

**Conflict of Interest –
Performing Forensic Engineering Services Against Wholly Owned Subsidiary
After Providing Engineering Service to Another Subsidiary of Holding Company**

Case No. 17-9

Facts:

Engineer A is a forensic engineer in private practice. Company W is a holding company. Under the holding company, there are several wholly owned subsidiaries that operate as independent business units: X, Y, and Z. Engineer A performs nonforensic engineering design work for one of those wholly owned subsidiary companies, Company Y. Engineer A is later asked by a third party to be an expert in a case against Company Z, one of the wholly owned subsidiaries that operates as an independent business unit of Company W. The nature of the forensic engineering work to be performed by Engineer A in the litigation against Company Z is different from the work Engineer A does for Company Y. Engineer A does not know and has never performed services for Company Z.

Question:

Would it be ethical for Engineer A to perform forensic engineering services as an expert in a case against Company Z, a company that is a wholly owned subsidiary of Company W?

NSPE Code of Ethics References:

- Section II.3. - *Engineers shall issue public statements only in an objective and truthful manner.*
- Section II.3.a. - *Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*
- Section II.3.c. - *Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*
- Section II.4. - *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.4. - *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.*

NSPE BER Case References: BER Cases 76-3, 82-6, 92-5, 98-4, 11-10

Discussion:

The nature of professional engineering work often exposes professional engineers to circumstances and situations that raise the potential for a conflict of interest. Professional engineers in private practice are often involved in relationships with multiple parties, many of

whom have complex financial and business relationships with other groups. Professional engineers must be mindful and sensitive to these relationships to avoid improper conflicts or even the appearance of conflicts.

Over the years, the Board of Ethical Review has considered a variety of difficult cases involving conflicts of interest and the scope of an engineer's ethical obligation to past and present clients. The Board has also considered several cases involving the question of engineers providing and performing forensic engineering services and the ethical issues that arise in that context (BER Case Nos. 92-5, 82-6, 76-3). These cases have involved issues such as performance of services based on a contingency fee, licensure requirements when serving as an expert witness, the qualifications of the individual under consideration to perform the expert services, relationships with attorneys, and examination of the conflict-of-interest questions that may arise.

As the Board has noted on at least one previous occasion, one of the most common ethical issues that face engineers in their professional lives is the issue of conflicts of interest. In the past, engineering codes of ethics, including the NSPE Code of Ethics for Engineers, specifically implored engineers to avoid all conflicts of interest. The basis for this position was that the engineer cannot serve two masters and when faced with a conflict of interest, the engineer must in all cases take steps to remove him or herself from such conflicts. Among the concerns expressed by supporters of this position was that engineers who were involved in conflict of interest situations created a poor image for the engineering profession because the issue raised the appearance of impropriety. However, over time, the engineering profession came to the general conclusion that by the very nature of the role of the engineer in society, conflicts of interests were virtually an immutable fact of professional engineering practice and that it was generally impossible for the engineer to, in all cases, remove him or herself from such situations. As a result, codes were changed and engineers were implored to disclose all known or potential conflicts of interest to their employers or clients, by promptly informing them of any business association, interest, or other circumstance that could influence or appear to influence their judgment or the quality of their services.

In NSPE BER Case 98-4, Engineer A was retained by ABC Manufacturing for reviewing documents to form an opinion in a patent litigation matter in an area of Engineer A's expertise. Engineer A performed the requested services and was paid for her work by ABC Manufacturing. Several years later, Engineer A was retained by Attorney X who represented a plaintiff in product liability litigation against ABC Manufacturing in a matter not involving any aspect of the earlier patent litigation. Several years later, Engineer A was again retained by ABC Manufacturing in a different patent-litigation matter not related to either of the proceeding events. Engineer A again performed the requested services and was paid for her work. However, during cross examination at trial, opposing counsel questioned Engineer A's previous relationship both in defense of and in litigation with ABC Manufacturing, implying that by providing those services, Engineer A was acting improperly. The BER concluded that the facts did not rise to the level of a conflict of interest prohibited by the NSPE Code of Ethics. While engineers clearly have certain basic professional obligations to their employers and clients to protect their interests, engineers do not

have a duty of absolute loyalty under which the engineer can never take a position adverse to the interests of a former client. Being a “faithful agent and trustee” to a client does not obligate an engineer to a duty of absolute devotion in perpetuity (NSPE Code Section II.4.). Such an approach would be impractical and compromise the autonomy and professional independence of engineers. This is particularly true in the present case where the matters at issue are not in any way related to any previous work Engineer A performed for either of her former clients.

More recently in BER Case 11-10, Engineer W provided forensic engineering and expert witness services for attorneys with X, Y, and Z, a law firm with multiple offices in State L. Later, Engineer W was retained by an attorney from law firm Q, R, and S to assist an insurance claims specialist with an investigation of a claim that was expected to end up in litigation. Engineer W then learned that the opposing party in the insurance claim had hired an attorney from Law Firm X, Y, and Z, but from a different branch office with different attorneys than the ones with which Engineer W worked. Engineer W had never worked for any of the attorneys in the branch office. None of Engineer W’s work in the past for the X, Y, and Z law firm had involved any of the lawyers or the parties involved in the insurance claim. The BER determined that Engineer W should advise both the Q, R, and S law firm and the insurance company of his earlier relationship with the X, Y, and Z law firm and allow those parties to determine what steps, if any, they wish to take in connection with Engineer W’s services.

Gleaning the reasoning from the earlier BER cases and turning to the facts in the instant case, it is the BER’s view that the question of conflict of interest is remote because the only connection between Company Y and Company Z is that they are related through a holding company, W in a manner that does not appear to affect the engineering or other relationships at issue. In the BER’s view, having performed engineering design services for Company Y and now being requested to perform forensic engineering services in a suit against Company Z with both Company Y and Z connected by common ownership by Company W does not, without more information, constitute a conflict of interest. The duty of loyalty to a client is intended to apply to the ethical duties that adhere during the actual rendering of engineering services and is not an unconditional bond that prohibits a professional engineer from performing unrelated services on behalf of other clients. To this latter point, the nature of the work relating to the claim against Company Z is unconnected to any engineering design work Engineer A performed for Company Y. There is nothing in the facts to suggest that Engineer A was anything other than truthful and objective in any of the services provided or that Engineer A would breach any duty of confidentiality or reveal any business affairs or technical processes of Company Y in performing forensic engineering work in the litigation against Company Z.

Conclusion:

It would be ethical for Engineer A to perform forensic engineering services as an expert in a case against Company Z, a company that is a wholly owned subsidiary of Company W.

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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 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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