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Engineers & the law Bryan J. Buttigieg

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ENGINEERS & THE LAW

Conflict of Interest

Consulting engineers need to be vigilant

By Bryan J. Buttigieg, Miller Thomson

Conflict of interest situations are often easy to spot in hindsight but tend to start in such an innocuous way that the problem is not noticed as it is developing. Placing oneself in a position of conflict of interest can be embarrassing at best and can be a breach of one's obligations to clients and professional and regulatory bodies at worst.

A conflict of interest arises when one is in a position of having duties or obligations to act in one way while having simultaneous obligations to act in a contrary manner. A duty to tell one client everything the consulting engineer knows about a site may, for instance, be in conflict with the duty the engineer may have to another client to keep some of that information confidential. The engineer must either breach his obligations to one client or the other, an impossible position to be in.

Professional codes of conduct invariably contain a prohibition against placing oneself in a conflict of interest. The Professional Engineers Ontario (PEO) Code of Ethics, for instance, states:

- A practitioner shall act in professional engineering matters for each employer as a faithful agent or trustee and shall regard as confidential information obtained by the practitioner as to the business affairs, technical methods or processes of an employer and avoid or disclose a conflict of interest that might influence the practitioner's actions or judgment.
- A practitioner must disclose immediately to the practitioner's client 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.

The legal consequences of acting for a client while in a position of conflict of interest can be significant. In an Alberta case, for instance, the client argued that payment was not due because the engineer had acted while in a conflict of interest (the engineering firm also had an interest in adjacent lands). While the court found that the conflict had been properly disclosed in advance, the court did not reject the premise that the client may have withheld payment had they been successful in arguing there was a conflict.

Disclosing the potential conflict to the new client is not sufficient. While the new client may still be willing to hire and pay the engineer, the former client may well have concerns. The existence of a fiduciary relationship between a client and a consulting engineer remains a matter of some controversy in Canada and is still subject to analysis on a case by case basis.

Developing safeguards

Consulting engineers need to be vigilant for potential conflicts of interest. First, consider conducting an internal audit to examine what procedures your firm has in place to detect and recognize conflict situations before a new contract is signed. Are appropriate records kept of previous contracts to help identify potential conflicts with new work being considered? Do professionals know what to do if they think they or someone within the firm is in a conflict? Who is responsible for contacting the clients and what records are kept of those contacts? Professional staff may have to be educated to ensure that they are all aware of the systems that are in place to deal with conflicts.

Contracts should be reviewed and carefully drafted to establish what information relating to a client or the subject of the contract is to be considered confidential. You should take care not only to consider possible conflicts that are with your firm, but also those that may exist with your employees and principals. While your firm may not have worked for one of your client's competitors, one of your engineers may well have done so for a previous employer.

The fact that the courts have held that these matters will be reviewed on a case by case basis highlights the importance of imposing internal controls and maintaining vigilance for potential conflicts. Early detection will always be the less problematic route.

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[Table of Contents](#)