

## Advertising—Use of Client Information by Third Party

### **Case No. 12-4**

#### **Facts:**

Engineer A practices engineering in States X and Y and collaborates on a variety of projects with a land surveyor and a law firm. A general contractor (Contractor Z) specializing in residential home construction who has worked with Engineer A in the past asks Engineer A to provide the names of home owner clients that Engineer A has worked for directly or in connection with their services to the land surveyor and the law firm, in order for Contractor Z to market new homes to those home owner clients. Engineer A could potentially benefit from home-building work from Contractor Z, but there is no formal agreement between Engineer A and Contractor Z to share client referrals. Engineer A does not require Contractor Z to pay for any of the lists that Engineer A provides to Contractor Z.

#### **Question:**

Would it be ethical for Engineer A to provide Contractor Z with the names of the home owner clients that Engineer A has worked for directly or in connection with their services to the land surveyor and the law firm?

#### **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.4.c - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- 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.*
- Section III.6. - NSPE Code of Ethics: *Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.*

#### **Discussion:**

The use of innovative marketing schemes and other sales mechanisms by professional engineers in collaboration with others, and the ethical implications involved in such business associations, has been the subject of NSPE Board of Ethical Review deliberations in the past. Whether such business associations (“consortiums”) create the potential for conflicts of interest or other circumstances that could create appearances of impropriety is often dependent upon a review of all of the facts and circumstances relating to the operation of the consortium.

For example in BER Case No. 86-1, the Board considered two situations involving an engineer's involvement in a business association. In the first case (Case 1), Engineer A had the opportunity to join a business consortium consisting of his engineering firm, an architectural firm, a construction firm, and a financial firm. The general purpose of the consortium was to improve the collective general marketing and business development of the members. To defray consortium expenses for promotion, publicity, overhead, etc., each firm was required to pay to the consortium an entrance fee plus a percentage of income derived from business successfully generated from referrals by other consortium members. In the second case (Case 2), which involved the same opportunity and purpose, Engineer B and the other members of the consortium were required to pay an entrance fee to the consortium. In addition, in Case 2, Engineer B was also required to pay a referral fee directly to the consortium firm member who found a new business client for Engineer B. If Engineer B found a new business client for a member of the consortium, Engineer B would receive a finder's fee. The Board found that Engineer A's participation in the consortium would not be prohibited by the NSPE Code of Ethics for Engineers in Case 1, but Engineer B's participation in the consortium would be unethical in Case 2. The Board specifically noted that both consortiums were formed primarily for marketing purposes and represented, in effect, a strategy for individual firm marketing capabilities and efforts through an umbrella approach. The Board compared the consortiums with typical joint ventures, wherein one firm learns of a potential project and forms liaisons with other firms having expertise complementary to the others. In such joint ventures, marketing efforts are combined to secure the business and fee arrangements agreed to by all joint venture participants. The joint venture, in the Board's view, becomes a temporary and less structured form of a consortium widely and successfully practiced within the engineering profession. The Board noted that objectivity can be compromised in the selection of joint venture participants as that potential existed in the Cases 1 and 2. Nevertheless, the Board noted that it was an acceptable form of practice. However, the Board concluded that the matter of a referral fee, a portion of which is exchanged among consortium firm members, constituted a payment for valuable consideration in order to secure work, which is specifically prohibited in the NSPE Code.

Later, in BER Case No. 05-9, Engineer A was employed in private practice and was approached by a networking and referral organization that has multiple chapters around the world. Only one person from any given profession or line of business could join any individual chapter. The chapter that approached Engineer A included a lawyer, contractor, investment advisor, and insurance agent. At each weekly meeting, there was usually a presentation on how to market a business and one member gave a detailed presentation about his or her business. Finally, members exchanged all referrals that they had obtained from each other during the week. The referral organization earned its revenue through annual membership fees. The members did not pay any fees to each other, and the organization did not make any referrals nor require that members make referrals to each other. Engineer A described the organization's role as helping to bring people together to make "free referrals among themselves."

In deciding that it would be ethical for Engineer A to participate in the networking and referral organization, the Board determined that the facts were clearly more in line with Case 1 of BER Case No. 86-1, noting that the structure was based upon an established model that was presumably practiced throughout the world. While that does not necessarily indicate that the practice was acceptable, it does demonstrate a level of credibility and sustainability. The arrangement outlined appeared to constitute a formalized networking circle and information exchange with no requirement that any party make a referral to another party. In addition, the fees that were paid were intended to cover chapter membership and general administrative cost, but are not provided to any individual member in consideration for a referral. A member was also free to make referrals outside of the network if the member so chose. On this basis, the Board concluded that there is no violation of the NSPE Code.

Turning to the facts in the present case, based upon the earlier cases discussed and the general custom and practice within the design and construction industry, it is the Board's view that the situation described under the facts constitute an acceptable method of sales and marketing activities. In today's competitive world, use of client lists, directories, and other related sources of information have become one of the many standard ways of advertising and promoting professional services. Under the facts, no direct compensation changed hands between Engineer A and Contractor Z. In addition, there did not appear to be any direct *quid pro quo* under which Engineer A was promised or guaranteed any future business or considerations in exchange for providing Contractor Z with the client information.

The Board, however, wishes to caution Engineer A that (1) since some of the information apparently was generated as a result of Engineer A's collaboration with the land surveyor and the law firm, Engineer A should advise both the land surveyor and the lawyer to determine whether those parties had any agreements with their individual clients regarding the use of their contact information and future sales and marketing efforts, and (2) Engineer A should determine whether there are any federal, state, or local laws or regulations that might limit Engineer A's use of the information in the manner proposed.

**Conclusion:**

While the Board considers it would not be unethical for Engineer A to provide Contractor Z with the names of the home owner clients that Engineer A has worked for directly or in connection with their services to the land surveyor and the law firm, it would be prudent, before sharing the information with Contractor Z, to either inform the home owner clients, or preferably, to receive their permission to make the referral.

**Board of Ethical Review:**

Curtis A. Beck, P.E., F.NSPE

Luke Patterson, P.E.

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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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## **Dissenting Opinion – BER Case No. 12-4**

Mark H. Dubbin, P.E.

Samuel G. Sudler, III, P.E.

It would not be ethical for Engineer A to provide a client list to Contractor Z.

NSPE Code of Ethics Section II.1.c has been cited as a relevant section in dozens of past BER cases. Following a review of these cases, one learns that they commonly involve a conflict with another portion of the code and are examined in that light. In past cases, the Board has weighed on engineers acting in conflict with one provision of the NSPE Code of Ethics Section II.1.c while adhering to an ethical duty of confidentiality to clients and employers, as well as a duty to voluntarily disclose information to protect the health, safety, and welfare of the public. Some of the overarching ethical dilemmas discussed in these cases involve the protection of trade secrets and proprietary information during different matters of employment or when involved in legal processes.

In BER Cases 05-9 and 86-1, the engineers were in a networking consortium involving other businesses such as attorneys, contractors, investment advisors, insurance agents, and financial firms. The purpose of the consortium was to exchange referrals and marketing strategies freely with each other to promote their general business interests. In Case 86-1, the Board found that “consortiums are being formed primarily for marketing purposes and represent, in effect, a ‘pooling’ of individual firm marketing capabilities and efforts through an ‘umbrella’ approach. In this sense the consortium is quite similar to joint ventures where one firm learns of a potential project and forms liaisons with other firms having expertise complementary to the others. Marketing efforts are combined to secure the business and fee arrangements agreed to by all joint venture participants. The joint venture, in the Board’s view, becomes a temporary and less structured form of a consortium widely and successfully practiced within the profession.” In BER Case 05-9, the board noted that the Engineer did not receive any compensation for the referrals and found the arrangement to be ethical as well.

In the cases cited above, the Board found it to be ethical for the engineer to voluntarily reveal general information regarding former clients without their prior consent. The board has found that while this action was acceptable during the course of standard practice between businesses, it differed from the facts in the present case. In most cases relating to marketing activities concerning referrals, the sharing of information between businesses was conducted to solicit clients who used engineering services and who also presumably received and welcomed solicitations by engineers and related enterprises in the normal course of business activities. Marketing connections between those in the business of engineering and those who would receive the referrals would amount to networking in the interest of general business goodwill. It can be assumed that those businesses would be receptive to the marketing efforts by those in their industry of practice. It is assumed that the business associates of Engineer A would welcome favorable referrals of their business colleagues.

In the present case, an important distinction lies in the fact that the client list requested consists of home owners and end users who do not regularly require the need of a residential contractor, are not in the business-to-business relationship, and have not indicated any interest whatsoever in being solicited for services. It is likely that the individuals contacted might not be receptive to the sales efforts of Contractor Z. Furthermore, Engineer A’s connection to Contractor Z could be seen as an implied endorsement of Contractor Z’s abilities, a possibly misleading and deceptive act which could expose Engineer A to potential liability. Additionally, clients of Engineer A may find Engineer A providing their personal contact information for unsolicited service to be a breach of trust, privacy, and confidentiality, potentially diminishing the “honor, reputation, and usefulness of the engineering profession”.

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