Gifts—State Department of Transportation Employees

Case No. 05-6

Facts:
Engineer A performs engineering services as an employee of the State Department of Transportation. Part of Engineer A's responsibilities is to serve as liaison with the consulting engineers and contractors that perform design and construction work for SDOT. Over the years, following completion of various successful projects, consulting engineering companies (including Engineer B's company) and contractors have from time to time offered the following to Engineer A:

1. Free tickets to the engineering company's box seats at a major league sporting event;

2. An invitation to a cocktail reception, celebrating the recently successful project with various other project participants;

3. An invitation to a dinner party hosted by the company to celebrate the recently successful project with various other project participants; and

4. An invitation to participate in a golf outing with company employees with various other project participants.

Questions:
1. Would it be ethical for Engineer A to accept such gifts as described in 1, 2, 3, or 4?
2. Would it be ethical for Engineer B to offer such gifts described in 1, 2, 3, or 4?

Reference:
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.*

Discussion:
Questions concerning the receipt of gifts or other valuable consideration have been considered by the NSPE Board of Ethical Review on several occasions. Providing or receiving a gift in the context of a business or professional relationship is a longstanding ethical issue because of the questions it raises concerning the motivation and intent and whether it is intended to influence the award of a contract, the manner in which the contractual relationship is administered, future considerations, or other factors.

One of the very first cases considered by the Board in this area was BER Case No. 60-9, where the Board considered three scenarios with the following results (all dollar figures have been adjusted for inflation):

Situation A – A consulting engineer who has done considerable work for a public body makes it a practice to take certain staff engineering employees of the agency to lunch or dinner three or four times a year, at an average cost of $25 (per person). He also makes it a practice to give certain members of the engineering staff Christmas presents at an average cost of $50 each.

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- ***Determination in Situation A*** – The Board determined that occasional free luncheons or dinners and Christmas presents of relatively small value do not exceed the bounds of ethical behavior by the giver.

Situation B – Certain engineering employees of an industrial firm, who are in a position to recommend for or against the purchase of products used by the company, regularly receive cash gifts ranging from $100 to $500 from salesmen for particular products.

- ***Determination in Situation B*** – The Board determined that inasmuch as it does not appear that the employees performed any services for the cash gifts, and in view of their position of responsibility and trust to the employer, the receipt of such cash gifts immediately raises a doubt as to the integrity of the employees and leaves an impression that the intent is to influence their discretion in favor of the giver. Acceptance of cash gifts in such circumstances is an unethical act.

Situation C – Upon completion of a major engineering contract held by a consulting engineer, the chief engineer of the client who worked directly and intimately with the consultant receives a new automobile of the value of approximately $25,000 from the consultant with a letter stating that the gift is in appreciation of his close and friendly cooperation and assistance in the successful performance of the work.

- ***Determination in Situation C*** – The Board determined that it is unethical to offer such a gift.

In considering these three separate situations, the Board acknowledged that the question of when a gift is intended to or becomes an inducement to influence one's impartial decision, as distinguished from an expression of friendship or a social custom, has remained a perplexing one over the years. The Board recognized that no blanket rule covering all situations exists. The size of the gift is usually a material factor, but must be related to the circumstances of the gift. It has been customary in the business world for friends and business associates to tender tokens of recognition or appreciation, and picking up the tab at a business luncheon or dinner is commonplace and well accepted in the mores of our society.

Recognizing the difficulties inherent in passing judgment on each instance, the Board noted that the NSPE Code of Ethics states, in substance, that an engineer may neither offer nor receive a gift that is intended to or will influence his independent professional judgment. However, the Board pointed out that the full application of this principle requires the impossible—that we read the state of mind of the donor or donee. Therefore, the Board sought to apply a criterion that reasonable men or women might infer from the circumstances; that the giving or acceptance of the benefit be a matter of good taste, and such that among reasonable men or women it might not be of a nature that raises suspicions of favoritism. Applying these general principles to the situations at hand, we think that an occasional free luncheon or dinner, or a Christmas or birthday present when there is a personal relationship is acceptable practice. On the other hand, cash payments to those in a position to influence decisions favorable or unfavorable to the donor are not in good taste and do immediately raise a suspicion that there is an ulterior motive. Likewise, a very expensive gift has a connotation of placing the recipient in a position of obligation.

Later in BER Case No. 79-8, the Board considered a case involving Engineer A, a principal in an engineering firm that had performed work for a local water district. Engineer A gave Engineer B, the executive director of the water district, a hunting rifle. This fact was later reported in the local newspaper, quoting other public officials in the community to the effect that it was improper for the executive director to keep the rifle in light of the relationship between the water district and Engineer A. One of the quoted officials commented that he did not object to small, personal gifts, but it was "inappropriate" to keep an "expensive" rifle, noting that the executive director had "considerable influence" in the award of contracts. The cost of the rifle was not given, but local engineers who raised the question from the standpoint of engineering ethics estimated its retail value in excess of $1,500 (dollar figure adjusted for inflation). In

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concluding that (1) it was not ethical for Engineer A to give a public official of an agency with whom he has had contractual relations a personal gift, as described, and that (2) it was not ethical for Engineer B to accept the gift of Engineer A, the Board, citing BER Case No. 60-9, noted the difficulty of knowing what was in the minds of the two engineers. However, the Board determined that the NSPE Code language must be read with the result being that both the giving and receiving of the rifle was ethically improper. Even giving both engineers the benefit of the doubt as to their intentions, the controlling factor is the impression created in the public mind. Using the criteria set forth in BER Case No. 60-9, the Board decided that it did not need to decide precisely whether a $1,500 gift is too much to qualify as a token gift; it is enough that it is well beyond a nominal expression of friendship or esteem, such as the kinds of token gifts described in the BER Case No. 60-9 criteria.

Using the earlier BER cases as a guideline for the Board's consideration of the circumstances in the present case, the Board concludes that the situations described in Situations 1, 2, 3, and 4, without more, are not of a sufficient level to constitute an ethical violation. Situation 1 describes a very common situation that has long existed within our culture and within the general business community, whereby customers or clients are occasionally invited to sporting events or other entertainment events to enhance ongoing working relationships that may exist between the client and the services provider. Unless the event in question involves more than a nominal cost (e.g., expense paid trips to the Super Bowl), the Board is hesitant to conclude that such activities are strictly prohibited under the NSPE Code. Situations 2 and 3 are not unlike the situations described in BER Case No. 60-9 and, again, are intended to enhance ongoing working relationships that may exist between the client and the service provider or to celebrate mutually attained project achievements. Again, in the absence of some indication of some extravagance or excessiveness, the Board cannot condemn such events as constituting a violation of the NSPE Code of Ethics. Finally, Situation 4 relates to the hosting of a recreational event involving firm employees and other project participants that is presumably intended to strengthen working relations among the parties. Without more (e.g., extravagant or excessive costs associated with the event), and in line with earlier NSPE BER decisions, the Board is not inclined to conclude that a violation has occurred.

Having said that the situations described in 1, 2, 3, and 4 are not on their face a violation of the NSPE Code, the Board must also recognize that as an employee of the SDOT, Engineer A must be mindful of all applicable rules and regulations that would apply to SDOT employees and would ultimately govern. Engineer A clearly has an obligation to adhere to those rules and regulations, which may prohibit the receipt of such gifts. In addition, as a party contracting with SDOT, Engineer B and his firm may be barred from providing such gifts to SDOT employees. The Board's opinion is in no way intended to offer an opinion or a judgment on the appropriateness or the applicability of such rules. However, in the context of this case, the Board does not believe there was any intent on the part of Engineer B to influence the judgment of Engineer A.

Conclusions:

1. It would be ethical for Engineer A to accept such gifts as described in 1, 2, 3, or 4.
2. It would be ethical for Engineer B to offer such gifts as described in 1, 2, 3, or 4.

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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), 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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DISSENTING OPINION:
NSPE BER CASE NO. 05-6

Much can be said about the ethics of the offering and accepting of gifts within the context of professional/business relationships, and my dissent from the majority opinion focuses more on what that opinion leaves unsaid than what it discusses. The offering and receiving of gifts represent a type of conflict of interest for the engineer, and five key points in the facts directly bear on whether it is ethically permissible for Engineer A to accept the gifts, or for Engineer B to offer them. First, Engineer A receives the gifts following *completion* of successful projects in which Engineer A was involved. Second, this is an ongoing practice. Third, Engineer A's position of responsibility as liaison with consultants and contractors appears to place him in a position of considerable influence, direct or indirect, relative to awarding of contracts. Fourth, the value of the gifts varies, and although hard dollar amounts are not provided, reasonable persons might question whether the value of each of the four gifts is less than nominal. And fifth, as an employee of the SDOT, Engineer A does not work in the private sector, but in the *public* sector, where different, higher thresholds of ethical conduct and accountability typically apply.

That gifts are being offered to Engineer A *after the fact*, upon completion of successful projects, warrants specific comment. The timing aspect is critical because the act of offering or accepting gifts that directly or indirectly influence the awarding of a contract is expressly forbidden by the NSPE Code of Ethics (Code Section II.5.b). Code Section II.4.a highlights that even the *appearance* of corrupting influence is a concern. The code language implies that many (perhaps most) instances of gift-giving occur during the course of business/professional interactions, ostensibly to enhance the working relationship, or perhaps as part of business development activities—so-called "wining and dining." This is typical, although not necessarily ethical, practice. But that more typical interaction is *not* what this case is about, and the engineer who would seek guidance on the ethics of offering or accepting gifts must recognize this rather unique aspect.

Here, on the face of things, the gifts are not offered prior to or during contract negotiations, but after the fact, within the context of celebrating successful completion of a project. This means that overt bribery is not an issue. Instead, the gifts might be construed as a tangible *thank you*, an expression of gratitude for a job well done. Recognizing this unique timing aspect allows us to entertain the possibility that nothing could be wrong with offering or accepting gifts in such circumstances.

But this would be a questionable stance for at least two reasons. First, the facts indicate that the offering of gifts (by Engineer B and others) and the receiving of gifts (by Engineer A) is an ongoing practice, occurring "from time to time." There is a cycle, this is not a one-time event. Second, Engineer A appears to be in a position of considerable influence, direct or indirect, relative to awarding of contracts. Putting these two observations together dramatically affects the timing aspect and causes me to question both the intent and the effect of such gifts. Is a "thank you" gift awarded after completion of one project to the very person with influence over awarding the next project substantially different than an inducement "having the effect of intent to influencing the awarding of a contract?" Is there the appearance of impropriety? The answers to these questions would ultimately turn on points not discussed in the facts, such as how frequently the gifts are offered, whether the celebration of one project coincides with contract negotiations on another, and whether there is an escalation in the value of the gifts. The point is that a reasonable person—and this is the threshold for acceptance under the NSPE Code—might conclude there is *no real difference* between an after-the-fact "thank you" gift of valuable consideration and an inducement to influence award of the next contract. If that were the case, it would *not* be ethical to offer or accept *any* of the four gifts.

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Of course, it can be argued that because the gifts are of less than nominal value, any concern about the corrupting influence of the gifts is moot. The NSPE code does *not* accept this line of reasoning, but some might. In response, it seems fair to ask, what is the actual value of the four gifts?

Gift 1 (free tickets—*note the plural*—to box seats at a major league sporting event) might be conservatively valued at $200 to $500. Gift 2 (an invitation to a cocktail reception) might be valued at $25 to $50. Gift 3 (an invitation to a dinner party) might be valued at $50 to $100. Gift 4 (an invitation to participate in a golf outing) might be valued at $100 to $200. It is also appropriate to observe that gift events 2, 3, and 4—cocktails, dinner, golf—are explicitly described as social gatherings with company employees and project participants. In contrast, Gift 1—box seat tickets to a major league sporting event—is *not restricted* (or at least not identified as such). The question under consideration is whether these four gifts are of less than nominal value. As per the discussion, one can compare the value of the four gifts with the value of gifts considered in past BER cases. In those cases, an occasional lunch or dinner ($25) was determined to be acceptable, as were Christmas presents ($50). However, offering or accepting cash gifts ($100–$500) was deemed unethical. Offering or accepting an automobile ($25,000) and a hunting rifle ($1,500) were also determined to be unethical.

By this standard of comparison, Gift 2 (the cocktail reception) seems within the bounds of ethical propriety, and Gift 3 (dinner party) is not strongly suspect. However, Gift 1 (box seat tickets to a major league sporting event) is of sufficient value so as to raise strong concerns, and this is exacerbated by the unrestricted nature of the gift. Gift 4 (golf outing) also seems to be outside the range of nominal but not so much as Gift 1.

What this means is that if monetary value was the sole factor in determining whether it is ethical to offer and accept a gift, only two of the gifts—the cocktail reception and the dinner party—would fall below the threshold of nominal value. The other two gifts—a golf outing and box seat tickets to a major league sporting event—are of sufficient value to warrant concern about their propriety. Further, it must be emphasized that per the NSPE Code, appearances do matter, and *any* gift offered with the intent to influence award of a contract would not be ethically permissible, no matter its value.

My final point of dissent has to do with the fact that Engineer A works in the public sector, for an SDOT. An engineer in public service can be expected to encounter greater visibility and increased accountability as compared to similar positions of authority in the private sector. This fiduciary responsibility carries with it the obligation to maintain the public trust by avoiding even the appearance of impropriety. In addition, public entities, such as DOTs, are obligated to promote fairness and to provide equal access to all vendors, contractors, and consultants who do business with the state. Recognizing that accepting gifts and other valuable consideration represents a potent avenue for corruption, the public system intentionally stands against the exclusiveness and elitism that are barriers to equal opportunity for all. Accordingly, stricter policies on matters, such as contract negotiation and accepting gifts and other valuable considerations, are the norm in the public sector. Relative to the facts of this case, the ethics of whether to offer gifts to an engineer in public service or for that engineer to accept them must take into account this heightened standard of propriety.

I have tried to show that for this case, the timing of the gifts, the nature and value of the gifts, and the influential role of the person receiving the gifts can reasonably be viewed as having "the effect of intent to influencing the awarding of a contract." The NSPE Code of Ethics clearly and unambiguously states that this is not ethical. Further, even if offering/accepting such gifts in the private sector was deemed acceptable, Engineer A does not work in the private sector, but in the *public* sector, and different, higher thresholds of ethical conduct and accountability typically apply.

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More liberal interpretations are possible, of course. Certain key details being absent from the facts, the actual circumstances of this case *may* allow that it would be ethical for Engineer B to offer Gift 2 (cocktail reception) and Gift 3 (dinner party), and for Engineer A to accept these gifts within the context of a celebrating the recent completion of a successful project. Under the NSPE Code of Ethics, it would *not* be ethical for Engineer B to offer Gift 1 (box seat tickets to a major league sporting event) or for Engineer A to accept it. Given the public service nature of Engineer A's employment and the value of Gift 4 (golf outing), it would also *not* be ethical to offer or accept this gift.

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