

# **Neil R. Luebke's Commentary on "Boundary Between Professional Engineering Society and State Licensing Board"**

Commentary On

Boundary Between Professional Engineering Society and State Licensing Board

As the case itself suggests, the primary issue is a conflict of interest. Although the term "conflict of interest" occurs frequently in media accounts of public dealings, its usage in this context is somewhat technical and calls for a brief explanation. The only type of individual who can be involved in a conflict of interest situation, properly understood, is a person having a fiduciary duty, that is, the person has an obligation to carry out a matter that has been entrusted to him/her by another individual or group. The entrusting individual might be a client or a corporate superior. An entrusting group might be a state government or a board of directors. An engineer might have a fiduciary duty acting on behalf of a client or as a member of a state registration board. Most professionals--lawyers, architects, engineers--are hired for their trained judgment and their skill in carrying out such judgments. Trust is the basis of the relationship between the professional and the client or the authorizing party who empowers the professional to act on its behalf. Should anything imperil this trust, the fiduciary relationship is in danger. In the case before us, the New Wyoming State Board of Professional Engineers is a licensing board. It is entrusted by the state and its governor to perform its public duties in a responsible, objective manner and not to be swayed by special personal considerations or possible private favors.

The trust that is placed in the Board's members can be threatened in a number of ways. For example, some engineers in that state may attempt to bribe members of the Board to secure licensing; there may be close business relationships between members of the Board and some major employers in the state who are concerned with having their engineers licensed; or one or more members of the Board may be

related to a candidate for licensure. Each of these situations could be looked upon as a conflict of interest situation, that is, a situation in which the fiduciary duty of the Board member is potentially or actually threatened to be compromised by a personal relationship or by a business or other financial relationship. To take other examples, an engineer who also owns a major share of an electronics firm might have a conflict of interest in making recommendations to a client regarding the purchase of electronic equipment. A lawyer whose firm is on retainer to provide legal services to a major business could not without conflict of interest represent a client who was suing that business.

There are different ways to handle a conflict of interest. One way, of course, is for the person who is involved in the conflict to remove himself from the situation. In the case of a person serving on a public board or agency, it is common practice for the person to refrain from voting on matters which might involve a conflict. Thus, for example, if a contract for a public project is to be let and one of the board members happens to be a part owner of one of the firms bidding on the contract, he should definitely abstain from the vote and probably from the discussion preceding the vote.

If possible, professionals should avoid getting into a conflict of interest situation. They should also avoid giving the appearance of conflict of interest. Surprisingly, giving the appearance of a conflict of interest may be just as damaging as having an actual conflict of interest. The trust placed in Board members can be endangered, and consequently the judgments of the Board placed in doubt, as easily by a strong appearance of conflict of interest as by an actual one. As described, our case suggests at least an appearance of conflict of interest. An enterprising reporter could easily make it look as if the state society of professional engineers was attempting to wine, dine, and influence the members of the State Board. In short, the arrangement looks over cozy.

On the other hand, the state society of engineers certainly has a professional interest in hearing the viewpoints, problems, and plans of the State Board. Similarly, the State Board should see that one of its legitimate duties is to communicate with the professionals it regulates. The society is justified in issuing an invitation to the Board, or a set of Board representatives, to participate in a discussion session at the annual meeting. The society might offer to pay the expenses of any Board members attending, although this offer raises a separate question. The Board might choose to accept the program invitation but decide to fund the travel and expenses either out

of personal funds, the Board's travel budget, or a combination. However, since all Board members except Brian are society members, the use of state funds to attend one's own professional society meeting might be suspect. Ironically for this case, Brian seems to have the strongest justification for State Board support. Token or partial support for other Board members would probably not be seen as objectionable.

It would be unwise for the State Board to meet at the resort immediately preceding the state society's meeting because the arrangement would also give a strong appearance of conflict of interest. The ordinary meeting site in the state capitol building is far more neutral territory.

The decision facing Board Chairman Harold Brock seems initially to have less to do with ethics than it does with purely administrative judgment. From the facts of the case as presented, there is no evidence that the question of conflict of interest came up in the Board's discussion prior to its acceptance of the invitation of the state society. Second, it was an invitation issued to the Board, not to individual members of the Board, and it was the Board that accepted the invitation. Even if Chairman Brock himself does not think a conflict of interest or its appearance is likely, he should allow the other Board members to be aware of the situation and to respond with their judgment. They might advise an additional Board meeting. We do not know whether there are additional meetings scheduled between the time they accepted the invitation and the time of the meeting with the state society. Possibly a conference call could be held with members of the Board to discuss the matter. The Board might then decide to withdraw the acceptance of the invitation, it might decide to send some representatives at its own expense, or it might decide on some other course of action. Allowing individual members of the Board to follow their own judgment in this matter would not seem to address the problem of conflict of interest. In fact, it might even draw attention to it. If the judgment of the Board is to hold its own meeting at the resort, the expenses should be paid through the Board's operating budget, and Brian and Ellen should have no reluctance in accepting reimbursement for their expenses. The Board, however, should consider whether meeting at a resort would be seen by the public as legitimate expenditure. Thus, the best course would seem to be (1) a Board meeting as usual at the state capitol, (2) acceptance by the Board to participate in the society program, and (3) refusal of Board members who are also society members to receive anything more than token reimbursement, such as travel cost, for their society meeting expenses. Another

aspect of this case ought to be mentioned.

Virtually all states have laws governing conflict of interest on the part of public office holders. These laws will differ a great deal from state to state. Some members of the Board may not be familiar with the extent of the laws, and it should be one of Chairman Brock's actions to seek legal advice from the appropriate state office, rather than rendering his own judgment on the legal soundness of Brian's concern over conflict of interest.