Disclosure:
Engineer's Obligation to Disclose Work Performed Offshore

Case No. 04-1

Facts:
Engineer A is the CEO of an international consulting engineering firm. Recently Engineer A's firm began using an off-shore company to perform certain engineering-related services for the firm. In its agreement with the off-shore company, there are no provisions regarding confidentiality of client information. In addition, Engineer A does not inform clients about using the off-shore company to perform the engineering-related services.

Question:
Is it ethical for Engineer A not to inform his client about using the off-shore company to perform the engineering-related services?

References:

Section II.1.c	*-*	*NSPE Code of 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.	*-*	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.3.a.	*-*	*NSPE Code of Ethics:*	*Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*
Section III.4.	*-*	*NSPE Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve*
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Section III.8	*-*	*NSPE Code of Ethics:*	*Engineers shall accept personal responsibility for their professional activities; provided, however, that Engineers may seek indemnification for services arising out of their practice for other than gross negligence, where the Engineer's interests cannot otherwise be protected.*

Discussion:
The globalization of engineering practice and the international practice of engineering has been a growing trend in recent years. As a result of this development, increasingly engineering firms and engineering practitioners have faced a variety of new business and professional practice challenges that have an impact on the way engineering services are performed both in the U.S. and in other countries. For example, some of the issues faced by engineering firms and engineers include identifying qualified engineers and others to perform services offshore, addressing state engineering licensure laws "responsible charge" requirements, the adequacy of state licensure laws and regulation provisions, appropriateness of electronic and other remote communications practices, and the variety of ethical, cultural, legal and practice requirements in the countries in which the services are being performed.

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International and global issues are not a new concern for the NSPE Board of Ethical Review. For example, NSPE considered a set of facts in BER Case No. 96-5. There, Engineer A was a consulting engineer who did work in the U.S. and abroad. Engineer A was contacted by the government of Country A and asked to submit a proposal on a major water project being constructed in Country A. As part of the project, Engineer A was encouraged to associate with and retain Engineer B, a local engineer in Country A, who Engineer A had worked with in the past on private projects in Country A. One of the acceptable "customs" in Country A was for consultants such as engineers to give substantial gifts to public officials in connection with the awarding of public works contracts. Engineer A recognized that the giving of such gifts may be a violation of U.S. law—although it might not technically have been a violation of the law in Country A. Engineer B proposed to Engineer A that if the project was awarded to Engineer A's firm, Engineer B would handle "business arrangements" in Country A and that Engineer A would be involved in overall management of the project, as well as all technical matters. The Board reviewed the case and determined that it would not be ethical for Engineer A to proceed with the project under these circumstances. The Board noted that with the increase in international engineering practice as a result of the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade in Services (GATS), engineers are being exposed to differing design selection methods. These practices are in many cases quite similar to the practices used in the U.S. and elsewhere; however in some cases, particularly in the developing world and in some cultures, there are sometimes different methods of selection. Some of these methods involve a design selection process which is more deliberative, more subjective and more personal than the methods employed in the U.S. Engineers need to be sensitive to these differences, practicing in a manner that is consistent with the ethical principles of the U.S. engineering community, and at the same time being respectful of the differing cultural traditions and expectations that manifest themselves in other societies. Engineers must not take actions that bring dishonor on other engineers, and this is equally true when engineers are practicing in the international arena. (See NSPE Code Section II.1.d.).

The central issue in the present case is whether an undisclosed business association with a foreign company for engineering related services without a confidentiality agreement is ethical under the NSPE code. The issue of business associations among U.S engineers with imperfect histories has been addressed by the Board in cases 75-3 and 78-2 and the conclusions of the Board provide guidance for the case at hand. Though the Board conclusions in the two are congruent, the more relevant of these two cases to the facts in the present case is case 78-2. The facts in case 78-2 were that John Smith, a registered engineer at the time involved, was head of a state agency which administered a large public works program. He and his assistant, also a registered engineer, were charged with establishing dummy agencies within the state to receive funds from the program. Those funds were channeled into their personal

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accounts. They were fined and convicted of fraud and embezzlement and sentenced to prison terms. Subsequently, the state registration board revoked their licenses. Smith has been found qualified for a work-release program under state law whereby he is permitted to work during the day, returning to prison each night.

The XYZ Engineering Firm, located in the area of the prison where Smith is serving his term, proposes to hire Smith as a technician. Smith will not be in responsible charge of engineering or sign or seal engineering documents. The Board concluded that it was ethical for the engineering principals of the XYZ firm to hire Smith under the conditions stated. The Board reasoned that:

“It is not necessary or desirable to interpret the "association" aspect of [13](now II.1.d) to mean that an ethical engineer or firm may not employ a person convicted of a felony in employment related to engineering. Any other conclusion under the circumstances of this case would offend the generally accepted social philosophy of redemption and be a disservice to the purpose of the state legislature in establishing a work release program to help those who have violated its laws to gain orderly return to society on a self-supporting basis. The principals of the XYZ firm may indeed suffer some loss of their prospects of practice by those who take a harsh, unforgiving attitude. For this willingness to help return one who has strayed from the standards of society they should be commended for applying the true spirit of ethical behavior.” The Board was silent on the issue of disclosure and in doing so is interpreted as not requiring disclosure as a qualifying requirement.

Turning to the facts in the present case, the NSPE Board of Ethical Review is of the opinion that in view of the wide range of ethical, cultural, legal, and professional practice issues and concerns that could easily have an impact on the manner in which the engineering company and the engineering practitioner’s services are being performed for the benefit of the client the engineer should have the flexibility and responsibility to exercise judgement based on his knowledge and experience with each sub-contractor. The engineer has an ethical obligation to protect the interests of the client as stated in Section II.4 of the Code and should sub-contract work only under conditions that will protect those interests, including confidentiality of private information. Great care should always be exercised in making sensitive client information available to a sub-contractor, particularly in regions outside of the jurisdiction of U.S. Courts. Moreover, in view of the recently well-publicized situations regarding the improper compromising of financial and other data transferred through electronic means (e-mail, Web sites), it must be recognized that a confidentiality agreement can be compromised and the ability and willingness of a service provider to take adequate safeguards to protect information should be a consideration. Further, in light of contemporary concerns over national security, the engineer should not minimize the possibility of design details and other information being compromised in a manner that could potentially have serious implications for a facility being built anywhere.

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Some of the facts in this case are vague, which if known, could influence the conclusion. The Board presumes that engineering related services refer to graphic presentations, data compilation and reduction, report typing, etc. and are distinguished as not encompassing engineering services. Were the foreign company to provide engineering services without disclosure of identity and holding a license in the states of application, several ethical requirements and registration laws would be breached. The nature of information to be exchanged has not been defined and it is presumed that Engineer A believes that confidentiality of that which is to be shared is not a client concern. It would be unethical to place the confidentiality of sensitive client information in jeopardy and it is the responsibility of Engineer A to afford appropriate protection.

The following excerpt from the "Discussion" in case 96-12 seems applicable to the present case:

> "As the Board has noted on numerous occasions, a basic tenet of ethical conduct relates to the obligation of the engineer to accept responsibility for professional services that the engineer renders. This tenet is based upon the view that as a member of a learned profession, an engineer possesses skill, knowledge and expertise and is expected to use those attributes for the betterment of mankind. Engineers, through the enactment of engineering licensing laws and other legal restrictions, are granted the authority to practice their profession to the exclusion of others. As a result of this grant of authority, the law expects licensed engineers to perform professional services in a non-negligent manner. In addition, as with other professions, engineers are also expected to be personally liable for their acts, errors or omissions in the performance of their professional services. Engineers typically address issues of liability through a variety of risk management techniques such as insurance, contract document language and other professional practice considerations."

If Engineer A's decision satisfies the above to best of his ability then he has made an ethical decision. If not, then simple disclosure of the identity of a foreign source for a sub-contract to a client that does not understand all of the ramifications would not be a satisfactory remedy. Engineer A must exercise the judgement and take responsibility for the decision. It appears to the Board that it would be in the best interest of Engineer A and his continued relationship with the client, to inform the client of all major sub-contractors regardless of national origin.

Conclusion:
The facts as presented do not support a conclusion that Engineer A's sub-contract for engineering related services without informing the client is unethical.

BOARD OF ETHICAL REVIEW:

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Louis L. Guy Jr., P.E., F.NSPE
William D. Lawson, P.E., NSPE
James D. Lesikar II, Ph.D., P.E., F.NSPE
William J. Lhota, P.E., NSPE
Robert L. Nichols, P.E., F.NSPE
Harold E. Williamson, P.E., NSPE
E. Dave Dorchester, P.E., F.NSPE, Chair

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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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