

**Obligation to Former Employer and
Former Client Following Acceptance of Position with State**

Case No. 14-8

Facts:

Engineer A worked for a private engineering company in the field of water rights. The firm was hired by a client to complete a water-rights analysis in which Engineer A participated. Engineer A, along with one other employee at the firm, stamped the final document. These types of analyses quantify water and provide terms and conditions for future use that must be approved by the local courts. Typically, the court process takes years to complete and, in short, it includes the following steps:

1. Application (proposal)
2. Engineering to support application
3. Objections from the public/other water users
4. Rebuttal of objector's comments
5. Mediation or trial

Engineer A worked on the project through step No. 2 and resigned from the firm to work for the State, who is an objector in this specific analysis (the State is typically an objector in most cases).

Engineer A feels that he can and should support the work he performed and which was included in the stamped report, but he is concerned about the remaining steps in the court process. In his current employment, he has been isolated from the State's case in the matter, and his current position does not include opposing this or other cases.

Question:

What are Engineer A'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 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 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.

Section III.4.b. Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer.

Discussion:

Over the years, the NSPE Board of Ethical Review has considered a number of cases involving ethical concerns relating to an engineer's involvement in adversarial proceedings.

As the Board has noted on at least one previous occasion, one of the most common ethical issues that engineers face in their professional lives is conflicts of interest. At one point 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 engineer's role 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 BER Case No. 98-4, the Board considered a situation involving Engineer A, who was retained by ABC Manufacturing for the purpose of 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 preceding 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. In deciding that it was ethical for Engineer A to provide services to the parties in the manner described under the facts, the Board noted that it does not believe the facts rose to the level of a conflict of interest prohibited by the NSPE Code. The Board noted that 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. (See 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 BER Case No. 98-4, where the matters at issue are not in any way related to any previous work Engineer A performed for either of her former clients. The Board also noted that while all engineers must make professional decisions based on a variety of considerations and factors, engineers must analyze technical matters, weighing all appropriate considerations. For a variety of reasons, some engineers might choose to decline an engagement that could place the engineer in a position adverse to the interests of a former client, even though the engagement is not in any way related to the engineer's earlier services to the client. However, the NSPE Board of Ethical Review is not prepared to say that an engineer who fails to follow this approach is somehow violating the NSPE Code. To do so would undermine the individual judgment, independence, and discretion that each engineer must exercise. In this connection, the Board has also expressed concern regarding the attorney's implication under the facts in BER Case No. 98-4 that Engineer A may have acted improperly, with the suggestion that Engineer A's action may have constituted a conflict of interest. It appears that the attorney was attempting to draw a parallel between the legal profession, where there is an institutionalized plaintiff's bar and defense bar, and the engineering profession. However, while engineers may find themselves at times working within the confines of the legal adversarial profession, unlike attorneys, they are not advocates in rendering their professional services, and thus they should not be expected to compromise their professional independence and autonomy. It is important to note that the engineer's role as an expert witness in a litigation matter is to assist the trier of fact, which may be a judge or jury, in better understanding the technical complexities of the case.

Turning to the facts in the case Engineer A clearly has an ongoing duty to honor his obligations both to his former employer and the private client. Engineer A cannot disclose, participate or represent the state's interest in connection with this proceeding unless Engineer A first obtains the permission/consent of Engineer A's former private firm employer and also the client. In light of the facts and circumstances, it is doubtful that such permission/consent would be granted by either party. By refraining from becoming involved in this matter for the state, Engineer A is not "representing the client" (as the facts suggest) or providing any services to the client. Engineer A is merely remaining silent.

The NSPE Code of Ethics (and the codes of other engineering societies) make it clear that "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." The Code also states that "Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the engineer has gained particular specialized knowledge on behalf of a former client or employer."

Engineer A should be assigned other duties by the state, remain isolated from the State's water rights case involving Engineer A's former employer and its client—and the state should recognize and respect Engineer A's ethical obligations in this matter. Any involvement by Engineer A in the state's case could potentially compromise the interests of all parties—the former employer, the private client, and the state—as Engineer A's dual role and his professional opinion/judgment—as an employee of the private firm and now as a state employee—could be called into question—by one of the parties, the public, the media, etc.

Conclusion:

Engineer A clearly has an ongoing duty to honor his obligations both to his former employer and the private client. Engineer A should be assigned other duties by the state remain isolated from the State's water rights case involving Engineer A's former employer and its client—and the state should recognize and respect Engineer A's ethical obligations in this matter.

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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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