

Conflict of Interest—Reviewing and Approving Engineer Offering Redesign Services

Case No. 19-4

Engineer A is a professional engineer employed as an owner’s representative for the design and construction of a commercial project in a small community. Engineer A prepares drawings, plans, and specifications for the project and submits them to a public authority for approval. The public authority routinely assigns Engineer B, a civil/structural engineer in private practice, to review the drawings, plans, and specifications and make recommendations to the public authority. Engineer B also performs inspections for the public authority during the construction process to verify compliance with local codes and standards.

During Engineer B’s design review process, Engineer B makes a series of recommendations concerning modifications to Engineer A’s design drawings, plans, and specifications, and suggests that Engineer A and the owner engage Engineer B’s services to assist in the preparation of the modified documents in order to obtain approval by the public authority.

Question:

Was it ethical for Engineer B to suggest that Engineer A and the owner engage Engineer B’s services to assist in the preparation of the modified documents in order to obtain approval by the public authority?

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 II.4.c. - Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.*
- Section II.4.d. - Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.*

NSPE BER Case References: [85-6](#), [69-13](#), [88-1](#), [97-4](#)

Discussion:

Conflicts of interest present some of the thorniest ethical issues for engineers because the practice of engineering, by its very nature, involves relations with parties often with conflicting interests. Professional engineers are often faced with conflicts of interest in their professional practice.

Earlier versions of the NSPE Code of Ethics prohibited engineers from engaging in any activities that presented a conflict of interest. However, this approach was criticized as unworkable, and the NSPE Code was ultimately revised to reflect the basic notion that an engineer has an obligation to disclose all known or potential conflicts of interest to employers or clients by promptly informing them of any business association of interest or other circumstance that could influence, or appear to influence, the engineer's judgment or the quality of services. On this basis, engineers were deemed to have met their ethical responsibility in situations involving conflicts of interest by providing full and timely disclosure to their employers or clients.

Some have criticized this more modern approach because it could be interpreted as shielding serious conflict of interest that could impact a client's interests or even the public safety, when the client or employer either (1) is unsophisticated and has little understanding of the impact of the conflict or (2) colludes in the conflict. Under such circumstances, the engineer could arguably defend such action by arguing that "I did what the NSPE Code of Ethics requires and informed the employer/client of the conflict of interest, and the employer/client did not object and therefore I proceeded." Another related criticism of this approach is that it takes responsibility for making the ethical determination away from the engineer and places it with the client or the employer. Some have noted that this shift has the effect of reducing the scope of the engineer's professional judgment and autonomy.

A good example of the Board's struggle with this issue was [Case No. 85-6](#). In that case, Engineer A was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area that was adjacent to a residential community in which Engineer A's property was located. After learning of the proposed location for the spur, Engineer A disclosed to the state the fact that his residential property might be affected by the new spur and fully disclosed the potential conflict with the state. The state did not object to Engineer A performing the work and Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed.

In reviewing the question of whether it was ethical for Engineer A to perform the feasibility study despite the fact that Engineer A's land might be affected, the Board determined that the ethical obligations contained in NSPE Code Section II.4.a. do not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. Such an interpretation of the NSPE Code would leave engineers with neither any real understanding of the ethical issues nor any guidance as to how to deal with the problem (of conflict of interest). The Board noted that the purpose of a code of ethics is to provide the engineering profession with a better understanding and awareness of ethical issues that

impact the public. Only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

In contrast to [Case No. 85-6](#), in [Case No. 69-13](#), the Board, considering the facts under the earlier version of the NSPE Code of Ethics, reviewed a situation in which an engineer was an officer in an incorporated engineering consulting firm that was engaged primarily in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The Board was faced with the question of whether the engineer could ethically design a water and sewer system in the general area of his land interest and concluded that the engineer could not do so ethically. The Board concluded that disclosure was not enough under the facts and the engineer could avoid such a conflict either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it were not feasible or desirable for him to dispose of his land then. The Board added that "this is a harsh result, but so long as men are in their motivations somewhat lower than angels, it is a necessary conclusion to achieve compliance with both the letter and the spirit of the NSPE Code of Ethics. The real test of ethical conduct is not when compliance with the NSPE Code comports with the interests of those it is intended to govern, but when compliance is adverse to personal interest." (For further discussion, see [BER Case No. 88-1](#)).

Finally, in [BER Case 97-4](#), Engineers A and B were in a joint venture in an engineering and construction management practice that provides civil and municipal engineering and construction management services for clients in a number of townships in the state. The joint venture was hired by a developer to design a 90-lot subdivision in Township A. Engineer A provided the engineering design and Engineer B provided construction management services for the project. During a review by officials in Township A, it was determined by the officials that a second road would be needed to access the subdivision. However, the second road exited into Township B, which was adjacent to Township A. Engineer A and B's joint venture owned undeveloped property in Township B, and their joint venture also served as municipal engineer in Township B. It was clear that the property owned by Engineers A and B would be positively affected by the construction of the new road. As municipal engineer for Township B, the joint venture of Engineers A and B disclosed its relationship with regard to Township A with the developer to Township B, but did not disclose its ownership of the property in Township B. On this basis, Township B did not object to Engineers A and B making a recommendation regarding the feasibility of the construction of the proposed road. Thereafter, as municipal engineer for Township B, Engineer A's and B's joint venture recommended that Township B approve construction of the proposed road.

The BER determined that (1) it was not ethical for Engineers A and B to serve as the engineers for the developer and also serve as municipal engineer for Township B, because there was only partial disclosure and no disclosure of the engineers' ownership of undeveloped property in Township B, and (2) it was not ethical for Engineers A and B to recommend approval of the road because, as employees or advisors

in public service to Township B, the engineers could not participate in decisions involving professional services provided by them in their private practice. Said the BER, “[B]y disclosing their relationship with the developer with regard to Township A, but failing to disclose their ownership of undeveloped property in Township B, the engineers did not provide Township B with a full range of all known or potential conflicts of interest or other circumstances that could influence or appear to influence their judgment or the quality of their services.” The BER also determined that there appeared to be a clear violation of NSPE Section II.4.d., which prohibits engineers in public service as advisors or employees of a governmental body to participate in decisions involving such information.

Turning to the facts in the present case and using the standards established in earlier NSPE Board of Ethical Review opinions, this Board is of the view that Engineer B cannot be found to have acted in concert with the NSPE Code of Ethics. This is not an instance in which disclosure to the affected parties would resolve the conflict of interest as prescribed in NSPE Code Sections II.4.a and II.4.b. Instead, Engineer B appears to have misused the position as a reviewing and recommending consultant for the public authority to leverage additional services for himself in violation of Code Section II.4.c. While Engineer B would not in the strictest sense be reviewing his or her own work as proscribed by NSPE Code Section II.4.c., the net effect of Engineer B’s actions would be substantially the same. Either Engineer A or another independent, experienced, and qualified professional engineer should have been retained by the owner to assist in the preparation of the modified documents in order to obtain approval by the public authority.

Conclusion:

It was not ethical for Engineer B to advise that Engineer A and the owner engage Engineer B’s services to assist in the preparation of the modified documents in order to obtain approval by the public authority.

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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, 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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