATORS facing similar concerns

By Michael Mastromatteo

Regulator	Average number of cases per year	Disposition at the hearing stage?	Alternative Dispute Resolution (ADR)/ Stipulated Orders (SO)
Association of Professional Engineers and Geoscientists of British Columbia (APEGBC)	2 to 3 cases (8 to 10 consent order offers)	Majority of complaints going to a discipline hearing result in guilty finding	Two types: Stipulated orders (take-it-or-leave-it offer to admit allegations and agree to offered penalty), and special agreement where SO would not be suitable
Association of Professional Engineers, Geologists and Geoscientists of Alberta (APEGGA)	29 complaints, 6 discipline cases (2001 to 2006 average)	Majority of complaints result in some penalty, although there are cases where there are no findings against a member	APEGGA process provides for settlement of some complaints via a mediator. Any such settlement must be reviewed by the Investigations Committee
Association of Professional Engineers and Geologists of Saskatchewan (APEGS)	2 to 6 complaints, 1 to 2 discipline hearings	Almost all complaints going to a hearing result in finding of professional misconduct or incompetence	N/A–a pre-hearing conference is held prior to preparation of formal complaint but only after Investigation Committee determines that a matter should go to a hearing. No provision for SO
Association of Professional Engineers and Geologists of Manitoba (APEGM)	3 complaints (received in 2005), 2 complaints (to date in 2006)	Some cases are dismissed	APEGM working on ADR modeled on PEO example
Association of Professional Engineers and Geoscientists of New Brunswick (APEGNB)	5 to 8 complaints heard each year, with an average of 1 going all the way to discipline	If one of APEGNB goes to discipline, there is a "good chance" for conviction with penalty	ADR has been used occasionally by professional conduct committee, but there are no plans for formal adoption of the process
Association of Professional Engineers of Nova Scotia (APENS)	On average, 20 complaints per year, resulting in 3 hearings	It is fair to say that most of the hearings result in a guilty decision and penalty	APENS does not support ADR processes
Professional Engineers and Geologists of Newfoundland (PEGNL)	On average, 2 complaints and 1 discipline case per year	N/A	N/A

Engineering Dimensions recently posed a series of questions to selected Canadian engineering regulators to help gain a national perspective on the disciplining of professional engineers.

On the positive side, it appears the average number of discipline cases for each regulator remains low, and that practitioners support an active investigation of all legitimate complaints.

Although there are minor procedural and administrative differences from regulator to regulator, one common characteristic is the need to emphasize the deterrent effect of discipline as a manifestation of the profession's commitment to the public interest. In addition, there seems a genuine concern that the processes are fair and transparent, and that communication and full disclosure be made to all contesting parties. While regulators take no pleasure in disciplining and reprimanding their own, they take seriously the need to mete out proper justice to licence holders found guilty of professional misconduct or incompetence.

Are there concerns for lasting damage to practitioner's reputation?	Plans to review discipline process?	Unique observations	Source(s)
No–the preference is to conduct discipline in an open manner to preserve the deterrent effect	Review of APEGBC discipline process completed June 2006	"Discipline is a very expensive and inefficient way to educate membership"	Geoff Thiele, P.Eng., associate director, regulatory compliance
Some members might "suffer" damage, especially when their registration is affected by suspension/cancellation. APEGGA seeks to impose sanctions that are appropriate to each situation	APEGGA is always reviewing complaints and discipline process with a view to improvements. Nothing in these reviews to date requires a change in legislation	"About the only comment that comes to mind is that the hearing process is becoming more lengthy, fraught with delays, and is expensive"	Ray Chopiuk, P.Eng., director, professional practice
Council has policy to report disciplinary actions when a member's licence is restricted, suspended, or revoked	APEGS reviewed investigation and discipline process in 2002	"Costs are always a concern, but for the association and the member …there is always a concern about coercion, however, in the past five years this has not been an issue"	Robert McDonald, P.Eng., director, membership and legal services
So few cases heard by APEGM that damage to practitioner's reputation not a real issue	N/A–only change involves ADR set-up	"Members feel you have to be a sloppy engineer to wind up in front of the investigations committee. Most complaints seem to occur because a member of the public felt slighted by the engineer"	Grant Garopatnick, P.Eng., executive director and registrar; Robyn Taylor, P.Eng., president
The time involved in a case from start to finish weighs heavily on those involved	Minor changes are ongoing, related largely to making sure all documents are disclosed to both parties	"Our members are very supportive of the process. We typically get good cooperation from the accused and the complainant"	Tom Sisk, P.Eng., director of professional affairs
APENS does not have concerns that there is excessive suffering by engineers who have been complained about or who have gone through the discipline process	A council committee is now reviewing APENS complaints and discipline processes with a view to making them more transparent	"The repetition of similar complaints against engineers is not an issue, however, APENS is supportive of continuing professional development activities in these areas"	Dermot Mulrooney, P.Eng., director of professional practice
Those involved see it as a fair process but those who are complained against would give a different response. For them, damage to name and reputation is important	No plans for review of process, but training seminar available for council members and for those who serve on complaints and discipline committees	"The complaints process is not very prominent in the minds of our members "	Leo White, P.Eng., professional standards director

Lessons learned from hard experience

By Michael Mastromatteo

The experience of two professional engineers who have been through the PEO discipline process reflects the ambivalence, wistfulness, resignation and general disquiet expected of most participants in adversarial situations.

Both engineers (one of whom asked that his name not be used) were found to have committed professional misconduct, and both faced similar penalties involving a reprimand, payment of costs, writing and passing Professional Practice and related examinations, and publication of their respective cases–with names–in Gazette.

> **"It is also a process that I would have preferred not to have been involved in."**
> **–Engineer X**

Although both engineers recognize the importance of self-governing professional organizations disciplining licence holders, they continue to struggle with elements of the process, and would welcome efforts to help their colleagues avoid a similar fate.

As might be expected, both engineers say the experience has been singularly unpleasant, especially in terms of cost, inconvenience and professional reputation. They diverge, however, in their respective feelings on the lasting damage to their careers as a result of the professional misconduct finding.

And while one engineer suggested that PEO's complaints and discipline process is as fair and transparent as can be expected, the other suggested the system is weighted in favour of the complainant and the prosecution.

David Sebarras, P.Eng., a practitioner in the town of St. George, just south of Guelph, Ontario, admits to some feelings of bitterness for having been disciplined.

"The discipline has been a financial burden, due to legal fees and the PEO penalty," he told *Engineering Dimensions*. "The time to prepare for the PEO exams, as well as the actual exam costs, have been a further burden, due to lost income as I am self-employed. I have had several occasions where the discipline issue has been raised by clients and potential clients. Being cited in the "Blue Pages" is very unpleasant and I believe [it] places a permanent stain on one's reputation."

Despite his concerns about the lasting impact of the discipline experience, Sebarras believes PEO acted as fairly as possible under the circumstances.

"The process from PEO's part was fair and transparent. I had adequate time to prepare a defence, and would recommend that everyone use a lawyer." He said that one of the positives from the experience was gaining some insight into the workings of the law as a result of preparing for the PPE examination. He also advises colleagues to consider reading up on the profession's Code of Ethics and other engineering law texts, "to get a full appreciation for just how vulnerable engineers are to discipline and litigation with respect to our professional and personal life."

Asked about any potential enhancements that might see justice better served, Sebarras would point to efforts to overcome the lengthy time period that elapsed from the time of original complaint to the time the matter was finally dealt with at the discipline hearing.

Engineer X, the second engineer who agreed to an interview about the PEO complaints and discipline process, took a more detached and philosophical view, but with hints of wariness.

"First of all I would like to confirm that I believe that a disciplinary process is essential in the governing of our profession," Engineer X said. "It is also a process that I would have preferred not to have been involved in. The process and subsequent penalty did indeed cause an impact to me personally, and for the [three-year] duration I was under a great deal of stress and had many sleepless nights. Particularly worrisome was the potential that I could lose my licence to practise and my business, not to mention my reputation, within the community."

Engineer X, who also practises in a smaller community, supports the view of at least one attorney specializing in defending engineers before the Discipline Committee that pre-hearing negotiations, plea bargains and the implications of publishing decisions and reasons with or without names aren't fully understood in the wider profession.

"Although the allegations made [against me] were, for the most part, defendable, it was felt that the potential for a drastic consequence, such as loss of licence and livelihood, was significant enough that it made more sense to negotiate and plead guilty to a reduced set of allegations," Engineer X said. "The only sticking point was that [the defence team] and I believed that the case should be reported in Gazette without names. I had felt that such publication would be detrimental to my business and would result in harm to my professional reputation and standing in

the community. The disciplinary panel did not agree and the results were published with names."

Despite his concerns about his name appearing in the "Blue Pages," however, Engineer X says there was no apparent damage to his practice or reputation.

"As for the impact of the publication with names, I cannot point to any real negative effects," he said. "In fact, there were a few calls from colleagues who offered support and encouragement. My business continued to prosper and remains profitable."

Even so, Engineer X would like to see changes to the complaints and discipline process that he believes would level the playing field between PEO as prosecutor and engineers facing professional misconduct allegations. Echoing some of the concerns raised by PEO's Complaints Review Councillor in a recent review of the process, Engineer X suggested that complained against licence holders lack the time and full access to expert witness reports to adequately prepare a full defence.

"I believe there should have been an opportunity to meet with the expert selected by PEO prior to the allegations being put forward to the Complaints Committee," he said. "When we finally did have the opportunity to meet during the plea bargaining stage, we were able to demonstrate to PEO's expert engineer that some of his conclusions were, in fact, incorrect."

Engineer X believes that had he been given an opportunity to meet with PEO and its expert prior to the case being turned over to the Complaints Committee, there might have been a different outcome.

Despite his observations, Engineer X expressed a sense of beneficence at his disciplinary denouement. "I suppose one could consider the process a learning experience. The importance of documentation and clear communications was one lesson that was learned. I believe and hope that publication of the opinions of both engineers and PEO will lead to some further thought being put into the procedure in general, and that the end result will be improvements to a necessary process."

Plea bargaining–a WIN-WIN process

By Bruce Matthews, P.Eng.

The majority of disciplinary matters at PEO are settled by way of a plea agreement–meaning that PEO and the licence holder agree to certain facts, the licence holder agrees to admit to professional misconduct or incompetence based on those facts, and the parties make a joint submission as to penalty. Such agreements, or "plea bargains," have been criticized as being back-room deals between lawyers that subvert the purpose of the discipline process and undermine the authority and powers of the Discipline Committee. Nothing could be further from the truth.

The courts have recognized the benefits and the necessity of plea bargains. A 1998 study in Ontario concluded that over 90 per cent of all criminal cases were resolved without the necessity of a trial. It is acknowledged that without the practice of plea negotiations, the justice system would be unable to operate efficiently and would ultimately grind to a halt.

The same is true at PEO. If every discipline case had to be contested, it would place an unmanageable strain on PEO's resources. The resultant delays would be unfair to all parties involved. However, the public interest in the administration of the discipline process must not be sacrificed in the interest of expediency and cost savings.

While the plea bargain process might give the impression the justice system is being manipulated, there are safeguards that exist to ensure that such manipulation does not take place. First, both PEO and the defendant in a discipline matter will typically retain legal counsel. These lawyers do not determine the nature of the plea agreement between themselves, but rather they act on the instructions of their clients. The lawyers provide important legal advice to their client regarding the benefits and implications of any plea agreement. This advice is based on complete disclosure of PEO's case against the defendant. On PEO's side, the prosecuting legal counsel takes instructions from staff within the Regulatory Compliance department. The primary concern of staff, consistent with PEO's mandate, is protection of the public interest.

Another safeguard is the discipline panel itself. A plea agreement does not absolve the discipline panel from having to perform its adjudicative role. Before making a finding of professional misconduct or incompetence in a plea bargain situation, the Discipline Panel must satisfy itself that: 1. the agreed facts support such a finding, and 2. the plea was voluntary, informed and given without reservation. To that end, the panel performs a "plea inquiry" and asks the defendant a series of questions relating to the plea and his or her awareness of the consequences.

Further, the discipline panel is not obliged to accept a joint submission as to penalty. In making the joint submission, PEO's legal counsel will explain why the parties believe that the penalty terms are appropriate in the circumstances. However, the final decision on penalty rests with the Discipline Panel. If the panel believes the jointly submitted penalty is inappropriate, to an extent that it would be contrary to the public interest, the panel may reject the joint submission and impose its own penalty. The panel typically receives advice from its independent legal counsel that it should depart from a joint submission only in very rare circumstances. Generally, as long as a joint penalty submission is within an acceptable range for the conduct in question, it should be accepted by the panel without variation.

Plea bargains, when properly conducted, are truly a win-win process, benefiting the defendant, PEO, the public interest and the administration of justice.

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