

Confidentiality—Duty to Advise Client of Subpoena

Case No. 12-3

Facts:

Engineer A works for Client X. Engineer A completes the work for Client X and several months later, Engineer A is contacted by, and thereafter subpoenaed by, a federal grand jury regarding a criminal investigation of Client X and Client X's project funding by a federal agency. Engineer A provided copies of his written contracts with Client X as well as other documents, and cooperates fully with the investigation in connection with Engineer A's work for Client X. Following the submission of the contracts and documents, Engineer A is not called to testify before the grand jury and receives no other information or instructions from the federal grand jury.

Questions:

1. Does Engineer A have an ethical obligation to participate in the investigation?
2. Does Engineer A have an ethical obligation to advise his former client regarding Engineer A's submission of documents filed with the grand jury?

References:

- Section II.1.c. - NSPE Code of Ethics: *Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
- Section II.3.a. - NSPE Code of Ethics: *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.4. - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.4.a. - NSPE Code of Ethics: *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 III.3.a. - NSPE Code of Ethics: *Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.*

Discussion:

Ethical obligations relating to client confidentiality and disclosure have been addressed by the NSPE Board of Ethical Review on several occasions. One example is BER Case No. 97-5. In that case, Engineer A was retained to investigate the structural integrity of a 60 year-old occupied apartment building, which his client was 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 clear to Engineer A that the building was being sold "as is" and that the client 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 or mechanical engineer, he realized that those deficiencies could cause injury to the occupants of the building and so informed the client. Specifically 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 deciding it was unethical for Engineer A not to report the safety violations to the appropriate public authorities, the Board noted that the facts presented in the case 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's health and safety. The Board concluded that Engineer A was bound by the NSPE Code of Ethics for Engineers to inform the appropriate regulatory agencies of the engineer's findings and the potential dangers to the public health and the environment.

Later in BER Case No. 07-11, Engineer A was retained by Client X to prepare drawings and plans for a structure on Client X's property. During the course of Engineer A performing services for Client X, Client X mentioned to Engineer A that there was an existing structure on the property that required permits and approvals to be constructed, but that Client X had the property built without obtaining the necessary plumbing, electrical, structural, mechanical permits, and code approvals. The structure was used for the storage of materials and equipment but is usually not intended for human habitation or use, other than for delivery and servicing. The Board concluded that Engineer A would have an obligation to discuss with Client X the fact that code exists to protect the public health and safety as well as the overall integrity of the building and its contents and that Client X has an obligation to comply. Engineer A should encourage Client X to bring the storage facility into code compliance.

Turning to the facts in this case, unlike the earlier cases discussed, it is the Board's view that Engineer A does not have any ethical obligation to former Client X to maintain confidentiality in connection with Client X's business affairs by withholding any information from the federal grand jury. Instead, Engineer A has an obligation to fully cooperate with this governmental investigation. As a matter of law, Engineer A's failure to cooperate with the investigation could expose Engineer A to contempt and potential criminal prosecution. Engineer A's ethical obligation to not divulge confidential information without the client's consent comports with Engineer A's legal requirement to cooperate with a federal grand jury, as implied in Section II.1.c of the Code. Furthermore, nothing in Engineer A's relationship with Client X constitutes any legally protected privileged information that might justify the withholding of information under the circumstances. Unlike relationships between attorneys and their clients,

relationships between engineers and their clients do not enjoy any legally recognized privilege. Under the facts, Engineer A's relationship with Client X is one of a former and not of a current client. Based on earlier BER cases, because of the passage of time, the ethical duty of confidentiality that might otherwise exist could be diminished. Finally, unlike the two earlier BER cases discussed, the facts in the present case involve a matter outside of Engineer A's direct relationship with Client X and pertains to a matter of public interest and concern. In BER Case Nos. 97-5 and 07-11, the Board of Ethical Review was clear that matters involving the public health and safety require assertive action on the part of the engineer to protect the public.

Regarding the question of whether Engineer A has an ethical obligation to advise Client X regarding Engineer A's participation in the federal grand jury investigation, the Board believes the same reasoning about confidentiality that was used in discussing Question 1 would also apply to Question 2. Since this is a criminal matter and because grand jury proceedings are generally secret, any action by Engineer A to advise Client X regarding Engineer A's participation in the federal grand jury investigation could easily compromise the federal criminal investigation and potentially expose Engineer A to criminal prosecution.

Finally, because of the fact that this is a criminal matter and Engineer A's testimony relates to Engineer A's business relationship with Client X, it may be prudent for Engineer A to consult with competent legal counsel with experience in federal criminal law and procedure to counsel Engineer A regarding this matter.

Conclusions:

1. Engineer A has an ethical obligation to participate in the investigation.
2. Engineer A does not have an ethical obligation to advise Client X regarding Engineer A's submission of documents filed with the grand jury.

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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 NSPE 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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