

Re-evaluating the Duty to Report

PEO's definition of professional misconduct makes a practitioner's failure to report a situation that the practitioner believes endangers the safety or welfare of the public an offence for which the practitioner can be disciplined. Some see exercising this duty to report as a career-ending proposition, but that doesn't have to be the case.

by Bernard Ennis, P.Eng.

Some professional engineers react to the "duty to report" as though it were an order to behave like an overly suspicious citizen of a police state. On the other hand, there are those who see it as an obligation for every engineer to save the world, regardless of consequences to themselves or their careers. As with most contentious issues, reality lies somewhere in between.

A major reason for these extreme attitudes is that some engineers tend, incorrectly, to see the duty to report entirely in terms of "whistleblowing." But whistleblowing refers to exceptional cases where a person must go public to deal with an otherwise irresolvable situation. It is a final step and can usually be avoided if engineers deal with problems in an appropriately professional manner from the beginning.

Misconceptions

Let's clarify what the duty to report is not.

First, it is not a program to pit engineer against engineer in an effort to police the profession. Most situations that compel engineers to make reports do not even involve another engineer. These may be cases where engineers in the course of their work notice unsafe conditions, such as a damaged beam or improperly grounded equipment, in a client's facility or operation. Or an engineer may discover that an employer's quality assurance program is not able to identify a particular kind of flaw that will make a product unsafe. Upon discovery of such problems, the engineer must bring them to the attention of someone who has authority or responsibility to deal with the situation.

Second, the duty to report need not always result in a conflict, especially if engineers make every effort to present their opinions in an assertive but constructive manner so as to avoid a dispute. Reporting to an employer that a punch press needs to be shut down due to inadequacy of a mechanical guard isn't likely to be met with resistance, if the engineer explains the risks in terms of both worker safety and corporate liability. To reinforce the presentation, the engineer should bring to the employer's attention the requirements of any applicable legislation, standards, or codes. Have proposals for solutions ready. Framing the presentation in a way that addresses the interests of employers or clients will give them ownership of the problem and compel them to deal with it.

Third, the duty to report shouldn't be exercised anonymously. Professional engineers must exhibit their professionalism in every aspect of their work. They must always be willing to defend their opinions, including those about a client's safety problems or the competence of another engineer. Such opinions must always be first made openly and constructively to the person concerned. Work with that person to resolve the issue. Unless the person is completely uncooperative, there is no need to alert others to the situation.

Professional engineers should also know that their duty to report is rather limited, relating only to situations where they apply judgment based on their professional train-

ing, experience and competence. Though each professional engineer "shall regard the practitioner's duty to protect the public welfare as paramount" (section 77(2)i, Regulation 941), the duty to report isn't intended to make professional engineers full-time guardians of the public interest, responsible for pointing out all of society's faults. Instead, they are expected to report only on those issues that come to their attention during the course of their professional practice. This is why references to the duty to report emphasize clients and employers; rarely would professional engineers have sufficient awareness and knowledge of situations outside of their usual practice that they could be compelled to report them. And, unless engineers have the appropriate authority to make changes or order work, their duty is only to report, not to solve the problem. Often, the responsibility for solving the problem rests with someone else. The engineer is required only to make that person aware of the situation.

However, although limited, a professional engineer's duty to report is a legislated obligation mandated by section 72(2)(c) of Regulation 941, which defines professional misconduct as, among other things, the "failure to act to correct or report a situation that the practitioner believes may endanger the safety or the welfare of the public." In other words, in exchange for the right to practise provided by society, a professional engineer must report any situation he or she believes may endanger the safety or welfare of the public.



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But not every situation where an engineer thinks something might be amiss and must be reported is a case of professional duty. And engineers should not confuse professional duties with duties that might arise from other relationships—be they legislated, contractual or moral. Although one must fulfil legislated and contractual obligations, moral obligations are matters of personal conscience on which an individual may or may not decide to act.

For example, a professional engineer might be aware that a client or co-worker has a personal problem, such as drug or alcohol abuse. Being a professional does not usually impose a duty to report this situation, although the engineer might have a duty as a friend, client's agent, or employee to report such activities. But these duties are separate from, and should not be confused with, a professional duty to report. Of course, if these personal problems lead to situations that can be judged from an engineering perspective to create a danger to the public, the engineer is obliged to deal with the situation.

Proper course of action

What should engineers do if they discover situations that endanger safety or the public welfare? Because each situation is different, engineers should judge how to proceed based on the particular facts of each case.

In most cases, however, here is how you should try to deal with situations endangering the public:

1. Assure yourself that the problem is real and that you have correctly assessed the potential harm that might result. Find and prepare all supporting information, such as legislation, codes, practice guides, calculations, and technical manuals, that will reinforce your opinion.
2. Determine whom you should inform. Because a professional engineer has obligations of fairness and loyalty to clients and employers and is also obliged to act as a faithful trustee or agent, initial disclosure must always be to the practitioner's employer or client.
3. Advise the client or employer of the problem and suggest remedial action. Take all reasonable steps to ensure that

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the person is aware of the danger that you believe might result from a failure to deal with the situation.

4. After a reasonable length of time, follow up with the client or employer to see if appropriate action has been taken. The engineer should advise the client or employer that, because of the engineer's duty under the *Professional Engineers Act*, it will be necessary to take this matter to appropriate authorities if the client or employer does not take action.
5. At this time, it might also be helpful to review the situation with at least one independent engineer to obtain an opinion on the harm that might arise from the situation, if not corrected. This will provide the engineer with some corroboration and support. The other engineers might also provide suggestions on what action might be taken. But be aware of your duty to maintain confidentiality about an employer's or client's business. If possible, limit your discussions to in-house engineers. If you can't find in-house engineers, find engineers who can be considered impartial third parties.
6. In the absence of a resolution and where the situation is serious enough to warrant your ongoing concern, the matter should be escalated up the management chain. This should not be done without first informing the initial contact. Reiterate that as a professional engineer you are legally obliged to report a dangerous situation and that, in your opinion, this situation must be corrected.

Whistleblowing

Sometimes, professional engineers find that their advice isn't accepted and the client or employer has no intention of correcting the situation. If after exhausting all internal resources, an engineer firmly believes that the health and safety of any

person is, or is imminently, endangered, the engineer might find it necessary to report these concerns to such an external authority as a designated regulatory body, a government ministry, or ombudsperson. It is only in exceptionally rare cases that going directly to the media or a private watchdog agency would be justified. Because professional engineers have obligations both to clients and employers, they must be discreet in bringing the situation to the attention of anyone outside of their employer's or client's business.

Because a whistleblower is violating moral and legal obligations to an employer or client, it is a risky proposition. No one should take this step without seriously considering its necessity. If an engineer has reported the situation through the entire internal management chain, most would agree that the duty to report has been fulfilled. But like civil disobedience, whistleblowing is sometimes the morally correct response to an intolerable situation, especially if people are in danger.

Professional engineers who engage in whistleblowing are often driven to take this action out of a sincere belief in the "rightness" of their cause. They can become crusaders but, as a judge noted in a recent case, an engineer in this kind of situation can lose objectivity. Having become so involved in trying to correct a perceived wrong, the whistleblower may not be able to step back and view the issue dispassionately from different perspectives. This is why it is a good idea to seek independent opinions before going public.

Engineers faced with this decision may also contact PEO for guidance. The association has a process for assisting professional engineers who are dealing with an uncooperative or wilfully negligent client or employer. This process is detailed in the *Guideline to a Professional Engineer's Duty to Report*, which is available from the publications section of PEO's website, (www.peo.on.ca).

Reporting incompetence or misconduct

There is no explicit requirement in the *Professional Engineers Act* that requires PEO licensees to report to the association apparent breaches of the rules of professional conduct by other licensees. The Act refers only to the duty to report unsafe situations or situations that are detrimental to the public welfare. Where an engineer's incompetence or negligence creates a situation that meets these criteria, other engineers who notice need deal only with that situation, in the manner described above. Since the duty to report refers only to situations rather than people, they are not compelled to report the individual to PEO. However, if an engineer is concerned that the incompetence or misconduct exhibited by another engineer is extreme and warrants action by the association, the engineer can make a complaint, just like any member of the public. Since the profession's reputation can be adversely affected by any incidence of incompetence or misconduct, members of the profession who are aware of such behaviour should consider reporting it to be a prudent and practical decision.

Protecting the public

The duty to report is an essential component of an engineer's commitment to professionalism. In fact, it is so fundamental that most engineers probably don't realize that they are doing this daily when they identify designs, processes and procedures that are unsafe, unhealthy, or uneconomical (which is detrimental to the public welfare) and then take action to correct these problems. Indeed, no professional engineer should disparage or renege on his or her duty to report.

All professions exist at the pleasure of, and in order to serve, the public. And without the exclusive privilege given professionals to provide specific services to the public, there would be no engineering profession. But unless the citizens of Ontario are assured that professional engineers are protecting their interest, they have no reason to award this privilege. ♦

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