

Michael Davis' Commentary on "Boundary Between Professional Engineering Society and State Licensing Board"

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Boundary Between Professional Engineering Society and State Licensing Board

A conflict of interest exists when someone who is supposed to exercise judgment on behalf of another is in a situation where he has some special connection, commitment, or other interest making him less likely to judge correctly than he otherwise would. The appearance of a conflict exists where someone may, on the information available, reasonably conclude that a conflict of interest exists. An appearance of conflict is merely an appearance if the person supposedly having the conflict can, upon request, show that he lacks the special connection, commitment, or other interest or that, while he has the interest, there is in fact no reason why it should affect his judgment.

"Appearance of conflict of interest" should not be used as a polite way of talking about an actual conflict of interest. Problems of appearance can be handled by providing more information. Actual conflicts of interest can only be handled by giving up the interest causing the conflict, by withdrawing from the situation altogether, or by getting the informed consent of the person on whose behalf one is to exercise judgment.

The State Board's problem is not a mere appearance. It really could have a conflict of interest. Its members will have received benefits from the NWSPE that, in some future decision, may make them view that organization with a friendlier eye than the facts justify. Mileage, a few nights lodging, and a few good meals don't add up to much. The whole package may be worth no more than \$500 for each engineer over three days, less than most could earn in the same time. For those engineers already at the resort for the NWSPE conference, the package will be worth somewhat less,

since travel would not be covered. Still, a gift generally carries more emotional weight than the cash that paid for it.

What should Brian Simpson do as a Board member who thinks the NWSPE's invitation would, if accepted, involve the Board in a conflict of interest? If New Wyoming is like many states, it has a State Board of Governmental Ethics to which such questions should be put (and a State Code of Ethics prohibiting certain conflicts of interest). Simpson should give the Board of Ethics a call and see what they advise. If they have been around for even a few years, they probably have had a question like that before, thought it through, and issued an advisory opinion. Such an opinion would certainly clarify the situation. It might even preempt the Board's decision.

But let's suppose New Wyoming has neither a code of ethics nor a board of ethics. What then? Simpson is on the State Board of Professional Engineers because he is a licensed engineer who the State, in its wisdom, thought would do a good job overseeing the practice of licensed engineering in the state. He is supposed to use his knowledge of engineering to distinguish between engineers who meet minimum standards and those who do not. He is on the board as an engineer, not as an ordinary citizen.

Simpson is not a member of the NWSPE. He is then not subject to the NSPE code. But, let us suppose that New Wyoming, like some states, includes a code of ethics more or less equivalent to the NSPE's in the statute providing for licensing. Simpson could then conclude that NSPE Code II.4 might apply. Simpson should "act in professional matters for each employer or client as a faithful agent or trustee."

But does it apply? Is the State's relationship to Simpson that of employer or client of an engineer? Simpson is not a state employee. Most likely, he is a volunteer reimbursed only for expenses. Even if he receives something more than expenses, it will be as an official, not as an employee. Is the state then his client? What is a client? No engineering code defines that term. The dictionary is a bit more helpful. It offers several possibilities: a customer; the dependent of a patron; or one on whose behalf a lawyer, accountant, or the like acts. The state is certainly not Simpson's customer or dependent. That leaves one possibility: an engineer's client is someone on whose behalf the engineer acts. Since it seems reasonable to think Simpson is supposed to act on the state's behalf when serving on the Board, we may think of the state as his client. He should act as the State's "faithful agent and trustee". What does that mean here?

NSPE Code II.4.a requires engineers to "disclose all known or potential conflicts of interest to their...clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services." If this were the only relevant provision of the code, Simpson's only responsibility would be to make sure the Board informed the Governor, the Secretary of State, or whichever official it reports to. Is there any other relevant provision?

While no other provision of the NSPE Code is both relevant and specifically concerned with conflict of interest, two at least seem relevant. Code III.2.a requires engineers to "strive to serve the public interest". This is not much help. The Board is conducting the joint meeting in order to benefit the public. Even Simpson has not suggested that the roundtable discussion of common concerns will not be useful.

Code III.3 is not much more helpful. It requires engineers to "avoid all conduct or practice which is likely to discredit the profession or deceive the public". But it gives no direction concerning whether the sort of conflict of interest in question here is likely to discredit the profession. There seems to be no reason to think it should deceive the public.

Why doesn't the Code simply outlaw all conflicts of interest? The answer is that some conflicts of interest are so trivial and the costs of avoidance so great, that a client may be better off with an agent who has that conflict of interest than she would be if she had to get a new agent or if this agent purged himself of the conflict. Is this such a case? Perhaps. After all, the chances of an actual conflict between the NWSPE and the State Board is small. The effect of the NWSPE picking up the Board's expenses is likely to be both small and short-lived. The advantage to the State of a joint meeting, on the other hand, might be substantial. Even Simpson seems willing to admit that. So, assuming disclosure to the state and its consent, why not?

We have now reached the question of appearance. Can the Board explain what it proposes to do in such a way as to dispel any appearance of impropriety? The Board almost certainly can explain it to the Governor, Secretary of State, or other official to whom it reports. But the State is a peculiar client. It will not be well served if the Board causes trouble between it and its "client", the public.

The Board should therefore do what it can to reduce the public appearance of conflict, for example, by getting the State to pick up as much as possible of the cost

or, at least, by having the money for expenses channeled through a State account. As the Board considers how to avoid public misinterpretation of what it is planning, it may come to wonder whether Simpson might not have identified the best approach after all. The cost to them of avoiding the conflict is not all that much.

But suppose the Board decides to let the NWSPE pick up expenses. What should Simpson do if some member of the public asks about ethical issues the Board has faced? He certainly should mention this issue of conflict of interest (assuming he has no more interesting ethical issues to report and no rule bars him from discussing what goes on at Board meetings). He should try to be fair to both sides. Reasonable and decent people might differ on this issue. He should, however, not be afraid to talk publicly about the public's business. (NSPE Code II.1) Part of any dispelling any appearance of impropriety is publicly airing the issue before there is a scandal. The public is likely to be more trusting of people who seem enough aware of the potential for trouble to take sensible precautions. Scandal grows in darkness.