Conflict of Interest—Disclosure Obligation to Parties

Case No. 13-8

Facts:

Engineer A is an environmental engineer and performs professional engineering services for Company A and Company B, two industrial companies that manufacture similar products and compete with one another. Over the years, in serving both clients, Engineer A has maintained confidentiality of all information received in his relationship with Company A and Company B.

Company A has a facility which has been permitted by a state agency as a result of the services provided by Engineer A. Recently Engineer A has learned that as a result of new and stricter regulations that will be going into effect, Company A's operations will no longer be in compliance with applicable state and federal environmental regulations that will be going into effect at a future date. Engineer A recommends that Company A agree to negotiate a new permit under which Company A (or any successor company) will agree to undertake certain operational changes to bring Company A into compliance with the new and upcoming regulations. Company A decides that it would not be prudent at this time to agree to Engineer A's recommendations because Company A has made a decision to cease its activities in this area of business and is currently in the process of negotiating an agreement with Company B for the purchase of the facility. Selling a facility not in compliance with the regulations going into effect in the future is not a violation of the law. Engineer A is still under contract to provide engineering analysis for Company B.

Question:

What are Engineer A's obligations under these circumstances?

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.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 III.1.b.	-	*NSPE Code of Ethics:*	*Engineers shall advise their clients or employers when they believe a project will not be successful.*
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.*
Section III.4.b.	-	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer.*
Section III.5.	-	*NSPE Code of Ethics:*	*Engineers shall not be influenced in their professional duties by conflicting interests.*

Copyright © 2013 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Discussion:

Engineers in private practice frequently face situations and circumstances where they must strike a balance in addressing the interests of their clients. Sometimes those interests may conflict with one another or with the engineer's interests and sometimes the engineer may become aware of facts involving one client which may impact upon the interests of another client. How to effectively navigate though those situations is among one of the many challenges of professional practice.

The NSPE Board of Ethical Review has addressed some of these thorny issues in earlier cases. For example, BER Case No. 76-3 involved an engineer who had been under a retainer with a county for general advisory services and long performed extensive engineering services for it. While still on the retainer, the engineer was retained by a developer with the approval of county officials. The developer filed a petition with the county board to rezone a substantial area of the county for commercial purposes. The County Department of Public Works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water-sewer facilities. The developer called the engineer as an expert witness at the hearing and he testified in support of the rezoning petition.

In ruling that it was unethical for the engineer to appear for the development company while serving as an engineering consultant to the county, the Board noted that he was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the zoning board—he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers. The Board noted that the engineer was not required to agree with the county engineering staff or its reports, or even to support their position at the hearing. If the engineer chose to oppose that position on behalf of an adverse party he could ethically do so by first resigning from his role as adviser to the county.

In BER Case No. 85-6, a state retained an engineer to perform certain feasibility studies relating to the construction of a highway spur. After learning that the spur would go through an area adjacent to the community in which he resided, the engineer informed the state that the new spur might affect his residential property, fully disclosing the potential conflict with the state. The state did not object to the engineer's performing the work. He proceeded with his feasibility study and ultimately recommended that the highway spur be constructed, which was done. In deciding that is was not unethical for the engineer to perform the feasibility study despite the fact that his land may be effected, the Board noted that NSPE Code of Ethics Section II.4.a does not require the engineer to "avoid" any and all situations that may raise the specter of a conflict of interest. They noted that such an interpretation of the NSPE Code would leave engineers with neither any real understanding of the ethical issue nor any guidance as to how to deal with the problem.

Copyright © 2013 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Later, BER Case No. 87-3 involved Greenhill County, a county which employed individuals to perform building inspections. Dissatisfied with the services provided by in-house inspectors and as part of an effort to "contract out" certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. Greenhill County selected and retained Engineer A's firm. One of Engineer A's responsibilities was to inspect a building project developed by Enterprise Inc., a company for which she has regularly performed services in the past. Although she did not provide any services in connection with the building project in question, Engineer A and Enterprise Inc. anticipated that they will continue to work together in the future. In contract negotiations with the county, Engineer A disclosed this relationship with Enterprise Inc., and it became a matter of public record. In deciding that it would not be unethical for Engineer A to perform building-inspection services for the county in connection with the project developed by Enterprise Inc., the Board noted that unlike earlier cases it considered, the case did not involve a situation where an engineer was being retained as a paid "advocate" for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor was the Board faced with a situation where the timing of the retainer raised a question of propriety.

Rather, in BER Case No. 87-3, Engineer A was being asked to perform basic inspection services in connection with a building with which she has never previously been involved, but which was developed by a former and possibly future client. While the Board noted that Engineer A clearly had a professional obligation under NSPE Code Sections II.4 and II.4.a to disclose her relationship with Enterprise Inc. to the Greenhill County, the Board did not believe it would be necessary for her to decline to perform the inspection services. To prohibit Engineer A from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

Turning to the facts in the present case, it is the Board’s view that Engineer A has mutual ethical obligations to Company A and to Company B since both are Engineer A’s clients. As current clients, Engineer A’s obligation to maintain the confidentiality of Company A’s information has the effect of causing Engineer A to take actions that are inconsistent with the interests of Company B, also a client of Engineer A. At the same time, if Engineer A disclosed what appears to be confidential information involving Company A to Company B, it would result in Engineer A breaching his confidentiality obligations to Company A.

In view of these facts, it is the Board’s view that this case demonstrates that a servant cannot serve two masters—Engineer A can no longer effectively serve the interests of both Company A and Company B simultaneously. Engineer A must therefore resign from his relationship with one of his clients because of the specialized knowledge Engineer A obtained in his relationship with Company A.

Copyright © 2013 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Conclusion:

In view of the facts and circumstances involved in this matter, and the information to which Engineer A is privy regarding Company A's business decision to refrain from immediately addressing the environmental regulations that will be going into effect at a future date, Engineer A should resign from his relationship with Company B because the specialized knowledge Engineer A obtained in his regulatory review relationship with Company A created a conflict of interest.

Board of Ethical Review:
Curtis A. Beck, P.E., F.NSPE
John C. Branch, P.E.
Daniel K. O'Brien, P.E., F.NSPE
Luke Patterson, P.E.
Robert J. Andreoli, P.E.
Mumtaz A. Usmen, Ph.D., P.E., F.NSPE *(Vice Chair)*
Samuel G. Sudler III, P.E., NSPE *(Chair)*

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.

Copyright © 2013 National Society of Professional Engineer (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).