

Section III.9. - Code of Ethics

USE OF BROAD INDEMNIFICATION CLAUSE FOR POLLUTION SERVICES**FACTS:**

Engineer A, a civil engineer, requires a broad indemnification provision in all of his agreements where he provides pollution-related services. Under the agreement, the client is 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. In recent years, the insurance industry has re-entered the pollution insurance market and now provides limited pollution coverage for an additional premium.

QUESTION:

Would it be ethical for Engineer A to continue to require a broad indemnification provision in *all* of his agreements where he provides pollution-related services?

REFERENCE:

Section III.9. -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.

DISCUSSION:

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 as they do other professions 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.

The Board has not reviewed Section III.9. of the Code with great frequency. In BER Case 86-4, the Board considered a case involving the modification of signed and sealed plans by other than the responsible engineer. In reviewing the case, the Board cited Section III.9. of the Code and expressed concern that the engineer in that case failed to acknowledge responsibility for the full design by notations on the drawings. The Board indicated that this failure suggested a lack of recognition on the part of the engineer that his modifications in the design might have an impact on the efficacy and integrity of the entire project design. For that reason, we found the engineer unethical in that case. However, BER Case 86-4 was rendered before a significant change was made to Section III.9. of the Code. Soon after BER Case 86-4 was issued, the Board of Ethical Review proposed an addition to Code Section III.9. which was adopted by the NSPE Board of Directors. That addition made the following revision (addition underlined):

"III.9. 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 engineer 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) 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 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.

It has been approximately seven years since the modification was made to Section III.9. of the Code of Ethics. Since that time, it appears that the professional liability insurance market has changed significantly. Most major professional liability insurers in the US today have reentered 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 Section III.9 and the intent of the changes made to Section III.9. during the height of the "liability crisis", we believe there is a need to further amplify the extent to which engineers should appropriately avail themselves of the scope of Section III.9. In our view, Section III.9. 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. We are mindful that the cost and scope of professional liability insurance continue to be prohibitive for some practitioners and we are in no way suggesting that the failure to obtain professional liability insurance is in any sense a breach of ethics. However, we are of the view that where such protection 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.

We believe that this was the original intent of the drafters of the modification to Section III.9. and is also the proper interpretation of the Code of Ethics in the current professional liability environment. We recognize that the professional liability environment is cyclical, fluid and subject to change. However, we feel it is the role of this Board to interpret the Code provisions consistent with current conditions within professional practice and we reserve the right to modify our view as circumstances within professional practice warrant.

CONCLUSION:

It would not be ethical for Engineer A to continue to require a broad indemnification provision in *all* of his agreements where he provides pollution-related services. Engineer A should tailor the indemnification agreement to accept reasonable liability and consider current availability of professional liability insurance as appropriate to the project.

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Note: In regard to the question of application of the Code to corporations vis-a-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.