



## Code of Ethics—a misnomer?

Is PEO's Code of Ethics enforceable? It's commonly thought not to be. But what if it were called a code of professional conduct? That would be enforceable, wouldn't it?

by Sal Guerriero, P.Eng.

In Ontario, the statutory regime allows only licensed practitioners to engage in the practice of professional engineering, and to offer those services to the public. As well, the *Professional Engineers Act* sets out the entitlements for practitioners, as well as the duties and obligations owed to the public. A basic principle of the Act is that an individual, upon applying and meeting the requirements for licensure, becomes accountable to the public in exchange for the privilege of a licence. The requirements for licensure are found at section 14(1) of the Act. To obtain a licence from PEO, an individual must meet the leg-

The Act ensures accountability to the public through the Complaints and Disciplinary processes<sup>1</sup> that are administered by PEO. Since being licensed to practise professional engineering is a privilege and not a right, there are means available to revoke this privilege when a case of serious professional misconduct or incompetence is proven against a practitioner.

### Objects of the profession

Engineering is considered a profession because it is an intellectual endeavour that requires of those who practise a combination of extensive formal education, training and experience before one is able to render independent and reasoned professional judgment. The products that are a result of professional engineering create

and protected. Moreover, section 2(4)(3) of the Act states that for the purpose of carrying out its principal object, PEO has an additional object to establish, maintain and develop standards of professional ethics among its license holders.

PEO's Council holds delegated powers granted by the Ontario Legislature to make regulations in accordance with the empowering Act, with prior review by the Minister and subject to the approval of the Lieutenant Governor-in-Council. Section 7(1)(20) of the Act allows Council to make regulations prescribing a code of ethics. Unfortunately, the current Act and regulation may not be the best examples of legal drafting. This is not an unusual occurrence in legislation that has undergone numerous amendments. Consequently, certain

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islation's requirements for education, experience, the passing of professional examinations, and be of good character.

Under the Act, PEO also administers statutory processes that result in the rendering of disciplinary decisions that sanction those who fail to maintain an expected standard of care. Individuals who wish to engage in the practice of professional engineering must therefore have an awareness of the laws and regulations that govern the profession to avoid contravening them.

wealth and overall economic benefit to society, but also have the potential, if improperly designed, to create harm to the public. Most members of the general public are unable to exercise the skills required to judge a professional engineer's ability, and thus enter with the P.Eng. into a relationship of trust.

Section 2(3) of the Act establishes that the principal object of PEO is to regulate the practice of professional engineering and to govern its licence holders in order that the public interest may be served

terms used in the Act and Regulation 941 may have conflicting meanings.

### Norms—not philosophy

It is often stated that ethics must not be confused with law. Modern legal theory separates the question of what is legal from the question of what is moral. It also expresses the view that any law counts as a legal norm, as long as it is created according to set procedures and by entities that have the recognized authority to do so.

On the other hand, ethics is a branch of philosophy involving issues of morality, and permits individual deliberation in order to arrive at a decision about what is good or evil, right or wrong. There are also numerous theories that provide analytical frameworks that assist a conscientious person faced with a dilemma. These theories permit ethical discourse, the means to critically review a dilemma, pass judgment and engage in a course of action.

The two main schools of ethical thought involve teleological and deontological theories.<sup>2</sup> Teleological theory is concerned with consequences of actions upon others, while deontological theory focuses on the motivation behind an action rather than on the consequences. What constitutes ethical behaviour is always subject to debate as evidenced by the many theories expounding ethical frameworks for resolving moral dilemmas.

Ethics often form a backdrop to laws, yet not all laws are ethical. History is full of examples of unethical laws. Consequently, ethics can be used as a tool to criticize a law as immoral, and may assist in making cogent arguments for having laws amended or repealed. Although ethical theories are useful, professional engineering codes of ethics are not structured as analytical theories to help a person to make choices. Rather, codes of ethics describe duties and standards of care that practitioners are expected to meet.

Similarly, PEO's Code of Ethics should not be confused with ethics per se. A code is primarily a collection of laws, regulations or rules. A code of ethics cannot prescribe ethical conduct when, by definition, ethics imply moral deliberation and freedom of choice. Rather, what the Code of Ethics in section 77 of Regulation 941 states as duties and standards of care, section 72 defines a failure to meet prescribed standards as professional misconduct.

There is considerable debate on the usefulness of codes of ethics. Not only have ethical codes been criticized as oxymorons and therefore unnecessary, several scholars have also argued that ethical codes can actually have a negative effect on ethical deliberation.<sup>3</sup>

Consequently, it would be best for professional engineers to construe the Code of Ethics as simply a code of professional conduct that provides legal norms and rules that help define the duties and standards of care owed by practitioners.


Codes of ethics, including PEO's, may therefore be a misnomer<sup>4</sup> for codes of professional conduct. In that sense, codes of professional conduct are nothing more than a compendium of legal norms that may be amenable to disciplinary processes to ensure compliance.

### Context is everything

Legislation must always be read as a whole. The language of one section may affect the interpretation of another. Another rule of construction of statutes is that words may have a different sense from their ordinary meaning, if there is something in the context or in the object of the statute that tends to show that they were used in a special sense. Rules of statutory interpretation are not rules of law, but are rather rules of construction to assist in finding the lawmaker's true intent.

Section 72 (2)(g) of Regulation 941 is often cited as the provision that makes section 77 unenforceable. But the disciplinary process is not limited to actions that constitute professional misconduct, including also actions that may lead to a finding of incompetence. Specifically, section 28(1) of the Act gives jurisdiction to the Discipline Committee to hear and determine matters that allege professional misconduct or incompetence.

Section 72(2)(g) states that a breach that is solely a breach of the Code of Ethics is not in itself professional misconduct. But this lone provision must be read taking into consideration the object of the statute, together with the wording of other provisions under the Regulation and the Act. For example, nothing prevents section 77 from being used to support a complaint that alleges only incompetence, or preventing section 77 to be used in conjunction with allegations of negligence defined under section 72. These few examples show that a breach



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of section 77 is not limited to issues of professional misconduct. Hence, section 72(2)(g) should not be interpreted as preventing the enforceability of section 77.

### Discipline process

“Soft” law or aspirational norms are also included in section 77. They are identified by the words “shall endeavour.” One way for a code of professional conduct to become “hard” law, is through disciplinary decisions. For example, section 77(2)(iv) states that practitioners shall endeavour to keep their licence displayed in the place of business. Although there is

ing of professional misconduct or incompetence is made, the sanctions that are prescribed by law will be imposed to discourage future recurrence of the behaviour. The sanctions also serve as a deterrent to others, with an overriding concern to prevent undermining the public’s trust in the profession. What is always at stake is the trust conferred by the public upon the profession to self-regulate in the interest of the public. Therefore, it would be imprudent for a practitioner to disregard section 77 on the basis that there are a few aspirational norms incorporated within that section.

ests, and the person on whom the trust is fully reposed has unilateral power to affect the interests of the other.

A fiduciary relationship probably best describes the relationship between a practitioner and his or her client, and where a fiduciary duty is stated by legislation to exist, a standard of care is implicitly expected to be met. Hence, it would be inappropriate to ignore one of the defining duties and fundamental norms of conduct owed by members of the professions. Viewing section 77 as a binding code of professional conduct preserves coherence in the law, in that there are

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nothing inherently unethical about failing to display a licence, a breach may nonetheless be a contributing factor for decision-makers to arrive at a conclusion that there has been a violation of a positive legal norm.

Section 72(2)(j) of Regulation 941 defines professional misconduct as conduct or an act relevant to the practice of professional engineering that, having regard to all the circumstances, would reasonably be regarded by the engineering profession as disgraceful, dishonourable or unprofessional. This is a very broad provision that confers wide adjudicative discretion on the discipline panel to determine what constitutes unacceptable professional behaviour.

An enforceable code of professional conduct ensures that members who fail to maintain the expected standards of practice will be subject to an objective disciplinary process that will inquire into whether there has been a failure to meet a prescribed standard of care. It is not an inquiry into the subjective mind of the complained-against practitioner. If a find-

### Standards and duty of care

Professional misconduct is generally defined as a failure to meet the minimum standards that a reasonable and prudent practitioner would maintain in the circumstances. The latter definition is closely related to the concept of negligence, in tort law. The main difference is that the defined failures are to be judged objectively using the standard of a reasonable and prudent practitioner, not simply that of a reasonable person. More is demanded of practitioners because they hold themselves out as possessing specialized knowledge and experience. This is the fundamental reason that the public consults professionals.

Section 77(1) states unequivocally that a practitioner owes duties to the public, the employer or client, other professionals and therefore by implication to the profession.

Section 77 also incorporates the fiduciary obligations that are often imposed by the courts.<sup>5</sup> Such duties exist in relationships where one person trusts or relies on another to act in his or her best inter-

no conflicts between Regulation 941 and the general law. ♦

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### References

1. Section 28(4) of the Act provides for the power to revoke, suspend, impose terms and restrictions, reprimand, fine up to \$5,000, and impose costs of proceedings against a practitioner guilty of professional misconduct or incompetence.
2. D. Lametti, “Property and (Perhaps) Justice” (1998) 43 McGill L.J. 663 at 670.
3. M.A. Wilkinson, C. Walker and P. Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill L.J. 645 at 648.
4. V.N. Hamner, “Do Scientists Need a Professional Code of Ethics?” online: <[http://www.csu.edu.au/learning/eis/ethix\\_4.html](http://www.csu.edu.au/learning/eis/ethix_4.html)>(date accessed: February 20, 2003).
5. *Hodgkinson v. Simms* [1994] 3 S.C.R. 377.