

- III.8. - *Code of Ethics: Engineers shall accept personal responsibility for their professional activities, provided, however, that Engineers may seek indemnification for services arising out of their practice for other than gross negligence, where the Engineer's interests cannot otherwise be protected.*

USE OF SPECIFIC INDEMNIFICATION CLAUSE FOR HAZARDOUS WASTE SERVICES

FACTS:

Engineer A performs hazardous waste remediation services for his clients. In drafting the contractual agreement that he uses with his clients, Engineer A has determined that he must include an indemnification provision whereby the client shall be required to "indemnify and hold harmless Engineer A for any damages or legal costs (including attorneys fees) arising from the performance of the hazardous waste remediation services". Engineer A's agreement, however, also includes exclusionary language to the effect that the indemnification would not apply to losses resulting from Engineer A's "willful misconduct or sole negligence." Engineer A concluded that he is compelled to incorporate the indemnification provision into the agreement after carefully surveying and analyzing the hazardous waste insurance market and determining that the hazardous waste liability insurance coverage currently available is inadequate to protect himself and his firm.

QUESTION:

Was it ethical for Engineer A to include in his contractual agreement with his clients a provision whereby the client is required to "indemnify and hold harmless Engineer A for any damages or legal costs (including attorneys fees) arising from the performance of the hazardous waste remediation services"?

DISCUSSION:

As the Board has noted on numerous occasions, a basic tenet of ethical conduct relates to the obligation of the engineer to accept responsibility for professional services that the engineer renders. This tenet is based upon the view that as a member of a learned profession, an engineer possesses skill, knowledge and expertise and is expected to use those attributes for the betterment of mankind. Engineers, through the enactment of engineering licensing laws and other legal restrictions, are granted the authority to practice their profession to the exclusion of others. As a result of this grant of authority, the law expects licensed engineers to perform professional services in a non-negligent manner. In addition, as with other professions, engineers are also expected to be personally liable for their acts, errors or omissions in the performance of their professional services. Engineers typically address issues of liability through a variety of risk management techniques such as insurance, contract document language and other professional practice considerations.

In BER Case No. 86-4, the Board considered a case involving the modification of signed and sealed plans by other than the responsible engineer. However, BER Case No. 86-4 was rendered before a significant change was made to Section III.8. of the NSPE Code of Ethics. Soon after BER Case No. 86-4 was issued, the Board proposed an addition to NSPE Code Section III.8. which was adopted by the NSPE Board of Directors. That addition made the following revision (addition underlined):

"III.8. Engineers shall accept responsibility for their professional activities; provided, however, that Engineers may seek indemnification for professional services arising out of their practice for other than gross negligence, where the Engineer's interests cannot otherwise be protected."

This language was added to the NSPE Code of Ethics in response to the needs expressed by many practitioners at the height of the "liability crisis" during which many engineers were forced to practice with little or no professional liability insurance, or in some instances, as a condition of performing certain types of services (e.g., pollution and asbestos-related professional services) that require clients to indemnify and hold the engineer harmless for the engineer's professional errors and omissions. This change reflects the view stated by the Board on numerous occasions that the NSPE Code of Ethics is a living document that must be realistic and from time-to-time reflect changes that occur in the practice environment in order to maintain credibility and currency.

Later, the Board considered BER Case No. 93-8 where Engineer A, an engineer, required a broad indemnification provision in all of his agreements where he provides pollution-related services. Under the agreement, the client was required to "indemnify and hold harmless Engineer A for any damages or legal costs (including attorneys fees) arising from Engineer A's negligence in the performance of pollution-related services." Engineer A had inserted the indemnification provision during the early 1980's at the time of the "liability crisis" because of the unavailability of pollution-related insurance coverage but since that time the insurance industry had re-entered the pollution insurance market and provided limited pollution coverage for an additional premium.

In deciding that Engineer A's actions in BER Case No. 93-8 were unethical, the Board noted that since the change in Section III.8. of the NSPE Code of Ethics, the professional liability insurance market had changed significantly and that most major professional liability insurers in the U.S. today had re-entered the A/E professional liability insurance market and many now offer some type of limited coverage for both pollution and asbestos-related services. For that reason, consistent with the intent of NSPE Code Section III.8. and the intent of the changes made to NSPE Code Section III.8. during the height of the "liability crisis", the Board concluded that there was a need to further amplify the extent to which engineers should appropriately avail themselves of the scope of NSPE Code Section III.8. In the Board's view, NSPE Code Section III.8. should be read in the context of indemnification to mean that an engineer has an obligation to accept responsibility for professional activities and, where appropriate, obtain professional liability or other protection for the benefit of the engineer's client to the extent that such professional liability or other protection are available either on the market or in other spheres. In reaching this conclusion, the Board specifically noted that the cost and scope of professional liability insurance continued to be prohibitive for some practitioners and that the failure to obtain professional liability insurance is not in any sense a breach of ethics. However, the Board noted that where such protections are reasonably available and affordable to the engineer

to guard the interests of both the client and the engineer, barring special or additional circumstances, the engineer has an ethical obligation to obtain such protection and not seek indemnification from the client for ordinary negligence. Among the reasons for the Board's decision in BER Case No. 93-8 was the Board's clear concern over Engineer A's reflexive use of an indemnification provision without any apparent regard or examination as to whether his interests could otherwise be protected as stated in the NSPE Code Section III.8.

Turning to the facts of the present case, we believe the circumstances in this case can be clearly distinguished from BER Case No. 93-8. Case No. 93-8 involved broad pollution-related services on all projects while the present case involves specifically hazardous waste remediation services. Unlike traditional and customary engineering services, hazardous waste remediation services frequently require engineers to perform actual physical work (i.e., sampling, testing) on the remediation site and such activities could easily expose professional engineers to significant additional third party liability exposures. Moreover, the risks incurred in performing hazardous waste work may be quite significant, not necessarily based on fault and may significantly increase due to strict joint and several liability standards. Finally, unlike traditional areas of engineering practice, the hazardous waste field is in its infancy and is slowly evolving. Because of these factors, engineers practicing in this challenging field should be allowed a degree of flexibility to explore a variety of risk management techniques which include insurance, contractual provisions (e.g., indemnification, limitation of liability) and other professional practice considerations.

It should be noted that, unlike BER Case No. 93-8 where the engineer routinely and automatically included an indemnification provision in all contracts, in the present case, Engineer A evaluated his professional liability options and only after this careful evaluation, determined that the only reasonable course of action to protect his and his firm's interest would be to include the indemnification provision in his agreements with clients. Additionally, Engineer A has excluded his own willful misconduct or sole negligence from indemnification and thereby accepted a share of risk in the hazardous waste services. By its project specific proscription of service to hazardous waste remediation and by proposing a risk-sharing form of agreement, the Board cannot interpret the language to constitute a "broad" form of indemnification.

Taking all of these factors into consideration, we believe that Engineer A acted reasonably and ethically because he carefully evaluated the facts and circumstances involved and determined that the inclusion of the indemnification provision was the only reasonable means of protecting his and his firm's interests. In addition, it is reasonable to expect the client to retain this liability exposure.

CONCLUSION:

It was ethical for Engineer A to include in his contractual agreement with his clients a provision whereby the client is required to “indemnify and hold harmless Engineer A for any damages or legal costs (including attorneys fees) arising from the performance of the hazardous waste remediation services”?

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- * Note -- In regard to the question of application of the Code to corporations vis-à-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.