Employment – Employee/Employer Files

Case No. 06-9

Facts:

Engineer A, employed by ENJ Engineering, recently accepted a position as an engineer with RFP Engineers, a competitor of ENJ Engineering. Engineer A has files in his office including the following:

1. Client files, which include correspondence between Engineer A and various clients while employed by ENJ Engineering and project specific technical information;

2. Technical information files, such as articles, publications, and external reports, that Engineer A has personally received and saved during the course of his employment with ENJ Engineering to assist him in providing technical and professional services for clients;

3. Personal files, which include personal correspondence received from past and present clients acknowledging and expressing appreciation for Engineer A's work on various engineering projects and technical information obtained outside of his employment by ENJ Engineering.

Questions:

1. Would it be ethical for Engineer A to take the client files with him when he terminates his employment with ENJ Engineering?

2. Would it be ethical for Engineer A to take the technical information files with him when he terminates his employment with ENJ Engineering?

3. Would it be ethical for Engineer A to take the personal files with him when he terminates his employment with ENJ Engineering?

References:

Section I.4.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
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 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.9.d. - NSPE Code of Ethics: *Engineers' designs, data, records, and notes referring exclusively to an employer's work are the employer's property. The employer should indemnify the engineer for use of the information for any purpose other than the original purpose.*

Discussion:

The obligations of a professional engineer with respect to an employer's files and records are well established. NSPE Code of Ethics Section III.4. makes it clear that engineers have an ethical obligation not to 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. As with many provisions of the Code, the application of the language in the Code will often turn on the facts and circumstances involved in the individual case being considered. For example, in some earlier NSPE Board of Ethical Review cases, the board discussed the need to balance (1) the ethical obligation of the professional engineer to maintain the client information in confidence, versus (2) the ethical obligation of the professional engineer to report information that might have an effect on the public health and safety or other particular interests.

The duty of the engineer to maintain the confidence of his client is well recognized in the context of engineering ethics. Engineers are frequently called upon by their clients to perform services in areas that involve highly restricted or undisclosed material or information. Sometimes that information is provided by the client or by third parties on behalf of the client. Other times the information is developed through the efforts of the engineer and the engineer agrees to refrain from making the information public or available to others. Occasionally, the information is developed through joint efforts and others involved in providing services to the client.

The obligation to maintain the confidences of the client is based upon the general view that certain information about the business interests or technical affairs of the client are proprietary in nature or, if disclosed could harm the business interests of the client. As a professional, an engineer has a basic duty to his client to make all reasonable efforts not to intentionally or negligently disclose the information to third parties.

The board in the past had occasion to examine this ethical obligation. In BER Case No. 87-2, the board considered a case involving the disclosure of previous work by a consultant. After being terminated by one client, the engineer agreed to provide services to a second client. As part of those services, the engineer divulged specific information unique to the product designed for the first client. In ruling that it was unethical for the engineer to divulge the specific information unique to the product designed earlier by him for the first client, the board interpreted the language of NSPE Code Section III.4. and determined that the Code section applied to the consulting engineer as well as the employed engineer.

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In three other opinions, the board has had occasion to consider fact situations in light of NSPE Code Section III.4. In BER Case No. 89-7, in a case involving an engineer's failure to report safety violations by a client, the board ruled that it was unethical for the engineer not to report the violations to the appropriate public authorities. The board noted that while the obligation of the engineer to refrain from revealing confidential information concerning the business affairs of the client without consent is significant, matters of public health and safety must take precedence.

Later in BER Case No. 92-6, the board ruled that it was unethical for an engineer to fail to advise his client that he suspected hazardous material and provide a recommendation concerning removal and disposal in accordance with federal, state, and local laws. In that opinion, the board noted that the engineer made no oral or written promise to maintain the client's confidentiality.

While these cases raise important issues for consideration by the board, we must clearly state as we have in the past that the provisions of the Code must be interpreted in a balanced and measured way. In this context, we should note that NSPE Code Section III.4. must be read in light of other sections of the Code, particularly NSPE Code Sections II.1.a. and II.1.c. Those sections read together, remind the engineer that while he has a duty not to reveal facts, data, or information obtained in a professional capacity without prior consent of the client or employer, the engineer's primary obligation is to protect the safety, health, property, and welfare to the public. Therefore, in the event that the engineer's obligation of nondisclosure to his client conflicts with his obligation to protect the safety, health, property, and welfare to the public, the former obligation must yield. In support of this position, the board notes that the first "Fundamental Canon" (NSPE Code Section I.1.) and Rules of Practice (NSPE Code Section II.1.) requires the engineer to "hold paramount the safety, health, and welfare of the public in performance of professional duties."

However, under the facts in the present case, there is no indication that the facts or circumstances involve any clear or implicit danger to the public health and safety. Instead, the circumstances appear to involve purely commercial, proprietary, and functional material used as part of or in support of work performed by Engineer A for his employer for the benefit of the employer's clients.

NSPE Code Section III.9.d. makes it clear that an engineer's designs, data, records, and notes referring exclusively to an employer's work are the employer's property and not the property of the engineer. Therefore, under the facts, the board must conclude that it would be unethical for Engineer A to remove client files from ENJ's offices. With regard to the corporate and technical files that do not refer exclusively to Engineer A's work on behalf of ENJ, the board believes that Engineer A should discuss with his supervisor in ENJ whether he could keep or at least make copies of the material contained in the technical files. Since this material was apparently generic in nature, not

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client specific but was developed and prepared within ENJ's operations, it would appear that a reasonable approach would be for Engineer A to offer to provide the technical files to ENJ but that Engineer A ask ENJ if he could maintain a copy of the material for his professional records. Finally, with regard to personal files, such files remain the property of Engineer A.

Conclusions:

1. It would not be ethical for Engineer A to take the client or project specific files with him when he terminates his employment with ENJ Engineering.

2. It would not be ethical for Engineer A to take the corporate or technical information files that pertains to the employer's business without the employer's permission.

3. It would be ethical for Engineer A to take personal files, which include personal correspondence received from past and present clients acknowledging and expressing appreciation for Engineer A and ENJ Engineer's work on various engineering projects, and technical information obtained outside of his employment by ENJ Engineering.

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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, and 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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