DISCLOSURE – ADVISING CLIENT TO EXERCISE JUDGMENT WHEN DISCLOSING INFORMATION TO ENGINEER

Case No. 99-7

Facts:

Engineer A is a consulting engineer and provides civil and environmental engineering services for public and private clients. Among the standard practices that Engineer A has incorporated when initially meeting with clients is to explain to the client that in an effort to fulfill his obligation as a faithful agent and trustee to the client, the client should be advised that should Engineer A discover a danger to the public health and safety, he (Engineer A) has an ethical obligation to report such violations of the law to the appropriate public authorities and, therefore, the client "should exercise judgment and discretion when providing information to him or making him aware of facts and circumstances that could involve a violation of the law."

Question:

Was it ethical for Engineer A to advise the client in the manner described?

References:

Section I.1.	-	*Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall hold paramount the safety, health and welfare of the public.*
Section II.1.d.	-	*Code of Ethics:*	*Engineers shall not permit the use of their name or associate in business ventures with any person or firm which they believe is engaged in fraudulent or dishonest enterprise.*
Section II.1.e.	-	*Code of Ethics:*	*Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.*
Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.1.b.	-	*Code of Ethics:*	*Engineers shall advise their clients or employers when they believe a project will not be successful.*
Section III.2.b.	-	*Code of Ethics:*	*Engineers shall not complete, sign or seal plans and/or specifications that are not in conformity with applicable engineering standards. If the client or employer insists on such unprofessional conduct, they shall notify the proper authorities and withdraw from further service on the project.*

Discussion:

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Over the years, the Board has considered cases relating to the duty of the engineer to report safety violations, report unrelated information observed during the rendering of services, and the duty to report unsafe conditions in the context of a client requesting secrecy. The Board has interpreted the language contained in NSPE Code Section II.4. in the context of the obligations of employed engineers to maintain the confidences of their employer particularly with regard to certain confidential information that might be made available to the engineer during the course of employment or on a consulting basis, as in BER Case No. 61-8. However, more recently, the Board has also interpreted this language in the context of the relationships owed by the engineer in private practice to the client and the public.

The facts in this case are somewhat different than those presented in BER Case No. 89-7. In that case, Engineer A was retained to investigate the structural integrity of a 60-year old occupied apartment building, which his client is planning to sell. Under the terms of the agreement with the client, the structural report written by Engineer A was to remain confidential. In addition, the client made it clear to Engineer A that the building was being sold "as is" and he was not planning to take any remedial action to repair or renovate any system within the building prior to its sale. Engineer A performed several structural tests on the building and determined that the building was structurally sound. However, during the course of providing services, the client confided in Engineer A and informed him that the building contained deficiencies in the electrical and mechanical systems, which violated applicable codes and standards. While Engineer A was not an electrical nor mechanical engineer, he did realize those deficiencies could cause injury to the occupants of the building and so informed the client. In his report, Engineer A made a brief mention of his conversation with the client concerning the deficiencies; however, in view of the terms of the agreement, Engineer A did not report the safety violations to any third party.

In determining that it was not ethical for Engineer A not to report the safety violations to the appropriate public authorities, the Board first noted that the facts presented raised a conflict between two basic ethical obligations of an engineer: (1) the obligation of the engineer to be faithful to the client and not to disclose confidential information concerning the business affairs of a client without that client's consent, and (2) the obligation of the engineer to hold paramount the public health and safety. In its review, the Board noted that NSPE Code Section III.4 can be clearly understood to mean that an engineer has an ethical obligation not to disclose confidential information concerning the business affairs of any present client without the consent of that client. That provision makes no specific exception to the language. For example, the drafters of the NSPE Code could have provided exceptional circumstances, where such confidential information could be disclosed by the engineer; however, no such provisions have been included.

However, after noting the significance of NSPE Code Section III.4, the Board stated: "We believe under the facts, Code Section II.1.c. should be read in conjunction with

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Code Section II.1.a. The latter section refers to the primary obligation of the engineer to protect the safety, health, property, and welfare of the public. The obligation of the engineer to refrain from revealing confidential information, data, and facts concerning the business affairs of the client without consent of the client is a significant ethical obligation. We further believe that matters of public health and safety must take precedence. The NSPE Code is clear on this point. Code Section I.1. employs the word “paramount” to describe the obligation of the engineer with respect to the public health and safety."

In BER Case No. 88-6, Engineer A was employed as the City Engineer/Director of Public Works. She found that the municipal sewage plant lacks the capacity to handle the waste from several large industrial food processing plants. Engineer A revealed this to her supervisor, the City Administrator, who ordered Engineer A to discuss the problems only with him and warns her that her job was in danger if she disobeyed. She privately brings the problem up to other city officials. Engineer A was notified by the City Administrator that she was removed from responsibility for the entire sanitary system and the chain of command by a letter instructing Technician B that he was to take responsible charge of the sanitary system and report directly to City Administrator.

Although she had already gone beyond her immediate superior by discussing the matter with other city officials and had been relieved of responsibility for the operation, the Board maintained that Engineer A had a further responsibility to report a matter endangering the public safety and health to the proper authorities.

While the Board noted earlier that the NSPE Code makes no direct exception to the language contained in Code Section III.4. as the Board stated on numerous occasions, no section of the NSPE Code should be read in a vacuum or independent of the other provisions of the NSPE Code. Code Section II.1.c. provides additional guidance in this case, making it clear that the Engineer A has an ethical obligation to refrain from disclosing information that she acquires during the course of providing professional services to the client unless first obtaining the client's consent to disclose. Importantly, however, this section also includes a relevant exception that allows the engineer to disclose information acquired during the course of providing professional services to the client if such disclosure is authorized or required by law or by the NSPE Code. In other words, if the engineer has a legal or ethical responsibility to disclose the information in question, the engineer is released from the obligation to maintain confidentiality.

The facts in the present case take a different twist than earlier cases by the Board in this area. In the present case, the communication between the engineer and the engineer’s client is interesting in that it communicates and gives notice to the client of the engineer’s role in reporting violations of the law to such authorities as appropriate. Engineer A’s comments appear to also communicate something important. The implication of Engineer A’s comment appears on its face to be a communication to Engineer A’s client that the client should not make Engineer A privy to unnecessary or

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inappropriate information that the owner does not want reported. The Board believes Engineer A's comments are reasonable and accurate. The Board is not convinced that the comment could be understood as constituting a "wink" to the client that if there is information that might involve possible violation, the client should keep it concealed and out of the Engineer A's view.

While some might not understand such comments as prudent advice, the Board is comfortable with this approach and the atmosphere that such a comment would create in the engineer's relations with clients. The Board rejects the notion that this type of comment indicates that the engineer is willing to freely associate with businesses that engage in illegal conduct so long as the facts and circumstances of the illegal conduct are not disclosed to the engineer. It is important to note that unlike an attorney or other similar professionals, no legal protection of confidentiality exists between Engineer A and his client. The Board is also not of the opinion that this type of atmosphere would interfere with Engineer A's ability to serve the best interests of Engineer A's client or meet all of Engineer A's obligations under the NSPE Code. In sum, the Board believes the type of atmosphere that would be created by such comments do not in any way diminish the professional integrity of Engineer A or the engineering profession as a whole and would be consistent with the NSPE Code.

Conclusion:
It was ethical for Engineer A to advise the client in the manner described.

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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 of Ethics 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 services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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