Ethical Considerations

Overview

Many issues of law yield shades of grey instead of black-and-white answers. For this reason, professional associations adopt ethical standards. Broadly stated, ethics is the theory of morality. Moral principles are the standard of conduct required by society, by an organization or group, or by an individual. The standard of conduct discussed in this chapter is not the legal standard discussed in Chapter 12; rather, it is the standard required of a profession or group of its members as set out in codes of ethics or codes of professional practice.

Professional and trade associations adopt codes of ethics to assist members in determining the correct course of action in unclear circumstances. While failure to follow these codes of ethics can result in legal liability, the primary penalty is disciplinary action against members.

Ethical issues are closely related to conflicts of interest. A conflict of interest is a situation in which the professional has conflicting obligations to the public, the client, the employer, the profession, or him- or herself. An ethical problem can often be solved by identifying the conflicting interests and obligations and then determining which obligations or interests take precedence.

Breaches of ethics are difficult to define, but a professional should recognize one when it is present. However, the vague assertion that “you’ll know it when you see it” provides little assurance. Some potential breaches are easy to recognize because they are so common (e.g., acting in the same matter for two competing parties is obviously a conflict of interest). Normally, when duties are owed to more than one party simultaneously, a code is needed to determine which duty governs.

3.1 The Relationship between Ethics and the Law

There is a strong connection between ethics and law. That is because laws are derived and created based on a society’s collective sense of morality. It is therefore not surprising that conduct which is considered unethical or, more specifically in the case of a design professional, contrary to the applicable code of ethics will usually attract other legal consequences as well.
Legal consequences for most members of the public can be divided into two categories: criminal consequences and civil liability. In the case of a design professional, there may also be a third category of consequences: consequences that may arise out of disciplinary proceedings, including temporary or permanent loss of professional status. In terms of severity, criminal consequences are the most serious because they can result in imprisonment. Civil consequences are usually in the form of monetary damages awarded against a defendant. Disciplinary consequences for breach of a code of ethics may be in the form of a reprimand, a suspension, a fine, loss of the right to practise, or a requirement to undergo further training or review.

It is easy to think of an example of conduct that can attract criminal, civil, and disciplinary consequences simultaneously. Fraud is such an example. An engineer who defrauds a client may be charged under the Criminal Code of Canada, may be sued for damages in court by the client, and may also face a disciplinary hearing. The commonly understood rule against “double jeopardy” (or, in this case, triple jeopardy) does not apply, as that rule merely prevents a person from facing criminal charges twice for the same offence. It does not prevent criminal charges from being brought at the same time as civil and disciplinary proceedings. The fictitious engineer in this example could be sentenced to a term of imprisonment, be ordered to pay damages to the defrauded client, and lose his or her licence.

Criminal conduct committed by a design professional relating to his or her work will, in the vast majority of cases, also be considered unethical. However, the converse is not true; not all unethical behaviour is criminal, and it is fair to say that most cases in which a design professional is found guilty of unethical conduct do not involve criminal prosecution. For example, an architect who acts for two clients simultaneously where those clients have competing interests would likely be found to have breached the applicable code of ethics, but only in rare circumstances would such behaviour be found to attract criminal liability.

It is also possible that criminal behaviour and criminal conviction in a matter that does not involve professional duties, such as fraud unrelated to the professional practice, could attract disciplinary consequences. But not all such behaviour would result in disciplinary proceedings.

Many matters that attract civil liability for damages, such as negligence, may also attract disciplinary consequences. Professional engineers and geoscientists are routinely disciplined by their professional bodies for negligent conduct.

Standards of proof differ from one type of proceeding to another. Criminal charges must be proved beyond a reasonable doubt, and civil claims must be proved to a lower standard of proof, known as balance of probabilities. Therefore, if a design professional is found guilty of criminal fraud, that conviction would almost always be sufficient to prove civil liability and could be relied upon by a disciplinary tribunal where the charges relate to the same conduct.

Rules almost always have exceptions. Because ethics is a matter of personal morals in many cases, there are exceptions to the rule that criminal behaviour is generally considered unethical. Countries and provinces may pass unjust legislation, such as the slavery laws that existed in the United States in the past or the internment legislation in Canada during World War II. In such cases, civil disobedience may result in criminal conviction, but is not necessarily unethical.

From a practical perspective, when a design professional is accused of having done something unethical, this accusation should alert the accused to obtain legal counsel immediately and to notify his or her liability insurer. Liability insurance will, in some cases, provide coverage for defence of the accused in disciplinary proceedings. Whether coverage exists depends on the

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1. There is conflicting case authority regarding whether disciplinary charges for unethical behaviour must be proven on a balance of probabilities or to a standard that falls somewhere between that standard and the criminal standard.
wording of the policy and the nature of the charges. Charges that relate to intentional behaviour such as fraud are not likely to be covered, whereas negligence is more likely to be covered. Care must be taken, if possible, to avoid having the evidence in one proceeding be used in other proceedings. An accused in a criminal case has the right to remain silent and avoid self-incrimination, and if criminal charges are pending simultaneously with disciplinary proceedings, the accused should apply to suspend the disciplinary proceedings until the criminal case is concluded. The same considerations apply to civil cases. If a civil lawsuit is pending at the same time as disciplinary proceedings, the accused should apply to suspend the disciplinary proceedings temporarily.

For certain professions, codes of ethics clearly identify to whom duties are owed and in what priority. For example, lawyers have very specific rules dealing with conflict of interest between two clients, and between the duty owed to the client and the duty owed to the court. Virtually all governing bodies for architects, engineers, and geoscientists have similar codes of ethics. For individuals who are not members of professional bodies and are therefore not bound by their rules, the law sometimes provides a legal remedy for unethical behaviour.2

For architects, engineers, and geoscientists, duties to the following parties can usually be found in the applicable code of conduct in each province:

- a. duty to the public
- b. duty to the client
- c. duty to the employer
- d. duty to the profession

In addition, a professional owes a duty to him- or herself. However, that duty typically ranks lower than duties owed to other parties. Many of the toughest and most problematic ethical dilemmas occur when there is conflict between two sets of duties or roles.

This chapter examines each of the above duties individually, as well as the interrelationship between the duties. The duty to the public includes the paramount duty of protecting the safety and welfare of members of the public, as well as the duty to act with fairness and integrity toward members of the public. The duty to the client includes avoiding conflict between personal gain and the client’s interest, as well as maintaining confidentiality. The duty to the employer is similar to that owed to the client, particularly regarding confidentiality and non-competition. The duty to the profession is often a formalization of basic principles of common courtesy but may include an obligation to report misconduct of other members.

### 3.2 Codes of Ethics

Each provincial association governing the engineering profession has a code of ethics. All are based to some degree on Engineers Canada’s Guideline on the Code of Ethics, which states its philosophical principles in the preamble:

Professional engineers shall conduct themselves in an honourable and ethical manner. Professional engineers shall uphold the values of truth, honesty and trustworthiness and safeguard human life and welfare and the environment. In keeping with these basic tenets, professional engineers shall . . . .3

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2 The law may impose a fiduciary relationship upon parties to protect one of the parties; or it may impose one of the attributes of a fiduciary relationship, such as the requirement not to disclose or make use of confidential information.

3 Excerpt from the Engineers Canada Guideline on the Code of Ethics (p. 3). Available at http://www.engineerscanada.ca/sites/default/files/guideline_code_with_1.pdf
The PEO Code of Ethics is structured somewhat differently but contains the same general requirements. For example, the first paragraph of that code contains the following requirements:

It is the duty of a practitioner to the public, to the practitioner’s employer, to the practitioner’s clients, to other licensed engineers of the practitioner’s profession, and to the practitioner to act at all times with,

i. fairness and loyalty to the practitioner’s associates, employers, clients, subordinates and employees,

ii. fidelity to public needs,

iii. devotion to high ideals of personal honour and professional integrity,

iv. knowledge of developments in the area of professional engineering relevant to any services that are undertaken, and

v. competence in the performance of any professional engineering services that are undertaken.5

The code of ethics for British Columbia engineers and geoscientists mirrors Engineers Canada’s guidelines more closely. For example, the first numbered paragraph after the preamble is identical to the guidelines: “Hold paramount the safety, health and welfare of the public, the protection of the environment and promote health and safety within the workplace.”6

The codes of ethics for architects follow the same patterns. Architectural codes of ethics contain conflict-of-interest guidelines, as well as provisions relating to disclosure requirements, confidentiality, honesty and impartiality, courtesy to fellow architects, and reporting requirements where the architect becomes aware of a violation of the code of ethics. For the most part, the codes of ethics for geoscientists are identical to those that apply to engineers.

3.3 The Duty to the Public

Professional architecture, engineering, and geoscience regulatory bodies have been established to protect the public interest; therefore, it is not surprising that the codes of ethics place the duty to the public higher than any other duty.7 Disregard for public safety can result in negligence claims and loss of the right to practise. This duty also encompasses the duty not to undertake work outside one’s area of competence.

Professionals sometimes find themselves in difficult ethical situations. Sometimes employers and clients expect them to compromise their professional judgment to save money or further the client’s or employer’s interest. This type of pressure can put professionals in a further conflict if loss of employment is one possible outcome. However, in such cases, the professional’s decision must be clear-cut: Public interest in safety must take precedence over all other duties.8

Yet the duty to the public encompasses more than safety. It also includes a duty to act with fairness and integrity. Professionals must act independently and impartially to all parties. For

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4 Professional Engineers Ontario.
5 Professional Engineers Ontario Code of Ethics (section 77, regulation 941). Available at http://peo.on.ca/index.php/ci_id/1815/la_id/1.htm
7 Engineers Canada uses the term paramount for that obligation.
8 In some jurisdictions, this pressure is explicitly recognized and addressed. For example, laws in parts of the United States require engineers to “not permit a client, employer, another person or organization to direct, control or otherwise affect the registrant’s exercise of independent professional judgment in rendering professional services for the client.”
instance, members of the public need to be able to rely on professional reports when making investment decisions and must be able to assume that the professional who wrote the report believed the contents of the report to be true.

Negligence claims often focus on the duty to the public. In such cases, the plaintiff has to prove on a balance of probabilities that the defendant failed to meet the standard of care expected of an average professional in the field. For this reason, the plaintiff often calls an expert witness to provide an opinion. An allegation by one professional that the work of another is unprofessional is a very serious allegation and should not be made unless the breach is clear. Therefore, expert witnesses cannot act as hired guns, saying what they are told to say. Experts are to assist the court in understanding technical matters. When experts take on the role of an advocate, they lose their independence and their credibility.\(^9\)

### 3.4 The Client’s Interest

The duty to the client is usually second only to the duty to the public. The following duties to the client found in the Association of Professional Engineers and Geoscientists of Saskatchewan (APEGs) Code of Ethics are typical of those found in other codes of ethics:

Members and licensees shall

- c. act as faithful agents of their clients or employers, maintain confidentiality and avoid conflicts of interest; . . .
- e. conduct themselves with fairness, courtesy and good faith towards clients, colleagues, employees and others . . . ;
- f. present clearly to employers and clients the possible consequences if professional decisions or judgments are overruled or disregarded; . . .
- h. be aware of, and ensure that clients and employers are made aware of, societal and environmental consequences of actions or projects . . . \(^{11}\)

Architects, engineers, and geoscientists also have a duty not to accept financial compensation from any other party whose interest conflicts with an existing client or to accept any assignment where personal interest may conflict with the client’s interest. For example, if a client retains an engineer to obtain zoning approval for a development that will decrease surrounding property values, and the engineer owns property in the affected area, the engineer has a conflict between the client’s interest and his or her personal interest. However, by providing full disclosure of this conflict of interest to the client, the engineer may avoid a conflict-of-interest problem.

During the course of performing duties, the architect, engineer, or geoscientist may become aware of certain confidential information.\(^{12}\) For example, an architect normally knows a client’s construction budget. This information must remain confidential, because a contractor bidding or working on the project could make use of it to the owner’s disadvantage. An exception to the duty of confidentiality is where the duty to the public demands disclosure.

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\(^9\) The balance of probabilities test means that the claim is more likely true than not. In a criminal case, the burden of proof is beyond a reasonable doubt, which is a much more difficult burden to meet.

\(^{10}\) See Chapter 14, p. 169.

\(^{11}\) Association of Professional Engineers and Geoscientists of Saskatchewan, Code of Ethics, s. 20(2)(a). Available at [http://www.apegs.ca/Portal/Pages/Act-Bylaws](http://www.apegs.ca/Portal/Pages/Act-Bylaws).

\(^{12}\) Confidential information is discussed in detail in Chapter 21.
3.5 The Employer’s Interest

An employee is an agent of his or her employer. One of the attributes of an agency relationship is the duty of loyalty; the employee must be loyal to the employer. Loyalty means that the employee must put the employer’s interest ahead of his or her personal interest.

In many ways, the duty to the employer is similar to the duty to the client. For this reason, the duties found in the APEGs Code of Ethics, as reproduced in the above section, apply to both clients and employers.

An employee’s duty to the employer requires that the employee not accept financial compensation from any other party whose interest conflicts with the employer’s interest, nor accept any assignment where personal interest may conflict with the employer’s interest. The most common example of such a conflict is an employee competing with the employer, either by moonlighting or by quitting to pursue an opportunity found by the employer. For example, an employee engineer who accepts engineering assignments on a personal basis, even if the work is performed on weekends or in the evening, is technically in competition with the employer. As long as it is work that the employer might reasonably perform, then the employee’s acceptance of the assignment privately without the permission of the employer constitutes a breach of the employee’s duty.

One remedy for such a breach is a constructive trust.13 A constructive trust is a trust implied by law in order to protect the rights of one party in a relationship; it may protect the rights of the employer if an employee improperly competes with the employer. Any profit earned by an employee in competition with his or her employer is deemed to be held in trust for the employer, and the employee can be forced to forfeit those profits to the employer. Of course, the employee may obtain the consent of the employer in advance to avoid this problem.

As with the duty to the client, employees have a duty of confidentiality to the employer. The issue of confidentiality often arises when employment is terminated. It is not uncommon for employers to require employees to agree that the employee will not compete with the employer for a set period of time. This agreement may be requested either at the time the employee is hired or at the time of termination, particularly while a severance package is being negotiated.14

3.6 Duty to the Profession

The professions of architecture, engineering, and geoscience are self-governing in the sense that once legislation is in place regulating the profession, the members oversee enforcement of the profession. The members elect a board or council, which in turn establishes committees to conduct investigations and disciplinary proceedings, verify qualifications of new members, draft bylaws, and perform related functions.

One of the consequences of self-governance is that members must accept the less-than-enviable duty of policing each other. For this reason, organizations enact statutes and bylaws that require all members to report certain types of unprofessional conduct of their fellow members. Some governing bodies even require self-policing by expelling members who fail to report malpractice claims against themselves.

13 Trusts are described in Chapters 17 (p. 206) and 18 (pp. 215–217).
14 See Chapter 21, pp. 248–250.
In Alberta, the Association of Professionals in Engineering and Geoscience in Alberta Code of Ethics defines the duty to the profession in this way:

Professional engineers, geologists and geophysicists shall uphold and enhance the honour, dignity and reputation of their professions and thus the ability of the professions to serve the public interest.\textsuperscript{15}

In British Columbia, the Association of Professional Engineers and Geoscientists of BC Code of Ethics requires that members

report to their association or other appropriate agencies any hazardous, illegal or unethical professional decisions or practices by members, licensees or others.\textsuperscript{16}

However, policing other professionals requires caution. If accusing professionals do not have access to all of the relevant facts, their criticism of the work or opinion of another member of the profession may in turn be interpreted as unprofessional conduct. While the logic of this requirement is obvious, its application can be troublesome. Consider the dilemma faced by an expert witness with limited access to documents and other evidence who is asked to express an opinion in a courtroom. In fact, this is quite common in lawsuits, because it is the job of the lawyer to introduce into court as evidence proof of the facts underlying the opinion. If experts rely on facts not in evidence, the opinion may be worthless.

An expert must provide an opinion based on a limited set of facts, and that opinion may impugn the professionalism of one of the defendants. In order to be fair to all parties, the expert should clearly state the assumptions upon which the opinion is based and should advise the client that the opinion may change if the facts are proven to be different.

3.7 The Dual Role of the Consultant as Owner’s Agent and Impartial Arbiter

Certain functions of a consulting professional, such as providing advice about selecting contractors, inspecting work for deficiencies, and negotiating with regulatory bodies, are always performed in the client’s interest. For example, the architect of record for a building project is almost always required under the terms of his or her contract to perform the following additional functions, each of which can substantially affect the rights of the contractor:

- evaluate and certify requests for progress payments
- evaluate claims for extra payment and delay
- issue the certificate of completion
- act as the first arbiter of disputes between the owner and contractor

These requirements give the architect a significant role when working with a contractor. In performing these functions, the consultant must not allow any perceived or real obligation to the owner to influence his or her decision such that it creates bias or a decision that is unfair to the contractor.\textsuperscript{17}

Certainly, the consultant must not prejudice the owner’s position, for example, by certifying an amount

\textsuperscript{15} Association of Professionals in Engineering and Geoscience in Alberta, Code of Ethics, Rule 5. Available at https://www.apega.ca/about/ACT/code.htm


\textsuperscript{17} The CCDC 2 contract, clause GC 2.2.6, states explicitly that the consultant must not show favour to either party when interpreting the contract.
for payment that exceeds the value of the work performed. However, consultants in this position sometimes favour the owner.

Claims for extra payment can place the consultant in a conflict-of-interest position. Three interests are at work when a dispute arises over a claim for extra payment. The consultant owes a duty to the owner to protect against unfounded claims; the consultant also owes a duty to the contractor to act fairly and impartially in evaluating the claim; and the third interest is the consultant’s self-interest.

The consultant’s self-interest exists because approving a claim for extra payment may mean that there was an error or omission in the original design. In effect, the consultant is being asked to evaluate the adequacy of his or her own design. If the claim for extra payment is approved in circumstances where the adequacy of the design is called into question, the owner may sue the architect to recover the extra cost. At the very least, the admission of an extra may lower the consultant’s reputation and may affect future work.

If a consultant honestly believes that the contractor is entitled to an extra, regardless of the cause, he or she should approve the claim. However, the consultant should be careful not to make any statement that could prejudice his or her insurer’s rights. If the contractor’s claim raises the possibility of a claim against the consultant, the consultant should notify his or her insurer and seek legal advice first.

### 3.8 Bribery of Foreign Public Officials

Because many Canadian engineers, geoscientists, and architects provide services and transact business outside of Canada, it is important to understand the risks and obligations associated with dealing with foreign public officials. There is a federal statute, entitled the *Corruption of Foreign Public Officials Act* (CFPOA), that prohibits bribery of foreign public officials. The CFPOA is an unusual statute in some respects. First, it is one of very few Canadian statutes that applies to conduct that takes place outside of Canada. The CFPOA applies to business transactions that have a “real and substantial” connection to Canada, as well as to all individuals and companies that have Canadian nationality. The definition of Canadian nationality in the Act includes permanent residents of Canada.

One of the difficulties faced by Canadian companies and individuals carrying on business abroad is that in some countries it may be difficult or impossible to get things done without making payments to foreign officials. The CFPOA currently contains an exception for “facilitation payments,” which may be described as small payments to help expedite the processing of routine approvals, but excluding the awarding of contracts. Similar legislation in other western countries, such as the United States, contains exceptions for facilitation payments. The Government of Canada is in the process of eliminating this exception in the CFPOA.

Breaches of the CFPOA are considered serious and are punishable by lengthy terms of imprisonment in addition to fines. But criminal penalties in Canada pale in comparison to penalties in other countries, including the United States.

The US legislation is entitled the *Foreign Corrupt Practices Act* (FCPA). It is beyond the scope of this textbook to examine the FCPA or similar legislation in other countries, but there are two aspects of the FCPA that should be of interest to Canadian design professionals and businesspeople. First, some countries, including the United States, do not recognize the principle of “double jeopardy” in relation to bribery of foreign officials. The principle of double jeopardy is that a person cannot be tried or convicted twice for the same criminal offence. However, if a Canadian is convicted under the CFPOA, that person could still be tried and convicted in the
United States in relation to the same conduct that gave rise to the conviction in Canada. Second, the United States does not require a real and substantial connection to the offence before it will take jurisdiction. Even a small connection, such as the use of the US Postal Service, may be sufficient to create jurisdiction of the US courts in relation to the offence.

CHAPTER QUESTIONS

1. A contractor has entered an agreement with an owner that contains a “no damages for delay” clause, precluding recovery by the owner for any delay howsoever caused. The owner then causes an intentional delay, which results in severe financial consequences to the contractor. The contractor asserts a claim, reasonable in all the circumstances except for the no damages clause. The architect must evaluate the claim. How should the architect deal with it?

2. A geoscientist is asked to provide assay results for a mining exploration company, which will be used in a public disclosure. The company offers to pay the geoscientist in shares of the company rather than cash. What is the acceptable course of action for the geoscientist?
   a) He/she cannot accept payment in shares.
   b) He/she can only accept payment in shares if he/she agrees to provide an unbiased report.
   c) He/she can accept the shares under any circumstances.

3. An architect is hired as the consultant under a CCDC 2 contract. The contractor claims that it was delayed by late approval of shop drawings. The architect should do the following:
   a) Reject the claim because it might result in the architect being sued by the owner.
   b) Evaluate the claim on its merits.
   c) Approve the claim so that it does not appear that the architect is biased.

4. Which of the following statements is true?
   a) Duty to the employer governs over duty to the client in all cases.
   b) Duty to public safety governs over duty to the client in all cases.
   c) Duty to one’s self governs over public interest in most cases.

5. An engineer is hired as an expert witness in a lawsuit. In the course of investigating the facts, the engineer discovers a serious structural deficiency. After the lawsuit is settled, as part of the settlement, the parties enter into a confidentiality agreement. The client demands that the engineer keep confidential all facts learned during the investigation. To whom does the engineer owe duties in this situation? Which duty prevails?

6. An engineer has designed formwork for a difficult concrete pour. The engineer submits the design to her superior, who suggests that smaller structural members can be used without violating the applicable code. The engineer rechecks her calculations, but remains unconvinced. What course of action should the engineer take? Does it make any difference if the superior is not a professional engineer?

7. An engineer employee has invented a new product for use in building construction. The invention was made during the course of employment, but has not yet been disclosed to the employer or anyone else. The engineer decides to quit his job and patent the invention as his own. Is there a breach of any duty? Discuss the ethical issues involved.
8. Which statement is true for a person who is not an architect, engineer, or geoscientist?
   a) He/she owes no ethical duty to anyone.
   b) He/she is not bound by the codes of ethics for those professions.
   c) He/she always owes a duty to comply with the codes of ethics of those professions.

9. During the course of employment, a geoscientist working for a mining company learns about a property rich in minerals. That geoscientist wants to quit her job and buy up some of the surrounding properties. In this situation, which of the following statements is false?
   a) The geoscientist owes a duty to her employer even after leaving her job.
   b) The geoscientist can buy up properties as long as the former employer agrees.
   c) The geoscientist owes no duty to the employer after quitting.

ANSWERS

1. The architect must evaluate the claim fairly, in accordance with the terms and conditions of the contract.

2. A

3. B

4. B

5. The engineer owes duties to the public, the profession, and the client. The duty to the client suggests that the engineer keep the problem confidential, but the engineer’s duty to the public and the profession suggest that the engineer should disclose the problem. Since the duty to the public is higher than the duty to the owner, the engineer should disclose the problem.

6. Public safety issues fall under the duty to the public. The duty to public safety demands that the engineer not reduce the size of the members and must re-evaluate the design with her superior. If the superior is also an engineer, then the junior engineer must also mention her professional requirement to disclose her concerns about her superior’s failure to uphold the duty to the public.

7. The engineer owes a duty of loyalty to his former employer. The invention is likely owned by the employer or held in constructive trust by the engineer for the benefit of the employer.

8. B

9. C