



# Engineer Liability Issues

Liability

Strategic Risk Management Guideline

Issue SRM201902-09

## Professional Engineers and Road Commissions – Protecting Each Other

In 2016, we discovered that some of the Licensed Professional Engineers (PEs) working for our Road Commissions had concerns that the exposure they have under the professional liability standards of their PE licenses may be different than the exposures the Road Commission has insured through our Pool. While we believe that the insurance offered by MCRCSIP covers all insurable risks for the Road Commission and its employees, our legal research has found that there is a (very small) possibility that Licensed Professional Engineers working for a Road Commission could be held individually liable for

professional malpractice to a member of the public or to another governmental entity for whom they have performed services under their license.

There is also a (very small) risk of exposure to individual liability for professional malpractice when a PE employed by a Road Commission performs professional services for a different Road Commission.

What standards apply to engineers? Those in the engineering and construction trades are required to act in a way that is characterized by care “normally possessed by members of the profession in good standing.” You can see that is a somewhat subjective definition. As an engineer, you are required to make the same reasonable, sound decisions that others educated in your field would be expected to make.



### *Key Terms*

**Engineering Malpractice** is an area of law dealing with a **professional's** wrongdoing or **negligence** that causes injury or damage. A few typical examples of **professional malpractice** are breach of fiduciary duty, fraud, mismanagement, errors in judgment, misconduct or carelessness that would not be observed in an ordinarily prudent member of the profession.

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**Gross negligence** is a substantial disregard of the need to use reasonable care, which is likely to cause foreseeable grave injury or harm to persons, property, or both. It is conduct that is extreme when compared with ordinary **Negligence**, which is a mere failure to exercise reasonable care

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Who can recover damages? Members of the public can collect financial compensation because of professional malpractice. Engineers need to make sure they are taking appropriate measures to protect themselves from civil litigation by adhering to ethical and legal requirements associated with the profession.

If a PE does work for others either on their own, or for a private company, their insurance representative will recommend they purchase a Professional Liability policy to cover their malpractice risks.

MCRC SIP does not have a coverage type that is titled "Professional Liability." Instead, the risks covered by professional liability policies are generally covered in our Public Officials' Errors and Omissions Coverage. That coverage provides a defense for all Road Commission employees when there is a claim of Negligence or Gross Negligence for work they have done, as long as they were performing authorized work for their Road Commission. No coverage is provided for intentional or illegal acts, and there is an exclusion for any claim arising out of the performance, or rendering of, or failure to perform professional

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*To support a claim of negligence, plaintiffs must prove that the engineer had a duty to protect the victim, that the duty was breached, that the victim suffered injury and that the injury was caused by the engineer's actions.*

*Negligence is not always cut-and-dried, which is why we have civil litigation to protect the due process rights of both victims who have been wronged by professional malpractice and professionals who have been wrongly accused of malpractice.*

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services to anyone other than the Member Road Commission by any engineer (or architect, accountant or member of the medical profession). We believe that coverage to be appropriate to protect our Road Commissions and their employees in a responsible manner.

Because of the fine line between some of the terminology in insurance coverage and professional

engineering standards, we recommend that your Board of Road Commissioners pass a Resolution that indemnifies your Professional Engineers and holds them harmless to the fullest extent permitted by law. The Sample Resolution attached to this SRM Guideline has been developed for you to adapt and use. It is intended to make it clear to all that the Road Commission accepts all of the necessary risks for their Professional Engineer employee's work.

We further recommend that Road Commissions sharing the work of one engineer enter into an Intergovernmental Agreement, as authorized by MCL 124.2, to ensure that immunity for their PE is preserved to the greatest extent possible.

A Sample Intergovernmental Agreement is also attached to this SRM Guideline.

#### **Attachments:**

1. SAMPLE: Resolution to Defend, Indemnify and Hold Harmless the County Highway Engineer for Professional Liability
2. SAMPLE: Intergovernmental Agreement – Engineering Services



**Resolution to Defend, Indemnify and Hold Harmless the County Highway Engineer for Professional Liability**

WHEREAS, pursuant to MCL 224.1, *et seq.*, the Board of County Road Commissioners of the County of \_\_\_\_\_ employs a county highway engineer.

WHEREAS, pursuant to MCL 224.10(2) and MCL 224.19(3), the county highway engineer fulfills and performs statutory obligations at the pleasure of the Board, which may include: preparation and review of surveys; preparation and review of plans and specifications for roads, bridges, and culverts; supervision over construction and implementation of said plans and specifications; and other engineering duties as appropriate.

NOW, THEREFORE BE IT RESOLVED, that the Board shall defend, indemnify, and hold harmless, to the fullest extent permitted by law, the county highway engineer for and against any claim or liability arising from his or her acts or omissions as a professional engineer, and occurring within the course of his or her employment, and within the scope of his or her authority , while acting on behalf of the Board.

NOW, THEREFORE, BE IT FURTHER RESOLVED, that this Resolution shall not require the Board to indemnify or hold harmless the county highway engineer for and against any act or omission constituting gross negligence or an intentional tort .

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_

By: \_\_\_\_\_

Date: \_\_\_\_\_



## **INTERGOVERNMENTAL AGREEMENT – ENGINEERING SERVICES**

This Agreement is made and entered into on [month/day/year] by and between the Board of County Road Commissioners of the County of [Name of County] (hereinafter referred to as the [Name of County] Road Commission), and the Board of County Road Commissioners of the County of [Name of County] (hereinafter referred to as the [Name of County] Road Commission), collectively referred to as “the Parties.”

### **Recitals**

1. [Name of County] Road Commission and [Name of County] Road Commission are both “municipal corporations” within the meaning of MCL 124.1.
2. [Name of County] Road Commission has sole jurisdiction over certain roads within [Name of County], as provided by the laws of the State of Michigan.
3. [Name of Engineer] is an engineer licensed in the State of Michigan and is employed by the [Name of County] Road Commission.
4. [Name of County] Road Commission, by and through its primary contractor, will be making certain improvements to roads within its jurisdiction, as specified in Attachment 1.
5. [Name of County] Road Commission requests the professional services of [Name of Engineer] for the project described above.
6. This Agreement is made pursuant to MCL 124.2, which permits any municipal corporation to contract with any other municipal corporation for the performance of any service which each would have the power to perform separately.

The Parties therefore agree as follows:

1. **Professional Services.** [Name of Engineer] agrees to provide professional engineering services in connection with the Project described in Attachment 1. The Parties agree that these services are to be provided within the scope of [Name of Engineer's] authority as a licensed engineer for the Board of the County Road Commissioners for the [Name of County] pursuant to MCL 124.2 and MCL 691.1407(2)(a) or their successor statutes. The Parties further agree that professional services of [Name of Engineer] are to be used in the exercise or discharge of a governmental function assigned by operation of law to the Parties.
2. **Consideration.** In exchange for the professional services of [Name of Engineer], [Name of County] Road Commission agrees to compensate the [Name of County] Road Commission in the amount of [form and amount of payment or other valuable consideration].
3. **Acknowledgement.** The Parties acknowledge and represent that this Agreement is entered into freely and voluntarily, without duress, undue influence, or misrepresentation.
4. **Amendment.** This Agreement shall not be modified or amended in any manner, except by written agreement signed by each Party. There are no representations or agreements beyond those expressly set forth in this Agreement.
5. **Signatures.** This Agreement will bind each Party and its respective heirs, personal representatives, successors, and assigns.
6. **Indemnification, Subrogation, and Insurance.** [Name of Road Commission for whom Engineer will be providing services] (as indemnitor) agrees to protect, defend, indemnify, and hold [Name of Road

*Commission loaning engineer]* (as indemnitee), and its officers, employees, and agents, free and harmless to the fullest extent permitted by law from and against any and all losses, penalties, damages, assessments, costs, charges, professional fees, and other expenses or liabilities of every kind and arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings, or causes of action of every kind in connection with or arising out of indemnitor's acts, errors and/or omissions in conjunction with *[name of Engineer's]* professional services provided pursuant to this Intergovernmental Agreement. Indemnitor further agrees to investigate, handle, respond to, provide defense for, and defend any such claims, etc. at indemnitor's sole expense and agrees to bear all other costs and expenses related thereto to the fullest extent permitted by law. Indemnitor also agrees to waive any right of subrogation against indemnitee should the above-mentioned expenses be incurred. Indemnitor shall be responsible for maintaining adequate liability insurance to provide for any such expenses.

7. **Governmental Immunity.** All activities performed under this Agreement are governmental functions. Governmental immunity is not waived or altered for any governmental entity, or individual, including services provided by the Engineer, *[Name of Engineer]*, in connection with the project.
8. **Governing Law.** This Agreement will be governed by the laws of the State of Michigan and must not be construed against any party.
9. **Interpretation.** For purposes of interpretation of this Agreement, neither *[Name of County]* Road Commission, nor *[Name of County]* Road Commission shall be deemed to have been the drafter of this Agreement.

[NAME OF COUNTY] ROAD COMMISSION  
*[Name of Engineer]*

[NAME OF COUNTY] ROAD COMMISSION

\_\_\_\_\_  
[Signatory Printed Name]  
[Signatory's Position]

\_\_\_\_\_  
[Signatory Printed Name]  
[Signatory's Position]

Dated:\_\_\_\_\_

Dated:\_\_\_\_\_