SELECTION OF FIRM—
PROMOTION OF SOFTWARE FIRM'S PRODUCT

Case No. 03-5

Facts:

Engineer Y is offered a contract by a software firm to help promote the software firm's latest product (quality management) within State A. In exchange for Engineer Y's efforts, Engineer Y would receive a commission on the sale of each unit of each product sold by Engineer Y. Engineer Y also provides consulting engineering services to public and private clients in State A, which sometimes include the use of quality management software. After Engineer Y is retained by a client, Engineer Y discloses the product relationship to the client and also offers to give the commission to the client in the form of a discount on the software—with the client being free to select a different software product if desired.

Question:

Are Engineer Y's actions ethical?

References:

Section I.5.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall Avoid deceptive acts.*
Section II.4.a.	-	*NSPE Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*
Section II.5.b.	-	*NSPE Code of Ethics:*	*Engineers shall not offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect of intent to influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*
Section III.5.a	-	*NSPE Code of Ethics:*	*Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.*

Discussion:

The issue of engineers receiving a commission or something of value in exchange for recommending the use of a particular product has been the subject of earlier NSPE Board of Ethical Review opinions. As a general matter, the Board is always concerned in situations where an engineer's judgment could be compromised or there is an appearance that the engineer's judgment is being compromised. As the Board noted in an earlier case, these kinds of facts raise a fundamental issue concerning the manner in which engineers may properly provide professional services and specify products from companies which they control (or in this case are employed by). The language contained in the NSPE Code of Ethics Section

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Code II.4.a. requires engineers to disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.

BER Case 75-10 involved a set of facts similar to the present case. There, Engineer Y was employed on a full-time basis by a radio broadcast manufacturer as a sales representative. In addition, Engineer Y performed consulting engineering services to organizations in the radio broadcast field, including analysis of their technical problems and, when required, recommendation of certain radio broadcast equipment as may be needed. Engineer A's engineering reports to his client were prepared in form for filing with the appropriate governmental body having jurisdiction over radio broadcast facilities. In some cases, Engineer A's engineering reports recommended the use of broadcast equipment manufactured by his employer. After reviewing previous BER cases relating to conflicts of interest (see BER Case Nos. 72-9 and 74-4), the Board concluded that Engineer Y may ethically provide consulting services as described only if there is full disclosure of all the facts and circumstances to his client. In reaching its conclusion, the Board noted that it would have been preferable if the client could rely on the technical judgment and recommendations of an engineer without any financial interests in the equipment of any manufacturer, but it is understood that under some circumstances, the client may wish to retain the services of an engineer with an apparent conflict of interest. In the latter instance, the client must have full knowledge of all the circumstances; otherwise the client has been defrauded.

A more recent case, BER Case 98-11, involved an engineer who was asked by a firm to prepare specifications for an air compression system. The engineer made the firm aware that she was the president (and major shareholder) of a company that manufactures and sells air compression systems and that she had no problem with preparing a set of generic specifications. The engineer also provided the firm with the names of four other manufacturers that prepare air compression systems for bidding purposes, and she did not include her company as one of the four specified manufacturers. Thereafter, the firm wanted to meet with the engineer and a salesman from her company. The engineer indicated to the firm that it might be a conflict-of-interest.

In reviewing the facts in BER Case 98-11, the Board noted that although the engineer was the president and major shareholder in a company that manufactured and sold air compression systems, clearly she took all necessary and reasonable steps to disclose all potential conflicts of interest in order to avoid any appearance of a conflict. By immediately disclosing the fact that she had a major interest in an

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air compression manufacturing company, by suggesting the name of four other alternative manufacturers, and by raising the issue before it surfaced as a result of possible appearances, the engineer had acted consistently with the NSPE Code. Unlike the previous provisions of the NSPE Code that required the engineer to "avoid" conflicts of interest, the current code acknowledges that potential conflicts do arise and imposes upon the engineer the responsibility to take all reasonable steps to notify and advise the client—leaving it up to the client whether to proceed with the services of the engineer. It was the Board's view that, in Case 98-11, the engineer's conduct was in keeping with NSPE Code provision that engineers must disclose all known conflicts of interest which could influence or appear to influence their judgment or the quality of their services.

In the present case, we believe that Engineer Y's actions in not disclosing the product relationship to the client prior to selection was not the appropriate course of action and this failure to disclose, based upon prior Board precedents, is not within the bounds of the NSPE Code of Ethics. The Board is also uncomfortable with Engineer Y's offer to give the commission to the client in the form of a discount on the software, even with the client being free to select a different software product if the client desires. The Board finds that the NSPE Code would prevent this marketing approach (see NSPE Code Sections II.5 and II.5.b) and therefore must conclude that Engineer Y's actions are unethical. The Board determines that Engineer Y has abrogated his professional responsibility to his client by using the software discount purely as a marketing ploy without proper regard to the client's needs, requirements and interests. There is nothing in the facts to suggest that Engineer Y's motivation in promoting the quality management software is based upon Engineer Y's belief in the value of the product for the ultimate benefit of the client.

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Conclusion:
Engineer Y's actions were not ethical.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services—which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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