

Michael Davis' Commentary on "Obligation to Client or Employer?"

Commentary On
Obligation to Client or Employer?

Presumably, Joe's support of the application would require him to exercise his professional judgment. That is, I'm assuming that "support" is not just a matter of testifying that he made certain calculations and stamped the documents in question. Given that assumption, Joe has a conflict of interest.

Presumably, Joe is a PE. He should then begin by checking the engineering code of ethics for the state in which he is licensed. If it instructs him to avoid all conflicts of interest, he must tell his past employer (and client) that he is no longer available. Some other PE would have to replace him and, before supporting the application, would have to review the details and reach the conclusion it was properly done. That would be an added expense for the client -- and an inconvenience for Joe's former employer -- but not that big a deal or that unusual. Engineers come and go. They die. And so on.

More likely, however, the code will allow Joe to serve a past employer in a matter like this with the informed consent of the current employer (the state). Let us suppose that the state, or at least its legal department, consents after full disclosure to Joe's serving the previous employer without compensation. The question remains whether he can properly serve his former employer under these conditions. He will have to take the side of his former employer while opposing his present employer. Might he tend to soften his position in order not to upset the state -- fearing, perhaps, that word would get back to his supervisors? Or will he bend over backward to be fair to the past employer, thereby giving the past employer a stronger case than he would have had he not also been working for the state? There really is no clean way to serve his past employer in this case. Testifying against the state when he is in its employ looks disloyal even when it does not raise conflict of interest issues. Joe should therefore decline -- for the sake of both his profession and his own reputation.

The answer would be different only if Joe's testimony were, for some reason, irreplaceable. Where the former client cannot have justice without Joe testifying, Joe should testify, but only after making clear the conflict of interest issues both to the former client and the relevant state officials and getting consent from both.