

Confidentiality—Fire Investigation

Case No. 19-7

Facts:

Engineer A is retained by Attorney X, representing Client Y, a plaintiff in a lawsuit against the owner of a building and several building material manufacturers, to conduct a forensic engineering investigation in connection with a building fire that resulted in the death and injury of several individuals. Following the completion of Engineer A's investigation and report, Attorney X and Client Y enter into a private settlement with the building owner and the building material manufacturers. Under the terms of the settlement, which is approved by the court, Engineer A is ordered not to reveal the contents of her forensic engineering investigation report. Engineer A is concerned that her settlement will undermine her obligation to the public, because she believes the forensic engineering report contains important findings relating to the use of manufactured building materials.

Question:

What are Engineer A's obligations under the circumstances?

NSPE Code of Ethics References:

- Section II.1. - Engineers shall hold paramount the safety, health, and welfare of the public.*
- Section II.1.a. - If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.*
- Section III.2.a. - Engineers are encouraged to participate in civic affairs; career guidance for youths; and work for the advancement of the safety, health, and well-being of their community.*
- 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.*

NSPE BER Case References: [76-4](#), [07-3](#), [13-9](#)

Discussion:

As the Board of Ethical Review has noted before, conflicts between fundamental provisions of the NSPE Code of Ethics are common. Among such conflicts are situations in which the public interest and the protection of the public health and safety are matched against ethical duties of confidentiality to clients. Both values are vital to engineering ethics and professionalism and need to be maintained in order to protect the integrity of the engineering profession.

One of the earliest NSPE Board of Ethical Review cases that sought to balance these two considerations was [BER Case No. 76-4](#). In that case, the XYZ Corporation had been advised by a State Pollution Control Authority that it had 60 days to apply for a permit to discharge manufacturing wastes into a receiving

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body of water. XYZ Corporation was also advised of the minimum standard that had to be met for that discharge. In an effort to convince the authority that the body of water, after receiving the manufacturing wastes, would still meet established environmental standards, the corporation employed Engineer Doe to perform consulting engineering services and submit a detailed report. After completion of his studies but before completion of any written report, Doe concluded that the discharge from the plant would lower the quality of the receiving body of water below established standards. He further concluded that corrective action would be very costly. Doe verbally advised the XYZ Corporation of his findings.

Subsequently, the corporation terminated the contract with Doe with full payment for services performed and instructed Doe not to render a written report. Thereafter, Doe learned that the authority had called a public hearing and that the XYZ Corporation had presented data to support its view that the present discharge met minimum standards. In deciding that Doe had an ethical obligation to report his findings to the authority upon learning of the hearing, the Board noted that the NSPE Code requires that [Doe's] duty to the public be paramount. In this case, it was presumed that a failure to meet the minimum standards established by law was detrimental to the public health and safety.

Later in [BER Case No. 07-3](#), Engineer A was retained by a warranty company to perform warranty inspections on manufactured building claims filed against a manufactured building company. Engineer A was asked to inspect a building for the company relating to a claim by Owner A regarding certain mechanical and electrical issues. During the course of the inspection, Engineer A investigated mechanical and electrical issues but also separately discovered that the building plans prepared by a manufactured-building-employed engineer indicated that the building was built in 2002 with a roof load requirement of 40 pounds per square foot. However, Engineer A was aware that the local code requirements were changed in 2000 with load requirements of 80 pounds per square foot because of local snow conditions. The engineering drawings were submitted to a local code official in 2002 and they were approved with the 40 pounds per square foot included. Engineer A advised the warranty company and the manufactured building company, and neither believed any remedial action was necessary. With winter approaching, Engineer A was concerned about the potential danger of a heavy snow causing a roof collapse for the occupants of these buildings.

In reviewing the facts, the BER decided that it would be ethical for Engineer A to (1) first give the building manufacturing company the opportunity to contact the local code enforcement authorities, and, only if the building manufacturing company did not act within a reasonable period of time, then (2) take further action including personally contacting the building code enforcement authorities, and, if necessary, contacting appropriate state building officials. According to the Board, the obligation to protect the public health and safety takes precedence and overrides other considerations in most cases. The Board in [Case 07-3](#) said “in most cases” because the Board conceived of at least some circumstances in which the risk to the public health and safety might be somewhat marginal or remote and therefore other ethical considerations might be viewed in a different light. While [Case 07-3](#) raised the possibility of a

significant risk to the public health and safety, it does illustrate that sometimes the risk may not be immediate or imminent, and therefore other factors may come into play. Certainly, the need to address the risk to the public can never be ignored or delayed unreasonably. However, where a risk is more remote, the engineer's ethical obligations might take on different dimensions. For example, under the facts in [Case 07-3](#), since the risk was not immediate, Engineer A may have had an opportunity to explore a variety of different approaches (e.g., give the building manufacturing company the opportunity to contact the local code enforcement authorities, and, only if the building manufacturing company did not act within a reasonable period of time, take further action including personally contacting the building code enforcement authorities, and, if necessary, contacting appropriate state building officials).

More recently, in [Case 13-9](#), Engineer A performed an investigation of a recent structural failure in connection with services provided to Attorney B for Client C. Engineer A signed a confidentiality agreement by which Engineer A was prohibited from disclosing any of the conclusions reached in connection with the cause of the structural failure without the consent of Client C. Early in the litigation process, Attorney B negotiated a settlement agreement for Client C. As part of the settlement agreement, Attorney B and Client C agreed that all investigative reports, including the work performed by Engineer A, would be sealed and remain strictly confidential forever. Engineer A believed that his investigation had identified a significant technical issue that, if communicated more broadly in the technical literature, could prevent future structural failures. In its analysis, the Board noted that this case was another illustration of the ongoing tensions that often exist between two fundamental ethical principles—here, duty of confidentiality versus protection of the public health and safety. The Board noted that in [Case 13-9](#), Engineer A should explore negotiating appropriate language in his agreement with attorneys or clients recognizing the engineer's obligations to report safety violations as necessary to protect the public health and safety. The Board was not willing to go as far as an earlier Board went in [BER Case No. 76-4](#) in concluding that the public health and safety issue superseded Engineer A's confidentiality obligations. The Board determined largely for the reasons identified in [Case No. 07-3](#) that there was no immediate or imminent danger or threat to the public health, safety, or welfare. Instead, Engineer A's belief that his investigation had identified a significant technical issue that, if communicated more broadly in the technical literature, could prevent future structural failures was prospective and speculative.

The facts in the present case relate not to a written confidentiality agreement between Engineer A and Engineer A's client but instead to a court-approved settlement agreement requiring confidentiality. Also, the facts of this case do not suggest Engineer A's technical concerns involved matters of urgency or imminent harm to the public health and safety.

It is true that a professional engineer has an obligation to hold paramount the public health, safety and welfare under the NSPE Code of Ethics and under many state licensing board rules of professional conduct. At the same time, when a professional engineer submits to the judicial branch of government, the professional engineer is bound by those rules as well. An order or a ruling by a judge is a serious

matter, has the force of law, and must be adhered to under penalty of law. Courts hear individual cases involving parties in litigation and seek to reach a result that serves justice. At times, in order to reach a result that serves justice for one or more parties involved in the litigation, the court will order the record to be sealed. More often, legal cases and controversies are settled before a court verdict, with the parties agreeing to adhere to strict confidentiality of the record and the settlement. These are not decisions to which the professional engineer is an actual party, but that professional engineers are required to adhere to as a matter of law.

While the Board must conclude that Engineer A has an ethical obligation to maintain the confidentiality of her forensic engineering report, as noted in [Case 13-9](#), there may also be constructive alternatives for Engineer A to explore. Those could include the identification of salient technical issues involving the public health and safety and the development of an unrelated paper or article that explains Engineer A's technical concerns without revealing specific and identifiable facts and circumstances that would compromise the settlement agreement involving Client Y. While this may be difficult because of the possible need to specifically identify the context upon which Engineer A's technical issues are based, it is the Board's view that this approach would be a reasonable middle ground for Engineer A to pursue and which would fulfill her ethical responsibilities both to the public and to the client.

Conclusion:

Engineer A has an ethical obligation to maintain the confidentiality of the forensic engineering report. Engineer A may also explore an alternative path to identify the technical issues involved, such as further research that explains her technical concerns without revealing specific and identifiable facts and circumstances that would compromise the settlement agreement involving Client Y.

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