

Confidentiality – Becoming Aware of Technical Information Important to the Public Health and Safety

Case No. 13-9

Facts:

Engineer A performs an investigation of a recent structural failure in connection with services provided to Attorney B for Client C. Engineer A signs a confidentiality agreement by which Engineer A is prohibited from disclosing any of the conclusions reached in connection with the cause of the structural failure without the consent of Client C.

Early during the litigation process, Attorney B negotiates a settlement agreement for Client C. As part of the settlement agreement, Attorney B and Client C agree that all investigative reports, including the work performed by Engineer A, will be sealed and remain strictly confidential forever. Engineer A believes that his investigation has identified a significant technical issue that, if communicated more broadly in the technical literature, could prevent future structural failures.

Question:

What are Engineer A's obligations under the circumstances?

References:

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| Section II.1. | - | NSPE Code of Ethics: | <i>Engineers shall hold paramount the safety, health, and welfare of the public.</i> |
| Section II.1.a | - | NSPE Code of Ethics: | <i>If Engineers' judgement is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.</i> |
| Section III.2.a. | - | NSPE Code of Ethics: | <i>Engineers are encouraged to participate in civic affairs; career guidance for youths; and work for the advancement of the safety, health, and well-being of their community.</i> |
| Section III.4. | - | NSPE Code of Ethics: | <i>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.</i> |

Discussion:

Conflicts between fundamental provisions of the NSPE Code of Ethics for Engineers are common. Among such conflicts include situations involving the public interest and the protection of the public health and safety matched against ethical duties of confidentiality to clients. Both values are vital to engineering ethics and professionalism and need to be maintained in order to protect the integrity of the engineering profession.

One of the earliest NSPE Board of Ethical Review cases that sought to balance these two considerations was BER Case No. 76-4. In that case, the XYZ Corporation had been advised by a State Pollution Control Authority that it had 60 days to apply for a permit to discharge manufacturing wastes into a receiving body of water. XYZ was also advised of the minimum standard that must be met for that discharge. In an effort to convince the authority that the body of water, after receiving the manufacturing wastes, would still meet established environmental standards, the corporation employed Engineer Doe to perform consulting engineering services and submit a detailed report. After completion of his studies but before completion of any written report, Doe concluded that the discharge from the plant would lower the quality of the receiving body of water below established standards. He further concluded that corrective action would be very costly. Doe verbally advised the XYZ Corporation of his findings. Subsequently, the corporation terminated the contract with Doe with full payment for services performed and instructed Doe not to render a written report to the corporation. Thereafter, Doe learned that the authority had called a public hearing and that the XYZ Corporation had presented data to support its view that the present discharge meets minimum standards. In deciding that Doe had an ethical obligation to report his findings to the authority upon learning of the hearing, the Board noted that the NSPE Code requires that [Doe's] duty to the public be paramount. In this case, it is presumed that a failure to meet the minimum standards established by law is detrimental to the public health and safety.

Later in BER Case No. 07-3, Engineer A was retained by a warranty company to perform warranty inspections on manufactured building claims filed against a manufactured building company. Engineer A was asked to inspect a building for the company relating to a claim by Owner A regarding certain mechanical and electrical issues. During the course of the inspection, Engineer A investigated mechanical and electrical issues but also separately discovered that the building plans prepared by a manufactured building employed engineer indicated that the building was built in 2002 with a roof load requirement of 40 pounds per-square-foot. However, Engineer A was aware that the local code requirements were changed in 2000 with load requirements of 80 pounds per-square-foot because of local snow conditions. The engineering drawings were submitted to a local code official in 2002 and they were approved with the 40 pounds per-square-foot included. Engineer A advised the warranty company and the manufactured building company, and neither believed any remedial action was necessary. With winter approaching, Engineer A was concerned about the potential danger of a heavy snow causing a roof collapse to the occupants of these buildings.

In reviewing the facts, the BER decided that it would be ethical for Engineer A to (1) first give the building manufacturing company the opportunity to contact the local code enforcement authorities and only if the building manufacturing company did not act within a reasonable period of time, then (2) take further action including personally contacting the building code enforcement authorities, and if necessary, contacting appropriate state building officials. According to the Board, the obligation to protect the public health and safety takes precedence and overrides other considerations in most cases. The Board in Case No. 07-3 said “in most cases” because the Board conceived of at least some circumstances in which the risk the public health and safety may be somewhat marginal or remote and therefore other ethical considerations may be viewed in a different light. While Case 07-3 raised the possibility of a significant risk to the public health and safety, it does illustrate that sometimes the risk may not be immediate or imminent and therefore other factors may come into play. Certainly, the need to address the risk to the public can never be ignored or delayed unreasonably. However, where a risk is more remote, the engineer’s ethical obligations might take on different dimensions. For example, under the facts in Case 07-3, since the risk was not immediate, Engineer A may have had an opportunity to explore a variety of different approaches (e.g., give the building manufacturing company the opportunity to contact the local code enforcement authorities and only if the building manufacturing company did not act within a reasonable period of time, take further action including personally contacting the building code enforcement authorities, and if necessary, contacting appropriate state building officials).

Turning to the facts in the present case, it is the Board’s view that this case is another illustration of the ongoing tensions that often exist between two fundamental ethical principles—here duty of confidentiality vs. protection of the public health and safety. Engineer A should always explore negotiating appropriate language in his agreement with attorneys or clients recognizing the engineer obligations to report safety violations as necessary to protect the public health and safety. The Board is not willing to go as far as an earlier Board went in BER Case No. 76-4 in concluding that the public health and safety issue supersedes Engineer A’s confidentiality obligations, largely for the reasons identified in Case No. 07-3—that there was no immediate or imminent danger or threat to the public health, safety, or welfare. Instead, Engineer A’s belief that his investigation has identified a significant technical issue that, if communicated more broadly in the technical literature, could prevent future structural failures is prospective and speculative.

It is the Board’s view that Engineer A should explain to Attorney B and Client C his ethical obligation to work for the advancement of the safety, health, and well-being of the community and explore an alternative path to identifying the technical issues involved, including developing a paper or article that explains his technical concerns without revealing specific and identifiable facts and circumstances that would compromise the settlement agreement involving Client C. While this may be difficult because of the possible need to specifically identify the context upon which Engineer A’s technical issue is based, it is the Board’s view that this would be a reasonable middle ground for Engineer

A to pursue and which would fulfill Engineer A's ethical responsibilities both to the public and to the client. The Board also noted that, although the facts of this case do not clearly indicate whether or not the technical issue that was discovered during his investigation was of such urgency or hazard that it compromises Engineer A's obligation to hold paramount the safety, health, and welfare of the public (Section II.1 of the Code), Engineer A may in that instance have further ethical obligations to communicate such issues in the broader technical literature.

Conclusion:

Engineer A should explain to Attorney B and Client C his ethical obligations as a professional engineer to work for the advancement of the safety, health, and welfare of the public and explore an alternative path to identifying the technical issue, including developing a paper or article that explains his technical issues without revealing specific and identifiable facts and circumstances that would compromise the settlement agreement involving Client C. However, if Client C refuses to allow Engineer A to disseminate this information, and Engineer A is convinced that the matter rises to the level of an imminent or urgent threat to public safety, health, or welfare, Engineer A should notify such other authorities as may be appropriate to safeguard the public.

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