CONFLICT OF INTEREST –
FAILURE TO DISCLOSE OTHER BUSINESS INTEREST

Case No. 99-2

Facts:
Engineer A, a mining engineer, is retained by a company that owns land upon which coal mines are located. Engineer A provides engineering services and surveys to determine the location of coal veins in the mine, assigns coal contractors to the locations in the mine, and performs other engineering services as required.

Engineer A also owns a laboratory that evaluates the quality of coal mined by coal contractors that contract with the coal mine owner. The quality and cost of mining the coal may vary. Although Engineer A mentioned that he owns a laboratory, Engineer A never informs the coal mine owner about the size and the extent of his laboratory, which is substantial and employs several other engineers and technicians, nor about his clients who are mining the owner's coal.

Question:
Was it ethical for Engineer A to not fully disclose the size and extent of his laboratory and his clients to the coal mine owner?

References:

Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section II.4.b.	-	*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.3.a.	-	*Code of Ethics:*	*Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

Discussion:
Conflicts of interest are among the most prevalent ethical concerns facing engineering practitioners. Over the years, the Board of Ethical Review has considered numerous cases dealing with the multifaceted issues involved in situations where engineers are faced with conflicts involving clients, employees, or other engineers. At one time, the NSPE Code specifically prohibited engineers from becoming involved in cases or situations where a conflict of interest was present. This was based upon the view that professional engineers must at all times be above reproach and avoid any situation that could be

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perceived as compromising their professional judgment and integrity as independent professionals. (See BER Case Nos. 59-3, 60-5, 62-7, and 63-5 for examples of cases where the Board expressed the view that engineers had a strict obligation to avoid conflicts of interest).

Over time, the NSPE Code and the Board of Ethical Review have moderated to the point of recognizing that certain types of conflicts of interest are difficult, if not impossible, to avoid and that the more realistic approach for individual engineers faced with this type of ethical conflict is to fully disclose the nature and extent of the conflict to the appropriate parties involved or impacted by the conflict. This is based upon the view that the parties that are most affected by the conflict and who have the most at stake (e.g., clients, employers, other engineering firms, etc.) are in the best position to determine whether their interests will be compromised by the conflict. While sometimes perceived conflicts of interest are resolved by the parties as a result of full disclosure, in other instances, the conflicts are deeper and require the engineer to disassociate from a specific project.

In recent years, the Board has considered the issue of conflicts of interest in various contexts. In BER Case No. 76-3, an engineer principal under retainer for many years with a county for services on a water project was then retained by a developer with the approval of county officials. The developer filed a petition with the county zoning 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 and sewer facilities. The development company called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the rezoning petition.

In concluding that the engineer was not ethical in appearing for the development company while serving as engineering consultant to the county, the Board noted that when the engineer was approached by the developer, while still on retainer to the county, it should have been quite clear to him that a conflict of interest was inevitable. "It would seem," said the Board, "that a little interrogation of the development company concerning its plans would have revealed the conflict of interest." The Board went further, stating that "it would be incorrect to accept the engineer's role as an expert witness in the ordinary sense of that kind of professional service arrangement." "The engineer," continued the Board, "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."

In BER Case No. 82-6, an engineer was retained by the U.S. Government to study the causes of a dam failure. Later, the engineer was retained by the contractor on the dam

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project who had filed a claim against the U.S. Government for additional compensation. In concluding that it was not ethical for the engineer to be retained as an expert witness for the contractor under these circumstances, the Board noted that the facts were similar to those in BER Case No. 76-3, with one exception. In BER Case No. 82-6, the engineer was paid in full for his services to the government and was free to oppose its position on behalf of an adverse party, while in BER Case No. 76-3, the engineer had an ongoing contractual relationship with the county client. However, we noted that since rendering the opinion in BER Case No. 76-3, the language in the NSPE Code had become more restrictive and therefore prohibited the engineer's actions in BER Case No. 82-6 because the engineer had failed to obtain the consent of his former client before serving as an expert on behalf of the contractor.

Finally, in BER Case No. 85-4, a forensic engineer was hired as a consultant by an attorney to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following the engineer's review and analysis, the engineer determined that he could not provide an analysis 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. After the engineer's services were terminated and his fee paid in full, an attorney representing the defendant in the case sought to retain the engineer to provide an independent and separate engineering and safety analysis report. The engineer agreed to provide the report.

In concluding that it was not ethical for the engineer to agree to provide a separate engineering and safety analysis report, the Board noted that the mere fact that the engineer ceased performing services for the first attorney would not be an adequate solution to the ethical dilemma at hand. The Board stated that the engineer, throughout his first analysis, had access to information, documents, etc. that were made available to him by the attorney in a cooperative and mutually beneficial manner. The Board rejected the proposition that following the termination of a relationship with the attorney, the engineer would "blot out" all of that information from his mind and start from "square one" in performing his engineering and safety analysis report. The Board commented that, in their view, the real reason for the attorney's hiring of the engineer was his belief that the engineer would provide a report that would be favorable.

Most of the cases cited herein are clear-cut examples of conflicts of interest and suggest circumstances in which the engineer's judgment could be compromised and the quality of the engineer's services may be affected. At the very least, these examples raise the appearance of a conflict of interest.

Under the facts there is nothing that would prevent an engineer from operating two separate businesses *per se*. The Board, however, is concerned about the appearance and the relationship between Engineer A's mining engineering consulting practice and

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his laboratory practice. A potential conflict of interest could appear to influence the quality of his services.

Under the facts, among the responsibilities and obligations the mine owner has given to Engineer A, is the assignment of coal veins to contractors who are then responsible for performing the coal mining operation. While the assignment of coal veins to the mining contractors by the engineer is dependent upon identifiable factors such as the competencies of the contractors and their experience, the engineer will exercise independent judgment and discretion. In view of Engineer A's independent laboratory practice, Engineer A could be accused by contractors or even by the owner of basing his decision to assign higher quality coal veins upon unrelated factors such as whether the mining contractor uses Engineer A's laboratory or whether the mining contractor is a better customer in Engineer A's laboratory than other mining contractors.

In view of these factors, the Board believes Engineer A had an obligation to fully disclose the nature and extent of his laboratory practice to the mine owner in order for the mine owner to fully understand the implications of the relationship between the two activities. The mine owner's business practices could be called into question by virtue of unknowingly permitting Engineer A to engage in such activities in connection with his mines. Therefore, Engineer A should have been much more forthcoming with the information. The Board believes having not provided the information is a violation of the NSPE Code.

Conclusion:
It was not ethical for Engineer A to not fully disclose the size and extent of his laboratory and his clients to the coal mine owner.

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