

Contacting the Prior Member

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This is an update of a two-part article prepared by Peter J Carson PEng, my predecessor, and published in the *BC Professional Engineer* in September and October 1985.

The issue I will address is the obligation of a reviewing member, who is asked to review and evaluate the prior work of another member, to contact that member. From my experience, this obligation appears to be frequently overlooked.

What the Code of Ethics Says

Principle 7 of the Code of Ethics states that “Professional Engineers and Professional Geoscientists shall conduct themselves with fairness, courtesy and good faith towards clients, colleagues and others, give credit where it is due and accept, as well as give, honest and fair professional comment.”

The *Guidelines for Professional Excellence*, at Appendix C, provide the “Code of Ethics Guidelines.” These Guidelines, under principle 7 at paragraph (c), and in the accompanying Commentary, expand on the Code of Ethics as follows:

“(c) Members should not, except in cases where review is usual and anticipated, evaluate the work of a fellow member without the knowledge of and after communication with that member where practicable.

Commentary:

Contacting a member whose work is to be reviewed is not only a professional courtesy but also provides the opportunity for the exchange of pertinent information that would assist in the review. If the results of such a review demonstrate safety or environmental concerns, it is recommended that the member responsible for the work be contacted again to review these concerns in order to provide him or her with an opportunity to comment prior to further action (see also Principle 9). It is recommended that all oral communication be confirmed in writing.

If a client requests a review of the work of a member and further stipulates that this member not be contacted, the client should be advised that these instructions are contrary to the spirit and intent of the APEGBC Code of Ethics.

Members are entitled to review and evaluate the work of other members when so required by their employment duties and when the experience and knowledge are appropriate. For an adequate review, it may be important to be aware of the nature and conditions attached to the assignment handled by the first member. Open communication should exist between the two members so that underlying assumptions are understood by the reviewing member, and so that the first member has an opportunity to respond to any comments or criticisms.”

When Contact is Required

Not all reviews fall under the requirement to contact the prior member. Where the review is part of a typical or institutional process — such as a review of a member’s submission by a regulatory body or an authority having jurisdiction — the

reviewing member will not be obliged to contact the prior member. In all but the most obvious cases, the reviewing member should carefully consider his or her obligation under the *Guideline* and err on the side of contact.

What kind of review triggers this obligation? As the *Guideline* points out, it must consist of a review and evaluation of the prior member’s work. If you are simply reading a report by another member for your own educational purposes — even though you naturally will be evaluating the work as you read the report — that does not require contact with the member who prepared the report.

At the other end of the scale, if you are asked to review the work product of another member and to offer comments or criticisms on that work product to your client, you clearly fall within the requirement to contact the prior member.

There will be many circumstances between these two extremes. Again, the reviewing member should carefully consider his or her obligation to contact the prior member and err on the side of contact.

The Commentary to the *Guideline* also raises the issue of the client instructing the reviewing member not to contact the prior member. The Commentary does require the member to advise the client that such instructions are contrary to the spirit and intent of the Code of Ethics. It does not, however, suggest what the member should do about the proposed engagement.

In my view, the member should decline the engagement in the face of such instructions, as the member should not undertake an engagement that would involve a breach of the Code of Ethics. The only possible exception is if the client is a lawyer who instructs the member not to contact the prior member so as not to breach solicitor-client privilege. I will address this in more detail below.

Nature and Extent of Communication

There may be some confusion about the communication required by the *Guideline*. The reviewing member must contact the prior member — and should have written documentation of this contact in the file — but certainly is not required to ask permission to conduct the review. Also, to clarify a misconception in the minds of some members, the reviewing member is not obligated to decline the engagement if the prior member has not been paid for the original work.

The *Guideline* makes some suggestions about the nature and extent of the communication. I would add that the reviewing member should use his or her good sense in determining the extent of the communication.

I would expect that the reviewing member would seek information on the prior member’s scope/terms of engagement, as well as any information on the work that would assist in the reviewing member’s understanding of the work. While the issue of payment for the original work does not preclude

the reviewing member from undertaking the review, such information might impact the reviewing member's business decisions relative to proceeding with the review.

Regarding the meaning of the phrase "where practicable" in the *Guideline*, I believe it is intended to address the situation where the original member has passed away or cannot be located.

Solicitor-Client Privilege

Solicitor-client privilege protects communications between a lawyer and client from disclosure. It also protects communications between the lawyer and a third party, made in the course of preparation for litigation, from disclosure.

Where a member is approached by a lawyer to review the work of another member for the purpose of litigation, that communication is protected by solicitor-client privilege and cannot be disclosed unless the client waives the privilege.

If the lawyer instructs a reviewing member not to contact the prior member, then the reviewing member would be precluded from such contact by virtue of solicitor-client privilege. That situation may also fall under the phrase "where practicable" in the *Guideline*. Of course, the member does not have to undertake the review of the prior member and could (and perhaps should) decline the engagement from the lawyer.

It could be argued that the member could undertake the review without contacting the prior member and not be in breach of the Code of Ethics, provided that the member receives written instructions from the lawyer not to contact the prior member for solicitor-client privilege reasons. The other proviso is that any report prepared by the reviewing member should contain a prominent qualifying statement to the effect that the reviewing member was not permitted to contact the other member, and therefore the reviewing member may not have all the correct information.

More Information

Members seeking more information on the above can reference the Code of Ethics Guidelines section in their copy of the *Guidelines for Professional Excellence*, which will also be posted on the APEGBC website this fall.

If you have any specific questions concerning when to contact the prior member, or what to do in a situation involving client-solicitor privilege, please contact me at (604) 412-4851 or rrettie@apeg.bc.ca. ▀

Penalty Hearing and Suspension — Kuldip Randhawa PEng (Surrey, BC)

The May/June 2005 issue of *Innovation*, page 28 reported that Kuldip Randhawa PEng of Surrey was found liable of unprofessional conduct. A penalty hearing was held on May 31, 2005 and the Discipline Panel ordered that:

1. **Beginning July 31, 2005, Mr Randhawa's work must be peer reviewed for the next 12 months by a member of the Association who has been approved by the Registrar. The peer reviewer must provide quarterly reports to the Registrar and the cost of the peer review is to be borne by Mr Randhawa.**
2. **Mr Randhawa must pass the Professional Practice exam and attend the Law and Ethics seminar before December 31, 2005.**
3. **Mr Randhawa must undergo a Practice Review (general and technical) before March 31, 2006 and pay for the cost of the review.**
4. **If Mr Randhawa fails to comply with any of the conditions set out above, he will be suspended until the condition is met.**

Mr Randhawa was also ordered to pay \$30,000 to APEGBC, representing 70% of the Association's legal costs. Mr Randhawa has filed an appeal of the Panel's decisions on liability and penalty.

Subsequent to the penalty hearing, Mr Randhawa failed to nominate a peer reviewer by July 31, 2005. Therefore, **effective August 1, 2005, Mr Randhawa's membership in the Association is suspended indefinitely.**

Contempt of Court — Richard G Jackson PEng (Kelowna, BC)

The November/December issue of *Innovation*, page 32 reported that an injunction was obtained against Richard George Jackson PEng of Kelowna to prevent him from continuing to practise engineering while under suspension. Mr Jackson has been under suspension since May 28, 2003.

It recently came to APEGBC's attention that, despite the injunction, Mr Jackson was still practising engineering. The Association has now obtained a court order that Mr Jackson was in contempt of the BC Supreme Court's injunction order. Mr Jackson has been advised that if APEGBC discovers he is still practising, it will seek an Order of the Court that he be incarcerated.

If you have any questions regarding Mr Jackson or any information regarding his engineering activities, please contact Geoff Thiele LLB, Associate Director, Regulatory Compliance at 1-888-430-8035, (604) 412-4852 or gthiele@apeg.bc.ca.

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