

Making judgment calls

The National Society of Professional Engineers' Board of Ethical Review provides impartial help to engineers facing tough ethical questions. Following are two cases it recently reviewed.



by the National Society of Professional Engineers Board of Ethical Review

Case #1: Disclosing a conflict of interest

Ann Thracite, P.E., a mining engineer, is retained by a company that owns land upon which coal mines are located. Thracite provides engineering services and surveys to determine the location of coal veins in the mine, assigns coal contractors to the locations in the mine, and performs other engineering services as required.

Thracite owns a laboratory that evaluates the quality of coal mined by coal contractors that contract with the coal mine owner. The quality and cost of mining the coal may vary. Although Thracite mentions that she owns a laboratory, she never informs the coal mine owner about the size and extent of her laboratory, which is substantial and employs several other engineers.

What do you think?

Was it ethical for Thracite not to fully disclose the size and extent of her lab and her clients to the coal mine owner?

What the board said

It was not ethical for Thracite to not fully disclose the size and extent of her lab and her clients to the coal mine owner.

Under the facts, there is nothing that would prevent an engineer from operating two separate businesses per se. The board, however, is concerned about the appearance and the relationship between Thracite's mining engineering consulting practice and her lab practice. A potential conflict of interest could appear to influence the quality of her services.

The responsibilities and obligations the mine owner has given to Thracite include the assignment of coal veins to contractors, who are then responsible for performing the coal mining operation. Although the assignment of coal veins to the mining contractors by the engineer is dependent upon identifiable factors, such as the competencies of the contractors and their experience, the engineer will exercise independent judgment and discretion. In view of Thracite's independent lab practice, she could be accused by contractors, or even by the owner, of basing her decision to assign higher quality coal veins upon unrelated factors, such as whether the mining contractor uses Thracite's lab or whether the mining contractor is a better customer of Thracite's lab than other mining contractors.

In view of these factors, the board believes Thracite had an obligation to fully disclose the nature and extent of her lab practice to the mine owner in order for him to fully understand the implications of the relationship between the two activities. The mine owner's business practices could be called into question because he unknowingly permitted Thracite to engage in such activities in connection with his mines. Therefore, Thracite should have been much more forthcoming with the information. The board believes that her decision not to provide the information was a violation of the NSPE Code of Ethics.

[PEO's Code of Ethics (Section 77 of Regulation 941) provides specific guidance on how professional engineers should deal with conflict of interest situations that involve clients. It obliges practitioners to "disclose immediately to the practitioner's clients any interest, direct or indirect, that might be construed as prejudicial in any way to the professional judgment of the practitioner in rendering service to the client."]

Case #2: Protecting client confidentiality

B. Yondalimitz, P.E., is hired by developer X to perform design and construction-phase services for a subdivision. As per the

agreement with developer X, Yondalimitz is paid 30 per cent of his fee by developer X. He submits the design drawings and plans to county authorities, and permits are issued for the benefit of developer X.

Developer X can't get financing for the project, and tells Yondalimitz that he should not disclose the contents of the drawings and plans to any unauthorized third party. Developer Y, a client of Yondalimitz and a business competitor of developer X, is interested in the subdivision project. Developer Y has secured financing for the project and approaches Yondalimitz, requesting that he perform the design on the project and provide the design documents for developer Y's review. Since Yondalimitz was not paid his entire fee for his completed project design by developer X, he agrees to provide the design drawings and plans to developer Y. He also agrees to charge developer Y only for the changes to the original subdivision design and drawings.

What do you think?

Was it ethical for Yondalimitz to provide a copy of the design drawings and plans to developer Y? Was it ethical for Yondalimitz to charge developer Y for the changes to the original subdivision design drawings and plans?

What the board said

It was not ethical for Yondalimitz to provide a copy of the design drawings and plans to developer Y. It was also not ethical for Yondalimitz to charge developer Y for the changes to the original subdivision design drawings and plans. However, had Yondalimitz successfully negotiated an agreement with developer X on the questions of ownership and possession of the design drawings, it would have been ethical for Yondalimitz to charge developer Y for changes to the original subdivision design drawings and plans.

The facts in this case raise a conflict between the obligations of an engineer not to disclose information that is considered confidential by the client and the right to be properly compensated for engineering services.

Although Yondalimitz may have had some basis for thinking that he was not fully obligated to developer X, since developer X only compensated Yondalimitz for 30 per cent of his professional and other ser-

vices, the board believes that Yondalimitz's consideration of this issue was affected by his ongoing client relationship with developer Y, a party with whom Yondalimitz may have felt a sense of loyalty. However, in view of the fact that developer Y was a competitor of developer X, developer X would certainly be justified in believing that Yondalimitz's actions were in conflict with his obligations to developer X.

Although Yondalimitz is entitled to full compensation for his design services for developer X, that alone was not justification for him to provide the reviewed and approved design drawings to developer Y. It's clear to the board that the fee dispute and Yondalimitz providing the design drawings to developer Y are separate and distinct issues that should not have been linked in his decision to provide the plans to developer Y.

NSPE's Code of Ethics makes it clear that Yondalimitz should not have shared the plans with another client without developer X's consent. The code is silent about the failure of clients to provide agreed compensation and how that would affect their status as clients. It is the board's view that, before providing the plans to a third party, Yondalimitz should have made every reasonable effort to resolve his situation with developer X. In those negotiations, Yondalimitz could have linked a settlement on his fee for the project with consent to use the project plans for other clients.

[PEO's Code of Ethics obliges professional engineers not to disclose confidential information of clients or employers and to avoid using confidential information to the disadvantage of clients/employers. It also calls on professional engineers to "act at all times with fairness and loyalty to the practitioner's associates, employers, clients, subordinates and employees."]

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