

## **Conflict of Interest—Overlapping Service Arrangements**

Case No. 16-4

### **Facts:**

Engineer A serves as managing director and president, and reports to the Board of Directors, of a start-up company (XPro), in which he is also an investor. XPro is involved in the development of a new low-cost technology to purify drinking water in developing countries. Engineer A also has a separate engineering company that is under contract with XPro to provide engineering services. The XPro board is aware of this relationship and does not object.

Fabrico, a fabrication company, has begun to provide technical services to XPro. Fabrico is now requesting professional engineering services—unrelated to its work with XPro—from Engineer A's engineering company. Fabrico does not want to invoice the start-up. Instead, Fabrico has proposed that Engineer A's company perform the engineering services for Fabrico for free and that Fabrico provide technical support to the start-up on a "pro bono" basis.

### **Question:**

Would it be ethical for Engineer A's company to perform the engineering services for Fabrico for free and to permit Fabrico to provide technical support to the start-up on a "pro bono" basis?

### **NSPE Code of Ethics References:**

- Section II.4.* - Engineers shall act for each employer or client as faithful agents or trustees.
- Section II.4.a.* - *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 II.4.b.* - *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.1.e.* - *Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.*
- Section III.2.* - *Engineers shall at all times strive to serve the public interest.*
- Section III.5.* - *Engineers shall not be influenced in their professional duties by conflicting interests.*
- Section III.5.a* - *Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.*

**NSPE BER Case References: 76-3; 99-2**

**Discussion:**

Ethical questions involving conflicts of interest are among the most common ethical concerns facing engineering practitioners. Over the years, the Board of Ethical Review has considered various cases dealing with the multifaceted issues involved in situations where engineers are faced with conflicts involving clients, employees, or other engineers.

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 averse 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 99-2, Engineer A, a mining engineer, was retained by a company that owned land upon which coal mines were located. Engineer A provided engineering services and surveys to determine the location of coal veins in the mine, assigned coal contractors to the locations in the mine, and performed other engineering services as required. Engineer A also owned a laboratory that evaluated the quality of coal mined by coal contractors that contract with the coal mine owner. The quality and cost of mining the coal varied. Although Engineer A mentioned that he owned a laboratory, Engineer A never informed the coal mine owner that it was substantial and employed several other engineers and technicians, nor about his clients who were mining the owner’s coal.

In deciding that it was unethical for Engineer A to not fully disclose the size and extent of his laboratory and his clients to the coal mine owner, the Board of Ethical Review expressed concern about the appearance and the relationship between Engineer A’s mining engineering consulting practice and his laboratory practice. Under the facts, among the responsibilities and obligations the mine owner had given to Engineer A was the assignment of coal veins to contractors who were then responsible for performing the coal mining operation. While the assignment of coal veins to the mining contractors by the engineer was dependent upon

identifiable factors such as the competencies of the contractors and their experience, the Board concluded that the engineer could have been accused by contractors or by the owner of basing his decision to assign higher quality coal veins upon unrelated factors such as whether the mining contractor used Engineer A's laboratory or whether the mining contractor was a better laboratory customer than other mining contractors. In light of those factors, the Board determined that 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.

Turning to the facts in the present case, as a starting point, it is the Board's view that because of the unique and critically important role Engineer A is being asked to play on behalf of the start-up XPro, Engineer A had a clear ethical obligation to provide full disclosure to the XPro Board of Directors and to keep the board fully informed of his many business relationships. This includes details of all business and related assigned arrangements that may exist or occur between XPro, Engineer A's separate engineering company, and any other third-party vendors, including Fabrico.

On its face, the arrangement proposed by Fabrico—for Engineer A's company to perform the engineering services for Fabrico for free and to permit Fabrico to provide technical support to the start-up a "pro bono" basis—may appear to arguably serve the relative interests of all parties. Under the arrangement, (1) XPro, a start-up, would gain the benefit from the fabrication services without having to pay for those services; (2) Fabrico would contribute fabrication services to XPro and receive engineering services from Engineer A's firm (under what is arguably a "barter exchange"); and (3) Engineer A would contribute engineering services to Fabrico and, as the managing director, president, and a shareholder of XPro, would gain the material benefits. At the same time, Engineer A's multiple roles—as an employee, officer, and director of XPro; principal of his engineering firm; and service provider to both XPro and Fabrico—creates a series of clear conflicts of interest.

In addition, while the mission of XPro is admirable and consistent with the public interest, under the proposed "three-part arrangement," Engineer A's services and relationship with Fabrico, including its unrelated engineering work for Fabrico, could raise contractual liability issues for XPro and its Board of Directors that could potentially harm the interests of XPro and create compromising circumstances over which XPro has no direct involvement or control.

For those reasons, Engineer A's new relationship as an engineering service provider to Fabrico as well as the details of the "three-part arrangement" proposed by Fabrico must be fully disclosed to the XPro Board of Directors in order for the board to determine the appropriate manner for Engineer A to proceed. The three-part arrangement proposed by Fabrico also implies that the work by Fabrico for XPro would be similar in quantity (cost) to that of Engineer A for Fabrico, which is not likely. Should there be a significant imbalance of work done by Fabrico for XPro, there is a possibility for substandard or incomplete work by Engineer A for Fabrico or by Fabrico for XPro, which would also be an ethical violation.

**Conclusion:**

Engineer A's new relationship as an engineering service provider to Fabrico as well as the details of the "three-part arrangement" proposed by Fabrico must be fully disclosed to the XPro Board of Directors in order for the board to determine the appropriate manner for Engineer A to proceed. While the mission of XPro is admirable and consistent with the public interest, under the proposed "three-part arrangement," Engineer A's services and relationship with Fabrico, including his unrelated engineering work for Fabrico, could raise contractual liability issues for XPro and its Board of Directors that could potentially harm the interests of XPro and create compromising circumstances over which XPro has no direct involvement or control. Should there be a significant imbalance of the work done by Engineer A for Fabrico or the work done by Fabrico for XPro, there is a possibility of substandard or incomplete work by Engineer A for Fabrico or by Fabrico for XPro, which would also be an ethical violation.

**Board of Ethical Review:**

John C. Branch, P.E.

Vincent P. Drnevich, Ph.D., P.E., F.NSPE

Neil A. Norman, P.E., F.NSPE, D.E.E.

Luke Patterson, P.E.

Susan H. Richard, P.E., F.NSPE

Susan K. Sprague, P.E., F.NSPE

Francis "Frank" J. Stanton Jr., P.E., F.NSPE (**Chair**)

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