



## ***Conflict Of Interest – Manufacturer Indemnification To Architect***

### **Question**

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***Q1:*** *Did an architect act unethically in failing to disclose to the client that he was specifying a building material whose manufacturer offers full indemnification to the architect for any claims that might arise out of the use of their product?*

### **Reference**

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*Code of Ethics and Professional Conduct, Canon III, Obligations to the Client*

R. 3.202 If Members have any business association, direct or indirect financial interest, or other interest which could be substantial enough to influence their judgment in connection with their performance of professional services, the Members shall fully disclose to their clients or employers the nature of the business association, financial interest, or other interest, and if the clients or employers object to such association, financial interest, or other interest, the members will either terminate such association or interest or give up the commission or employment.

***Commentary:*** *These rules are intended to embrace the full range of situations which may present a member with a*

*conflict between his interests and those of his client or employer. In some situations, a conflict is easily discerned, as when the architect owns property adjacent to property upon which he has been asked to design a structure and is faced with design options which would affect the value of his property. Other instances are not so clear, and that is more frequently the case as new systems and procedures of the construction process, such as design-build, come into the market. In every case, the architect must take adequate steps to ensure that the client is aware of any substantial interest which the architect has which might run counter to the interests of the client.*

### **Facts**

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An architect is approached by a sales representative of a roofing materials manufacturer. In discussing the product the sales representative advises the architect that the company offers architects who specify their product indemnification for defense costs and indemnity payments which might arise as a result of subsequent problems with the roofing material. Knowing the frightening regularity with which problems--imagined or real--seem to arise with roofing systems, the architect is intrigued and files



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the offer away for future reference.

As a project on which the architect is working progresses, it appears that the roofing material in question would be one of several appropriate choices for that project. The architect decides to specify the roofing material from the company that offers the indemnification. The architect does not disclose the offer of indemnification to the owner.

## **Discussion**

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The heart of R. 3.202 is full disclosure to the architect's client or employer of any situation which creates a potential or actual conflict of interest. Clearly, this offer of indemnification puts the architect in a more beneficial position than he would be if specifying a roofing material from a supplier not offering indemnification. If the architect is "going bare" and has no professional liability insurance, the indemnification may provide him with insurance-like coverage for problems that might develop with the roof. If the architect has professional liability insurance, the indemnification may prevent a claim against that policy, or may cover costs that would be paid by the architect's deductible. In either of those situations, the architect stands to benefit from the indemnification. Will that benefit affect his professional judgment in selecting the roofing material? Could it? Under R. 3.202, the architect must disclose that potential benefit to the client or employer. It is the sole prerogative of the owner or employer to decide whether or not the benefit to the architect creates an unacceptable conflict of interest.

## **Conclusion**

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**A1:** Yes. The architect acted unethically in failing to disclose to the client or employer

the indemnification offer from the roofing material supplier, which gave a clear benefit to the architect. It makes no difference that the indemnification may provide a benefit to the owner or employer. The decision about whether the benefit to the owner or employer outweighs the effect that benefit might have on the architect's professional judgment is a decision for the owner or employer--not for the architect.

***Risk Management Caveat:*** *Indemnifications can be deceptive. They may appear to offer a great benefit, but when the language is analyzed closely, the "fine print" may take away any benefit that appears to be offered. Also, an indemnification agreement can only be enforced if the company that offered it is still in business. If you carry professional liability insurance, you may wish to have your broker review the proposed indemnification language to assess what is really being offered and its effect, if any, on coverage available under the terms of your policy. If you do not carry professional liability insurance, you may wish to obtain the same assessment from competent legal counsel.*

***Note:*** *This opinion is based on data submitted to the National Judicial Council and does not necessarily include all the facts that would be pertinent in another specific case. This opinion is for information purposes only and should not be construed as expressing any opinion on the ethics of specific individuals.*

October 31, 1992