



Conflict-of-Interest
Engineer's Side Business Outside of Regular Employment

Case No. 14-7

Facts:

Engineer A is a professional engineer for Company X with expertise in electrical engineering. Engineer A also owns a side business, Company Y, which develops enterprise software. Company X could benefit from the software developed by Engineer A and Company Y. There are competing enterprise software products in the marketplace, but Engineer B, the president of Company X believes Company Y's enterprise software product is the closest to what Company X needs, in part because it appears that Engineer A developed the software based largely on his background as an employee of Company X. The price for the enterprise software is substantial.

There is nothing in Company X's policies or procedures that would prevent Engineer A from engaging in this outside activity or prevent Company X from purchasing the enterprise software from Engineer A and Company Y. Company X has no specific rules about contracting with current employees and their independent businesses.

Questions:

1. What are Engineer A's ethical obligations under the circumstances?
2. What are Engineer B's ethical obligations under the circumstances?

NSPE Code of Ethics References:

Section II.4. Engineers shall act for each employer or client as faithful agents or trustees.

Section III.1.c. Engineers shall not accept outside employment to the detriment of their regular work or interest. Before accepting any outside engineering employment, they will notify their employers.

Section III.3.a. Engineers shall avoid the use of statements containing a material misrepresentation of fact or omitting a material fact.

Section III.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 III.6.b. Engineers in salaried positions shall accept part-time engineering work only to the extent consistent with policies of the employer and in accordance with ethical considerations.

Discussion:

The question of the ethical obligations of an employee accepting outside employment to the detriment of an employer has been discussed by the NSPE Board of Ethical Review in previous cases. For example, in BER Case No. 97-1, Engineer A was a licensed professional engineer and land surveyor in State A. Engineer A was associated with a firm, XYZ Engineering and Surveying (which offered professional engineering and surveying), as the licensed professional engineer in charge under the state's certificate of authorization requirement. The firm had not performed any work outside of State A. Engineer A's understanding of the law of State A was that a licensed professional engineer must be in "responsible charge" of engineering, and a person licensed as a professional land surveyor must be in "responsible charge" of land surveying. Under the state's laws, these persons in responsible charge could be a principal or employee of the firm. Engineer A's agreement with XYZ Engineering and Surveying was that XYZ grants Engineer A a 10% share of the stock in the firm as compensation for his engineering services and 5% of the gross billings for engineering work for which the seal of a licensed engineer in responsible charge of engineering was required. This agreement was contingent on the understanding that if any one of the three principals of XYZ Engineering and Surveying becomes licensed as a professional engineer in State A, the agreement would become void and the 10% stock would be returned to XYZ Engineering and Surveying. In addition to working with XYZ, Engineer A had a full-time engineering position for a state government agency. This work required no engineering license. Engineer A worked 35 hours per week on a flex-time basis and provided about 20 hours per week supervising engineering services at the firm, plus an additional 12 hours of work on the weekends. Engineer A did not normally go into the field for XYZ Engineering and Surveying but was available for consultation 24 hours a day. In concluding that it was ethical for Engineer A to function in both capacities, the Board noted that both the state government agency and the engineering firm were aware of Engineer A's activities as a dual employee and did not object to these activities. However, the Board noted that should a conflict of interest arise (e.g., where Engineer A or the firm's activities conflict with the governmental employer's activities or interests) Engineer A would need to carefully address those activities, consistent with NSPE Code Sections III.6.b., II.4.d., II.4.e., and other applicable provisions of the NSPE Code.

Later in BER Case 99-3, Engineer A was employed by Company X and as part of her job, Engineer A organized continuing education seminars (i.e., contacting speakers, making meeting arrangements, etc.) for Company X. Company Y, a company that competed for business with Company X, was aware of Engineer A's track record in organizing effective and well-received continuing education seminars and requested that Engineer A organize a continuing education seminar for Company Y's architects, engineers, and surveyors, whereby Company Y would pay Engineer A for such services. Engineer A agreed to provide the services to Company Y. Engineer A had earlier told her supervisor at

Company X about establishing the continuing education business but did not mention that the services would be provided to Company Y, a competitor of Company X. At the time, Company X did not object.

In finding that it was not ethical for Engineer A to agree to provide continuing education seminar services to the competing Company Y without the knowledge and consent of her employer, the Board noted that Engineer A failed to fully disclose that she would be working for the benefit of a competitor of her employer. Her failure to provide this critical information did not provide her employer with the opportunity to make an informed decision concerning her outside employment.

The Board was not certain of all of the facts and details involved in Engineer A's decision not to inform her employer of her relationship with Company Y in BER Case 99-3. It may have been as simple as the fact that Engineer A believed that Company X would have objected to this relationship and Engineer A, therefore, decided not to fully disclose this fact to Company X because she wanted to pursue that opportunity. Or, Engineer A might have had plans to depart from Company X and establish her own business and decided to let her ties to Company X gradually diminish. Whatever her motivation, the Board believed that her actions were not consistent with the NSPE Code.

In BER Case 99-3, the Board added in passing that Engineer A's firm, Company X, will most probably learn that Engineer A is providing services to Company Y. In view of her failure to inform Company X of this fact when informing the company of her decision to establish a continuing education business, the consequences to Engineer A may be severe.

The Board also noted in Case 99-3 that over time, the NSPE Code and the Board of Ethical Review have moderated to the point of recognizing that certain types of conflicts of interest are difficult, if not impossible, to avoid. The more realistic approach for individual engineers faced with this type of ethical conflict is to fully disclose the nature and extent of the conflict to the appropriate parties involved or impacted by the conflict. This is based on the view that the parties that are most affected by the conflict and who have the most at stake (e.g., clients, employers, other engineering firms, etc.) are in the best position to determine whether their interests will be compromised by the conflict. While perceived conflicts of interest are sometimes resolved by the parties as a result of full disclosure, in other instances, the conflicts are deeper and require the engineer to disassociate from a specific activity.

Turning to the facts in the instant case, unlike BER Case 99-3, there does not appear to be any lack of knowledge on the part the employer regarding the engineer's ownership and involvement in the enterprise software engineering firm. Instead, the present case is more in line with BER Case 97-1, in which the employer was aware of and consented to the engineer's outside activities. As noted earlier, in BER Case 97-1 the Board concluded

that it was ethical for Engineer A to function in both capacities. The Board noted that both the state government agency and the engineering firm were aware of Engineer A's activities as a dual employee and did not object to these activities. However, the Board noted that should a conflict of interest arise (e.g., where Engineer A or the firm's activities conflict with the governmental employer's activities or interests) Engineer A would need to carefully address those activities, consistent with NSPE Code Sections III.6.b., II.4.d., II.4.e., and other applicable provisions of the NSPE Code.

The Board is a bit troubled, however, by Company X's lack of a policy regarding an employee's outside activities as well as the lack of a policy regarding contracting with current employees and their outside independent businesses. The Board does not wish to unduly restrict or limit the professional and business activities and opportunities for professional engineers or suggest business practices for engineering firms. However, the Board is concerned that the lack of any policy guidance for employees could create an ethical vacuum under which an employee could easily run afoul of ethical principles relating to the obligation of employees to their employer or clients, such as the basic obligation to act as faithful agent or trustee. In addition, depending on the size of Company X, whether Company X is a closely held or public company, as well as any public or private clients with whom they are engaged, there may be additional regulatory or legal obligations. These obligations, of which Company X must be mindful, cover issues such as conflicts of interest, self-dealing, nepotism, and others.

Conclusions:

1. It was ethical for Engineer A to function in both capacities as an employee and as a contractor to Company X. However, should a conflict of interest or any adversarial relationship arise, Engineer A may need to recuse himself from any decisions relating to his company's work with Company X or resign from Company X.
2. The Board is concerned that the lack of any policy guidance for employees could create an ethical vacuum under which an employee such as Engineer A could easily run afoul of ethical principles relating to the obligation employees have to their employer or clients, such as the basic obligation to act as faithful agent or trustee. In addition, depending on the size of Company X, whether Company X is a closely held or public company, as well as any public or private clients with whom they are engaged, there may be additional regulatory or legal obligations. These obligations, of which Company X must be mindful, cover issues such as conflicts of interest, self-dealing, nepotism, and others.

Board of Ethical Review:

Robert J. Andreoli, P.E.

John C. Branch, P.E.

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

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

Luke Patterson, P.E.

Samuel G. Sudler III, P.E.

Daniel K. O'Brien, P.E., F.NSPE **(Chair)**

NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE opinions, visit www.nspe.org or call 800-417-0348.