

Conflict of Interest—Serving as a Manufacturing Representative

Case No. 11-5

Facts:

Engineer A is a partner in ABC Engineering, a firm that primarily performs site investigation work for developers and other clients. ABC Engineering does not perform any building design or construction-related services.

XYZ Building Materials and Products approaches Engineer A and invites Engineer A and ABC Engineering to become its manufacturing representative in a specific territory in which XYZ does business. Engineer A agrees and ABC Engineering agrees and establishes a separate company to perform those services on behalf of XYZ.

Question:

Would it be ethical for Engineer A and ABC to accept XYZ Company's offer to become its manufacturing representative in a specific territory in which XYZ does business?

References:

- Section II.2.a. - NSPE Code of Ethics: *Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.*
- 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.5.a. - NSPE Code of Ethics: *Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.*
- Section III.5.b. - NSPE Code of Ethics: *Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the engineer in connection with work for which the engineer is responsible.*

Discussion:

The issue of an engineer serving as a manufacturing representative is not a new one and has been examined by the NSPE Board of Ethical Review on an earlier occasion. Serving as a manufacturing representative raises basic conflict of interest issues and unless appropriate precautions are taken, can lead to violations of the NSPE Code of Ethics for Engineers.

In BER Case 94-3, Engineer A was a principal in a consulting engineering firm which also served as an equipment manufacturing sales representative. When preparing specifications for the design and construction of manufacturing facilities, Engineer A almost without exception specified the equipment and products developed by the manufacturer which Engineer A represented. The Board concluded that it was unethical for Engineer A to serve as an equipment manufacturing sales representative while at the same time he is practicing as a consultant and specifying the equipment and products developed by the manufacturer. Engineer A presumably received reimbursement and commissions in his role, and at the same time Engineer A purported to be an independent consultant who would serve as an agent to represent the best interests of his client. This dual role, said the Board, was entirely inconsistent with the NSPE Code of Ethics and was unacceptable as it clearly raised the undeniable fact of a *quid pro quo*, or an exchange of valuable consideration for specifying a product. In addition to creating a serious conflict of interest, the Board noted that an engineer who specified certain product lines without regard to other competing products in the marketplace could easily cause his client to lose the benefit of new, innovative products and to incur higher costs. Such actions, said the Board, were directly contrary to the engineer's role as an independent professional and an agent to the owner. The Board concluded by noting that Engineer A's dereliction was compounded under the facts by his apparent failure to disclose his relationship with the equipment manufacturer to his clients.

While the facts in BER Case No. 94-3 are helpful and instructive to the Board's analysis, it is the Board's view that the circumstances in that case were distinguishable from the facts in the present case. Unlike Case 94-3, Engineer A and ABC Engineering would be performing engineering services (site investigation work for developer) in a field different from the new business venture (building materials and products) and so the likelihood of a conflict of interest would be lessened. In addition, under the facts of Case 94-3, Engineer A, almost without exception, specified the equipment and products developed by the manufacturer which Engineer A represented—a clear and unmitigated violation of the NSPE Code of Ethics provisions relating to conflicts of interest and the duty to one's clients.

At the same time, since professional practice and firm activities evolve over time, it is the Board's view that Engineer A and ABC Engineering must guard against any future possibility that if the firm's work expands into building design and construction-related activities, Engineer A and ABC Engineering will take appropriate steps including full disclosure and divestiture if necessary of its business interests as a representative of XYZ Company—or risk confronting some of the ethical issues addressed in BER No. Case 94-3.

Conclusion:

It would be ethical for Engineer A and ABC to accept XYZ Company's offer to become its manufacturing representative in a specific territory in which XYZ does business. However, if the firm's work expands into building design and construction-related activities, Engineer A and ABC Engineering should take appropriate steps including full disclosure and divestiture if necessary of its business interests as a representative of XYZ Company.

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