CONFLICT OF INTEREST—
APPRAISAL OF MANUFACTURING FACILITY

Case No. 03-7

Facts:

Engineer X works for a consulting engineering firm that provides services to clients, including feasibility studies through detailed engineering and construction management. Investor Group A (IGA) hired Engineer X to do an appraisal of a manufacturing facility, including buildings and equipment that it is interested in purchasing from Company Y. Engineer X travels to the site and inspects the facility and then develops estimates of the present value of the building and the present value of the equipment if it is sold at auction. Engineer X's fees are based upon an original estimate of his time and expenses. IGA pays Engineer X in full and appears satisfied with the work performed by Engineer X.

Engineer X is later approached by Investor Group B (IGB), which is seeking to purchase the same manufacturing facility from Company Y. IGB contacts Engineer X to determine Engineer X's interest in performing an appraisal of the manufacturing facility for IGB.

Neither IGA nor IGB has told Engineer X the amount each will be offering Company Y for the manufacturing facility, nor have either provided Engineer X with any estimates of anticipated revenue or expenses from their pro forma financial statements.

Question:

Would it be ethical for Engineer X to perform an appraisal for IGB of the manufacturing facility under the facts presented?

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References:

Section II.1.c.	-	*NSPE Code o f Ethics:*	*Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section II.4.b.	-	*NSPE Code of Ethics:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
Section III.4.a.	-	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.*

Discussion:

The issue of whether an engineer may ethically perform essentially the same engineering services for two separate clients has been the subject of earlier NSPE Board of Ethical Review opinions. The NSPE Code of Ethics ~~Section~~ Section II.4.b. specifically addresses the basic issue and notes the obligation of the engineer to address the obvious conflict of interest situation through full disclosure and agreement by all parties.

The Board addressed a case involving this very ethical situation in BER Case 85-4 and concluded the engineer's conduct was not consistent with the NSPE Code. In that case, Engineer A was a forensic engineer, hired as a consultant by Attorney Z to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following Engineer A's review and analysis, Engineer A determined that he could not provide an engineering and safety analysis report favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. Engineer A's services were then terminated and his fee was paid in full. Thereafter, Attorney X, representing the defendant in the case, learned of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and sought to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agreed to provide the report.

In concluding that Engineer A's actions were not ethical, the Board noted that the mere fact that Engineer A had ceased performing services for Attorney Z would not be an adequate solution to the ethical dilemma at hand. Nor was the fact that Engineer A had agreed to provide a "separate and independent engineering and safety analysis report." On the former point, the fact that

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Engineer A ceased performing services for Attorney Z did not mitigate the fact that Engineer A throughout his first analysis had access to information, documents, etc., that were made available to him by the plaintiff and plaintiff's attorney in a cooperative and mutually beneficial manner. The Board did not accept the proposition that following the termination of his relationship with attorney for the plaintiff, Engineer A could "blot all" of that information from his mind and start from "square one" in performing his engineering and safety analysis report. It was clear to the Board from the facts that the real reason for the defendant's attorney's hiring Engineering A was that the attorney believed Engineer A would provide a report that would be favorable to his client. Engineer A had to have been aware of the reasons why his services were being retained by virtue of the sequence of events. Even if Engineer A was so naive as to believe that Attorney X was unaware of the circumstances of his termination, the Board did not believe this would excuse Engineer A's actions. At a bare minimum, Engineer A should have fully discussed the issue with Attorney Z.

Notwithstanding, the Board noted that it could be argued, as it was in BER Case 74-2, that Engineer A's loyalties were not divided because he had terminated his relationship with the plaintiff's attorney. However, the Board recognized that while Engineer A did not currently have a professional relationship with the former client, Engineer A still had an ethical obligation to that client to protect certain confidential information and facts, as well as a certain duty of trust and loyalty.

The case at hand present a somewhat different set of circumstances than BER Case Nos. 85-4 and 74-2, since in the present case, there clearly was a relationship between Engineer X and IGA. It is difficult, if not impossible, for the Board to understand under what set of circumstances Engineer X could offer services to IGB, short of IGA deciding prior to any engagement between Engineer X and IGB that IGA no longer wished to purchase the manufacturing facility in question. However, even under that scenario, having originally commissioned Engineer X to perform the services in question and having paid Engineer X in full, it would appear that Engineer X has a clear obligation to obtain IGA's express consent before agreeing to discuss the offering of the same basic services to IGB.

The fact that neither IGA or IGB had told Engineer X the amount each would be offering Company Y for the manufacturing facility, nor provided Engineer X

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with any estimates of anticipated revenue or expenses from their pro forma financial statements would not appear to have any bearing upon Engineer X's obligation to maintain confidentiality of the study and report prepared for IGA. The Board can foresee countless situations whereby Engineer X could be called upon to provide further services to IGA in connection with the initial study and report, such as participation in future discussions with the owner of the manufacturing facility, and other additional services prior to the final auctioning of the manufacturing facility. Therefore, any services Engineer X might provide to IGA's competitor, IGB, relating to the same facility, at the same time, in connection with the same financial transaction, would raise clear and obvious unethical appearances as well as actual ethical concerns that would not be consistent with the language and spirit of the NSPE Code, unless he obtained express consent from IGA before agreeing to discuss the offering of the same basic services to IGB.

Conclusion:

It would not be ethical for Engineer X to perform an appraisal for IGB of the manufacturing facility under the facts presented.

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